No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,
Petitioners,

v.

JAMES A. MCCOY,
on behalf of himself and all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES

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The government acknowledges that the question presented in this case is of "limited prospective significance in light of the 2009 amendments" to Regulation Z. U.S. Br. 18. Indeed, the government does not deny that the question has no significance whatsoever outside of a handful of still-pending cases brought under the old regulation. The government also does not deny that plenary review is unwarranted.

Nonetheless, the government contends that this Court should grant, vacate, and remand ("GVR") in light of the government's lower-court amicus brief interpreting the old regulation. The regulation and the commentary, however, were both promulgated in 1981; the Federal Reserve Board's amicus brief in the First Circuit was filed 28 years later, in 2009—after the regulations had already been amended to require the very disclosures at issue. And the amicus brief in question was not filed until October 22, 2009—one month after the petition for certiorari in this case was filed.

1. The Court should not GVR, but should instead deny the petition. A GVR in light of the government's lower-court amicus brief would be unprecedented. As far as respondents are able to determine, this Court has not previously GVR'ed in light of a lower-court amicus brief, let alone an amicus brief concerning the meaning of a superseded regulation. To be sure, this Court has GVR'ed in light of "administrative reinterpretations of federal statutes," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), but the government does not contend that any such reinterpretation or change in position occurred here. To the contrary, the government claims that the October 2009

amicus brief represents "the Board's longstanding interpretation" of the pre-2009 regulations. U.S. Br. 11.

In addition, a GVR in light of the amicus brief would open the door to "unfair or manipulative litigation strategy." *Lawrence*, 516 U.S. at 168; *see Department of the Interior v. South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting). Such a GVR would invite government abuse in future cases and encourage litigants to file petitions for certiorari solely in the hope of obtaining a favorable brief from a government agency and subsequent remand from this Court. Those filings, in turn, would threaten to needlessly expand this Court's certiorari docket and place undue pressure on government agencies to produce briefs at the behest of regulated industries. It would also inevitably involve this Court in routine pleas for error correction in a wide range of cases. Moreover, to GVR in light of an agency amicus brief stating a view on the merits of a case would signal to the lower courts that the agency's view should prevail. Yet resolving questions presented in a petition for certiorari is the Court's role, not the government's. Where, as here, a question does not warrant this Court's review, the Court should not cede to an agency the power to answer the question through an amicus brief.

Members of this Court have increasingly expressed concern that the GVR device has become overused and governed by increasingly malleable standards. "The systematic degradation of our traditional requirements for a GVR," Justice Scalia recently remarked, "has spawned a series of unusual dispositions, including the GVR so the government can try a less extravagant argument on remand, the GVR in light of nothing, and the newly-minted Summary Remand for More Extensive Opinion than Petitioner Requested (SRMEOPR)." *Wellons v. Hall*, 130 S. Ct. 727, 732 (2010) (Scalia, J., joined by Thomas, J.,

dissenting) (internal citations omitted); *see id.* at 734 (Alito, J., joined by Roberts, C.J., dissenting). The Court should not expand the scope of GVR's to encompass cases in which the government has filed a brief in a lower court taking a position on the question presented—particularly where the question presented has as little ongoing significance as it does here.

2. Intervention by this Court is also particularly unwarranted because any practical impact of the question presented may be eliminated by litigation on remand from the court of appeals. The government does not address the possibility that resolution of the state-laws claim may render resolution of the federal-law claim academic. BIO 7-8. Nor does the government deny that "Chase may, at a later stage of litigation, assert a statutory 'good-faith' defense under 15 U.S.C. § 1640(f) for acting in conformity with an [official] FRB interpretation." Pet. App. 13a n.14. Under that "good faith" defense, a creditor is completely immune from civil liability for acts "done or omitted in good faith in conformity with any rule, regulation, or interpretation" of TILA by the Board, even if the rule or regulation at issue is subsequently amended or rescinded. 15 U.S.C. § 1640(f). In a footnote, the government says it is "not clear" whether petitioner could successfully mount such a defense because an amicus brief is not official staff commentary. U.S. Br. 20 n.5. But the government does not deny that Chase would be free to cite the amicus brief in making such a defense, and that district court would be free to take it into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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