No. 02-857

IN THE
Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC.
AND MBNA AMERICA BANK, N.A.,
Petitioners,
v.

SHARON R. PFENNIG,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief abandons the Sixth Circuit's decision below and her own previous contentions on which that decision was based. The Sixth Circuit held that 12 C.F.R. § 226.4(c)(2), which states that "[c]harges . . . for exceeding a credit limit" are "not finance charges" under the Truth in Lending Act ("TILA"), is contrary to the statute and "cannot stand." Pet. App. A12. Respondent advanced this position below and in her opposition to certiorari. Accordingly, we showed in our opening brief that § 226.4(c)(2) was a proper exercise of the Board's delegated authority and should have been upheld by the Sixth Circuit as it was by the district court. The United States, as amicus curiae, has filed a brief supporting the Board's regulation and explaining that over-limit fees are properly treated as "other charges" under Regulation Z, rather than "finance charges." In response to these arguments and the authority against her, respondent has changed her position. She now "does not challenge the validity of Regulation Z," and she states that "[t]he Board's authority to exclude *all* fees imposed for 'exceeding a credit limit' is not at issue here." Resp. Br. 6 (emphasis in original).

Respondent's merits brief advances, instead, a new theory that § 226.4(c)(2) should be judicially interpreted not to apply to her case. Respondent concedes that petitioners imposed over-limit fees because she engaged in transactions that exceeded the $2000 credit limit for her account. But she asks this Court to interpret Regulation Z's treatment of "[c]harges . . . for exceeding a credit limit" to be inapplicable, despite its plain language, on the ground that petitioners allowed merchants to honor her credit card in connection with the transactions that caused her account to exceed the credit limit. Respondent's new theory contradicts that portion of the Sixth Circuit's decision holding, against her, that petitioners were protected from any damages claims under TILA because they complied in good faith with the Board's regulation. The Sixth Circuit said: "Even assuming all allegations in Plaintiff's complaint are true and construing those allegations in the light most favorable to Plaintiff, it is undisputed that the fee at issue in this case was imposed for 'exceeding a credit limit'" and "unequivocally Regulation Z did not" require petitioners "to disclose this fee as a finance charge." Pet. App. A17. Respondent did not cross-petition for review of that aspect of the Sixth Circuit's decision, but she now asks this Court to modify the decision below based on her new theory of the case.

For the reasons we discuss below, respondent's current interpretation of Regulation Z should be rejected and the Board's regulation should be applied precisely as its plain text provides. Section 226.4(c)(2) states unambiguously that "[c]harges . . . for exceeding a credit limit" are "not finance charges," and the Board has confirmed that the regulation applies to over-limit fees imposed in circumstances like respondent's case.

I. RESPONDENT'S COMPLAINT FAILS TO STATE A CLAIM BECAUSE REGULATION Z PRESCRIBES THAT THE OVER-LIMIT FEES CHARGED BY PETITIONERS HERE ARE NOT FINANCE CHARGES.

Respondent's current argument that § 226.4(c)(2) does not apply to her case is wrong for two reasons. *First*, and most important, it is not what Regulation Z says. The plain text of § 226.4(c)(2) broadly requires creditors to exclude from the finance charge any fee for exceeding the credit limit on an account. The regulation was drafted to establish a bright-line rule, as the Board has stated, and it does not depend on a transaction-by-transaction analysis of why the cardholder exceeded the credit limit on her account. Respondent's reliance on *other* provisions of Regulation Z to support her interpretation of § 226.4(c)(2) is misplaced. *See infra*, Part I.A. *Second*, respondent's complaint does not in any event allege that petitioners authorized her to exceed the credit limit on her account. Respondent contends that petitioners allowed merchants to accept her credit card for transactions, and that those transactions resulted in her account balance exceeding its credit limit. But she does not allege that she asked petitioners for permission to exceed the credit limit placed on her use of the account, or that petitioners granted any such permission to her, and any such allegation would be inconsistent with the way the in-store merchant approval process works. *See infra*, Part I.B.

A. Regulation Z Provides That Charges For Exceeding A Credit Limit Are Not Finance Charges.

Respondent's argument is now that Regulation Z's exclusion of over-limit fees from the finance charge (12 C.F.R. § 226.4(c)(2)) is inapplicable to the fees at issue in this case. Her dispute is not about whether petitioners should have disclosed the over-limit fees at all—which petitioners undisputedly did—but about whether petitioners should have disclosed the fees as "finance charges" instead of "other charges." In adopting its regulation, the Federal Reserve

Board determined that credit-card issuers should treat *all* fees imposed for exceeding a credit limit on a uniform basis as "other charges," and it so provided in plain regulatory language. Nothing in the text of Regulation Z, or in the Board's basis for classifying such charges as "other charges" rather than "finance charges," suggests that this classification should turn on the reasons that the cardholder exceeded the credit limit, or on whether a merchant received an okay to accept the credit card for a transaction resulting in the cardholder's account exceeding its credit limit. Respondent's argument that § 226.4(c)(2) does not apply to her case is erroneous.

1. Plain language.

The text of § 226.4(c)(2) provides as follows:

> **§ 226.4 Finance charge.**
>
> . . .
>
> (c) *Charges excluded from the finance charge.* The following charges are not finance charges:
>
> . . .
>
> (2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

Respondent concedes that petitioners imposed over-limit fees because she exceeded the $2000 credit limit on her account. *See, e.g.*, Resp. Br. 7; Pet. App. A39 (Complaint ¶ A34). The words of § 226.4(c)(2) cover such fees, but respondent asks this Court to construe the regulation to limit the exclusion for over-limit fees to situations where the cardholder has engaged in what she calls a "unilateral act[] of default." *E.g.*, Resp. Br. 6. The exact contours of respondent's position are uncertain, and the phrase "unilateral act of default" is not found in Regulation Z or TILA.

Respondent's reading contradicts the text of the regulation. Section 226.4(c)(2) states an unambiguous, bright-line rule that uniformly excludes from the "finance charge" all "[c]harges . . . for exceeding a credit limit," regardless of whether the cardholder's act of exceeding the credit limit is or is not a "unilateral act of default." In this way, over-limit charges are uniformly treated as "other charges," rather than (as respondent would have it) sometimes as "finance charges" and sometimes as "other charges." The regulation makes no reference to the limitations respondent would read into it. There is no reason to read into the regulation exceptions that the Board, in its multiple rounds of rulemaking (*see* Pet. Br. 8), did not choose to include.

2. Textual construction.

Lacking express support in the regulation, respondent seeks implicit support in other charges (besides over-limit fees) that are excluded from the finance charge calculation by § 226.4(c)(2) and in the *ejusdem generis* canon of statutory interpretation. But that canon is simply inapplicable. The words to be interpreted here ("exceeding a credit limit") are not "general words [that] follow specific words in a statutory enumeration." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114 (2001) (internal quotation marks omitted). Rather, the phrase "exceeding a credit limit" describes charges that § 226.4(c)(2) quite *specifically* excludes from the finance charge.[1]

Furthermore, "[c]anons of construction need not be conclusive and are often countered . . . by some maxim pointing in a different direction." *Circuit City*, 532 U.S. at 115. In *Circuit City*, the Court employed the *ejusdem generis* canon because the alternative interpretation of the residual phrase of the statute at issue would have left portions of the statute without independent meaning. *See id.* at 114. Here, it is respondent's interpretation that would render part of the regulation superfluous. *See, e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal

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[1] Moreover, as respondent herself concedes (Br. 13), the phrase "exceeding a credit limit" *precedes* the only general words in § 226.4(c)(2), the residual phrase "or a similar occurrence."

principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (Internal quotation marks omitted)). Respondent's contention that the regulatory phrase "exceeding a credit limit" should be limited to "unilateral acts of default" would rob the over-limit clause of independent meaning, because § 226.4(c)(2) provides *separately* that charges for customer "default" are not finance charges. A charge for exceeding a credit limit that results from a unilateral act of default is thus already excluded from the "finance charge" by § 226.4(c)(2)'s reference to "default" charges.

Respondent also errs when she argues by comparison to Regulation Z's separate exclusions from the "finance charge" for "*actual unanticipated* late payment" charges (in § 226.4(c)(2) (emphasis added)) and checking-account charges "for paying items that overdraw an account, *unless the payment of such items and the imposition of the charge were previously agreed upon in writing*" (in § 226.4(c)(3) (emphasis added)). *See* Resp. Br. 17-18. Her basic error is that the particular language upon which she relies in the § 226.4(c)(2) late-payment and § 226.4(c)(3) overdraft exclusions—italicized above—is conspicuously *absent* from the § 226.4(c)(2) over-limit exclusion. In these circumstances, the appropriate inference is not that the over-limit exclusion should be interpreted similarly to the late-payment and overdraft exclusions, but rather that the special limiting words were meant to apply only in the exclusions in which they were used. *See Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (Internal quotation marks omitted)).

Turning more specifically to § 226.4(c)(2), respondent is wrong to uproot the phrase "actual unanticipated" from the late-payment exclusion and try to transplant it into the over-limit exclusion. *See* Resp. Br. 17. Section 226.4(c)(2) has three principal clauses, each distinct from the others, and each separately introduced by the word "for." *See* 12 C.F.R. § 226.4(c)(2) ("The following charges are not finance charges: . . . [c]harges *for* actual unanticipated late payment, *for* exceeding a credit limit, or *for* delinquency, default, or a similar occurrence." (emphases added)). Under standard interpretive principles, the use of the "actual unanticipated" modifier in the "late payment" exclusion, combined with its absence from the immediately following "exceeding a credit limit" exclusion, shows that the Board consciously intended the latter exclusion to be free from such a qualification.[2]

The history of the administrative process leading to the promulgation of § 226.4(c)(2) confirms this point. When the Board first proposed in 1980 to include an express reference to over-limit fees in § 226.4, the initial version of the proposed regulation arguably included "actual, unanticipated" as a modifier for all of the categories included in its list. *See* 45 Fed. Reg. 29702, 29735 (May 5, 1980) (excluding from the finance charge "[a] charge for actual, unanticipated late payment, exceeding a credit limit, delinquency, default, or similar occurrence"). The Board, however, revised this proposed language to make clear that the phrase "actual, unanticipated" would apply only to late-payment fees and to underscore that the three separate categories of charges listed in the regulation should be read separately. *See* 45 Fed. Reg. 80648, 80697 (Dec. 5, 1980) (excluding "[a] charge *for* actual, unanticipated late payment, *for* exceeding a credit limit, and *for* delinquency, default, or similar occurrence" (emphases added)). The final version of the regulation—

[2] Respondent's brief also relies on the Official Staff Commentary to § 226.4(c)(2). *See, e.g.*, Resp. Br. 13, 17 (citing 12 C.F.R. Part 226, Supp. I, § 226.4(c)(2)-1, *Late payment charges*). But the commentary itself undermines respondent's construction of § 226.4(c)(2). The discussion cited by respondent explains factors relevant to the determination of whether a charge is for "actual unanticipated" late payment and, as its heading states, pertains *only* to "late payment charges."

which was moved to § 226.4(c)(2)—retained this important clarification. *See* 46 Fed. Reg. 20848, 20894 (Apr. 7, 1981); 12 C.F.R. § 226.4(c)(2).

Respondent's invocation of § 226.4(c)(3) is similarly misplaced. That subsection provides that "[c]harges imposed by a financial institution for paying items that overdraw an account" are not finance charges "unless the payment of such items and the imposition of the charge were previously agreed upon in writing." Respondent seeks to read this subsection's "unless" clause into § 226.4(c)(2) as well, arguing that "where the creditor has acquiesced in what otherwise may appear to be an act of default, the fee imposed is a finance charge." Resp. Br. 18. But respondent's argument is again contrary to accepted principles of textual interpretation. What the presence of the "unless" clause in § 226.4(c)(3)—and its absence from the immediately preceding over-limit exclusion of § 226.4(c)(2)—demonstrates is precisely that the over-limit exclusion is *not* subject to the same qualification. *See supra*, p.6 (citing *Barnhart*, 534 U.S. at 452). Moreover, even reading the "unless . . . previously agreed upon in writing" phrase into the over-limit clause of § 226.4(c)(2) would not support respondent's argument: respondent does not (and could not in good faith) allege that she and petitioners ever agreed in writing to permit respondent to exceed her $2000 credit limit.[3]

3. Board interpretation and regulatory purpose.

Respondent recognizes that the Board's interpretation of its own regulation is important and accordingly contends

[3] Section 226.4(c)(3)'s distinction between written and oral agreements to pay checking-account overdrafts demonstrates the Board's use of bright-line rules in defining charges to be included and excluded from the finance charge under TILA. Even when a bank and the holder of a checking account have reached an explicit oral agreement that the bank will pay any future overdrafts, § 226.4(c)(3) excludes fees imposed in connection with such payments from the finance charge.

that the Board agrees with her construction of § 226.4(c)(2). But it does not. Indeed, the Government has filed a brief in this case supporting petitioners and arguing that the judgment of the court of appeals should be reversed. As that brief explains, the Board interprets § 226.4(c)(2) as "adopt[ing] a categorical approach that treats all [over-limit] fees" in the same manner, excluding such fees from the finance charge and instead classifying them as "other charges." U.S. Br. 28; *see also id.* at 22, 27-29. Unless "demonstrably irrational," that interpretation should be dispositive. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980); *cf. Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (holding that an agency's interpretation of its own regulation is entitled to deference).

The Board's interpretation of its own regulation is consistent not only with the plain text of § 226.4(c)(2), but also, as the Government's brief emphasizes, with the purposes of TILA. Congress enacted TILA in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). Approximately a decade later, Congress found that TILA's goals had been ill-served because consumers received disclosures that were lengthy and complex and creditors found it increasingly difficult to comply with the steady stream of complicated administrative and judicial interpretations of the statute. *See* S. Rep. No. 96-73, at 2 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 281). Congress therefore amended TILA in 1980, with passage of the Truth in Lending Simplification and Reform Act, "to provide the consumer with clearer credit information" and to "make creditor compliance easier." *Id.*, 1980 U.S.C.C.A.N. at 280. As we showed in our opening brief, and the United States explains in its brief, § 226.4(c)(2) serves the purposes of the amended TILA statute *because* it simply and uniformly excludes all over-limit fees as a class from the finance charge. *See* Pet. Br. 25-29; U.S. Br. 16-19, 26-29. This bright-line rule ensures that creditors disclose over-limit fees in an understandable and consistent manner, permitting consumers to compare such fees across time and across credit-card issuers in a meaningful way. Further, as a uniform exclusion of all over-limit fees from the finance charge, the regulation provides issuers with a straightforward, easily-applied standard.

Respondent advances no reason to believe that her construction of § 226.4(c)(2) would serve TILA's purposes or be consistent with the Board's goals in promulgating its 1981 amendments to Regulation Z. Contrary to Congress's goal of "mak[ing] creditor compliance easier" (S. Rep. No. 96-73, at 2, 1980 U.S.C.C.A.N. at 280) and the Board's stated purpose of amending Regulation Z to "substitute[], where possible, precise, easily-applied rules for principles that create ambiguity and require additional regulatory clarification" (45 Fed. Reg. 80648, 80648 (Dec. 5, 1980)), respondent asks this Court to adopt a construction of § 226.4(c)(2) that would impose a requirement on creditors that is not stated anywhere in the text of Regulation Z. An interpretation that contradicts the plain text of the regulation cannot square with the mandate for "precise, easily-applied" rules.

Because TILA subjects creditors who violate its requirements to potentially significant monetary damages (*see* 15 U.S.C. § 1640(a)), respondent's rule would also be an inappropriately expensive one for creditors, penalizing them for failing to divine an unstated exception to the regulation that is contrary to its express terms. As the United States explains in its brief, "[w]ith the costs of misclassification so high, . . . the Board rationally adopted a simple rule that classifies all [over-limit] fees as 'other charges,' and, at the same time, requires disclosure of those fees in every case." U.S. Br. 27. To ensure consistency with the purposes of TILA, and with the Board's stated purposes in amending Regulation Z, § 226.4(c)(2) should be interpreted just as its plain text reads, excluding all "[c]harges . . . for exceeding a credit limit" from the finance charge.

4. TILA solicitation and application provisions.

Respondent's last argument for her current interpretation of § 226.4(c)(2) is based on TILA's statutory provisions governing credit and charge card solicitations and applications, 15 U.S.C. § 1637(c)(1)(B)(iii) and (c)(4)(B)(iii). *See* Resp. Br. 13 n.2, 17. These provisions require certain solicitations and applications to disclose "[a]ny fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account." We showed in our opening brief that Congress's requirement of these disclosures of over-limit fees in connection with charge cards—which by statutory definition involve credit not subject to "finance charges"—supports the Board's regulatory position that over-limit fees are not "finance charges." *See* Pet. Br. 22-23. Respondent does not answer that argument.

Instead, seizing on the use of the word "authorized" in § 1637(c)(1)(B)(iii) and (c)(4)(B)(iii), respondent reads those statutory provisions as defining "[o]ver-the-limit fee" to exclude charges that are imposed for exceeding a credit limit whenever the card issuer has allowed the merchant to honor the credit card in connection with the relevant transaction. There are many problems with this argument, beginning with the point that nothing in § 1637(c) places any limit, as a logical or textual matter, on the Board's discretion to exclude fees from the "finance charge" to be disclosed under TILA and Regulation Z.

More important, respondent misunderstands what these provisions say. The word "authorized" is used in §§ 1637(c)(1)(B)(iii) and (c)(4)(B)(iii) in the phrase "the amount of credit authorized to be extended with respect to such account." That phrase describes the "limit" in an "[o]ver-the-limit" fee. When the statute refers to "the amount of credit authorized to be extended with respect to such account," it means the amount of debt the card issuer has pre-authorized the cardholder to incur on her account. It does not refer to a communication from the card issuer okaying or "authorizing" a merchant to accept a credit card as payment for a particular transaction.[4] The statute is therefore of no assistance to respondent, who does not (and could not) allege that petitioners raised her credit limit. On the contrary, she acknowledges that "[a] 'credit limit' represents the amount of credit the card issuer has *pre-approved* the consumer to obtain" on the account, and that this case concerns "an extension of credit that took Respondent beyond the stated $2000 credit limit" applicable to her account. Resp. Br. 1 (emphasis added). The over-limit fee in this case was (to use the words of the statute) "imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account" because (to use respondent's words) she made charges on her account "beyond the $2000 credit limit." Nothing in these sections of TILA indicates anything different.[5]

B. Respondent Does Not Allege That Petitioners Authorized Her To Exceed Her Credit Limit.

There is an additional problem with respondent's current argument: she has not pleaded (and cannot plead) that she ever obtained authorization from petitioners to exceed the credit limit applicable to her account. Respondent does not claim that she asked for a credit-line increase (or that one was given without her asking). Nor does she

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[4] We discuss *infra* at pp.13-14 & n.6, the contractual nature of a card issuer's "authorization" to a merchant to honor a credit card.

[5] The Board's interpretation of § 1637(c)(1)(B)(iii) and 1637(c)(4)(B)(iii) accords with our reading of the statute. The Board has interpreted the phrase "the amount of credit authorized to be extended with respect to such account" in those provisions as signifying the *credit limit* on a cardholder's account. The regulation, 12 C.F.R. § 226.5a(b)(10), refers to an "over-the-limit fee" as "[a]ny fee imposed for exceeding a credit limit." Section 226.5a(b)(10) parallels, and is fully consistent with, the regulation at issue in this case, § 226.4(c)(2). These interpretations are of course entitled to deference. *See* Pet. Br. 18-21; Resp. Br. 11, 21; *see also* U.S. Br. 12-14.

claim that she contacted petitioners and obtained their authority to exceed the credit limit on her account in connection with any individual transaction.

On the contrary, when respondent's briefs assert that her over-limit transactions were "authorized," she is referring to the fact that the merchants with whom she transacted business may have obtained an okay or "authorization" from the credit-card network (indirectly from a credit-card issuer) to accept respondent's credit card as payment for a transaction. *See* Brief for Appellant in the Sixth Circuit at 14 ("As anyone who has ever used a credit card to make a purchase knows, the merchant submits the charge for 'approval' by the credit card issuing bank before the charge can proceed. The credit card issuing bank gets to make the decision as to whether or not that charge will be permitted to go through."); *see also* Resp. Br. 14-16. Pursuant to separate agreements they have with their acquiring banks, merchants normally must seek "authorization" for credit-card charges through point-of-sale systems or else bear the risk of loss should the cardholder ultimately fail to pay the credit-card issuer because the charge was fraudulent or for other reasons.[6] These merchant agree-

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[6] When a merchant accepts a bank credit card from a consumer as consideration for a transaction, the merchant obtains payment by submitting the transaction information to its bank (known as the merchant bank or the acquiring bank), which credits the merchant's account in the amount of the charge minus a fee. The merchant bank then submits the transaction information to the relevant credit-card system (e.g., Visa, MasterCard, etc.), which in turn relays the information to the credit-card issuing bank. The issuing bank then pays the merchant bank the amount requested minus an interchange fee. The issuing bank posts the charge to the consumer's account and collects payment from the consumer. *See generally United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 235 (2d Cir. 2003); *National Bancard Corp.* v. *Visa U.S.A., Inc.*, 779 F.2d 592, 594 (11th Cir. 1986); 2 Lary Lawrence & Bryan Hull, *Payment Systems* § 17:2 (2002).

In a number of circumstances, a "chargeback" may be assessed to the merchant in connection with (and in the amount of) a particular transaction, thereby shifting the costs of a transaction back onto the ments and the "authorization" provisions thereunder are entirely separate and distinct from the credit-card lending agreements between card issuers and cardholders, and have no legal relationship with the credit limit that the credit-card agreements make applicable to consumers' uses of their accounts.

Thus, as the Government has explained, § 226.4(c)(2) applies when a fee is charged to the cardholder for having exceeded the credit limit on her account, without regard to whether a merchant obtains "authorization" from the credit-card issuer to accept the card for a particular transaction. The Board framed Regulation Z based on its expert understanding of the credit-card industry. Whether an account is over limit is a matter between the issuer and the cardholder, and there is no basis for interpreting a payment-system "authorization," given to a *merchant* who is not a party to the cardholder's agreement, as an authorization to the cardholder to exceed the credit limit.[7] The Govern-

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merchant. Merchant agreements normally provide that a chargeback may be assessed if the merchant fails to seek "authorization" for a credit-card charge in the amount of the charge and in accordance with the system's specifications or accepts a credit card as payment despite receiving a denial of "authorization." *See, e.g.*, 2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶ 15.02[4][b][i] (rev. ed. 2003) (describing the "merchant-merchant bank agreement"); Randy Gainer, *Allocating the Risk of Loss for Bank Card Fraud on the Internet*, 15 J. Marshall J. Computer & Info. L. 39, 46 (1996) ("If a merchant accepts bank card data for a sale without following the authorization procedures required by Visa or MasterCard and by the merchant's bank, only then does a merchant incur losses for accepting the fraudulent charge."); 2 Lawrence & Hull, *supra*, § 17:100; 1 Jacob W. Reby & James A. Douglas, *Banking & Lending Institution Forms: With Commentary & Checklists*, Form 5D.5 § 2.06(a), at 5D-16 (1992 & 1997 Supp.) (form bank card merchant agreement). *See generally* Brief for the American Bankers Ass'n et al. at 24-25.

[7] The Board has long recognized the difference between a request for an increased credit limit and the submission of a charge through the merchant point-of-sale authorization system. For example, Regulation B, which implements the Equal Credit Opportunity Act, distinguishes between a creditor's decision whether "to increase the amount of credit

ment's brief explains that there are numerous real-world reasons why this is sensible in fact, not the least of which is that credit-card issuers generally cannot determine with certainty, at the time they must decide whether to allow a merchant to accept a card, whether a particular charge will cause the corresponding credit-card account to exceed its credit limit and incur an over-limit fee. *See* U.S. Br. 20-22; *see also* Pet. Br. 13-16, 28-29; Brief for the American Bankers Ass'n *et al.* 24-25.

Respondent seeks to dismiss the Board's understanding of the real-world operation of credit-card systems, asserting that it consists of "facts that were not properly before the district court on a motion to dismiss, and thus are not properly before this Court," and she proposes to submit contrary expert testimony on remand. Resp. Br. 14-16. But respondent's claim to a superior insight about the credit-card industry is irrelevant. The regulation at issue in this case was promulgated by, and is properly interpreted and applied by, the Board. The Board's understanding of credit-card systems is therefore what is fundamental to the legal question of what its regulation means. The Government's brief explains that, because the point-of-sale authorization systems are not, in the Board's view, suited to identifying over-limit circumstances, "the Board has never placed any significance on what the merchant authorization process might indicate about the possibility that an [over-limit] fee will later be imposed. Instead, the Board rationally characterizes *all* [over-limit] fees as charges for violating the credit agreement rather than finance charges." U.S. Br. 22 (emphasis in original).

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available to an applicant who has made an application for an increase," 12 C.F.R. § 202.2(c)(1)(iii), and a decision whether "to authorize an account transaction at a point of sale." 12 C.F.R. § 202.2(c)(2)(iii).

II. RESPONDENT'S CURRENT ARGUMENT IS AT ODDS WITH HER POSITION BELOW, AND HER REQUEST FOR MODIFICATION OF THE JUDGMENT IS IMPROPER.

Respondent failed to cross-petition for certiorari on the portion of the judgment below on which she lost. In the Sixth Circuit, respondent's position was that "Regulation Z flatly contradicts the plain language of TILA." Brief of Appellant in the Sixth Circuit at 12. Agreeing with respondent, the Sixth Circuit reversed in part and affirmed in part the district court's judgment dismissing respondent's complaint for failure to state a claim. *See* Pet. App. A19. The Sixth Circuit agreed with *respondent's* argument that § 226.4(c)(2) conflicts with TILA (*see* Pet. App. A12), but the court also held in *petitioners'* favor that their good-faith compliance with § 226.4(c)(2) entitled them to immunity from civil liability under 15 U.S.C. § 1640(f). *See* Pet. App. A18-A19. In support of the latter holding, the Sixth Circuit found that, "[e]ven assuming all allegations in [respondent's] complaint are true and construing those allegations in the light most favorable to [respondent], it is undisputed that the fee at issue in this case was imposed for 'exceeding a credit limit.'" Pet. App. A17. The Sixth Circuit further held that, "even if the statute required [petitioners] to disclose this fee as a finance charge, unequivocally Regulation Z did not." *Id.* (emphasis added). Based on these conclusions, the Sixth Circuit affirmed the dismissal of respondent's monetary damages claim, holding that "it is beyond cavil that [petitioners] complied with Regulation Z and pursuant to 15 U.S.C. § 1640(f) should be afforded immunity from civil damages." *Id.* at A18 n.6.[8]

Respondent did not cross-petition, conditionally or otherwise, for a writ of certiorari to review the part of the Sixth Circuit's judgment that affirmed dismissal of her

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[8] Respondent's statement that the Sixth Circuit "ruled that section 226.4(c)(2) does not apply to the specific facts alleged in this case" is false. Resp. Br. 10.

claims for monetary damages. Yet respondent now argues, directly contrary to the portion of the judgment below on which she lost, that petitioners did not comply with TILA because § 226.4(c)(2) does not apply to petitioners' over-limit fees. While this Court has held that "[a] prevailing party need not cross-petition to defend a judgment on any ground properly raised below," that is true only "so long as that party seeks to preserve, and not to change, the judgment." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). If the respondent "seeks to alter the judgment below," it must file a cross-petition. *Id.*; *see also Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989).

Respondent has also completely changed her position from her brief in opposition to certiorari. In that brief, respondent agreed that the only question presented in this case was whether the Board's "regulation conflicts with . . . the statute," and argued that "the unambiguous language of [the] statute controls over any conflicting regulation." Resp. Br. Opp. 1.[9] Now, of course, respondent concedes that the regulation is valid and instead seeks to advance a newly-invented theory of what the regulation means. Thus, not only has respondent led the Sixth Circuit into error and then completely repudiated its opinion, she has also doubled back on the position she advanced in this Court nine months ago. Under Rule 15.2 of this Court, respondent's failure to raise her regulatory argument until her merits brief is sufficient grounds for the Court to consider the argument waived. *See also Knowles* v. *Iowa*, 525 U.S. 113, 116 n.2 (1998).

[9] Respondent's brief opposing certiorari agreed with the question presented by the petition, restating it slightly in the body of her brief as "whether a reviewing court is bound to defer to a regulation of the Federal Reserve Board interpreting [TILA] when that regulation conflicts with an unambiguous provision of the statute." Resp. Br. Opp. 1. Respondent did not identify any other questions presented in this case, nor did she argue that resolution of the statutory question could be avoided in any way.

At the conclusion of her merits brief, respondent compounds these errors by asking the Court to "modif[y]" (in reality, reverse) that portion of the Sixth Circuit's judgment against her. Resp. Br. 23. Her brief acknowledges that the Sixth Circuit held that petitioners are immune from monetary damages under TILA because they complied in good faith with Regulation Z (*see id.* at 19), but she then argues that the holding was erroneous and specifically asks this Court to "modif[y]" the judgment of the Sixth Circuit "to make clear that . . . no good faith defense is relevant." *Id.* at 23. It is well established that the respondent cannot seek to alter any part of the judgment below because she did not cross-petition for certiorari. *See Northwest Airlines*, 510 U.S. at 364. Respondent's request for "modification" of the judgment is therefore improper and should be rejected.

CONCLUSION

The judgment of the Sixth Circuit should be reversed, and the district court's decision dismissing respondent's complaint for failure to state a claim should be reinstated.

Respectfully submitted,

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