No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,
Petitioner,

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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A divided panel of the Ninth Circuit held that Regulation Z, the Federal Reserve Board's regulation implementing the Truth-in-Lending Act (TILA), required petitioner Chase Bank USA to provide a "change-in-terms" notice before implementing a default-rate provision in respondent James McCoy's credit card agreement—even though that implementation involved no change in the contractual terms previously disclosed to respondent. This Court's review is warranted because the panel majority's holding is wrong, inconsistent with this Court's precedent regarding deference to agencies' interpretations of their own

regulations, and in conflict with the conclusion reached by every other court to address the issue, including the Seventh Circuit, a different panel of the Ninth Circuit (in an unpublished decision), and numerous district courts.

Since the petition was filed, the First Circuit has reached the same result as the Seventh, deepening the conflict and underscoring both the infirmity of the decision below and the continuing importance of the question presented. *See Shaner* v. *Chase Bank USA, N.A.*, ___ F.3d ___, 2009 WL 4068703 (1st Cir. Nov. 25, 2007). *Shaner* also highlights another development. The First Circuit's decision rested on an amicus brief filed by the Board at that court's invitation. In its brief, the Board unambiguously states that its view of its own regulation—one long held—is the interpretation that Chase and the rest of the credit card industry share, not the interpretation that the panel majority adopted below.[1]

Respondent offers no valid basis to deny certiorari. He does not dispute the circuit conflict, nor does he seek to defend the fundamental flaws in the Ninth Circuit's analysis. Indeed, he does not defend the merits of the decision at all—doubtless because the Board's amicus brief confirms that the Ninth Circuit's "firm[]" conviction "of the [Board's] intent" was wrong. Pet. App. 13a-14a. Respondent instead notes that the Board has prospectively amended Regulation Z and that the case has not proceeded to final judgment. Neither point, however, justifies denial of plenary review.

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[1] The Board's brief is available through the First Circuit's online docket sheet for *Shaner* (*i.e.*, PACER) but not on LEXIS or Westlaw. Chase has therefore submitted a letter seeking permission to lodge the brief with this Court.

Even respondent's counsel recognizes the continuing importance of the question presented. Last week in *Shaner*, one of respondent's counsel urged the First Circuit to rehear that case *en banc* on the grounds that the Regulation Z question is one "of exceptional importance" on which an "irreconcilable circuit split" exists, involving a problem "national in scope," where the First Circuit's decision "will likely influence several other major lawsuits around the country." Pet. for Reh'g *En Banc* 1, 2, *Shaner*, No. 09-1157 (Dec. 9, 2009).

Those statements confirm the need for plenary review here. Even if such review were not warranted, the appropriate course would be to grant the petition, vacate the judgment below, and remand for further consideration in light of the Board's clear statement in its *Shaner* amicus brief of its longstanding position on the question presented.

I. RESPONDENT'S ATTEMPTS TO AVOID REVIEW LACK MERIT

A. The Board's Prospective Amendment To Regulation Z Does Not Obviate The Need For Review

Chase's first argument for certiorari (Pet. 18-23) is that the Ninth Circuit's decision conflicts with the Seventh Circuit's holding in *Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied with op.*, 563 F.3d 634 (7th Cir. 2009). That conflict has deepened: Last month the First Circuit rejected the Ninth Circuit's conclusion and sided with the Seventh Circuit (and every other judge to consider the issue save the two in the majority below). *See Shaner*, 2009 WL 4068703.

Respondent nevertheless urges the Court to ignore this irreconcilable division based on the erroneous contention (Opp. 4) that "[t]his Court does not normally grant certiorari to review assertedly erroneous interpretations of regulatory provisions." The decision respondent cites for this proposition, *Braxton* v. *United States*, 500 U.S. 344 (1991), actually says the opposite: There the Court observed that although "Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations," this Court "[o]rdinarily ... regard[s] the task as initially and primarily ours." *Id.* at 347-348. The Court departed from that ordinary practice in *Braxton* only because the relevant statute suggested that it "may not be Congress' intent *with respect to the Sentencing Guidelines*," *id.* at 348 (emphasis added), and because "the specific controversy before us can be decided on other grounds," *id.* at 349. Here, there is no parallel to the legislative charge to the Sentencing Commission, nor can the Ninth Circuit's decision about Regulation Z be reversed on another ground.

Respondent also wrongly contends (Opp. 5) that the Board's 2009 amendment to Regulation Z "resolves the question presented and eliminates any conflict among the courts going forward." The 2009 regulation applies only to transactions after its effective date, so it does nothing to eliminate the existing circuit split regarding the meaning of the pre-amendment Regulation Z. Until that conflict is resolved, the lower courts will continue to expend limited resources addressing these cases, just as the *Shaner* court had to do.

The Board's 2009 amendment also does not remove the threat of substantial liability under the Ninth Circuit's decision. As explained in the petition and the in-

dustry amicus brief, the practice that the Ninth Circuit condemned under Regulation Z was not an isolated one; it was the industry standard. *See* Pet. 5-6 & n.1, 11-12; Amicus Br. of Am. Bankers Ass'n *et al.* 2, 8. And the prospect of suits seeking such liability is not merely hypothetical. As a result of the decision below, similar putative class actions have been filed against a wide swath of the credit card industry. *See* Pet. 22 & n.4. The liability question also raises fundamental questions of fairness, owing to the Ninth Circuit's refusal to follow established principles of deference. The industry unfairly faces potential class-action TILA liability because it followed and complied with the Board's own longstanding construction of its regulation. *See* Pet. 20; Amicus Br. of Am. Bankers Ass'n *et al.* 4; Board Amicus Br. 5, 15, *Shaner* (Oct. 22, 2009).

Ultimately, as the First Circuit stated in inviting the Board to file an amicus brief in *Shaner*, the question presented "is a recurring one of considerable practical importance in law suits that have been and may yet be brought, even though a new prospective amendment to Regulation Z may resolve such problems as to future transactions." Order of Court 1-2, *Shaner* (Aug. 4, 2009). That statement describes a quintessential candidate for review by this Court.

B. The Posture Of The Case Does Not Support Denial Of The Petition

Respondent next asserts (Opp. 6-7) that review is unwarranted because the Ninth Circuit remanded the case for further proceedings. But this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (citing *Estelle* v. *Gamble*, 429 U.S. 97, 98 (1976),

and *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)). Review of such judgments is appropriate if the question would otherwise warrant review and "the Court of Appeals' decision is clearly erroneous," *Mazurek*, 520 U.S. at 975, or "is fundamental to the further conduct of the case," *General Motors*, 323 U.S. at 377; *accord* Gressman, *et al.*, *Supreme Court Practice*, § 4.18, at 281 (9th ed. 2007) (citing cases involving review by the Court of non-final judgments).

All of these standards are met here. Review is warranted for the reasons described above and in the petition, including the continuing circuit conflict and the fact that the Ninth Circuit's decision creates substantial problems for the industry as a whole. *See supra* pp. 3-5. Respondent does not defend the merits of the Ninth Circuit's interpretation of Regulation Z, and the Board's amicus brief in *Shaner* makes clear that the panel majority's decision is wrong. *See infra* pp. 7-10. Finally, because the facts regarding the timing of Chase's disclosure of respondent's increased rate are undisputed and the Ninth Circuit's decision construes Regulation Z for purposes of remand, absent this Court's review, the decision will fundamentally affect future proceedings in the case.[2]

Respondent contends (Opp. 6-7) that review is unnecessary because Chase might avoid liability on remand by invoking TILA's good-faith defense, 15 U.S.C. § 1640(f). The very passage of the Ninth Circuit's decision that respondent cites, however, undermines his

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[2] Respondent suggests to the contrary by asserting (Opp. 7)that "Chase [may] face liability in any event" on state-law claims, but that is no basis for declining review of the Regulation Z issue, which implicates liability predicated on a different theory.

point. In footnote 5, the panel majority stated that "the defense is only available for actions based on the Official Staff Commentary"—which the court ultimately construed as rejecting Chase's interpretation—and "not on such incidental interpretations appearing in an" Advanced Notice of Proposed Rulemaking (ANPR). Pet. App. 13a n.14.[3] The court also stated that the defense would be unavailable for reliance on interpretations issued after Chase acted, *see id.*, which would include the Board's *Shaner* brief that respondent says (Opp. 7) Chase might invoke on remand. The Ninth Circuit's treatment of the good-faith defense thus provides no basis for denying review. If anything, that treatment makes review of the underlying Regulation Z issue all the more important.

II. RESPONDENT'S REFUSAL TO DEFEND THE MERITS OF THE NINTH CIRCUIT'S DECISION CONFIRMS THAT COURT'S ERROR

Review is also warranted because the Ninth Circuit's decision is wrong on the merits—both in its conclusion (Pet. 23-26) and in its refusal to defer to the Board's interpretation of its regulation (Pet. 27-34). Respondent's answer is unusual: He twice recounts what the Ninth Circuit's analysis was (Opp. 2-3, 8-9), but does not defend its result.

Respondent instead advances two points unrelated to the merits, but both are irrelevant. First, he states (Opp. 8-9) that the panel majority considered the regulation, Official Staff Commentary, and 2007 ANPR and hence did not literally "ignore" them. That is true, but

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[3] Footnote 14 in the Petition Appendix is footnote 5 of the official version of the Ninth Circuit's opinion.

it does not validate the substance of the court's analysis or its conclusion, which are the subjects of Chase's challenges here. Second, respondent says (Opp. 9) that "Chase does not claim that [the Ninth Circuit's] analysis ran afoul of this Court's precedents." That is also true, as this Court has not previously considered the "change-in-terms" provision of Regulation Z, but the argument provides no reason to deny review. Chase seeks certiorari based on the entrenched conflict in the circuits and the error of the Ninth Circuit's decision. *See, e.g.*, S. Ct. R. 10.

Respondent similarly offers only a brief and misdirected answer to Chase's "length[y]" discussion (Opp. 9) of the Ninth Circuit's failure to defer to the Board's interpretation of its regulation. Here again respondent recounts what the court of appeals did, but does not address Chase's arguments. There can be no question, based on the panel majority's own explicit statements, that it refused to defer to what it termed the Board's "tersely worded," "incidental," and "conclusory" interpretations of Regulation Z. Pet. App. 13a n.14; *see* Pet. 27, 30-31. And even a cursory examination of the Ninth Circuit's opinion betrays the extent to which the panel majority strove to avoid the result to which appropriate deference should have led. *See* Pet. 31-33 & n.9. As previously explained, these aspects of the Ninth Circuit's decision have deleterious implications that go well beyond this case. *See* Pet. 33; Amicus Br. of Am. Bankers Ass'n *et al.* 9-18.

Respondent's choice to forego any defense of the merits of the Ninth Circuit's decision leaves Chase's challenges unrebutted, so Chase will not burden the Court by repeating those points. It is worth noting, however, that since the petition was filed, the Board has confirmed in unambiguous terms that, contrary to

the Ninth Circuit's decision, it interprets the pre-amendment version of Regulation Z—and has long interpreted it—precisely the same as Chase.

In response to an invitation from the First Circuit, the Board filed an amicus brief in *Shaner* explaining its views on the question presented here:

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Board Amicus Br. 1. The Board also observed that it has "consistently interpreted" Regulation Z in this way, *id.* at 5, adding that the recent amendments to Regulation Z confirm that consistency, *see id.* at 8-12. Finally, the Board specifically rejected several points at the heart of the Ninth Circuit's analysis. For example, the brief explains that Comment 9(c)(1)-3 of the Official Staff Commentary, *see* 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)(1)-3, is irrelevant because that comment concerns only the timing of required notices, not

whether notice is required in the first instance. *See* Board Amicus Br. 13-14; *compare* Pet. App. 5a ("Comment 3[] ... governs."). If there were any doubt that the decision below is wrong, the Board's amicus brief dispels it.[4]

III. At a Minimum, The Court Should Remand For Reconsideration In Light Of The Views Expressed In The Board's Amicus Brief In *Shaner*

Although plenary review is warranted for the reasons stated above and in the petition, at a minimum the Court should "GVR"—grant the petition, vacate the judgment below, and remand the case for reconsideration in light of the Board's amicus brief in *Shaner*. A GVR is appropriate "[w]here intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

That standard is met here. The panel majority viewed the relevant portions of Regulation Z as ambiguous and acknowledged that courts must "defer to an agency interpretation of its own ambiguous regulation provided it is not 'plainly erroneous or inconsistent with the regulation.'" Pet. App. 4a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court specifically recognized that deference would be due "to an in-

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[4] As Chase noted (Pet. 21 n.2), its rehearing petition urged the Ninth Circuit to invite the views of the Board. The court did not do so.

terpretation of a rule contained in an agency's legal brief that was directed specifically to the 'matter in question.'" Pet. App. 13a n.14 (quoting *Auer*, 519 U.S. at 462). The Board's amicus brief provides just such an interpretation, it does so in a clear manner, and it is entitled to deference. Like the agency brief to which this Court deferred in *Auer*, the Board's views were expressed "in an *amicus* brief filed at the request of the Court" and not "advanced ... to defend past agency action against attack." *Auer*, 519 U.S. at 461, 462. The First Circuit deferred to the brief for just these reasons. *Shaner*, 2009 WL 4068703, at *4-5. There is accordingly more than a "reasonable probability" that the amicus brief would lead the Ninth Circuit to a different conclusion on remand and that "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167.

This Court's precedent confirms that a GVR would at minimum be appropriate. For example, in *Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006), the Court granted, vacated, and remanded for reconsideration in light of an advisory memorandum that was issued by the Department of Labor after the court of appeals decision in the case. As explained by the United States in its amicus brief in *Coke*, that memorandum undermined the basis for the lower court's decision by making clear that the agency always had held a certain interpretation of its own regulation, an interpretation entitled to great deference. *See* U.S. Amicus Brief 7-8, 9-10, 17-19, *Long Island Care at Home*, No. 04-1315 (U.S. Dec. 22, 2005), *available at* 2005 WL 3533239. The same is true of the Board's amicus brief in *Shaner*. If plenary review is not granted here, a GVR is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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