No. 20-333

IN THE
SUPREME COURT OF THE UNITED STATES

BOZEMAN FINANCIAL LLC,
Petitioner,

v.

FEDERAL RESERVE BANK OF ATLANTA, et al.,
Respondents.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In the decision below, the Federal Circuit held the Banks are "persons" under the AIA because they are "distinct" from the Federal Government for purposes of the AIA.

The Banks correctly told the Federal Circuit "the question whether [they] qualify as 'person[s]'" under the AIA is "an important one." *See* Pet. 27. In this case, and previously, the Banks have sought post-issuance review to invalidate lawfully obtained patents, pursuant to the PTAB's "significant power to revisit and revise earlier patent grants." *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2139-40 (2016). The Federal Circuit recognized that whether the Banks are "persons" under the AIA "is pertinent to multiple pending and future patent litigations involving the Banks." Pet. 6a.

The Banks do not dispute this case is an ideal vehicle to resolve the important Question Presented.

Instead, they seek to dissuade the Court from granting the petition primarily by defending the Federal Circuit's *conclusion* they are "persons" under the AIA. They do so, however, with arguments that bear minimal resemblance to the Federal Circuit's own rationale. And several of the Banks' arguments to this Court were never made by them to the court of appeals.

The Banks' recalibrated arguments are unavailing, and should be rejected after the Court has the benefit of merits briefing in which their new arguments can be fully addressed. But the Banks' tepid defense of the Federal Circuit's reasoning, and

their own shifting positions, highlight the need for this Court to grant the petition.

I. The Banks Do Not Dispute This Case Is an Ideal Vehicle to Resolve the Question Presented

The Petition explained why this case is an ideal vehicle: (1) there are no obstacles to the Court's consideration of the question presented; (2) the question presented entirely controls the outcome of this case; (3) because the Federal Circuit has exclusive jurisdiction over appeals from post-issuance proceedings before the PTAB, there is no need or opportunity for other lower courts to pass on the question presented; and (4) the question presented was decided by the Federal Circuit in a precedential decision, and the full court considered Bozeman's request for en banc review, but refused to correct the panel's error. Pet. 33-34.

The Banks do not dispute any of these points.

The Banks also do not dispute that if they are not "persons" who may avail themselves of the post-issuance review procedures set forth in the AIA, then the PTAB lacked jurisdiction, its actions were *ultra vires*, and the deprivation of Petitioner's property rights will go unaddressed absent this Court's review. *See* Pet. 33.

II. The Banks' New Arguments Are Unavailing, But Highlight the Need for Review

The centerpiece of the Federal Circuit's decision is its determination that the Banks are "distinct" from the Federal Government (Pet. App. 6a-8a)—a stance

taken by the Banks in the court of appeals.[1] *See* Supplemental Response Brief of the Federal Reserve Banks at 2, *Bozeman*, No. 19-1020 (Fed. Cir. Aug. 20, 2019), ECF No. 57 (Banks "are distinct from the sovereign"); *id*. at 3 (same); *id*. at 4 (same).

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[1] The court of appeals reached that conclusion by focusing on three considerations. Pet. 11-12; Pet. App. 7a-9a. The Banks barely defend the Federal Circuit's analysis, instead advancing new arguments. Of the court's three considerations, the Banks only meaningfully rely on the second: that 28 U.S.C. § 1498(a) requires certain patent lawsuits against or concerning the United States be brought in the Court of Federal Claims. Pet. App. 7a-8a. The merits of that argument were addressed in the Petition (p. 20-23), and are further addressed below. As for the Federal Circuit's failure to consider the functional analyses previously employed by this Court in assessing whether an entity is part of the Federal Government (Pet. 13), the Banks inaccurately suggest all of the cases cited in the Petition "concerned whether an entity is part of the federal government for *constitutional* purposes" (Opp. 23-24, emphasis in original), ignoring *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946), and *Rainwater v. United States*, 356 U.S. 590, 591-92 (1958). The Banks' oversight of *Cherry Cotton Mills* is particularly glaring given this Court's reliance in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 393 (1995), on *Cherry Cotton Mills*' functional approach to a non-constitutional question. Also glaring is the red-herring-character of the Banks' apparent point. Petitioner does not dispute that Congress could have defined "person" in the AIA to exclude the Federal Reserve Board but include the Banks. But that is not what Congress did. The Court's functional approach employed in *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 54 (2015), and *Lebron*, is well-suited to aid in statutory interpretation when Congress has failed to provide clear direction. The Federal Circuit should have considered those cases, instead of using its formalistic test, which ignored numerous significant features of the Federal Reserve System. Pet. 13-26.

The Banks have seemingly abandoned that position. *See*, *e.g.*, Opp. 4 (Banks "serve the interests of . . . the sovereign"); 6 (Banks "execute United States monetary policy," carry out "public functions" and "serve the interests of the United States"); 24 (Banks "implement United States monetary policy" and "unquestionably further public purposes"); 25 (Banks "perform the 'work of the government'").[2]

The Banks unsurprisingly begin their Opposition by telling the Court this is a case about "statutory construction." Opp. 1. What is notable, however, is how little the Banks have to say about the AIA itself—either its text or statutory history.

Perhaps that is because *nothing* in the AIA supports reading the statute as if Congress meant to treat the constituent parts of the Federal Reserve System (*i.e.*, the Board of Governors and the Banks) differently from one another. The AIA's text says nothing of the sort. And if Congress actually intended to create different AIA rules for the Board and the operating arms of the nation's central bank, it clearly knew how to do. Courts avoid this kind of "odd result" when engaging in statutory interpretation. *Reiter v.*

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[2] The Banks also seemingly concede that 12 U.S.C. § 341 was a waiver of their sovereign immunity (Pet. 20-21), which would have been unnecessary were they "distinct" from the sovereign. *See* Opp. 21 ("As a result [of Section 341], they lack sovereign immunity . . . .").

Cooper, 507 U.S. 258, 267 (1993).[3] The result would be particularly odd here, given the Banks' concession that some of their activities are "for the United States," and in those situations they should be treated the same as the United States. *See* Opp. 22 n.7.

The Banks turn, instead, to purported "contextual evidence" in defending the Federal Circuit's conclusion they are "persons" under the AIA. Contextual evidence is, at best, part of an interpretive puzzle, resorted to when primary tools do not yield a conclusive answer. *Cf. Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (rejecting party's "best piece of contextual evidence"); *Lockhart v. United States*, 136 S. Ct. 958, 965-66 (2016) (rejecting party's "contextual evidence"); *Cook County v. Chandler*, 538 U.S. 119, 127-29 (2003) (rejecting party's "contextual evidence" concerning the meaning of "person" under the False Claims Act). Such evidence must be even more compelling when offered as support for an unusual reading of a statute—like the Banks', which would treat parts of the Federal Reserve System differently from one another.[4]

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[3] The Petition cites several cases where courts found the Banks were *not* statutory "persons" in the absence of clear direction from Congress (Pet. 29-30), while the Banks have cited no contrary cases. *Cf. Return Mail v. United States Postal Service*, 139 S. Ct. 1853, 1863 (2019) (discussing "presumption that a statutory reference to a 'person' does not include the Government").

[4] *King v. Burwell*, 576 U.S. 473, 501 (2015) (Scalia, J., dissenting) ("the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct").

Most of the Banks' "contextual evidence" is offered in support of their new primary argument for treating them as "persons" under the AIA: that they "participate in the patent system in a manner analogous to private entities." Opp. 2; *see also* Opp. 6, 19, 22, 23, 24. This argument bears a strong resemblance to an argument by the Postal Service rejected in *Return Mail*. 139 S. Ct. 1864 (addressing Postal Service claims about its participation in the patent system based on other statutory provisions, and observing they provide no "clue as to the interpretation of the AIA provisions"); *id*. at 1865-66 (same).

The Banks new argument also appears built upon a faulty factual premise. Although not argued below, or part of the Federal Circuit's rationale for its decision, the Banks now declare: "*Unlike the Postal Service*, Reserve Banks do not fall within the Patent Act's definition of 'federal agency,' which governs provisions regulating patent ownership by federal agencies." Opp. 2 (emphasis added). But that claim appears incorrect—perhaps made by the Banks based

on dicta in *Return Mail*.[5] "Federal agencies" are "any executive agency as defined in section 105 title 5." 35 U.S.C. § 201. "Executive agency" is defined as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The Postal Service is not an "Executive department" because it is not included in the enumerated list of such entities set forth at 5 U.S.C. § 101. It is also not a "Government corporation." *See USPS v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 746 (2004) ("Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment."). And 5 U.S.C. § 104(1) *specifically excludes* the Postal Service from the

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[5] In *Return Mail*, the parties appeared to agree the Postal Service is a "federal agency." Presumably because the issue was not in dispute, the Court occasionally employed that terminology in *Return Mail*, without analysis, as dicta. *See Central Virginia Comm. College v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). Regardless of whether the Postal Service is a "federal agency" under 35 U.S.C. § 201, the Court's holding in *Return Mail* remains sound, having relied upon the "longstanding interpretative presumption that 'person' does not include the sovereign." While not a "federal agency" under Title 35, the Postal Service is an "independent establishment of the executive branch," 39 U.S.C. § 201, and there was no serious question in *Return Mail* that it is part of the federal government. *See Return Mail*, 139 S. Ct. at 1860-61 ("The central question in this case is whether the *Federal Government* can avail itself of" post-issuance review.) (emphasis added); *id.* at 1861 ("The question in this case is whether the Government is a 'person' . . . .").

definition of "independent establishment."[6] *See also Banks v. MSPB*, 854 F.3d 1360, 1363 (Fed. Cir. 2017) ("the Postal Service does not fall into any of the categories that define an 'Executive agency' under Title 5"); *Murillo v. Kittelson*, 2020 WL 3250231, at *6 (D. Neb. June 16, 2020) (Postal Service is not an "agency" because it is "specifically excluded from the generally applicable definition of 'executive agency' in 5 U.S.C. § 105 by virtue of its exclusion from the definition of 'independent establishment' in 5 U.S.C. § 104"). Thus, the Banks' supposed "strong contextual

[6] The Banks' recitation of how "federal agency" is defined under Section 201(a) misleadingly omits the explicit exclusion of the Postal Service in 5 U.S.C. § 104(1). *See* Opp. 7 n.3.

evidence" that they are "persons" under the AIA (Opp. 2, 21-22) looks to be no evidence at all.[7]

This error by the Banks also undercuts their about-face with respect to the relevance of *Return Mail* to the Question Presented. The Banks told the Federal Circuit that *Return Mail* was "not applicable" to them. Supplemental Response Brief of the Federal Reserve Banks at 1, *Bozeman*, No. 19-1020 (Fed. Cir. Aug. 20, 2019), ECF No. 57; *id*. at 10 ("*Return Mail* does not apply to the Reserve Banks."). Changing course, they now tell this Court: "Under *Return Mail*,

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[7] The Petition identified several statutory provisions in which Congress has defined the Banks as "agencies" (Pet. 23), and there is reason to doubt the Banks' assertion they are not federal agencies under Title 35. The Banks contend they are not "Government corporations," which are defined as corporations "owned or controlled by the Government of the United States," 5 U.S.C. § 103, "because the Banks' stock is owned entirely by their member banks." Opp. 21. But, as the Banks have explained: "Stock of Federal Reserve Banks, unlike stock in a private corporation, is not acquired for investment purposes or for purposes of control." *See also Am. Bankers Assoc. v. United States*, 932 F.3d 1375, 1386 (Fed. Cir. 2019) (describing banks' ownership of Bank stock as mere "regulatory scheme"). Even more dubious is the Banks' assertion they are not "independent establishments" under 5 U.S.C. § 104, which is defined as an "establishment in the executive branch" that is "not an Executive department," 5 U.S.C. § 104(1). The Banks assert they are "outside the Executive branch" (Opp. 21, 23), but some courts have founds otherwise. *See*, *e.g.*, *Flight Int'l Group, Inc. v. Federal Reserve Bank of Chicago*, 583 F. Supp. 674, 679 (N.D. Ga. 1984) (Banks "are independent establishments in the executive branch of government"); *Dorsey v. Federal Reserve Bank of St. Louis*, 451 F. Supp. 683, 684 (E.D. Mo. 1978) ("The Federal Reserve banking system operates under the provisions of [Title 12]. An examination of those provisions convinces the Court that the Federal Reserve Bank is an 'executive agency.'").

then, an entity's status as a federal agency . . . and the nature of its participation in the patent system are critically relevant to its status as a "person." Opp. 20. That assertion significantly overstates the relevance of those considerations to the Court's holding in *Return Mail*.[8] Moreover, as explained above, the Postal Service does not appear to be a "federal agency" for purposes of Title 35, while there are credible arguments the Banks are.[9]

The Banks do advance one contextual argument made by the court of appeals: the contention that when the Banks are sued for patent infringement they do not enjoy the protections of 28 U.S.C. § 1498(a), which requires patent lawsuits against or concerning the United States be brought only in the Court of Federal Claims. Opp. 22. But, as noted in the Petition, this point is unsettled, with the Federal Circuit previously recognizing the Banks might "themselves [be] considered government agencies in a

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[8] The Banks similarly overreach in claiming—without any citation—"the AIA focuses on how the entity is structured and participates in the patent system." Opp. 26. Neither the AIA nor *Return Mail* say any such thing. The Banks also inaccurately state the Federal Circuit "follow[ed] this Court guidance in *Return Mail*." Opp. 1.

[9] The Banks represent they hold patents differently than the Postal Service. Opp. at 22. But their one example, the '108 patent, appears assigned directly to the Postal Service, and not held on behalf of the United States. U.S. Patent No. 6,480,108 (assigned to "United States Postal Service" in 2002).

patent infringement suit"—having declined to decide the issue in a prior case concerning Section 1498(a).[10]

A separate but significant contextual point both the Federal Circuit and the Banks ignore is the nature of the patents at issue, which concern a "match, authentication, authorization, clearing, and settlement system" that can "reduce check fraud and verify checks," while "maintain[ing] check payment control." *See* U.S. Patent No. 6,754,640 (filed Oct. 23, 2001). The amicus brief of the United States filed in another case, upon which the Banks rely here (Opp. 2, 13, 14 n.5, 18), shows the relevance of Petitioner's patents to the Banks' public functions, explaining: "as components of the Federal Reserve System [the Banks] operate in the public interest, and, specifically, in furtherance of that [S]ystem's functions of . . . fostering payment and settlement system safety . . . ." U.S. Kraus Br. at 6, *United States ex rel. Kraus v. New York*, No. 18-1746 (2d Cir. Aug. 2, 2019).

The Banks also conspicuously fail to respond to the Petition's discussion of the interplay between the interpretative canon of constitutional avoidance and

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[10] *See Advanced Software Design Corp. v. Fed. Reserve Bank of St. Louis*, 583 F.3d 1371, 1378 (Fed. Cir. 2009) (holding that remedies against the Banks are limited by 28 U.S.C. § 1498(a) in at least some contexts); *see also* Pet. App. 8a at n.3. The Banks portray *Advanced Software* as contemplating the Banks should be treated under Section 1498 "[l]ike any purely private actor" (Opp. 22 n.7), but the decision does not say that, and it remains an open question when the Banks can invoke Section 1498, notwithstanding the Banks' narrow construction for purposes of opposing the petition.

the private non-delegation doctrine. Pet. 25-26. If the Banks actually were "distinct" from the Federal Government it is doubtful the Board could delegate its powers to them. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Assoc. of Am. R.R.*, 575 U.S. at 87-88 (Thomas, J., concurring in the judgment). This supports interpreting the AIA as treating the Banks like the Board of Governors and other parts of the Federal Government, in the absence of clear congressional direction or intent to do otherwise.

CONCLUSION

The Federal Circuit incorrectly decided an important question of federal law that has not been, but should be, settled by this Court.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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