No. 22-1943

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM T. LYONS,
Plaintiff-Appellant,

v.

PNC BANK, N.A.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF AMICUS CURIAE OF AMERICAN BANKERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE AND REHEARING

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DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
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Pursuant to FRAP 26.1 and Local Rule 26.1,

American Bankers Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Mark W. Mosier Date: September 4, 2024

Counsel for: American Bankers Association

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INTEREST OF AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association for the financial services industry in the United States. Founded in 1875, ABA is the voice for the nation's $23.7 trillion banking industry and its more than two million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. Among them are banks, savings associations, and non-depository trust companies of all sizes.[1]

ABA often submits amicus curiae briefs in state and federal courts in matters that significantly affect its members and the business of banking. The ABA filed an amicus brief in this case during this Court's initial consideration of the case on the merits. ABA submits this brief in support of rehearing to underscore the issue presented and the significant adverse consequences of the panel majority's unprecedented interpretation of the Truth in Lending Act (TILA).[2]

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[1] Amicus ABA files this brief pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and states that Defendant-Appellee PNC Bank, N.A., consents to the filing of this brief and Plaintiff-Appellant William T. Lyons does not oppose the filing of this brief. No party's counsel authored this brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus curiae and their counsel contributed money that was intended to fund the preparation or submission of this brief.

[2] Truth in Lending Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601 et seq.).

INTRODUCTION AND SUMMARY OF ARGUMENT

TILA's "offset provision" is designed to protect consumers, but the panel majority misinterpreted it in a way that exposes consumers to increased risks, including the risk of foreclosure. The offset provision states that a credit card issuer may not offset a "cardholder's indebtedness arising in connection with a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer." 15 U.S.C. § 1666(h). The issue before the Court is whether home equity lines of credit (HELOCs) are "credit card plans" subject to this offset provision. Until the Consumer Financial Protection Bureau filed an amicus brief in this case, it had been understood for decades that HELOCs are not credit card plans. The statutory text, structure, and legislative history all support this understanding.

The panel majority's interpretation departs from this settled understanding and exposes consumers to significant risks. Unlike standard credit card products, HELOCs are a form of *secured* credit. In a HELOC, the consumer uses her home—often her most valuable asset—as security. As a result, the consumer faces a risk of foreclosure if she fails to repay the amount she borrows under a HELOC. Consumers face no such risk with standard credit card debt. By preventing banks from taking money from a consumer's checking or savings account to pay ordinary credit card debt, section 1666(h) helps ensure that the consumer does not lose access to funds

earmarked for critical obligations such as mortgage payments. In applying that limitation to HELOCs, however, the panel majority has subjected consumers to an increased risk of foreclosure. Congress could not have intended for this consumer-friendly provision to create additional risks for consumers, and the importance of the issue warrants rehearing.

ARGUMENT

I. The Panel Majority Misinterpreted TILA.

As Judge Floyd's dissent and the petition for rehearing explain in detail, the panel majority misinterpreted the meaning of "credit card plan" in 15 U.S.C. § 1666h. This brief will not repeat those arguments. Instead, this brief emphasizes three aspects of the statutory text that cut strongly against the majority interpretation and in favor of Judge Floyd's interpretation.

First, when interpreting statutes, courts "construe all parts to have meaning" if possible. *Nero v. Mosby,* 890 F.3d 106, 124 (4th Cir. 2018). Section 1666h refers to the cardholder's "credit card account" and a "credit card plan." *See* 15 U.S.C. § 1666h(a). Yet the panel majority's interpretation draws no distinction between the statutory terms "credit card plan" and "credit card account." Instead, the majority treats those different statutory terms as interchangeable.[3]

[3] The panel majority's opinion considers the meaning of the phrase "credit card account under an open-end (not home-secured) consumer credit plan." But the majority did not address the need to give the phrases "credit card plan" and "credit card account" distinct meanings if possible.

Second, "identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). Congress used the identical term "credit card plan" in another section of TILA, which states that "a card issuer may not require a seller, as a condition to participating in a credit card plan, to open an account with or procure any other service from the card issuer or its subsidiary or agent." 15 U.S.C. § 1666g. This provision demonstrates that merchants (*i.e.*, "seller[s]") are participants in a credit card plan, even though the contractual arrangement between the card issuer and the merchant is not a credit plan that is accessed by a credit card.

Third, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 721 (2022) (internal quotation and citation omitted). The Fair Credit Billing Act includes five sections that are broadly applicable to "open end credit plans," *see* 15 U.S.C. §§ 1666-1666d, followed by five sections that are targeted more narrowly to credit cards, credit card plans, and card issuers, *see* 15 U.S.C. §§ 1666e-1666i. Section 1666h appears among the latter five sections, providing a strong indication that Congress intended to regulate the credit card market specifically rather than other forms of open end credit plans such as HELOCs.

These textual arguments, as well as the additional arguments set out in Judge Floyd's dissent and the rehearing petition, weigh heavily against the panel majority's interpretation.[4]

II. The Panel's Decision Will Have Adverse Consequences, Including an Increased Risk of Foreclosure for Consumers.

The offset provision is designed to protect consumers, but the panel majority's unprecedented interpretation exposes them to an increased risk of harm. In the context of an unsecured credit card product, the provision can be viewed as protecting credit customers. If a credit card issuer could unilaterally offset a credit card debt by transferring funds from a deposit account, the card issuer would effectively transform the unsecured debt into a secured one. The practical consequences for cardholders could be significant: The money held in deposit accounts that the cardholders planned to use to pay, for example, a mortgage or car payment, could be transferred by the card issuer to cover incidental expenses charged to the credit card account. The result could be missed mortgage or car payments, resulting in foreclosure or repossession.

[4] The CFPB's view, advanced for the first time in an amicus brief that departed from the agency's longstanding practice, is entitled to no deference. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); *see also id.* at 2258 (explaining that an agency interpretation may deserve some respect "when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time"—neither of which is the case here).

The offset provision has a fundamentally different effect when applied to *secured* credit products such as HELOCs. Rather than decreasing the risk of home foreclosure, TILA may well *increase* that risk if applied to HELOCs. If a borrower falls behind in her payments on her HELOC, she puts herself at risk of foreclosure because the lender has a contractual right to foreclose on the home to obtain the funds owed on the HELOC account. A lender is less likely to undertake the costly and time-consuming process of home foreclosure when it could obtain—through the simpler offset process of transferring funds from a deposit account to the HELOC—the funds that it is owed.

But under the panel majority's interpretation of "credit card plan," that option may be off the table. In this situation, foreclosure could be the only option available for lenders to recover the funds that they are owed. Such unexpected "consequences" can "argue strongly against" an interpretation that would create them. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 545 (2013); *see also id.* at 538 ("[W]e find it unlikely that Congress would have intended these, and other related consequences."). That is especially true here, where the consequences of the divided panel's interpretation were not even in Congress's contemplation. HELOCs did not exist in 1974 when Congress enacted TILA; they came into prominence as a financial tool starting in the 1980s. Judge Floyd clearly identified and explained the

increased risk to consumers in his dissent, slip op. 27–28 (citing ABA Amicus Brief), but the panel majority did not acknowledge it.

It is important to recognize that Congress has adopted legislation that governs HELOCs and provides significant protections to consumers. For instance, lenders cannot unilaterally terminate a HELOC account and require immediate payment. 15 U.S.C. § 1647(b). That protection ensures that consumers have time to prepare themselves to pay off their debts before their homes are put at risk. Similarly, HELOC lenders cannot arbitrarily increase HELOC interest rates or otherwise unilaterally change a HELOC's terms to the consumers detriment. *See id.* §§ 1647(a) & (b). Lenders must also fully inform and not mislead consumers interested in utilizing a HELOC. 15 U.S.C. § 1665b. Thus, Congress ensured that lenders would not unfairly change a HELOC plan's terms counter to consumers' expectations and that consumers were well informed of the risks of using a HELOC. Both forms of protection limit the consumers' risk of foreclosure. The panel majority's interpretation of Section 1666h, by contrast, puts consumers' homes at risk.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for rehearing, this Court should grant rehearing or rehearing en banc.

DATED: September 4, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 1,676 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font.

s/Mark W. Mosier
Mark W. Mosier

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing brief was filed electronically with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on September 4, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Mark W. Mosier
Mark W. Mosier