No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,
Petitioner,

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 BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to review an interlocutory decision interpreting regulatory provisions under the Truth in Lending Act that were amended in 2009 to expressly require the consumer disclosures at issue in this case?

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MISCELLANEOUS

STATEMENT

1. In January 2009, the Federal Reserve Board amended Regulation Z, which implements the Truth in Lending Act, to expressly require a credit-card issuer to provide a cardholder with advance notice of increases on the rate of the cardholder's account due to default. In this case, Chase Bank seeks review of a decision holding that such disclosures were required under the pre-2009 version of the regulation.

Two pre-amendment regulatory provisions were at issue in the decision below. The first, 12 C.F.R. § 226.6(a)(2), required a credit-card issuer to initially disclose to cardholders "each periodic rate that may be used to compute the finance charge." The second, 12 C.F.R. § 226.9(c)(1), provided that "[w]henever any term required to be disclosed under 226.6 is changed or the required minimum payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected," within 15 days of the change. The controversy between the parties in the proceedings below focused on whether, under the pre-2009 regulations, the phrase "any term required to be disclosed under § 226.6" encompassed only contractual terms of the cardholder agreement or the specific items listed in § 226.6, including "each periodic rate."

The 2009 amendment added a third provision, 12 C.F.R. § 226.9(g), that expressly requires advance notice in the event of a rate increase, regardless of whether the cardholder agreement authorizes a maximum default rate. *See* 74 Fed. Reg. 5244, 5414–15 (Jan. 29, 2009). That amendment eliminates any prospective significance of the question presented in this case.

2. Respondent James McCoy sued petitioner Chase Bank in 2006, alleging that Chase retroactively increased

the interest rate on his credit card at the beginning of his payment cycle after his account was closed to new transactions, as a result of a late payment to another creditor. Pet. App. 2a. McCoy alleged that because Chase gave him no advance notice of the rate increase, the increase violated the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1615, and Regulation Z, 12 C.F.R. § 226.9. He also alleged that the increase violated Delaware law. The district court dismissed McCoy's complaint, holding that because Chase's cardmember agreement disclosed the highest rate that could apply due to McCoy's default, no actual notice of the increase was required. Pet. App. 35a-47a.

The court of appeals reversed and remanded for further proceedings concerning McCoy's state and federal claims. *Id.* at 18a. As to the TILA claim, the court engaged in a detailed analysis of the relevant regulatory provisions and the Federal Reserve Board's Official Staff Commentary. The court began by observing that although McCoy's was the "more natural" reading of the regulation, the text of the pre-2009 regulation was ambiguous. *Id.* 4a. Emphasizing the principle that "an agency interpretation of its own ambiguous regulation" is entitled to deference, the court focused on the Board's Staff Commentary. *Id. (*citing *Auer v. Robbins*, 519 U.S. 452 (1997)).

Specifically, the court rested its analysis on Comment 3 to section 226.9(c)(1), which provided that "a notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change . . . [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." *Id.* The court concluded that the "plain meaning" of this comment was "to require notice when a cardholder's interest rates increase because of a default, but

to specify that the notice may be contemporaneous, rather than fifteen days in advance." *Id.*

The court next rejected Chase's argument that a different portion of the Official Staff Commentary, Comment 1, should control. The court explained that "Comment 3's specific reference to interest rate increases attributable to the consumer's delinquency or default is directly on point and therefore governs." *Id.* 5a. In any event, the court concluded that Comment 1's more general statements did not alter the analysis. Comment 1 provided that "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate)." *Id.* Even if Comment 1 were applicable, the court concluded, notice would be required because "the increase here occurs at Chase's discretion and the most pertinent 'specific terms for an increase'—the actual amount of the increase and whether it will occur—are not disclosed in advance." *Id.* at 7a.

Finally, the court rejected Chase's contention that a different conclusion was required by statements characterizing existing law in the Board's then-superseded 2007 Advance Notice of Proposed Rulemaking, which sought public comment on the proposal ultimately adopted in January 2009. The court concluded that, although "language scattered throughout the 2007 ANPR offers some support for each view of the Official Commentary, the ANPR does not clearly weigh in favor of either interpretation of Regulation Z." *Id.* at 11a.

As to the state-law claims, the court of appeals held that McCoy had "made out a colorable claim" that Chase's retroactive rate increases were unconscionable

under Delaware law, which "does not appear to authorize rate increases that are discretionary and vary according to criteria in addition to the consumer's default where those criteria are not specified in a schedule or formula contained in the agreement." *Id.* at 14a, 16a.

Chase filed a petition for rehearing en banc. No judge of the court of appeals called for a vote, and the petition was denied. *Id.* 49a-50a.

REASONS FOR DENYING THE WRIT

I. The Question Presented Has No Continuing Importance Because the Regulation Has Been Amended To Expressly Require the Very Disclosures At Issue.

This Court does not normally grant certiorari to review assertedly erroneous interpretations of regulatory provisions. The ability of expert administrative agencies to decide when and how to amend their own regulations is reason alone for the Court to be "restrained and circumspect in using [its] certiorari power." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (declining to decide issue that could be decided by agency with authority to "periodically review the work of the courts" and "make whatever clarifying revisions conflicting judicial decisions might suggest"). That general approach is particularly suited to the Federal Reserve Board's intricate and highly technical regulations under the Truth in Lending Act—a statute in which Congress evinced "a decided preference for resolving interpretive issues by uniform administrative decision," rather than through the judiciary. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

In this case, review is especially unwarranted because the agency has already acted. As Chase acknowledges (at 12), its petition asks this Court to interpret a

regulation that the Federal Reserve Board amended in 2009 to expressly require the type of disclosures at issue here. Specifically, the Board added a new subsection, 12 C.F.R. § 226.9(g), that prevents retroactive changes and requires notice of higher interest rates 45 days in advance. 74 Fed. Reg. 5244, 5414–15 (Jan. 29, 2009). Thus, the Board has not only addressed the issue; it has rejected Chase's preferred rule on a prospective basis.

The Board's 2009 amendment resolves the question presented and eliminates any conflict among the courts going forward. Chase's petition seeks review primarily on the ground that the decision below conflicts with the Seventh Circuit's decision in *Swanson v. Bank of America*, 559 F.3d 653 (7th Cir. 2009); *accord Shaner v. Chase Bank USA*, --- F.3d ----, 2009 WL 4068703 (1st Cir. Nov. 25, 2009). But, as the Seventh Circuit explained in denying a petition for rehearing in that case, there is no continuing "conflict in need of resolution" because section 226.9(g) "clears up the ambiguity in the current regulation and commentary." *Swanson v. Bank of Am.*, 563 F.3d 634, 635 (7th Cir. 2009). Indeed, Chase concedes that the new regulation "requires advance notice when a card issuer is implementing an increased periodic rate pursuant to a default rate term," regardless of whether the original cardmember agreement specifies a maximum potential rate. Pet. 12. That concession demonstrates that the question presented has no continuing importance.

Undeterred, Chase maintains that the Court should grant review because the 2009 rulemaking "does not moot the legal question" concerning liability "under the prior regulation." *Id.* at 22. That observation holds true whenever an agency makes non-retroactive amendments to its regulations, but it hardly indicates that a question of regulatory interpretation—the sort of question this

Court generally does not review anyway—is sufficiently important to warrant certiorari. Moreover, as explained below, the prospect that any defendant will be held liable, even under the old rules, is far from certain. The decision below leaves open significant issues on remand, including whether Chase is completely exempt from liability as a result of good-faith reliance on administrative interpretations.

II. The Interlocutory Posture of the Case and Availability of a Good-Faith Defense on Remand Underscore That Review Is Unwarranted.

Apart from the fact that the regulation at issue has been amended to eliminate the prospective significance of the question presented, review is unwarranted because this case comes to the Court in an interlocutory posture. The court of appeals remanded this case for further proceedings on McCoy's claims. This Court ordinarily awaits the entry of final judgment before granting review, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), and there is no reason to depart from that settled practice here. *See* Gressman, *Supreme Court Practice* 280 (9th ed. 2007).

As the court of appeals correctly observed, "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.5. Under TILA's "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, or the interpretation of an authorized official of the Board, "notwithstanding that after such act or omis-

sion has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f). The defense thus exempts creditors from civil liability for the very sort of conduct that Chase presumably believes it engaged in here—conduct in good-faith reliance on a subsequently modified regulation or interpretation of the Board. In advancing its defense on remand, Chase may rely on any official Board interpretations. Chase may also cite a recent amicus filing by the Board concerning the question presented. *See Amicus* Br. of Bd. of Governors of the Fed. Reserve in Case No. 09-1157, *Shaner v. Chase Bank USA* (1st Cir.). If the district court or the court of appeals determines that Chase qualifies for the good-faith defense, Chase will face no federal civil liability.

In addition to remanding on McCoy's federal claim, the court of appeals also remanded for further proceedings concerning his state-law claims. Specifically, the court of appeals held that Chase's retroactive rate increases were not authorized by section 944 of the Delaware Banking Act because that section "does not appear to authorize rate increases that are discretionary and vary according to criteria in addition to the consumer's default where those criteria are not specified in a schedule or formula contained in the agreement." Pet. App. 14a. The court therefore concluded that McCoy stated a "colorable claim" implicating unsettled questions of Delaware law that must be addressed on remand. *Id.* at 16a. Chase does not, of course, seek review of this issue of state law. If McCoy prevails on his state-law claims, however, Chase will face liability in any event.

On remand, the district court will be free to find for Chase on any lawful ground, in which case review of the question presented would not be necessary (or appropri-

ate). Should Chase succeed in raising a good-faith defense, or defeat class certification, or prevail on the merits, the questions it now seeks to present will become academic. Should McCoy prevail on his state-law claims, the practical impact of the federal-law issues may also become academic. And should McCoy prevail on his TILA claims, Chase will be free to present the question presented to this Court following entry of a final judgment. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

III. The Court of Appeals Carefully Reviewed the Text of the Pre-2009 Regulation, the Official Staff Commentary, and the 2007 Advance Notice of Proposed Rulemaking.

Much of Chase's petition is devoted not to any significant issue of federal law, but to Chase's disagreement with the court of appeals' resolution of a narrow interpretative question concerning a now-superseded regulation. Pet. 23-34. That disagreement takes two forms, neither of which justifies this Court's review.

First, Chase contends that the court of appeals "ignored" the text of the pre-2009 regulatory provisions and accompanying Official Staff Commentary. Pet. 23-26. In fact, far from "ignor[ing]" them, the court engaged in an unusually detailed review of the text of those materials. The court concluded that a "natural reading" of the regulation favored McCoy, but that the regulations were ambiguous. Pet. App. 4a. Accordingly, the court turned to the Federal Reserve Board's Official Staff Commentary, emphasized that the Board's interpretation of its own regulations was entitled to deference, and concluded that Comment 3 to the relevant rule was directly on point and indicated that McCoy had stated a claim. Pet. App. 4a. But the court did not stop there; it also carefully exam-

ined Comment 1 to the regulation, on which Chase relied. It concluded that Comment 1 was not clearly applicable and that, even if it were, it would not alter the court's conclusion. Pet. App. 5a-8a. Chase does not claim that any of this analysis ran afoul of this Court's precedents or otherwise implicated any broader issues of federal law. Especially in light of the Federal Reserve Board's subsequent amendment to the regulation, this narrow dispute is unworthy of further review.

Second, Chase complains at length (Pet. 27-34) that the court below accorded insufficient weight to certain statements found in the Federal Reserve Board's 2007 Advance Notice of Proposed Rulemaking, which ultimately led to the 2009 amendments that resolved the question presented. Again, the court of appeals did not ignore the statements in the regulatory preamble. Rather, it concluded that "language scattered throughout" the ANPR provided "some support for each view of the Official Commentary," but did not "clearly weigh in favor of either interpretation of Regulation Z." Pet. App. 11a. Contrary to what Chase says (Pet. 30), the court never "refused" to follow the Board's statements in its preamble. Instead, it deferred to the portion of the Official Staff Commentary that it found directly on point (Comment 3) and concluded that the totality of other agency statements did not point in the opposite direction.

At bottom, despite its attempt to invoke settled rules of administrative deference (Pet. 30-31), Chase cannot identify any important principle of federal law at stake in this case. This narrow dispute, concerning the technical details of a superseded banking regulation, does not warrant review by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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