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

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondents the Federal Reserve Banks are corporations chartered under the laws of the United States pursuant to the Federal Reserve Act of 1913, 12 U.S.C. 221 *et seq*. They are corporate instrumentalities of the United States and have no parent company or publicly owned subsidiaries or affiliates.

Although stock of the Federal Reserve Banks is owned by commercial member banks within their respective Federal Reserve Districts, none of the stockholders control the Federal Reserve Bank whose stock they hold. Federal Reserve Bank stock, unlike stock in a typical private corporation, is not acquired for investment purposes or for purposes of control. Rather, such stock is acquired because its ownership is a condition of membership in the Federal Reserve System. Unlike owners of a typical private corporation, stockholders of a Federal Reserve Bank do not possess a residual equity interest in that Federal Reserve Bank. That residual interest remains always with the United States.

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INTRODUCTION

This case concerns an exceedingly narrow question of statutory construction: whether the Federal Reserve Banks, corporate instrumentalities of the United States, are "persons" entitled to petition for post-grant review of a patent under the America Invents Act (AIA).[1] 35 U.S.C. 311, 321. Petitioner Bozeman Financial LLC, having had its patents held invalid in a post-grant review proceeding initiated by the Reserve Banks, now contends that the Reserve Banks are not "persons" and therefore should not have been permitted to seek post-grant review. The Federal Circuit correctly rejected that argument.

This Court held in *Return Mail, Inc.* v. *United States Postal Service*, 139 S. Ct. 1853 (2019), that the term "person," as used in the AIA's post-grant review provisions, does not include "the sovereign, and thus excludes a federal agency" like the U.S. Postal Service. *Id*. at 1861-1862 (citations omitted). The Court's decision rested on the presumption that the term "person" ordinarily does not include the sovereign, as well as the fact that "it is reasonable for Congress to have treated [federal agencies] differently" for purposes of post-grant review because federal agencies enjoy certain advantages within the patent system, including protection from prospective remedies for infringement. *Id*. at 1867.

The Federal Circuit, following this Court's guidance in *Return Mail*, held that Reserve Banks are "persons"—not federal agencies like the Postal Service—for purposes of seeking post-grant review. That

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[1] Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, 125 Stat. 284.

decision is clearly correct. Reserve Banks are not federal agencies, and, by careful congressional design, were deliberately established as corporate instrumentalities distinct from the sovereign, with a mix of public and private features. 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. That is strong contextual evidence that the Reserve Banks are "person[s]," not federal agencies excluded from seeking post-grant review under *Return Mail*. Moreover, as a result of their unique hybrid attributes, the Reserve Banks participate in the patent system in a manner analogous to private entities. Reserve Banks are not subject to the Patent Act's provisions governing patent ownership by federal agencies, and unlike federal agencies, they can be sued for patent infringement in any district court, including for injunctive relief.

Although Bozeman contends that the Reserve Banks must be treated like the United States because they serve as the operating arm of the nation's central bank and further public purposes, it is well established that statutes that apply to the government do not automatically apply to federal instrumentalities, which serve the interests of, but stand apart from, the sovereign. As the United States has explained, "the extent to which laws applicable to government entities apply to Reserve Banks depends upon the specific statute at issue." Br. Amicus Curiae of the United States and the Federal Reserve Board in Support of Neither Party (U.S. *Kraus* Br.) at 1, *United States ex rel. Kraus* v. *New York*, No. 18-1746 (2d Cir. Aug. 2, 2019).

That principle also disposes of Bozeman's contention that the court of appeals' decision is in tension with decisions concerning the Reserve Banks' treatment under *other* statutes. The question of the Reserve Banks' status under a particular statute depends on the text and context of that statute, and the answer for purposes of one statute does not have any necessary implications for the Reserve Banks' status under a different statute. Here, the Federal Circuit properly considered the attributes of the Reserve Banks relevant to the question at hand—namely, the fact that the Banks' participation in the patent system bears little resemblance to that of federal agencies. This Court's review is not warranted.

STATEMENT

1. *The Federal Reserve System.*

a. The Federal Reserve System, the nation's central bank, was established pursuant to the Federal Reserve Act of 1913 (FRA), 12 U.S.C. 221 *et seq*. The Federal Reserve System includes the Board of Governors of the Federal Reserve System; the Federal Open Market Committee (FOMC); and the twelve regional Reserve Banks. In the FRA, Congress created a decentralized central banking system to balance government oversight over monetary policy with insulation from undue political pressure. See *Fasano* v. *Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 277 (3d Cir. 2006); *Lewis* v. *United States*, 680 F.2d 1239, 1241 (9th Cir. 1982). "Few issues in the history of this nation have been as thoroughly considered and debated as central banking and the regulation of the money supply, and private participation, or even control, have been hallmarks of what was from time to time prescribed by the Congress." *Melcher* v. *Fed. Open Mkt. Comm.*, 644

F. Supp. 510, 524 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987).

That extensive congressional consideration has led to an "exquisitely balanced approach to an extremely difficult problem." *Melcher*, 644 F. Supp. At 524. The Board of Governors is a federal agency, and its members are nominated by the President and confirmed by the Senate. 12 U.S.C. 241; *Fasano,* 457 F.3d at 277-278. The FOMC consists of the Governors, the President of the Federal Reserve Bank of New York, and, on a rotating basis, four Presidents of the other eleven Reserve Banks. See 12 U.S.C. 263. The Reserve Banks are federal instrumentalities—corporations chartered pursuant to the FRA to perform the central bank's operational responsibilities. See *Starr Int'l Co.* v. *Fed. Reserve Bank of N.Y.*, 742 F.3d 37, 40 (2d Cir. 2014) ("Because federal reserve banks conduct important governmental functions regarding matters including the general fiscal duties of the United States, they are instrumentalities of the federal government.") (citation omitted).

By deliberate congressional design, the Reserve Banks serve the interests of, but stand apart from, the sovereign. As the Court noted in *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba* (*Bancec*), governments frequently establish corporate instrumentalities because of their distinctive ownership structure and features, which "permit [them] to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies." 462 U.S. 611, 624-625 (1983). "A typical government instrumentality, if one can be said to exist, * * * is typically established as a separate juridical entity, with the powers to hold

and sell property and to sue and be sued." *Id.* at 624. "The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply." *Ibid.*

The Reserve Banks possess the hallmarks of instrumentality status, with characteristics both private and public. See *U.S. Shipping Bd. Emergency Fleet Corp.* v. *W. Union Tel. Co.*, 275 U.S. 415, 425-426 (1928) ("Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the government. They are private corporations in which the government has an interest."). The Reserve Banks are not part of any executive department, agency, or establishment. *Scott* v. *Fed. Reserve Bank of Kan. City*, 406 F.3d 532, 536 (8th Cir. 2005). Rather, they are corporations chartered under the laws of the United States. Like national banks, Reserve Banks are chartered by the Office of the Comptroller of the Currency. 12 U.S.C. 341. They do not receive federal appropriations but instead finance their operations through a combination of service fees and accumulated interest on securities they possess. See *The Federal Reserve System*: *Purposes & Functions* 6.[2] They do not have the authority to promulgate regulations having the force and effect of law. See *Scott*, 406 F.3d at 536; see also 12 U.S.C. 248(k).

Although the Reserve Banks are subject to general supervision by the Board of Governors, see 12 U.S.C. 248(j), each Reserve Bank conducts operations "under the supervision and control of a board of directors," which "shall perform the duties usually appertaining

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[2] https://www.federalreserve.gov/aboutthefed/files/pf_complete.pdf.

to the office of directors of banking associations." 12 U.S.C. 301. Member banks, not the United States, hold each Reserve Bank's stock. See*, e.g., Scott*, 406 F.3d at 535; *Lewis*, 680 F.2d at 1241. The FRA empowers Reserve Banks to make contracts and sue and be sued in their own name. 12 U.S.C. 341 (Third), (Fourth).

At the same time, Reserve Banks "are not private business." *Fasano*, 457 F.3d at 283 (internal citations and quotation omitted). "The policy of the Federal Reserve Banks is governed by the policy of the United States with regard to them." *Am. Bank & Trust Co.* v. *Fed. Reserve Bank of Atlanta*, 256 U.S. 350, 359 (1921). Reserve Banks execute United States monetary policy, including by serving as lender of last resort and conducting open-market operations. See 12 U.S.C. 347b (lending); 12 U.S.C. 353 (open-market operations). Reserve Banks also supervise financial institutions within their regional Federal Reserve Districts under authority delegated by the Board of Governors. See 12 U.S.C. 248(a), (k); 12 U.S.C. 1844. In carrying out these public functions, the Reserve Banks serve the interests of the United States—but they remain juridically separate entities. As the Court has acknowledged, "instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Bancec*, 462 U.S. at 626-627.

b. As a result of their hybrid characteristics, the Reserve Banks participate in the patent system on similar footing as private entities. The Patent Act expressly authorizes "federal agenc[ies]" (including the Postal Service, the agency at issue in *Return Mail*) to "apply for" and maintain patents in the name of the United States, 35 U.S.C. 207, but that provision does

not apply to Reserve Banks.[3] Instead, the Reserve Banks apply for and own patents in their own names, pursuant to generally applicable provisions. 35 U.S.C. 111, 261. The Reserve Banks may sue and be sued for patent infringement in any appropriate district court pursuant to 28 U.S.C. 1338, which grants federal courts jurisdiction over patent-infringement suits. See also 12 U.S.C. 341 (Fourth). When they sue or are sued, they are represented by private counsel, not the Department of Justice. In such suits, the Reserve Banks may be subject to injunctive relief, as well as compensatory damages, if they are found to have infringed. See generally 35 U.S.C. 271.

By contrast, federal agencies are not subject to infringement suits in district court under Section 271 of the Patent Act. Rather, a patent owner's remedy is "by action against the United States" in the U.S. Court of Federal Claims. 28 U.S.C. 1498(a).[4] No jury trial is available, and patent owners may seek only "reasonable and entire compensation"—not injunctive relief. *Ibid.*

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[3] Section 201(a) defines "Federal agency," by cross-reference to 5 U.S.C. 105, as an "Executive department, Government corporation, and an independent establishment." 35 U.S.C. 201(a). A "Government corporation" is one owned or controlled by the United States, 5 U.S.C. 103(a)—which the Reserve Banks are not. An "independent establishment" is an "establishment *in the executive branch*" that is "not an Executive department," 5 U.S.C. 104(1) (emphasis added)—but Reserve Banks are not established in the Executive Branch. See generally *Scott*, 406 F.3d at 535; see p. 21, *infra*.

[4] In *Return Mail*, the patentee had filed suit against the Postal Service for alleged infringement in the Court of Claims pursuant to 28 U.S.C. 1498(a). 139 S. Ct. at 1861.

2. The patents and Patent Board proceedings.

a. Petitioner Bozeman Financial LLC received two patents for the purported invention of using a computer to compare numbers on two records of a check transaction to see if they match, thereby detecting fraud. See Pet. App. 9a-12a, 14a; U.S. Patents Nos. 6,754,640 (filed Oct. 23, 2001), 8,768,840 (filed June 25, 2012, with priority date of Oct. 23, 2001).

In early 2017, Bozeman claimed—erroneously—that the Reserve Banks were infringing the '640 and '840 patents. Despite the fact that the Reserve Banks' payments systems do not utilize business methods that resemble anything described in the patents, Bozeman continued to accuse the Banks of infringement and eventually threatened enforcement. See Pet. App. 32a-34a, 148a-152a. The Reserve Banks then petitioned the Patent Trial and Appeal Board to review the validity of both patents. Specifically, the Reserve Banks sought covered business method (CBM) review, a post-grant review proceeding established for a transitional period by the AIA. The AIA permits "a person who is not the owner of a patent" to file a petition for post-grant review of a patent. 35 U.S.C. 311, 321.

b. The Patent Board instituted review. Following a hearing, in a pair of thorough decisions, it agreed with all of the Reserve Banks' asserted unpatentability contentions, ruling that all claims of both patents claimed ineligible matter under 35 U.S.C. 101 and that all but four of the twenty-six claims of the '640 patent were also unpatentable under the pre-AIA 35 U.S.C. 112, ¶¶ 2 and 6. See Pet. App. 3a, 21a-72a ('640 final written decision); 73a-143a ('840 final written decision). Before the Patent Board, Bozeman did

not assert that the Reserve Banks were not "persons" who could petition for CBM review. See *id*. at 4a.

Bozeman appealed both decisions to the Federal Circuit.

3. *This Court's decision in Return Mail.*

On June 10, 2019, after briefing in this case had concluded but before argument in the Federal Circuit, this Court issued its opinion in *Return Mail*. That decision construed the AIA's provision that "person[s]" may petition for AIA post-grant review. 139 S. Ct. at 1867. The Court applied its "longstanding interpretive presumption" that when Congress uses the term "person," it does not intend to "include the sovereign," and thus the term "excludes a federal agency like the Postal Service." *Id*. at 1861-1862 (citation omitted).

That textual interpretation, the Court explained, was buttressed by two characteristics of "federal agencies" that made it "reasonable for Congress to have treated them differently" from private parties. *Id*. at 1867. First, because federal agencies may be sued for infringement only under 28 U.S.C. 1498, "they do not face the threat of preliminary injunctive relief that could suddenly halt their use of a patented invention, and they enjoy a degree of certainty about the extent of their potential liability that ordinary accused infringers do not." 139 S. Ct. at 1867. Second, "excluding federal agencies from the AIA review proceedings avoids the awkward situation that might result" when "one federal agency" petitions for "an adversarial, adjudicatory proceeding * * * overseen by a different federal agency." *Ibid*.

4. *The Federal Circuit's decision.*

After granting Bozeman's motion for supplemental briefing on the impact, if any, of *Return Mail*

on this case, the Federal Circuit held that the Reserve Banks are "distinct from the government for purposes of the AIA, such that they are 'persons' capable of bringing petitions for post-issuance review under the AIA." Pet. App. 6a. The court explained that although *Return Mail* held that "federal agencies are not 'persons,'" *ibid.*, the Reserve Banks are "not part of any executive agency or department," *id.* at 7a. The "Banks were established as chartered corporate instrumentalities," and they are "not structured as government agencies." *Id.* at 8a. Specifically, "[n]o Bank official is appointed by the President or any other Government official"; "direct supervision and control of each Bank" rests with "its board of directors"; and "the Banks cannot promulgate regulations with the force of law." *Id.* at 8a-9a (citing *Scott*, 406 F.3d at 535).

The court then explained that it was particularly "significant that the Banks are subject to suit for patent infringement in any court." Pet. App. 7a-8a. As this Court observed in *Return Mail*, "it is reasonable" for Congress "to treat federal agencies differently" under the AIA because federal agencies, unlike private entities, may be sued only for limited infringement remedies under 28 U.S.C. 1498. *Id.* at 8a (citing *Return Mail*, 139 S. Ct. at 1867). But, the court of appeals reasoned, the Reserve Banks were differently situated from the government in this regard: because patent owners like Bozeman could "sue the [Reserve Banks] in any district court" instead of in the Court of Federal Claims and could "seek remedies they would be prohibited from in a suit against the government," including injunctive relief, a "finding that the Banks are separate from the government and Congress intended the Banks to have access to post-issuance proceedings" was "favor[ed]." *Ibid.*

The court of appeals expressly "recognize[d] that there may be circumstances where the structure of the Banks does not render them distinct from the government for purposes of statutes other than the AIA." Pet. App. 9a. But "for purposes of the AIA," the court concluded, "the Banks are 'persons' capable of petitioning for post-issuance review under the AIA." *Ibid.*

The Federal Circuit then affirmed *in toto* the Patent Board's conclusion that Bozeman's patents claimed ineligible subject matter under *Alice Corp. Pty. Ltd.* v. *CLS Bank International*, 573 U.S. 208, 216 (2014), and that Bozeman had waived any challenge to the Patent Board's Section 112 ruling on the '640 patent. Pet. App. 9a-20a. Bozeman does not seek this Court's review of that holding. Pet. 11 n.9.

Bozeman sought *en banc* rehearing, which the Federal Circuit denied with no judge calling for a vote. Pet. App. 219a.

REASONS FOR DENYING THE PETITION

The decision below does not merit this Court's review. As the court of appeals recognized, the question of how a Reserve Bank should be treated under a particular statute turns on the statutory text and context, and as a result, the Reserve Banks may be treated differently for purposes of different statutes. The court's conclusion that Reserve Banks are "person[s]" entitled to petition for post-grant review under the AIA therefore has no broader implications for the Reserve Banks' treatment under any other federal statute. For the same reason, the decision below is not, as Bozeman would have it, in any "tension" with decisions concerning the Reserve Banks' treatment under *other* federal statutes. Cf. Pet. 29. Nor does

the decision determine how other, differently structured federal instrumentalities should be treated under the AIA.

The Federal Circuit correctly held that Reserve Banks are "person[s]" under the AIA. The Reserve Banks are federally chartered corporate entities with unique, hybrid public and private characteristics—all part of Congress's careful design of the nation's central banking system. In the realm of patent litigation, Congress has given the Reserve Banks rights and liabilities that are analogous to those of private parties—and that contrast sharply with the government's. The Reserve Banks hold patents in their own names, and they can be sued for patent infringement in any district court for monetary damages and injunctive relief like private parties. It is only logical that the AIA authorizes the Reserve Banks—like other persons and unlike the government—to petition for post-grant review.

I. The Question Presented Does Not Warrant Review.

Bozeman's primary argument in support of certiorari is that the Federal Circuit's conclusion that the Reserve Banks are "persons," rather than federal agencies, under the AIA is in "tension" with decisions of other courts concerning the Reserve Banks' status under *other* statutes. Pet. 29. No such "tension" exists.

A. Congress established the Reserve Banks as corporate instrumentalities that are juridically separate from the United States and that have a mix of public and private features. See pp. 3-6, *supra*; 12 U.S.C. 341 (establishing each Bank as a "body corporate");

Bancec, 462 U.S. at 624 (noting that government instrumentalities are "typically established as * * * separate juridical entit[ies]"). As this Court recognized in *Bancec*, governments often establish corporate instrumentalities—particularly central banks with responsibility for implementing monetary policy—as separate from the sovereign. *Ibid*. Such instrumentalities are able to pursue their broad public mission while exercising "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies." *Id*. at 624-625.

As a result of their status as instrumentalities, the Reserve Banks have certain public attributes. As the operating arm of the central bank, for instance, they implement U.S. monetary policy. But they also have attributes in common with private entities, including boards of directors that exercise day-to-day "supervision and control." See *Lewis*, 680 F.2d at 1241 (citing 12 U.S.C. 301); see also 12 U.S.C. 341 (Sixth). Six of the nine board members at each Reserve Bank are chosen by member banks. See 12 U.S.C. 301, 302, 304.

Because the Reserve Banks have both public and private attributes, questions sometimes arise concerning how they should be treated for purposes of certain federal statutes. The question of the Reserve Banks' status under a particular statute presents a context-specific issue of statutory construction. See U.S. *Kraus* Br. at 1 ("The extent to which laws applicable to government entities apply to Reserve Banks depends upon the specific statute at issue.").

Thus, for example, the Ninth Circuit has held that the Reserve Banks are not "federal agencies" for purposes of the Federal Tort Claims Act, because "under

the FTCA, federal liability is narrowly based on traditional agency principles," and the Reserve Banks are not subject to the necessary day-to-day governmental control. See *Lewis*, 680 F.2d at 1241-1242. Similarly, the Eighth Circuit has held that Reserve Banks fall outside the definition of federal "agenc[ies]" for the purposes of Rule 4 of the Federal Rules of Appellate Procedure, because, under the relevant definitions, they are not executive "departments" or "corporation[s] in which the United States has a proprietary interest." *Scott*, 406 F.3d at 534. In the context of the False Claims Act, the Second Circuit acknowledged that Reserve Banks are federal instrumentalities, but held that Reserve Banks acted as "agent[s] of the United States," 31 U.S.C. 3729, when they extended emergency loans during the 2008 financial crisis. See *United States ex rel. Kraus* v. *Wells Fargo & Co.*, 943 F.3d 588, 598-599 (2d Cir. 2019). The court relied on its conclusion that the Reserve Banks had acted on behalf of the United States in extending those loans, as well as on the expansive scope of the False Claims Act.[5]

Just as those decisions turned on the statutory text and context of the specific statutory provisions at

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[5] The New York and Richmond Reserve Banks and the United States had argued in amicus briefs requested by the Second Circuit that the Reserve Banks did not act as "agents of the United States," see *Kraus*, 943 F.3d at 599, in extending the relevant emergency loans (and the parties settled the case before any party sought certiorari). The Second Circuit correctly recognized, however, that its holding was specific to the "expansive" provisions of the False Claims Act and the emergency lending at issue in the case, emphasizing that its decision "does not bear on the question of whether the FRBs may or may not be agents in other contexts"—or even whether the Reserve Banks "are agents within the [False Claims Act] in any other context." *Id.* at 601.

issue, the decision below narrowly holds that the term "person" in the post-grant review provisions of the AIA should be understood to include the Reserve Banks. The court concluded that Reserve Banks are not properly characterized as "federal agencies" excluded from the term "person" as construed in *Return Mail*, because the Reserve Banks are "distinct from the sovereign" and have distinct rights and remedies from the United States in patent litigation. Pet. App. 7a-8a.

The Federal Circuit expressly recognized the AIA-specific nature of its holding, explaining that the Reserve Banks' hybrid structure means that "there may be circumstances where the structure of the [Reserve] Banks does not render them distinct from the government for purposes of statutes other than the AIA." Pet. App. 9a. That court also recognized that its holding was inherently limited to the Reserve Banks: because the Reserve Banks have unique attributes, the court's decision does not apply to any other governmental instrumentality constituted with different attributes under other statutes. *Id*. at 6a ("We note that this decision is limited to the status of the [Reserve] Banks and does not prejudice other entities whose status as 'persons' under the AIA may separately be questioned.").

B. Contrary to Bozeman's argument, therefore, the decision below has no broader implications beyond the extremely narrow question that the Federal Circuit answered.

1. For the reasons discussed above, Bozeman's argument that the Federal Circuit's decision is in "tension" with the decisions of other courts of appeals concerning the Reserve Banks' characterization under

other statutes, Pet. 29-31, is wrong. The courts of appeals agree that the question of whether a particular statute applies to the Reserve Banks depends on the specific statutory language and context at issue. Pet. App. 9a; accord *Kraus*, 943 F.3d at 592 (operation of the Federal Reserve System "involves a complex set of relationships that any court must be wary of unsettling," and False Claims Act "analysis may not be relevant to questions involving the status of the [Reserve Banks] in other contexts"); *Lewis*, 680 F.2d at 1242 (explaining that Reserve Banks may *sometimes* be treated as governmental in nature).

The decisions on which Bozeman relies concerned distinct statutory or doctrinal contexts, and the courts did not purport to opine on the Reserve Banks' status as a categorical matter, or for purposes of any context other than the one squarely presented. For instance, in *Jet Courier Services, Inc.* v. *Federal Reserve Bank of Atlanta*, 713 F.2d 1221 (6th Cir. 1983), see Pet. 29, the Sixth Circuit concluded that the Reserve Banks were not "persons" amenable to suit under the Sherman Act because the Reserve Banks' alleged monopoly over U.S. monetary policy "'results from valid governmental action as opposed to private action.'" 713 F.2d at 1228 (quoting *E. R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961)). The "valid governmental action" in question was Congress's amendment of the Federal Reserve Act to direct the Board of Governors and the Reserve Banks to implement new fee schedules for check-presentment services. *Id.* at 1228-1229 (citation omitted).

Similarly, in *United States* v. *Hollingshead*, 672 F.2d 751 (9th Cir. 1982), the Ninth Circuit held that Reserve Bank employee Hollingshead was a "public official" for purposes of a bribery statute that defined

"public official" to include "any person acting for or on behalf of the United States." *Id.* at 752-753 (citation omitted); see Pet. 30-31. Because the expenditures in question were "subject to Federal Reserve *Board* [of Governors] approval and control"—that is, control by the Executive—the employee was acting "for or on behalf of the federal government in recommending the expenditure of federal funds." *Hollingshead*, 672 F.2d at 754 (emphasis added).

And in *Federal Reserve Bank of Boston* v. *Commissioner of Corporations & Taxation*, 499 F.2d 60 (1st Cir. 1974), the First Circuit held that Reserve Banks are protected from state or local action or taxation. In that context, the court focused on "whether the entity performs an important governmental function," and the court understood the Reserve Banks' actions furthering U.S. monetary policy to be such a function. *Lewis*, 680 F.2d at 1242 (discussing *Federal Reserve Bank of Boston*). The court in *Federal Reserve Bank of Boston* noted, however, that "[i]t would seem that Congress intended all components of the Federal Reserve System, including the banks, to act in many respects outside the executive chain of command."[6] 499 F.2d at 63-64.

The decisions on which Bozeman relies thus involved statutory or doctrinal contexts that were very distinct from the AIA. As the United States and the

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[6] Bozeman observes that the Office of Legal Counsel concluded in 1978 that the Reserve Banks were "sufficiently identified with the United States" for purposes of the Service Contract Act. See *Service Contract Act of 1965 (41 U.S.C. § 351 et seq.)—Applicability to Federal Reserve Banks*, 2 Op. O.L.C. 211, 212 (1978). OLC relied heavily on that statute's remedial purpose of preventing labor-law violations, which it viewed as militating in favor of applying the statute to entities that act in furtherance of governmental purposes. *Id.* at 214.

Board of Governors have explained, decisions "addressing whether Reserve Banks are properly considered to be part of the government" in particular statutory contexts are "of limited utility" in assessing the Reserve Banks' status under *other* statutes. U.S. *Kraus* Br. 13-14.

Here, the Federal Circuit correctly held that status as an AIA post-grant-review "person" turns on how Congress empowered the Reserve Banks to act within the patent system—that is, whether they act more in the nature of federal agencies, or private parties. See Part II, *infra*. No tension exists between that narrow, AIA-specific decision and decisions concerning the Reserve Banks' status under other statutes.

2. Bozeman also suggests that there are "hundreds of federally-created entities whose status under the AIA may be affected by the Federal Circuit's decision." Pet. 27. Not so. Although Congress has established many government instrumentalities, each is different. Some—unlike the Reserve Banks—are wholly or partially owned by the government. And each instrumentality has a unique authorizing statute that sets forth distinct characteristics and functions. See, *e.g.*, 31 U.S.C. 9101 (listing government-created corporations); 12 U.S.C. 1716, 1454 (Fannie Mae and Freddie Mac); 16 U.S.C. 831 (Tennessee Valley Authority). Bozeman identifies no other entity sharing the combination of characteristics with which Congress endowed the Reserve Banks—and therefore it has not shown that the court of appeals' decision implies that any other government instrumentality is or is not a "person" under the AIA. For its part, the court of appeals expressly disclaimed any such broader implications. Pet. App. 6a.

II. The Federal Circuit's Decision Is Correct.

Because the court of appeals' decision lacks any implications beyond its specific context, the petition merely seeks error correction. But the court of appeals correctly held that the Reserve Banks are "person[s]" under the AIA because they do not act as part of the sovereign when they seek post-grant review.

Bozeman contends that the court of appeals employed an unduly "formalistic" analysis that gave insufficient weight to the Reserve Banks' performance of governmental functions, including their implementation of U.S. monetary policy. Pet. 13. But the Federal Circuit correctly focused on the attributes of the Reserve Banks that the AIA makes relevant. *Return Mail* construed the term "person" to exclude "federal agencies" because they are part of the sovereign, and because their status as part of the government gives them certain advantages in patent litigation. 139 S. Ct. 1861-1862. Evaluated under that framework, the Reserve Banks are clearly "person[s]" under the AIA. The Reserve Banks are structured as corporate instrumentalities juridically separate from the sovereign—not as agencies within the Executive Branch—and as a result, they act like private parties when they participate in the patent system.

A. The Reserve Banks are "persons" under the AIA.

1. In *Return Mail*, this Court held that the term "person" in the AIA's post-grant review provisions does not "include the sovereign" and thus "excludes a federal agency like the Postal Service." 139 S. Ct. at 1861-1862 (citation omitted); *id.* at 1859 ("a federal agency is [not] a 'person' able to seek such review under the statute"). In addition to relying on the pre-

sumption that the term "person" does not include federal agencies, the Court explained that Congress reasonably treated federal agencies differently from private parties for purposes of post-grant review, for two reasons. *Id.* at 1867. First, because federal agencies may be sued for infringement only in the Court of Federal Claims under 28 U.S.C. 1498, they do not face the threat of injunctive relief that "could suddenly halt their use of a patented invention." 139 S. Ct. at 1867. In view of that significant advantage over private parties, federal agencies have less need for a streamlined avenue for canceling invalid patents. *Ibid.* Second, "excluding federal agencies from the AIA review proceedings avoids the awkward situation that might result" when one Executive agency seeks review in "an adversarial, adjudicatory proceeding * * * overseen by" a second Executive agency. *Ibid.* Under *Return Mail*, then, an entity's status as a federal agency—that is, its lack of juridical separation from the United States—and the nature of its participation in the patent system are critically relevant to its status as a "person."

2. The Federal Circuit correctly held that the Reserve Banks are "persons," not "federal agenc[ies]," and therefore may seek post-grant review. See *Return Mail*, 139 S. Ct. at 1859.

First, the Reserve Banks are not structured as federal agencies. Congress expressly provided that the Reserve Banks—unlike the Postal Service—are not part of any executive agency, department, or establishment. Compare 12 U.S.C. 341 with 39 U.S.C. 201 (Postal Service is an "establishment of the executive branch of the Government"). Congress structured the Reserve Banks as juridically separate entities—and because they are corporations, they are presumed to

be "persons" under the Dictionary Act, 1 U.S.C. 1 *et seq*. Congress further provided that the Reserve Banks may sue and be sued in their own names "in any court of law or equity." 12 U.S.C. 341 (Fourth). As a result, they lack sovereign immunity, and they have independent litigating authority: they are represented by private attorneys and not the Department of Justice, including in patent litigation like this case.

The Reserve Banks also do not fall within the Patent Act's definition of "federal agency." Section 207 establishes special rules pursuant to which a "federal agency" must hold its patents in the name of the United States. 35 U.S.C. 207. Section 201(a), by cross-reference to 5 U.S.C. 105, defines "Federal agency" to mean an "Executive department, a Government corporation, and an independent establishment." 35 U.S.C. 201(a); 5 U.S.C. 105. The Reserve Banks fall into none of these categories. The Banks are clearly not "Executive departments." 12 U.S.C. 341; 5 U.S.C. 101 (listing "Executive departments" without including Reserve Banks). The Banks are not "Government corporation[s]," 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. Moreover, these member banks elect six of nine members of each Bank's board of directors, and the board of directors exercises day-to-day "supervision and control" over each Bank. 12 U.S.C. 301, 302, 304. The Banks are not "independent establishment[s]," which are defined as residing "in the executive branch," 5 U.S.C. 104, because the Banks are expressly established *outside* the Executive branch. See 12 U.S.C. 341; *Scott*, 406 F.3d at 535 (holding that Reserve Banks are not an independent establishment or

government corporation for purposes of similar definition in 28 U.S.C. 451). The fact that Reserve Banks do not fall within Section 201's definition of "federal agency" is strong contextual evidence that the Reserve Banks are "person[s]," not federal agencies excluded from that category under *Return Mail*.

Second, as a result of those structural attributes, the Reserve Banks participate in the patent system in a manner analogous to private parties. Because the Reserve Banks' ownership of patents is not governed by Section 207, the Reserve Banks, unlike federal agencies, apply for and hold patents in their own names, just like private entities. Compare, *e.g.*, U.S. Patent No. 6,480,108 ("Assignee: The United States of America as represented by the United States Postal Service") with, *e.g.*, U.S. Patent No. 7,330,835 ("Assignee: Federal Reserve Bank of Minneapolis").

When the Reserve Banks are sued for patent infringement, they do not enjoy the protections of Section 1498. The Reserve Banks may be sued in any district court—and, just as in suits against private parties, patent owners may seek injunctive relief. See 35 U.S.C. 271(e)(4).[7] Reserve Banks therefore do not "face lower risks" than private parties in infringement litigation. *Return Mail*, 139 S. Ct. at 1867.

In addition, a Reserve Bank's institution of post-grant review before the PTAB does not give rise to the

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[7] Like any purely private actor, the Reserve Banks may invoke Section 1498 when sued for infringement based on activities directed by the government. See *Advanced Software Design Corp.* v. *Fed. Reserve Bank of St. Louis*, 583 F.3d 1371, 1372-1373 (Fed. Cir. 2009). That is because Section 1498 applies to suits against nongovernmental entities based on work performed "for the United States." 28 U.S.C. 1498.

"awkward[ness]" of an "adversarial, adjudicatory proceeding initiated by one federal agency (such as the Postal Service) and overseen by a different federal agency." *Ibid.* The Reserve Banks are not part of the Executive Branch. *See, e.g.*, 12 U.S.C. 341; *U.S. Shipping Bd. Emergency Fleet Corp.*, 275 U.S. at 425-426; *Scott*, 406 F.3d at 538; cf. *Bancec*, 462 U.S. at 624-625. A post-grant review proceeding instituted by a Reserve Bank is therefore not an intramural proceeding within the Executive.

In sum, the Reserve Banks participate in the patent system, and litigate patent infringement, like private entities do. Put another way, they do not share the characteristics of federal agencies that this Court described as justifying the exclusion of federal agencies from the category of "person[s]" entitled to seek post-grant review. *Return Mail*, 139 S. Ct. at 1867. The Federal Circuit correctly concluded that the Banks are "persons" under the AIA.

B. Bozeman's contrary arguments lack merit.

1. Bozeman first argues that the Federal Circuit employed a "formalistic" analysis that gave undue weight to Congress's provision that each Reserve Bank is established as a "body corporate." 12 U.S.C. 341. Bozeman advocates a "functional" approach that would disregard those attributes, which Bozeman dismisses as mere "labels." Pet. 13.

As an initial matter, the decisions from which Bozeman draws its "functional" approach are inapposite here, because they concerned whether an entity is part of the federal government for *constitutional* purposes. Pet. 13; see *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995); *Dep't of Transp.* v.

Ass'n of Am. R.R.s, 575 U.S. 43, 51 (2015). Those decisions hold that Congress's characterization of an entity as private, rather than governmental, are not dispositive "for purposes of determining the constitutional rights of citizens affected by [the entity's] actions." *Lebron*, 513 U.S. at 392. But *Lebron* itself emphasized that Congress's characterization is "assuredly dispositive" of whether an entity "is subject to *statutes* that impose obligations or confer powers upon Government entities." *Ibid.* (emphasis added). Under *Lebron*'s reasoning, therefore, Congress may make an entity's separate corporate status—or any other formal structural attribute—dispositive for purposes of a statute that distinguishes between governmental and nongovernmental entities.

In any event, the attributes on which the Federal Circuit relied here are hardly mere "labels"; they are the considerations that the AIA makes relevant. The fact that the Reserve Banks are structured as separate corporate instrumentalities, rather than as part of the Executive Branch, is self-evidently relevant to whether they should be thought of as more in the nature of "federal agenc[ies]" or "person[s]." See *Return Mail*, 139 S. Ct. at 1861-1862. And the Banks' structural characteristics have substantive consequences: as a result of those attributes, the Banks participate in the patent system like private entities, not like the federal government.

2. Bozeman next argues that the Reserve Banks should be treated as part of the sovereign because they implement United States monetary policy and they are subject to general supervision by the Board of Governors. Pet. 16-19. The Reserve Banks unquestionably further public purposes, and they are subject

to supervision by the Board of Governors—but those facts are not dispositive under the AIA.

The very purpose for which Congress creates federal instrumentalities is so that they may perform the "work of the government." *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939). But it is well established that instrumentalities' furtherance of governmental purposes does not render them part of the sovereign. *Bancec*, 462 U.S. at 625; see, *e.g.*, *Scott*, 406 F.3d at 537 (holding that Reserve Banks' implementation of government policy was not dispositive of whether they are "federal agencies" for purposes of the Federal Rules); *Lewis*, 680 F.2d at 1242-1243 (performance of governmental functions was not dispositive of the Reserve Banks' status under the FTCA; rather, federal status under that statute turned on application of agency principles). Whether implementation of government policy is dispositive of governmental status therefore turns on the specific statute at issue.

The decisions on which Bozeman relies are not to the contrary. Bozeman observes (Pet. 13) that *Lebron* held that Amtrak was part of the government, and therefore constrained by the First Amendment, in part because it performed governmental functions. 513 U.S. at 392. But where the question is whether an entity's actions with respect to private parties should be limited by the Constitution, it makes sense that the analysis would give significant weight to the fact that the entity is acting for governmental reasons. Similarly, the other decisions that Bozeman cites, Pet. 18-19, concerned distinct statutory or doctrinal contexts as discussed above. See pp. 16-17, *supra*. Here, therefore, the relevant question is not

simply whether the Reserve Banks serve a public purpose, but whether their public purpose is dispositive of their status as "person[s]" under the AIA. It is not. As discussed above, the AIA focuses on how the entity is structured and participates in the patent system.

For the same reasons, Bozeman is wrong to argue that the Board of Governors' supervision of the Reserve Banks renders them federal agencies for purposes of the AIA. Pet. 16. The Board of Governors exercises general supervision over the Reserve Banks, but each Reserve Bank's board of directors exercises day-to-day control. *Scott*, 406 F.3d at 536; *Lewis*, 680 F.2d at 1241 (citing 12 U.S.C. 301); 12 U.S.C. 248(j); see pp. 5-6, *supra*. Bozeman does not point to any Board of Governors authority to direct a Reserve Bank's conduct of patent litigation or its petitioning for post-grant review. To the contrary, the Reserve Banks "do[] not need to consult the United States Attorney or even the Board of Governors to pursue legal action." *Scott*, 406 F.3d at 538. Instead, each Reserve Bank "only needs to discuss what course of action to take with its private counsel, just like any other party to litigation." *Ibid*. For purposes of the AIA, then, the Board of Governors exercises no specific supervisory authority that could render the Reserve Banks "federal agenc[ies]" rather than "person[s]." *Return Mail*, 139 S. Ct. at 1859.

3. Bozeman next argues that the Federal Circuit placed undue weight on certain of the Reserve Banks' attributes and authorities. Pet. 20-26. Bozeman argues that each attribute on which the Federal Circuit relied is insufficient in isolation to establish that an entity is not a federal agency. But the Federal Circuit correctly recognized that whether an entity is a federal agency for purposes of the AIA turns not on any

single characteristic, but on the interaction of the entity's structure and powers with the AIA and the concerns underlying Congress's exclusion of federal agencies from post-grant review. Pet. App. 6a.

Bozeman first contends that the Federal Circuit incorrectly gave controlling weight to the Reserve Banks' organization as corporate entities. Pet. 14. To the contrary, the court considered the Reserve Banks' corporate organization as *one* relevant attribute that makes Reserve Banks different from federal agencies. Pet. App. 7a-8a. And although Bozeman argues that some government-created corporations are sometimes treated as part of the government, the examples it cites undermine its arguments about the Reserve Banks. Those examples—Amtrak, the FDIC, and the Commodity Credit Corporation (CCC)—are all, unlike the Reserve Banks, owned or controlled by the government. See, *e.g.*, 31 U.S.C. 9101 (listing "mixed-ownership Government corporations" including FDIC, and "wholly-owned government corporations" including the CCC—but not listing the Reserve Banks); *Ass'n of Am. R.R.s*, 575 U.S. at 50-51. While such government-owned or controlled corporations would be treated as "federal agenc[ies]" for purposes of protection of federal agency patents, 35 U.S.C. 201, the Reserve Banks are not. See p. 21, *supra*.

Bozeman next criticizes the Federal Circuit for pointing out that the Reserve Banks do not rely on appropriated funds and cannot promulgate regulations, arguing that some federal agencies share those characteristics. Pet. 24-25. Again, that misses the point. Congress may structure a federal entity to have one or both of those characteristics, yet still place that entity within the Executive Branch and provide that it operates as a federal agency within the

patent system by making it subject to Sections 207 and 1498. Those are the attributes that are dispositive for purposes of the AIA.

Finally, Bozeman contends that the Federal Circuit should have treated the Reserve Banks as part of the government because the sue-and-be-sued clause in Section 341 (Fourth) of the FRA is a waiver of sovereign immunity. Pet. 20. But for the purposes of assessing Congress's intention under the AIA, the sue-and-be-sued clause shows that Congress intended the Reserve Banks to be treated *differently* from the sovereign for the purposes of litigation.

* * *

The Federal Circuit correctly concluded that the Reserve Banks should not be viewed as part of the sovereign for purposes of the AIA's post-grant review provisions. The decision below is consistent with this Court's construction of the term "person" in *Return Mail*. And as the court of appeals correctly recognized, the question of Reserve Banks' treatment under the AIA has no broader implications for the Reserve Banks' treatment in other contexts or for other entities in the AIA context. This Court's review is not warranted.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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