No. 22-1943

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM T. LYONS, Individually and
on Behalf of Others Similarly Situated,

Plaintiff-Appellant,

v.

PNC BANK, N.A.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
No. 1:20-CV-02234 (SAG)

PLAINTIFF-APPELLANT'S RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

Defendant-Appellee PNC Bank asks this Court to take the extraordinary step of granting rehearing or rehearing en banc to revisit a panel's straightforward reading of statutory text—a reading that does not conflict with the interpretation of any other court, applies to specific narrow circumstances, and does not impact the interpretation of any other statutory provision. PNC's mere disagreement with the Court's decision is not a basis for rehearing. *See* 4th Cir. R. 40(a). Its request should be denied.

This case concerns the Fair Credit Billing Act, which in 1974 added a provision to the Truth in Lending Act (TILA) that limits lenders' ability "to 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" without prior written authorization. 15 U.S.C. § 1666h(a) ("the offset provision"); *see* 12 C.F.R. § 1026.12(d) ("Regulation Z"). Here, Plaintiff-Appellant William T. Lyons alleges that PNC Bank did just that: PNC Bank's predecessor, National City Bank, issued Mr. Lyons a credit card to access a home equity line of credit (HELOC), and PNC later withdrew funds

from his deposit accounts to offset indebtedness that he incurred using that credit card, without his consent. JA10–13.

PNC argues that the offset provision does not apply here because, in its view, consumer credit transactions utilizing HELOC-backed credit cards, as opposed to other kinds of credit cards, do not involve "credit card plans." As the panel recognized, however, this argument is contrary to the plain meaning of that term: "a plan in which a consumer accesses credit using a credit card." Op. 10. And because nothing in the statute limits the offset provision to credit card plans involving certain kinds of credit, the panel majority correctly concluded that the term "credit card plan" "includes HELOCs where credit is accessed via a credit card." Op. 17.

The panel's straightforward interpretation of the term "credit card plan" does not conflict with that of any other court; no court of appeals or district court other than those in this case have even considered the question. Op. 9. Indeed, PNC concedes that "[t]he issue addressed here is one of first impression." Pet. 1.

Nonetheless, PNC claims that the panel's interpretive methods "conflict" with precedent as to general principles of statutory

interpretation. But its argument shows that its real disagreement is not with the majority's approach, but with its conclusion. PNC also asserts that the panel's interpretation of the statute "hinges on a 2010 regulation." Pet. 9. That assertion, though, is a complete misrepresentation of the panel majority opinion, which discusses that regulation because *the district court* had relied on that regulation to rule in PNC's favor and PNC had defended that aspect of the court's ruling on appeal. Indeed, the main thrust underlying PNC's request for rehearing—that the consideration of post-enactment regulations in determining the meaning of a statute—is a 180-degree reversal from the position in its merits brief where it asked the Court to do just that.

Under the plain text of the statute, TILA's offset provision applies to consumer credit transactions connected to credit card plans—regardless of the type of credit accessed by the credit card. PNC's request that home-secured credit be excluded from the statutory prohibition is properly raised with Congress, not this Court.

BACKGROUND

I. Facts and prior proceedings

In 2005, William T. Lyons opened a HELOC account with National City Bank. JA10. National City issued Mr. Lyons a credit card to access this line of credit, which he used for purchases and cash advances. JA11. In 2009, Defendant-Appellee PNC Bank acquired and merged with National City. JA10. Mr. Lyons later opened two deposit accounts with PNC. JA270. In 2019 and 2020, PNC withdrew approximately $3,000 from Mr. Lyons's deposit accounts to offset outstanding payments on his HELOC loans. JA12–13. PNC did not notify Mr. Lyons before taking the money from his accounts, and Mr. Lyons objected to the deductions as unauthorized. *Id.*

Mr. Lyons then brought suit against PNC in Maryland state court on behalf of himself and a putative class, alleging that PNC's self-help to the funds in his deposit accounts violated the offset provisions of TILA and its implementing regulation, Regulation Z, 12 C.F.R. § 226.12(d), and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605. JA7. PNC removed the action to the District Court for the District of Maryland, JA250, and moved to compel arbitration, JA212. The district

court granted in part and denied in part the motion to compel. *Lyons v. PNC Bank, N.A.*, 2021 WL 50918 (D. Md. Jan. 5, 2021). On appeal, this Court affirmed in part and reversed in part, holding that enforcement of the arbitration agreements was precluded by the Dodd-Frank Act, 15 U.S.C. § 1639c(e)(3). *See Lyons v. PNC Bank, N.A.*, 26 F.4th 180 (4th Cir. 2022).

II. The decision below

On remand in the district court, PNC moved for judgment on the pleadings on all claims. JA110. As to the TILA claim at issue here, the district court found that "Lyons's HELOC is not a credit card plan" and that the offset provision thus did not apply. JA203–04. The court based that conclusion on a provision of Regulation Z promulgated in 2010 to implement a 2009 amendment to TILA known as the Credit Card Accountability Responsibility and Disclosure (CARD) Act. JA203. That statute, which did not alter the offset provision, uses the term "open end consumer credit plan" in several places. *See, e.g.*, 15 U.S.C. § 1637. When, in 2010, the Federal Reserve Board of Governors amended Regulation Z to implement the CARD Act, it used a new defined term—"Credit card account under an open-end (not home-secured) consumer credit plan"—

that it specifically stated excluded HELOC accounts. *See* Final rule, Truth in Lending, 75 Fed. Reg. 7658, 7793 (Feb. 22, 2010), *currently codified at* 12 C.F.R. § 1026.2(a)(15)(ii).

With little discussion, the district court held that that 2010 definition and exclusion applied to the term "credit card plan" in the offset provision enacted by Congress in 1974. JA203. In so doing, the court stated that "home equity plans … are simply different from credit card plans." JA204. As such, the court entered judgment on the pleadings on Mr. Lyons's TILA claim. JA206.

III. This appeal

Mr. Lyons appealed, arguing that "the district court erred by holding [his] HELOC loan d[id] not qualify as a 'credit card plan,'" because the loan met the statutory definition of a "credit card" (citing 15 U.S.C. § 1602(l)), and therefore formed the basis of a "credit card plan" subject to the offset provision, which contains no carve-out for HELOC-backed credit cards. Pls.' Opening Br. 14, 18–28.

Appearing as amicus curiae, the Consumer Financial Protection Bureau (CFPB)—the agency responsible for implementing and enforcing TILA and Regulation Z—agreed that the district court erred in

concluding that Mr. Lyons's loan was not a "credit card plan" and thus fell outside the scope of the offset provision. *See* CFPB Br. 13–22. Its brief focused on the district court's error in importing the definition of "credit card account under an open-end (not home-secured) consumer credit plan" in Regulation Z, 12 C.F.R. § 1026.2(a)(15)(ii), into the distinct phrase "credit card plan," used in both TILA and Regulation Z's offset provisions. *Id.* Importing the definition of one term into an entirely different one, the agency explained, ran afoul of "basic principles of textual interpretation," particularly because the term defined by section 1026.2(a)(15)(ii) was not even first used until 2009—more than thirty years after Congress added the offset provision to TILA. *Id.* 15, 17. Moreover, the agency explained, reading the phrase "credit card plan" to exclude HELOCs was in conflict with both the CFPB's own official interpretation of the offset provision and the way the term was used in other parts of Regulation Z, which plainly included HELOCs accessed by credit cards to be forms of credit card plans. *Id.* at 20–22.

In response, PNC argued that Mr. Lyons' HELOC was not a credit card and that the term "credit card plan" does not apply to home secured credit. *See* PNC Merits Br. 20–25. It further defended the district court's

reliance on the CARD Act regulation and discussed a variety of other legislative and regulatory materials unrelated to the offset provision in which Congress and administrative agencies distinguished between HELOCs and other kinds of credit cards. *See* PNC Br. 28–35.

On August 14, 2024, a panel of this Court issued its opinion in this case and, with respect to Mr. Lyons's TILA claim, reversed. In a 2-1 decision, the Court held that the district court "fail[ed] to recognize the relationship between 'credit card' and 'credit card plan,'" as those terms are used in the statute, thus "miss[ing] the possibility that a credit card plan is simply a plan in which a consumer accesses credit using a credit card." Op. 10. As the Court explained, "[t]he type of credit (secured, unsecured, home-secured, or secured by something other than a home) is not what matters. What matters is that a card is used to access the credit and that terms and conditions govern the credit." *Id.*

The Court went on to explain why the district court was wrong to incorporate the Regulation Z definition of "credit card account under an open-end (not home-secured) consumer credit plan" into the term "credit card plan." Op. 10 (quoting 12 C.F.R. § 1026.2(a)(15)(ii)). That definition, the opinion explains, "only matters if you assume that the term is

interchangeable with the term 'credit card plan,'" contrary to the basic precept that "differences in language … convey differences in meaning." *Id.* 11 (quoting *Wisc. Cent. Ltd. v. United States*, 585 U.S. 274, 279 (2018)). But, after examining "TILA's historical record and its implementing regulations," including those cited by the CFPB *and* by PNC, the majority found no basis for that assumption. *Id.* 11–17. It pointed to the fact that when the Federal Reserve Board promulgated section 1026.2(a)(15)(ii), it said that it did *not* intend to impact the provisions of Regulation Z that "refer generally to credit cards," as opposed to those that used the new defined phrase, and it did not include the offset provision on a list of provisions it *did* intend to impact. Op. 12–14 (quoting 75 Fed. Reg. at 7668). As to the materials cited by PNC to show that HELOCs have been treated differently in some *other* contexts, the Court found them irrelevant to the question of what the term "credit card plan" in the 1975 statute meant:

> The fact that home-secured and not-home-secured lines of credit are treated differently for some purposes does not mean that they must be treated differently for every purpose. What is relevant to whether something is a "credit card plan" is not whether it is home-secured credit, but instead whether it involves a specific access device, i.e., a credit card.

Op. 16.

Judge Floyd dissented as to the TILA holding. He would have held that "Congress did not intend 'credit card plan' in § 1666h to mean any type of credit so long as it can be accessed via credit card," Op. 22. While Judge Floyd recognized the "textual simplicity" of the majority's interpretation, he would have concluded that HELOC-backed credit cards were exempt from the statute based on other statutory provisions and regulations, a review of various CFPB materials, and policy concerns. Op. 22–28.

ARGUMENT

A rehearing petition is not an appropriate vehicle "merely to reargue the case." 4th Cir. R. 40(a). Rather, a litigant must establish one or more of the specific situations set forth in this Court's Rule, 4th Cir. R. 40(b). Neither of the bases for rehearing argued by PNC exists here: the Court's opinion does not conflict with any decision of the Supreme Court or of any court of appeals, and the issue raised by the petition is not one of "exceptional importance." *Id.*; *see also* Fed. R. App. P. 35(a).

I. The Court's plain-language reading of the statute is consistent with precedent.

The dispositive question on appeal as to Mr. Lyons's TILA claim is whether the statutory term "credit card plan," as enacted by Congress in

1974, 15 U.S.C. § 1666h(a), includes plans pursuant to which credit cards are issued to access HELOCs. As the Supreme Court has repeatedly recognized, "[w]hen a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). That is what the panel majority did here, recognizing that "a credit card plan is simply a plan in which a consumer accesses credit using a credit card," regardless of "[t]he type of credit." Op. 10.

Here, there is no dispute that Mr. Lyons accessed the credit that National City Bank extended to him via a credit card. *See* Pet. 5 (stating that National City issued Mr. Lyons "a card to access his credit line"); *see also* 15 U.S.C. § 1602(*l*) (defining "credit card" as "any card … or other credit device existing for the purpose of obtaining money, property, labor, or services on credit"). Thus, when PNC withdrew money from Mr. Lyons's accounts, it offset "indebtedness arising in connection with a consumer credit transaction" under a "credit card plan." 15 U.S.C. § 1666h(a). As Judge Floyd conceded in his dissent, this conclusion is one of "textual simplicity." Op. 22.

A. In seeking rehearing, PNC does not dispute that the panel adopted the most natural reading of the statute's plain text. It argues instead that giving the statute its plain meaning "conflicts with controlling law" because the Court "did not address the relevant statutory context and structure." Pet. 11. In so arguing, PNC accuses the Court of failing to address its argument that other statutory provisions treat HELOCs differently than other forms of credit.[1] But the Court expressly addressed that argument—and rejected it. *See* Op. 16 ("PNC seems to think that because HELOCs are treated differently from not-home-secured credit card plans for *some* purposes, HELOCs must be treated differently from those plans for *every* purposes."). Consistent with what this Court has termed the "different-terms canon," *Peck v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 996 F.3d 224, 231 (4th Cir. 2021), the panel majority explained that the fact that, in other places, Congress

[1] At the merits stage, PNC also argued that TILA's regulatory history weighed in favor of its view that the term "credit card plan" excludes HELOCs. *See* PNC Merits Br. 24–25, 28–41. As the CFPB explained in its amicus brief, however, that history shows that the term "credit card plan" generally is not limited to plans involving particular kinds of credit. CFPB Br. 19–23.

drew distinctions between different kinds of credit highlights that it chose not to do so in the offset provision. *See* Op. 16.

PNC also argues that the Court erred by not addressing the use of the term "home equity account" in 15 U.S.C. § 1665b(c). Pet. 11. PNC did not cite this statutory provision in its merits brief, however, and thus cannot properly seek rehearing on the ground that the Court did not either. In any event, that provision tells us nothing about whether Congress intended to limit the term "credit card plan" to certain kinds of credit cards. Section 1665b(c), enacted in 1988, prohibits the use of certain misleading terms in advertisements for "home equity account[s]." Home Equity Loan Consumer Protection Act, P.L. 100-709, § 2, 102 Stat. 4725 (1988). The provision does not mention offsets nor does it, contrary to PNC's suggestion, "make[] clear that when a consumer obtains a *HELOC*, it establishes a 'home equity account,' not a 'credit card account.'" Pet. 11. The provision provides no support for PNC's assumption that a customer's credit-card-accessed HELOC cannot be both.

In addition, PNC argues that Congress could not have meant for the term "credit card plan" to include HELOC-backed credit card plans,

because HELOC-backed credit cards were not in use in 1974. Pet. 10. But that argument runs contrary to the principle that courts apply "the plain terms of the law" even where a "new application emerges that is both unexpected and important." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 676 (2020). That a plain reading would make a statute applicable "in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

This Court has thus rejected arguments that it should ignore the plain language of a statute simply because Congress was "not thinking" about a particular application of that language at enactment. *Osmon v. United States*, 66 F.4th 144, 150 (4th Cir. 2023) (rejecting the argument that provisions of the Federal Tort Claims Act did not apply to Transportation Security Administration screeners because the agency was not created until many years after the statute's enactment); *see also*

Scott v. Baltimore Cnty., 101 F.4th 336, 350 (4th Cir. 2024) (holding that the Fair Labor Standards Act applied to certain workers, even though "Congress may well not have had workers like [plaintiff] in mind when it enacted" the statute). This same principle applies where, as here, entrepreneurial ingenuity leads to the development of new products. As the Sixth Circuit put it, "[a] statute enacted in 1890 that imposed an excise tax on sales, say, of 'any vehicle of transportation' would cover airplanes, even though they were not invented until several years after 1890." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 593 (6th Cir. 2005). By the same token, a 1974 statutory provision relating to "credit card plans" applies to plans under which a consumer accesses credit using a credit card, even if the particular kind of credit card used was not on the market in 1974.

PNC, like the dissent, posits policy reasons why Congress may have wanted to treat HELOC-linked credit cards differently than other credit cards. Pet. 14–15; Op. 27–28 (Floyd, J., dissenting). But "the best evidence of Congress's intent" is the language it enacted. *Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012).

B. PNC also argues that rehearing is warranted because "the linchpin of the Majority's decision" was "a 2010 regulation." Pet. 12. This argument rests on a mischaracterization of the majority's opinion, the "linchpin" of which was its plain language reading of the statute. *See* Op. 10. To be sure, the *district court*, ruling in favor of PNC on this issue, relied on 12 C.F.R. § 1026.2(a)(15)(ii). JA203. And in its briefing to the panel, PNC argued that it was appropriate for the district court to have done so. *See* PNC Merits Br. 28–35. For that reason, the panel appropriately addressed why the 2011 regulation did *not* support PNC's view of the statute—and concluded, unanimously, that section 1026.2(a)(15)(ii), did not "matter." Op. 11; *see id.* 22 (Floyd, J., dissenting). Moreover, PNC cannot in good faith obtain rehearing on the grounds that the Court should not have considered administrative agency pronouncements that post-dated the statute's enactment, since PNC extensively relied on not just the 2011 regulation, but a variety of other such pronouncements in its response brief. *See* PNC Merits Br. 28–35.

II. PNC's policy arguments do not support rehearing.

PNC briefly argues that the question whether HELOC-backed credit cards are subject to the offset provision warrants rehearing because the issue is exceptionally important. PNC, however, overstates the impact of the Court's ruling. While PNC notes that there are "millions of HELOCs" issued nationwide, Pet. 9, it offers no evidence that the self-help practice regulated by the offset provision is widespread. And importantly, the issue can arise only where a consumer has a HELOC and a deposit account with a single institution, and the consumer is in arrears on the HELOC. Moreover, as the American Bankers Association acknowledged in its merits-stage amicus brief, HELOCs "came into prominence as a financial tool starting in the 1980s," and credit cards have been used to access them since that time. ABA Merits Br. 13, 15. Yet prior to this case, no district or appellate court decision had addressed the question whether debt incurred under HELOC-backed credit cards was subject to the offset provision. If the practice at issue here were as vital to the functioning of the HELOC market as PNC suggests, the question surely would have come up in the past forty years. Furthermore, now, to the extent there was any doubt about the

applicability of the offset provision to all kinds of credit card plans, regulated entities are on notice that the offset provision does apply, both in the view of this Court and in the view of the CFPB.

Finally, PNC's suggestion that the Court's ruling will have adverse effects on consumers, Pet. 14–15, is both contrary to the views of the agency charged with protecting financial consumers and ignores that the statute does not prohibit banks from using deposit accounts to offset HELOC debt. The statute (1) requires lenders to obtain previous written authorization and (2) prevents the use of offsets as to disputed debts. The ability of lenders to self-help themselves to consumers' funds where a consumer has already registered a dispute is not in consumers' interests. And as to undisputed debt, if offsets are truly in consumers' best interest, lenders should be able to explain that to consumers and get authorization.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for panel rehearing and rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing response complies with the type-volume limitations of Federal Rule of Appellate Procedure 40(a)(3) and 40(b). As calculated by my word processing software (Microsoft Word 365), the response (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 3653 words.

2. This response complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a) because it is composed in a 14-point proportional typeface, Century Schoolbook.

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that, on September 23, 2024, the foregoing was served through the Court's ECF system on counsel for all parties.

/s/ Adam R. Pulver
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