

No. 09-329

In the
Supreme Court of the United States

CHASE BANK USA, NA,
Petitioner,

v.

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

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

**BRIEF OF THE AMERICAN BANKERS
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae American Bankers Association (ABA) is a trade association whose members issue credit cards that are subject to the Truth in Lending Act (“TILA”) and Regulation Z. The ABA is the principal national trade association of the banking industry in the United States. Its members are located in each of the 50 States and the District of Columbia. ABA members hold a substantial majority of domestic assets of the banking industry of the United States, and they are leaders in consumer financial services, including credit cards.

The questions presented in this case raise important issues for ABA members with regard to the role of the Board of Governors of the Federal Reserve System (“the Board” or “the Federal Reserve Board”) and the ability of the industry to safely rely upon the Board’s interpretation of its own regulations, such as Regulation Z. Specifically, the decision below failed to adequately defer to the Board’s interpretation of its own regulations. Given the technical and complex nature of TILA, Congress has expressly encouraged the banking industry to rely upon the Board for guidance on regulatory matters when drafting its customer agreements by

¹ This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than the amicus or its members contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief. Petitioner Chase has filed a statement with the Court preemptively granting consent to the filing of *amici* briefs. A letter from Respondent consenting to the filing of this brief has been lodged with the Court.

providing them with a “safe harbor” from liability when they act in “conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations...” 15 U.S.C. § 1640(f). The Ninth Circuit’s decision to reject the Board’s construction of Regulation Z, as expressed in its Official Commentary² and in administrative rulemakings, directly affects the continued ability of financial institutions to safely rely on Board guidance in connection with TILA.

The ABA has a strong interest in defending the validity of the Board’s interpretation of Regulation Z in this case. The decision below failed to defer to the Board’s controlling views of its own regulations. In so doing, the panel upset long-settled expectations in the industry. The default rate provision that the Ninth Circuit held to be in violation of Regulation Z is very common in the industry. And, as a result of the Ninth Circuit’s ruling, numerous lawsuits seeking enormous penalties have been filed in courts in the Ninth Circuit against banks that constitute approximately 50 percent of the credit card industry. This spate of litigation is particularly alarming because the claims are based on conduct that the industry reasonably believed was in full compliance with the Board’s regulations, as interpreted by the Board itself.

² 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary).

SUMMARY OF THE ARGUMENT

This case involves the obligations of credit card issuers to make certain disclosures to customers under TILA, 15 U.S.C. §§ 1601 *et seq.*, as implemented by the Federal Reserve Board in Regulation Z, 12 C.F.R. pt. 226.³ Regulation Z generally provides for disclosure by credit card issuers to their customers at the outset of the credit relationship, including the disclosure of “each periodic rate that may be used to compute the finance charge.” 12 C.F.R. § 226.6(a)(2). Regulation Z also requires a credit card issuer to give written notice (“change-in-terms notice”) of any “change[s]” it seeks to make to the basic terms of the credit relationship. 12 C.F.R. § 226.9(c).

In its Official Staff Commentary interpreting Regulation Z, the Board made clear that, prior to 2009, the change-in-terms notice required by section 226.9(c) did *not* apply to rate increases that are specifically provided for in the cardholder’s initial agreement. 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1 (“Comment 9(c)-1”). Moreover, the Board subsequently stated in the context of related formal rulemaking proceedings that Regulation Z does not require a change-in-terms notice for a periodic rate

³ The Board recently adopted regulations that require a change-in-terms notice in the circumstances presented in this case. *See* 74 Fed. Reg. 36077, 36095 (July 22, 2009). Those regulations, which took effect on August 20, 2009, have no application to this case or any of the other similar lawsuits pending in the lower courts. For simplicity, all citations in this brief to Regulation Z and to the Board’s Commentary are to the versions in effect before August 20, 2009.

increase that results from the implementation of a default provision that is specified in advance in the account agreement. See 69 Fed. Reg. 70925, 70931–32 (Dec. 8, 2004); 72 Fed. Reg. 32948, 33009 (June 14, 2007). Despite this, the Ninth Circuit held that § 226.9(c) requires that written notice be given for an increase in a credit card rate, even if that increase is merely the implementation of a default provision that was set forth in the initial disclosure to the customer.

In so holding, the panel’s decision is in conflict with (1) the interpretation of Regulation Z by the Board, which has recently made its position crystal clear via *amicus* filings in this and other proceedings, and (2) other courts that have considered this issue, see *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009); *Swanson v. Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009).

The ABA submits that the decision below is plainly wrong. In concluding that Regulation Z requires notice for implementation of a default rate provision, the Ninth Circuit panel misinterpreted the Official Staff Commentary that speaks directly to the issue of whether additional notice is required. Compounding this error, the Ninth Circuit panel failed to defer to the Board’s subsequent official statements regarding a creditor’s notice obligations under Regulation Z issued in connection with proposed administrative rulemakings.

This Court’s precedent establishes that, unless “plainly erroneous or inconsistent with the

regulation,” an agency’s “fair and considered” interpretation of its own regulation is controlling. *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (internal quotation marks omitted). In terms of policy, the Ninth Circuit’s failure to defer to interpretive statements by the Board undermines the banking industry’s ability to rely on the Board’s expertise in a “highly technical” area of law where “creditors need sure guidance.” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (internal quotation marks omitted). Congress “specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law,” and has “promote[d] reliance upon Federal Reserve pronouncements.” *Id.* The panel failed to account for the value to the industry of being allowed to rely on official agency statements or interpretations (albeit less formal than a final regulation) for guidance with respect to TILA or other regulatory issues.

The issue for *amici* is not only one of business necessity, but of fundamental fairness. Having reasonably relied upon the Board’s guidance, the Ninth Circuit’s decision would impose potentially significant retrospective liability on the financial services industry as a result of that reliance. The Court should allow the industry to rely on direct and unambiguous statements by the Board with respect to the proper interpretation of its own regulations, as TILA expressly permits.

For these reasons, and as shown below, this Court should reverse the decision of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING IS INCORRECT AND CONTRARY TO THE FEDERAL RESERVE BOARD'S REGULATIONS.

This case takes up the issue of whether, prior to 2009, the notice requirements mandated by TILA and Regulation Z required a lender to provide a defaulting credit card customer with advance notice prior to increasing the cardholder's interest rate in a situation where the credit card agreement (1) disclosed to the customer that the interest rate could be increased due to a default, and (2) specified a maximum rate of interest that the creditor could charge if the cardholder defaulted.

1. The ABA respectfully submits that the Ninth Circuit's ruling incorrectly interprets the text of Regulation Z and the Board's Official Staff Commentary. Many credit card agreements in use within the banking industry provide that the interest rate that a creditor will use to calculate an account holder's finance charge may be increased upon the occurrence of specified contingencies, such as the account holder's failure to make timely payments. These card holder agreements usually set forth the conditions under which a finance charge may be increased, the maximum amount of any such

increase, and whether and what type of additional notice will be provided.

As noted at the petition phase of this proceeding, the conclusion drawn by the Ninth Circuit that the implementation by a creditor of an unchanged, previously disclosed contract provision required additional advance notice to the customer decision under the Board's Regulation Z, stands in stark conflict with another panel of the Ninth Circuit⁴ as well as the other Federal Courts of Appeals that have been called upon to resolve this issue. See *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009); *Swanson v. Bank of Am., N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir.), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009).

2. TILA is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. 1601(a). The Board's Regulation Z, adopted pursuant to 15 U.S.C. § 1604(a), requires credit card issuers to disclose certain information to consumers. The statute confers authority on the Board to issue regulations to carry out the statute. See 15 U.S.C. 1604(a).

⁴ An earlier Ninth Circuit panel found the task of construing the Commentary sufficiently straightforward to the point that it designated its opinion "nonprecedential." See *Evans v. Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008). See also *Swanson*, 563 F.3d at 635 (commenting on the unpublished status of *Evans* and noting that "nonprecedential decisions should be used only when the legal issue is clear enough that all reasonable judges will come out the same way").

Recognizing that the disclosure requirements of TILA present a highly technical area open to disagreement and dispute regarding what may be required, Congress provided a safe harbor for creditors, protecting them from civil liability under TILA, if they act in good-faith reliance on a rule, regulation, or interpretation issued by the Board or its staff. 15 U.S.C. § 1640(f).⁵

During the relevant period in this litigation, Regulation Z required credit card issuers to provide an "initial disclosure statement" specifying, *inter alia*, "each periodic rate that may be used to compute the finance charge." 12 C.F.R. 226.6(a)(2). The

⁵ Section 1640(f) of TILA states:

No provision of this section, section 1607 (b) of this title, section 1607 (c) of this title, section 1607 (e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission 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).

regulation also required credit card issuers to provide a "periodic statement" notifying the consumer of the rates imposed during the previous billing cycle. 12 C.F.R. 226.7. Finally, the regulation imposed certain "subsequent disclosure requirements," 12 C.F.R. 226.9, including a requirement to provide notice "[w]henver any term required to be disclosed under § 226.6 is changed," 12 C.F.R. 226.9(c)(1).

The Board's Official Staff Commentary to the pre-2009 change-in-terms provision explained that the notice requirement did not apply "if the specific change is set forth initially, such as ... an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary). On the other hand, the commentary explained, "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." *Ibid.*

Regulation Z generally mandated that any required change-in-terms notice be provided 15 days in advance of the effective date of the change. 12 C.F.R. 226.9(c)(1). If a creditor *changed* the rate terms of the cardmember agreement as a result of a consumer's delinquency or default, however, the regulation permitted creditors to increase the rate with less than 15 days' notice, as long as notice was

provided "before the effective date of the change."
The Official Staff Commentary explained:

Timing—advance notice not required.
Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it 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.

Official Staff Commentary, cmt. 9(c)(1)-3.

3. The guidance provided in the Commentary was clarified and reinforced over the years by public statements by the Board. For example, the Board took up the question in 2004 whether to amend the disclosure requirements governing the implementation of contractual default-rate provisions. The Advance Notice of Proposed Rulemaking issued by the Board in 2004 explained that, under the then-current guidance offered by the Board, no advance notice of a rate increase would be due to a credit card customer if the increase in the interest rate or finance charge was due to a previously-disclosed default-rate provision:

Under Regulation Z, some changes to the terms of an open-end plan require additional notice. * * * However, advance notice is not required in all cases. For example, if the interest rate

or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. 226.9(c)(1); comment 9(c)(1)-3. And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if [the] card issuer learns the consumer paid late on another credit account, even if the consumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 69 Fed. Reg. 70,931-70,932 (2004) (advance notice of proposed rulemaking).

Likewise, in 2007, the Board published proposed amendments to Regulation Z and to the Official Staff Commentary in the Federal Register. Truth in Lending, 72 Fed. Reg. 32,948 (proposed rule). Describing Regulation Z in its then-current

form,⁶ the Board proposed an amendment that would require 45 days' advance written notice when

- (i) A rate is increased due to the consumer's delinquency or de fault;
- (ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

Id. at 33,058. The Board explained that

[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, *in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract.*

Id. at 33,012 (emphasis added).

4. In reaching its decision, the Ninth Circuit clearly misinterpreted the Board's regulations. The text of Regulation Z provided that written notice is required only when a "term" is "changed." 12 C.F.R. § 226.9(c)(1). The panel found the meaning of the regulation to be "ambiguous"⁷ with respect to whether it applied to an increase in a periodic rate

⁶ *Id.* at 33,009.

⁷ *McCoy v. Chase Manhattan Bank USA*, 559 F.3d 963, 965 (9th Cir. 2009)

implementing an *unchanged*, previously-disclosed contractual term. There was no ambiguity in the Regulation, the Commentary, or the Board's discussions in its rulemaking notices. Moreover, any latent "ambiguity" regarding the Board's intentions with respect to a lender's pre-2009 disclosure obligations has been definitively removed with the Board's *amicus* filings in the present litigation and before the First Circuit in *Shaner*.

In *Shaner*, the Court of Appeals asked the Board for its views on its own pre-2009 regulations. In response, the Board submitted an *amicus* brief addressing that question. *Shaner*, 587 F.3d at 491. The Board's position in its *amicus* regarding the proper construction of its regulations and Commentary makes it clear that no pre-effective date change-in-terms notice for an annual rate increase is required 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. Moreover, it is consistent with Regulation Z for a creditor to set forth a *maximum* rate that *may* be charged rather than a *specific* rate that *will* be charged if the triggering events and the maximum rate are disclosed in the initial agreement. The Board explained that it

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.

Federal Reserve Board Br. at 1, *Shaner, supra* (No. 09-1157) (filed Oct. 22, 2009). As the Court is well aware, this same interpretation of a creditor's obligations under TILA and Regulation Z has been reiterated by the Board in its *amicus* to the Court in the present proceeding, in conjunction with the briefing on the cert. petition. *Brief for the United States as Amicus Curiae*, at 11 – 17 (filed May 19, 2010).

5. In sum, the ABA respectfully submits that the panel erred when it failed to correctly interpret the Board's Regulation and Official Commentary or to accord the proper controlling deference to the Board's subsequent interpretation of their meaning. The descriptions of then-current law published by the Board in 2004 and 2007 in connection with the subsequent rulemakings were authoritative

summaries of the Board's interpretation of the existing change-in-terms requirements. These summaries were drafted to help explain the Board's proposals to change the very rules that are at issue here. As such, they clearly warranted the court's deference. See, e.g., *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (deference accorded to official staff interpretation of Regulation Z published in the *Federal Register*). More importantly, they establish that Chase's disclosure practices were fully consistent with the Board-issued guidance or interpretation of its TILA regulations, entitling Chase to the protection of the statute's "safe harbor" provision, 15 U.S.C. § 1640(f).

II. THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE BOARD'S PUBLISHED INTERPRETATIONS OF REGULATION Z UNDERMINES CONGRNRESIONAL POLICY THAT THE FINANCIAL INDUSTRY SHOULD BE ENCOURAGED TO RELY ON BOARD GUIDANCE REGARDING REGULATION Z AND TILA.

The Ninth Circuit's decision, if allowed to stand, has significant ramifications for the banking industry with respect to its ability to safely rely on guidance or interpretations issued by the Board. The Court has previously recognized that TILA is "highly technical" in nature and that creditors need "sure guidance" as to the meaning and scope of its provisions. *Milhollin*, 444 U.S. at 566. By failing to defer to the Board's interpretation of its own regulations, the holding below frustrates the

purposes of TILA and fails to take into account the benefit to the banking industry and the public-at-large of being able to safely rely on interpretive guidance from the Board.

1. “Guidance” from the Board regarding compliance with Regulation Z or TILA can take many forms. There are, of course, formal Board regulations as well as the Official Commentary, adopted via notice and comment rulemaking pursuant to the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* In practice, the industry commonly relies on agency guidance that is issued via other official outlets. For example, it is well-understood within the banking industry and among the banking regulators themselves that the rulemaking process is only one way by which the Board provides the industry with the agency’s current interpretation or guidance on a particular issue in a relatively timely fashion. The panel decision, however, takes issue with this well-accepted practice, noting that:

Although 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 FRB interpretation promulgated “under such procedures as the Board may prescribe,” the defense is only available for actions based on the Official Staff Commentary, not on such incidental interpretations appearing in an ANPR...

McCoy, 559 F.3d at 969, n. 5.

2. In a long line of cases beginning with *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Court has held that where an agency interprets its own regulations, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Id.* See also *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *N. Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam); *United States v. Larionoff*, 431 U.S. 864, 872–73 (1977); *Milhollin*, 444 U.S. at 566; *Mullins Coal Co. v. Dir., Office of Workers’ Comp. Programs, Dep’t of Labor*, 484 U.S. 135, 159 (1987); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991); *Martin*, 499 U.S. at 150–51; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Auer*, 519 U.S. at 461; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007).

While the Court has previously made clear that *Chevron* deference is not owed to an agency interpretation of a *statute* it administers if that interpretation is contained in an informal issuance

such as an opinion letter, policy statement, agency manual, or enforcement guideline, “all of which lack of the force of law.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), this Court has held that deference to an agency’s interpretation of its own *regulations is* warranted so long as the interpretation “reflect[s] the agency’s fair and considered judgment on the matter in question.” *Auer*, 519 U.S. at 462.⁸ Accordingly, this Court has been willing to defer to agency interpretations of regulations where they appear in a legal brief, *id.*; *Gardebring*, 485 U.S. at 430, or in an “Advisory Memorandum” issued only to internal agency personnel and which the agency appeared to have written in response to the pending litigation, *Long Island Care at Home, Ltd.*, 551 U.S. at 171 (internal quotation marks omitted).⁹

⁸ *Accord Am. Fed’n of State, County & Mun. Employees v. Am. Int’l Group, Inc.*, 462 F.3d 121, 126 (2d Cir. 2006) (explaining that “while agency interpretations that lack the force of law do not warrant deference when they interpret ambiguous *statutes*, they do normally warrant deference when they interpret ambiguous *regulations*”) (emphasis in original); *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm’n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (“[A]gency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) do not warrant *Chevron*-style deference when they interpret ambiguous *statutes* but do receive deference under *Auer* when interpreting ambiguous *regulations*.”) (emphasis in original) (internal quotation marks omitted).

⁹ See *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004) (deferring to an agency’s interpretation even though the agency’s “gloss” came “only in a brief rather than in some more formal manner (*e.g.*, an interpretive ruling)"); *Am. Fed’n of State, County & Mun. Employees v. Am. Int’l Group, Inc.*, 462 F.3d 121, 126 (2d Cir. 2006) (deferring to

3. The ABA submits that the panel’s holding on deference is simply incorrect. The Ninth Circuit’s decision, if allowed to stand, calls into question the continued ability of financial institutions to reasonably – and safely – rely on anything other than formal statements or guidance issued by the Board via notice and comment rulemaking pursuant to the Administrative Procedure Act. As discussed above, the law does not require such rigor. Courts regularly defer to agency interpretations of their own regulations that are embodied in considerably less formal statements than those at issue in the present litigation. The Board’s plain and repeated statements—whether they are offered in an *amicus* brief submitted by the agency or contained in regulatory documents such as the preamble to a proposed rule that is published in the Federal Register—plainly “reflect the

an agency interpretation provided in a proposed amendment to the regulation and stating that “[w]hen the language of a regulation is ambiguous, we typically look for guidance in *any* interpretation made by the agency that promulgated the regulation in question”) (emphasis added); *Conn. Gen. Life Ins. Co. v. Comm’r*, 177 F.3d 136, 144 (3d Cir. 1999) (deferring to an agency interpretation offered as a “mere’ litigating position”); *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 293 (4th Cir. 2007) (deferring to an agency interpretation offered in an *amicus* brief); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (deferring to informal agency interpretive statements in an opinion letter, handbook, and *amicus* brief); *Glen Coal Co. v. Seals*, 147 F.3d 502, 521 (6th Cir. 1998) (deferring to an agency interpretation offered as a “litigating position”); *Bigelow v. Dep’t of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) (deferring to an interpretation of regulations set forth by government counsel in its brief).

agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.

CONCLUSION

For the foregoing reasons, the Court should overturn the Ninth Circuit's decision.

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