

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   HOUSEHOLD CREDIT SERVICES,               :  
4   INC. and MBNA AMERICAN BANK,           :  
5   N. A. ,                                       :  
6                   Petitioners                       :  
7               v.                                       :   No. 02- 857  
8   SHARON R. PFENNIG.                       :  
9   - - - - -X  
10                                       Washington, D. C.  
11                                       Monday, February 23, 2004  
12               The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States at  
14   10: 03 a.m  
15   APPEARANCES:  
16   SETH P. WAXMAN, ESQ., Washington, D. C. ; on behalf of the  
17       Petitioners.  
18   BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D. C. ; on  
20       behalf of the United States, as amicus curiae,  
21       supporting the Petitioners.  
22   SYLVIA A. GOLDSMITH, ESQ., Sandusky, Ohio; on behalf of  
23       the Respondent.  
24  
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 02-857, Household Credit Services v. Sharon R.  
Pfennig.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN  
ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Mr. Chief Justice, and may it  
please the Court:

This case involves a regulation promulgated by  
the Federal Reserve Board to govern the disclosure of fees  
imposed for exceeding a credit limit. It does not involve  
any challenge to the fees themselves or any contention  
that the fees were not disclosed. Unquestionably they  
were. This case concerns only how such fees should be  
characterized when they are disclosed.

QUESTION: Would you enlighten us on just how  
this transaction gets authorized in the ordinary course of  
events and in this event? Is there any special call made,  
or is the credit card just submitted to the store and the  
store processes it and if it's not rejected, it goes  
through? What happens?

MR. WAXMAN: Well, as the Solicitor General has  
explained in his brief for the Federal Reserve Board,

1 ordinarily the arrangement between banks -- that is, the  
2 banks that issue the cards and the banks that do the  
3 corresponding relationship with the merchants -- have an  
4 agreement between the merchants and the banks where the  
5 merchant will be liable for fraudulent use of the card or  
6 the other unless it obtains authorization to process the  
7 charge. And so in the ordinary practice, the board has  
8 explained, a merchant may or may not, is not required to,  
9 but may well call in the charge or submit the account  
10 number to the issuing bank via the correspondent bank and  
11 get an approval, yes or no, to process the charge.

12 Now, the board has explained that when the  
13 issuing bank authorizes the merchant to process the  
14 charge, that two important things don't happen. One, it  
15 does not in any way represent a renegotiation between the  
16 consumer and the issuing bank, and it says nothing about  
17 the overall credit limit. And two, the issuing bank often  
18 will have no idea whether the charge being authorized will  
19 or will not trigger a credit limit of the consumer for a  
20 variety of reasons, not the least of which is that, as the  
21 board explains, credits and payments aren't instantly  
22 reflected, merchants often don't put the true amount of  
23 the charge in. They may, as hotels and -- and rental car  
24 companies do -- often block very large amounts because  
25 they don't know what the ultimate charge will be.

1           And there is also a recognition in the industry,  
2 the board explains, of a certain tolerance. That is, the  
3 merchant -- the credit card company won't always want to  
4 cut somebody off whenever it has a suspicion that they may  
5 hit their credit limit because the merchant has a  
6 relationship with the customer. And since the system of  
7 information is so imperfect, the issuing bank also has a  
8 relationship with its consumer and doesn't want to  
9 embarrass the consumer.

10           So the short answer to that -- the short version  
11 of the very long answer is in the ordinary course,  
12 merchants have an incentive to seek authorization, but  
13 they're not required to, and the authorization that's  
14 given doesn't reflect knowledge by the issuer that a  
15 credit limit will be exceeded.

16           QUESTION: But, Mr. Waxman, is it not true that  
17 there are many occasions on which the credit limit will,  
18 in fact, be exceeded and there will, nevertheless, come  
19 back an approval, and that the customer in those cases may  
20 or may not know that his -- that, A, his limit was  
21 exceeded, and B, that he's going to be charged for it?

22           MR. WAXMAN: Well, the creditor -- the consumer  
23 may or may not know that his or her credit limit was  
24 exceeded, but of course, that information is entirely  
25 within the knowledge of the -- the potential knowledge of

1 the consumer because the consumer does know what or --  
2 what charges he or she has made and what payments he or  
3 she has made.

4 QUESTION: Well, not necessarily. You can have  
5 a card owned by two or three people in the same family and  
6 maybe the husband spent some money that the wife didn't  
7 know about while this was going on. So it's at least  
8 possible that they would exceed the credit limit without  
9 the credit cardholder knowing it, their not being aware of  
10 it, not keeping track of it.

11 MR. WAXMAN: Well, the --

12 QUESTION: And -- and I'm just asking you, is it  
13 not true that it is possible that he will receive an  
14 affirmative answer to using the card without knowing  
15 whether or not he exceeded the limit and therefore is  
16 going to be -- be charged for it?

17 MR. WAXMAN: It's possible either because he  
18 doesn't keep good track or he doesn't -- he's not accurate  
19 or he's allowed a child or a spouse to use the card and  
20 isn't keeping track or control of that.

21 But one thing that you said, Your Honor, that is  
22 not true is the issuing -- the credit card issuer is not  
23 giving permission directly to the consumer to do anything,  
24 and most particularly if --

25 QUESTION: Well, but I'm not sure that's right.

1 If the -- if the credit card issuer is informed of the  
2 overcharge, that it's over the limit, and decides this is  
3 a good customer, well, let's not charge him for it or  
4 let's okay it anyway, he gives that information to the  
5 merchant and the merchant may not tell the customer  
6 anything about it.

7 MR. WAXMAN: The merchant --

8 QUESTION: Isn't that true?

9 MR. WAXMAN: The merchant won't know. The  
10 merchant isn't going to tell the customer anything.

11 QUESTION: No.

12 MR. WAXMAN: And the credit card issuer may not  
13 know.

14 QUESTION: But he may know.

15 MR. WAXMAN: But you're positing --

16 QUESTION: That's my point.

17 MR. WAXMAN: Yes.

18 QUESTION: The credit company may know and he  
19 will not pass that information on to the consumer.

20 MR. WAXMAN: There is a credit -- there is an  
21 agreement that must be accepted --

22 QUESTION: Well, am I correct on my facts?

23 MR. WAXMAN: You're --

24 QUESTION: Is it not possible?

25 MR. WAXMAN: You are correct that it is possible

1 that the consumer won't realize it and the issuer may  
2 know. And in that instance, the issuer, which has no  
3 relationship directly with the consumer, doesn't tell the  
4 merchant to tell the consumer.

5 QUESTION: Correct.

6 MR. WAXMAN: But, Justice Stevens --

7 QUESTION: And so the consumer may end up paying  
8 a charge that he didn't realize he'd incurred.

9 MR. WAXMAN: Well, the --

10 QUESTION: Is that correct or not?

11 MR. WAXMAN: That is only partially correct.  
12 It's correct factually given the hypothetical that you've  
13 articulated. It's incorrect legally because the credit  
14 agreement -- it must --

15 QUESTION: If he has -- if he knows two things.  
16 He knows the fine print on the credit agreement and, two,  
17 he knows the status of his balance.

18 MR. WAXMAN: I --

19 QUESTION: But if he doesn't have either of  
20 those in mind, it could occur -- it could occur that he  
21 would run an overcharge and be charged \$15 or \$20 or  
22 whatever it is without realizing he's incurred the charge.

23 MR. WAXMAN: It is true with the following  
24 caveats. I'm not trying to fight the hypothetical. I  
25 just want to make sure --



1           QUESTION: It seems to me you're unwilling to  
2 give me a categorical yes answer when the answer is yes.

3           MR. WAXMAN: And I can't, and here's why,  
4 Justice Stevens. I -- I mean no disrespect. But many,  
5 many credit card issuers do not imply an over-limit fee on  
6 a transactional basis. They apply it, for example, if at  
7 the end of the month the balance exceeds the limit as  
8 opposed to whether a particular transaction sort of spikes  
9 it over the limit one time. And so I'm just trying to be  
10 completely accurate.

11           Now, the term -- I think it's very important --

12           QUESTION: Well, you've given me lots of  
13 examples where the charge would not be incurred. I'm  
14 merely trying to get you to acknowledge there will be some  
15 cases in which a person who is not fully familiar with the  
16 -- with the balance in his account doesn't realize he's  
17 gone over the amount and is being charged for an extra  
18 credit charge.

19           MR. WAXMAN: I think that must -- there must be  
20 instances in which that is true.

21           But the term, credit limit, Your Honor, is a  
22 term of art that is recognized in the industry, that is  
23 reflected in the Federal Reserve Board regulations, and it  
24 draws an important distinction between increasing a credit  
25 limit, an established credit limit, upon an application

1 and authorizing a point-of-sale transaction.

2 QUESTION: Well, now, Mr. Waxman, exactly what  
3 happens when a point-of-sale transaction is authorized?  
4 The merchant is then off the hook?

5 MR. WAXMAN: The merchant has a safe harbor,  
6 Your Honor. The merchant is told, if you pay this charge  
7 and it turns out not to be collectible for any reason, we  
8 will hold you harmless. And that's the reason that this  
9 business -- contractual relationship is established  
10 between issuers and merchants, as a way to encourage  
11 merchants to allow use of the card.

12 Now --

13 QUESTION: Mr. Waxman, is -- I'm sorry.

14 MR. WAXMAN: No.

15 QUESTION: Is the -- is the event of exceeding  
16 the -- the limit defined in these agreements  
17 characteristically as an event that can occur at any time  
18 during the billing period, or is it an event that is  
19 defined as -- as occurring only at the end of the billing  
20 period when all the credits and -- and all the debits are  
21 -- are accounted for?

22 MR. WAXMAN: My understanding, Justice Souter,  
23 is it varies depending on issuer and card, but that is,  
24 some -- some cards will -- all -- all -- well, there are  
25 some credit cards and charge cards that don't have limits,

1 but when they have a limit, the limit is required to be  
2 explicated in the initial disclosures. And in the  
3 solicitation, the disclosure, and all periodic statements,  
4 the lender, the credit card issuer, is required to  
5 identify the credit limit and specify that fees that are  
6 charged for exceeding a credit limit will be the following  
7 amount.

8 QUESTION: Mr. Waxman, will you explain what the  
9 consequence is? It's -- this is not a question of  
10 disclosure or not because either it will be part of the  
11 finance charge and disclosed as such or the -- whatever  
12 you call OCL. What difference does it make? It's not  
13 notice. If it goes -- if it's part of the finance charge,  
14 how is the consumer benefitted?

15 MR. WAXMAN: Well, I don't -- I will explain  
16 what difference it makes. No one has yet explained,  
17 neither the respondent in this case nor the Sixth Circuit,  
18 how the consumer is benefitted by the rule that she's  
19 advocating or the Sixth Circuit's rule, but here's how it  
20 works.

21 In the open-end credit relationship, the credit  
22 card or charge card relationship, there are three relevant  
23 events.

24 One is the solicitation or advertisement to  
25 invite someone to enter into a relationship. That's

1 called the solicitation.

2 The --

3 QUESTION: Are you talking about solicitation  
4 for a purchase of a credit card or for purchase of  
5 merchandise?

6 MR. WAXMAN: For a purchase of a credit card.  
7 You get a letter in the mail saying buy a -- open a  
8 Citibank card, and there are certain disclosures that are  
9 required in those solicitations.

10 If you send back something that says, yes, I  
11 want to have a -- I want one of your credit cards, the act  
12 and the regulations require that certain disclosures be  
13 made at that point, and that's called the initial  
14 disclosure.

15 And then the third event is the periodic  
16 statement, when you get your statement every month or so.

17 Now, with respect to the solicitation and the  
18 initial disclosure, the consequences of calling this a  
19 finance charge or a component of the finance charge versus  
20 an other charge are zero. That is, in both of those  
21 instances, the lender, the issuer, must disclose that  
22 there will be charges paid -- fees assessed for exceeding  
23 a credit limit and how much it is. And they're not  
24 characterized there as part of the finance charge or  
25 otherwise.

1           The -- on the -- those documents require a  
2 statement of what the APR, the annualized percentage rate,  
3 is, but the APR in those statements refers only to the  
4 periodic rate, the interest rate that's going to be  
5 charged to all -- applied to all charges. In the --

6           QUESTION: That's the only thing it could occur  
7 to.

8           MR. WAXMAN: Yes.

9           QUESTION: Yes.

10          MR. WAXMAN: Because you don't know whether  
11 there will be late charges or over-limit charges.

12          QUESTION: Is -- is it a consequence of -- of  
13 the other position that they would somehow have to try to  
14 do the impossible?

15          MR. WAXMAN: Not at those two stages, but at the  
16 third stage, that is, the periodic statement, when you get  
17 your bill every month, there is a difference there. In  
18 both instances, there will be a specification of over-  
19 limit charge, but if the Sixth Circuit is right, in those  
20 instances in which the issuer actually knew that the  
21 charge it authorized the merchant to process resulted in  
22 the consequence of an over-limit charge, it would be  
23 called over-limit charge finance charge. That is, there  
24 would be a line item that specifies what it is, just like  
25 any other charge or any other purchase or payment, and the

1 amount. But it would affect the annual percentage rate,  
2 what's called the historical annual percentage rate, in  
3 the periodic statement.

4 QUESTION: Are there any other -- other  
5 instances in the act where the APR, calculated  
6 retroactively on the monthly statement, is higher than  
7 what was the APR that was disclosed?

8 MR. WAXMAN: Yes, there -- yes, there are,  
9 Justice Stevens, because there are certain types of  
10 charges that may or may not occur. For example, if you  
11 use your card to get cash at the cash machine or something  
12 that will be -- will -- that are charged in the finance --  
13 that are part of the finance charge and will, therefore,  
14 affect the APR on the monthly statement, but won't be  
15 disclosed to the --

16 QUESTION: So -- so then the respondent's theory  
17 could -- and that's consistent with the act, I take it.  
18 So then respondent's theory could work.

19 My concern was that respondent's theory couldn't  
20 work because you had -- couldn't hypothetically calculate  
21 an annual percentage rate not knowing whether charge would  
22 be made.

23 MR. WAXMAN: Well --

24 QUESTION: But if you can and -- and do have an  
25 adjustment of the APR that's permitted under the act, on

1 the disclosure statement, then her theory at least can  
2 work.

3 MR. WAXMAN: Well, her -- I'm not saying that  
4 her theory or the Sixth Circuit's rule couldn't work. It  
5 would require a great deal of additional rulemaking by the  
6 Federal Reserve Board because the APR is a -- is a  
7 fraction, is a percentage, the numerator of which is the  
8 component of all the individual charges and the  
9 denominator is something that, in the context of an over-  
10 limit fee, is unclear. Does it apply to the transaction  
11 that it was applied to? Is it the average monthly  
12 balance? Is it for the whole month or part of the month?  
13 It's not impossible.

14 But what it -- what it is is directly contrary  
15 to the two objectives of TILA. The purpose of TILA is to  
16 come up with bright line classifications that are readily  
17 complied with by issuers and that help consumers compare  
18 competing costs of credit. That is manifest in Congress'  
19 purpose, and a rule that requires the treatment month to  
20 month, charge to charge depend on what the issuer knew at  
21 the time it authorized some charge that may later be  
22 determined to have triggered at -- the -- allowing the  
23 borrower to exceed the credit limit would cause these  
24 monthly APR's to vary widely and, it seems to me, can only  
25 create confusion and inability to say, well, gee, I just

1 got an application or a -- a thing in the mail from, you  
2 know, Citibank saying 17.3 percent, but I just looked at  
3 my statement and it's 79 percent.

4 QUESTION: Mr. Waxman, I don't think you  
5 finished the answer to the question I asked, and what I  
6 wanted to know is if it's labeled a finance charge, then  
7 there won't be interest on it; whereas, if it's treated as  
8 a debit like any purchase, then the interest would run on  
9 it in the future. So could -- it could be a difference  
10 for the consumer, could it not?

11 MR. WAXMAN: Well, yes, in the month in which it  
12 has occurred because, with respect to the next month,  
13 whatever finance charge was applied and -- and continues  
14 as a balance will also have applied to it the finance  
15 charge, that is, the interest rate that would apply. So,  
16 but with -- there is a consequence in the month in which  
17 it is applied; that is, for whatever days it's  
18 outstanding, up until the -- the end of the -- the card's  
19 grace period, a finance charge could be applied to that  
20 other charge.

21 QUESTION: So it could be -- it could be --

22 QUESTION: Why isn't it carried over from month  
23 to month? In other words, I -- I get a late -- this --  
24 this special charge, but I just pay the minimum, so I'm  
25 really carrying part of the special charge over to the



1 next month. I pay interest on that too, I take it.

2 MR. WAXMAN: These cards typically have a grace  
3 period in which you can pay off your balance and you don't  
4 have to pay any finance charge, but if you don't, whatever  
5 charges are carried forward, whether they derive from  
6 purchases of over-limit charges or late fee charges or --  
7 or finance charges in the previous month, something is  
8 charged against it.

9 May I reserve the balance of my time?

10 QUESTION: Very well, Mr. Waxman.

11 MS. McDowell, we'll hear from you.

12 ORAL ARGUMENT OF BARBARA B. McDOWELL

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

15 MS. McDOWELL: Mr. Chief Justice, and may it  
16 please the Court:

17 Congress has given the Federal Reserve Board  
18 broad authority to implement the Truth in Lending Act.  
19 The regulation at issue here is the permissible exercise  
20 of that authority.

21 The board has addressed the disclosure of fees  
22 for exceeding a credit limit with a clear bright line rule  
23 which requires all such fees to be disclosed clearly and  
24 conspicuously but separately from the finance charge and  
25 APR.

1           To use the Court's own terminology, that  
2 approach is neither obviously repugnant to the statute nor  
3 demonstrably irrational. To the contrary, the rule is a  
4 sensible one that, in the view of the expert agency,  
5 provides meaningful disclosure to consumers and clear  
6 guidance to creditors. There's no merit to the court of  
7 appeals' and respondent's contrary approach which would  
8 only impose exorbitant compliance costs on creditors  
9 without any meaningful benefit in terms of disclosure to  
10 consumers.

11           The board's rule is not foreclosed by the  
12 statutory text. The act does not speak expressly to  
13 whether over-the-limit fees are or are not finance  
14 charges. Nor is that question resolved by the act's  
15 generally phrased definition of finance charges as charges  
16 imposed as an incident to the extension of credit. That  
17 phrase is ambiguous as to whether it encompasses charges  
18 that are imposed not as the cost of the credit that the  
19 creditor has contractually obligated itself to provide,  
20 but instead as a penalty for the consumer's obtaining some  
21 additional credit that she had no contractual right to  
22 obtain.

23           The board's rule is rational. As the board  
24 recognized over-the-limit fees --

25           QUESTION: Ms. McDowell?

1 MS. McDOWELL: Yes.

2 QUESTION: Would you -- as I understand the  
3 respondent's brief, it asks us to draw a line between the  
4 over-the-limit fees that are imposed for acts of default  
5 and those that are imposed for extension of the credit  
6 limit and says that Regulation Z draws such a distinction.  
7 Would you comment on that argument?

8 MS. McDOWELL: That argument is incorrect, Your  
9 Honor. The relevant provision of Regulation Z, which is  
10 at page 2 of the petitioners' brief, contains no limit of  
11 that sort. It speaks of charges for actual unanticipated  
12 late payment for exceeding a credit limit and for  
13 delinquency, default, or similar occurrences. It thus  
14 speaks in a categorical manner of charges for exceeding a  
15 credit limit. It doesn't condition them on whether it was  
16 unanticipated or whether it's tantamount to a default.

17 The board has acknowledged that there are  
18 hypothetical situations at least in which a -- a charge  
19 might be labeled an over-the-limit charge when it actually  
20 is not, when there actually, for example, is no  
21 contractual credit limit and -- and a charge is simply, in  
22 that context, labeled inaccurately an over-the-credit-  
23 limit fee. However, when a charge is, in fact, imposed by  
24 the creditor as a consequence of the consumer's exceeding  
25 the contractual credit limit, it is validly within this

1 regulation.

2 QUESTION: Was this an account that carried a  
3 finance charge? Because the regulations describe  
4 something called charge card that doesn't have finance  
5 charge, but could have an over-the-limit charge.

6 MS. McDOWELL: That's -- the particular account  
7 at issue in this case was a credit card.

8 QUESTION: Which did have a finance charge, or  
9 you don't know?

10 MS. McDOWELL: Yes, it does impose a periodic  
11 charge if all charges that are run up during a particular  
12 month are not paid within the grace period.

13 QUESTION: If I understand the other side, they  
14 make kind of a plain language argument. They -- they talk  
15 to the merchant. The merchant sends in -- they want  
16 approve a \$200-purchase and they get back, well, it'll go  
17 over the limit and is it okay. And they say, yes, let  
18 them go over the limit, and so they've extended additional  
19 credit. And -- and they, if they're going to charge them  
20 \$15 to do it, that would be a finance charge -- I mean,  
21 that would be a charge for an extension of credit. Why  
22 doesn't it fit the plain language?

23 MS. McDOWELL: We don't disagree with you,  
24 Justice Stevens, that it is, at some general level, a  
25 charge imposed incident to the extension of credit. There

1 was necessarily an extension of credit here.

2 QUESTION: In -- in exchange for the higher  
3 credit limit, yes.

4 MS. McDOWELL: The -- but -- but the term,  
5 incident to the extension of credit, is an ambiguous one.  
6 The Court construed similar language in the Holly Farms  
7 case and recognized it to be ambiguous. It doesn't  
8 address precisely the nature or -- or the extent to which  
9 a particular charge has to be connected to an extension of  
10 credit. And here, the board has reasonably viewed over-  
11 the-limit fees like late payment fees and other default  
12 fees as being imposed for a violation of the terms of the  
13 credit agreement rather than as --

14 QUESTION: And then the -- but wouldn't the  
15 customer say, well, I didn't violate anything? You told  
16 me I could do it. Why is it a violation?

17 MS. McDOWELL: In the first place, there was no  
18 communication in this case, and there typically is no  
19 communication when we're speaking only of the  
20 authorization process.

21 QUESTION: But what if there were -- what if  
22 there had been a communication? Would it be different?  
23 Would it be a different case if the merchant put the bank  
24 officer on the phone and said, you're over your limit, and  
25 the -- and the customer said, is it okay for me to pay the

1 extra 15 bucks for this -- go over the limit \$15? He  
2 says, yes, we'll -- we'll okay it. And then they hang up.  
3 At the end of the month, he gets a \$15 charge for that.  
4 Would that be -- that would not be an extension of credit  
5 in your view if they talked on the phone and agreed to it  
6 instead of having to just go through these anonymous  
7 communications.

8 MS. McDOWELL: It would look more like an  
9 extension of credit, I -- I might grant you, but the board  
10 is still entitled to draft categorical rules by virtue of  
11 its authority under section 1604(a) to make classification  
12 adjustments and exceptions.

13 QUESTION: There's no duty on the -- on the part  
14 of the bank to say, of course, if we okay it, you have to  
15 pay an extra 15 bucks.

16 MS. McDOWELL: Well, Your Honor, you're raising  
17 a policy question that Congress or the board could address  
18 whether additional disclosures are required at the point  
19 of purchase. Here we're talking about disclosures that  
20 occurred later, days or weeks later, when the customer  
21 receives her periodic statement.

22 QUESTION: Just a bill that said, you didn't  
23 realize it, but you just earned a -- you just -- you owe  
24 us \$15 that you should have realized.

25 MS. McDOWELL: Well, and whether it's imposed as

1 a finance charge or -- or as an other charge, the consumer  
2 is still going to have the -- the kind of surprise that  
3 you referred to. And in the board's view, it doesn't make  
4 any meaningful difference whether, at that point when the  
5 customer receives her periodic statement, it is identified  
6 as one or the other. Indeed, it could confuse the  
7 consumer to have the over-the-limit fee included in the  
8 historic or actual APR on her periodic statement. If she  
9 were, for example, comparing that statement with a  
10 solicitation that she received by direct mail, she might  
11 be inclined to think that -- that the solicitation offered  
12 better terms when it really did not.

13 QUESTION: Would you agree that -- that it would  
14 be to the consumer's advantage to have this categorized as  
15 a finance charge because then she wouldn't have to pay  
16 interest on that in -- in future charges?

17 MS. McDOWELL: No, Your Honor. She would still  
18 have to pay interest on it. Whether it's labeled a  
19 finance charge or not makes no difference in that regard.  
20 It only has to do with how it's labeled and whether it's  
21 included in the actual APR on the -- the customer's  
22 periodic statement. Even if it's labeled a finance  
23 charge, in other words, she can be charged additional  
24 interest. The periodic rate can be applied to it.

25 So, in fact, the board has concluded that --

1 that there's no benefit to consumers to treating over-  
2 the-limit fees generally as finance charges, and the Sixth  
3 Circuit's rule, in particular, would make no sense because  
4 it would depend on the creditor's subjective knowledge  
5 whether a particular charge was or was not included in the  
6 APR in the particular month. That would impose  
7 significant compliance costs on creditors and would not  
8 tell consumers anything that's particularly meaningful to  
9 them

10 When the board revised Regulation Z in the 1980-  
11 81 period, after the TILA Simplification Act, the board  
12 sought to focus on legally enforceable relationships, not  
13 on unenforceable understandings that a consumer might have  
14 as a result of a course of dealings with the credit card  
15 company.

16 And understanding this particular provision,  
17 consistent with its plain terms, as applying to all  
18 charges imposed or exceeding a credit limit is consistent  
19 with that approach. It provides the meaningful disclosure  
20 and it avoids imposing unwarranted compliance costs.

21 If there are no further questions --

22 QUESTION: Thank you, Ms. McDowell.

23 Ms. Goldsmith, we'll hear from you.

24 ORAL ARGUMENT OF SYLVIA A. GOLDSMITH

25 ON BEHALF OF THE RESPONDENT



1 MS. GOLDSMITH: Mr. Chief Justice, and may it  
2 please the Court:

3 This case has come full circle. It started 4-  
4 and-a-half years ago with the filing of a complaint, a  
5 complaint that says if you authorize the request of a  
6 consumer to have more credit and you tie a fee for that  
7 authorization, that fee is a finance charge.

8 The question presented here is whether or not  
9 the Sixth Circuit has the right or should have invalidated  
10 a provision of Regulation Z with respect to the exclusion  
11 of certain over-limit fees, and we believe that resolution  
12 of that question brings us back to the complaint. What  
13 does the complaint say in that regard?

14 QUESTION: Are -- are you fully defending the  
15 decision of the Sixth Circuit, Ms. Goldsmith?

16 MS. GOLDSMITH: We -- yes. We believe that the  
17 Sixth Circuit's decision is that this fee, the fee in this  
18 case, is a finance charge, and we stand behind that  
19 decision 100 percent. We have stated in our complaint  
20 that this fee -- and -- and it's important to remember  
21 that --

22 QUESTION: Ms. Goldsmith, before you continue,  
23 the Sixth Circuit said a portion of Regulation Z is  
24 invalid because it's incompatible with the statute. Are  
25 you defending that invalidation?

1 MS. GOLDSMITH: In theory, yes. We -- we feel  
2 that --

3 QUESTION: How about in practice?

4 (Laughter.)

5 MS. GOLDSMITH: We feel that perhaps the court  
6 did not need to go there, that -- in -- in looking at the  
7 situation now, we -- we have always --

8 QUESTION: But you asked -- you asked the court  
9 to do that.

10 MS. GOLDSMITH: Yes, we did.

11 QUESTION: When you argued the case before the  
12 Sixth Circuit, you made it very clear that you were  
13 seeking a holding that a portion of Regulation Z was  
14 incompatible with the statute.

15 MS. GOLDSMITH: I think to the extent that  
16 Regulation Z says that anything you call an over-limit fee  
17 as excluded from the finance charge, that is incompatible  
18 with the regulation. And we stand by our lower court  
19 argument that if that is the case, then that regulation  
20 cannot stand.

21 And -- and once the Government stepped in, we  
22 realized -- a significant part of their argument is that  
23 the -- that the Federal Reserve Board could say that. The  
24 Federal Reserve Board could say that all over-limit fees  
25 are excluded from the finance charge and we took that as a

1 -- as a tacit concession that the -- the Federal Reserve  
2 Board didn't actually do that. What they said, within the  
3 context of section 226.4(c)(2), is that fees, penalty  
4 fees, fees for unilateral acts of default, need not be  
5 disclosed as part of the finance charge. And so while we  
6 support the Sixth Circuit's decision, this is a finance  
7 charge -- no matter how you get there, you have to get to  
8 that point -- alternately, as an alternate basis to  
9 support the decision, we realize that the regulation is  
10 not necessarily triggered in this instance.

11 QUESTION: But that's an argument you didn't  
12 make before the Sixth Circuit. The Sixth Circuit -- you  
13 told them that this regulation was incompatible with the  
14 statute.

15 MS. GOLDSMITH: That is correct. And I -- I  
16 have to fall on the sword in that regard, that honestly,  
17 until the Government stepped in and helped clarify that  
18 issue for us, we did -- we were fighting a battle we  
19 didn't need to fight. And ultimately --

20 QUESTION: But they clarified it in the Sixth  
21 Circuit. So why didn't you say, oh, Sixth Circuit, we've  
22 now seen the light and we -- we don't want the regulation  
23 declared invalid?

24 MS. GOLDSMITH: I don't believe that the  
25 Government clarified that for us in the Sixth Circuit.

1 What -- what clarified it for me was the Government's  
2 brief, the merit briefing in this case, where they said, I  
3 believe 28 pages into a 30-page brief, if the Federal  
4 Reserve Board wants to exclude all over-limit fees, they  
5 could, and that's sort of when the light bulb went off.  
6 They didn't. And that -- that's sort of what took us  
7 where we are.

8 And ultimately, I think there's precedent for  
9 this Court to review the ultimate basis to support this  
10 decision based on making sure that the --

11 QUESTION: Well, you used the word review. We  
12 wouldn't be reviewing it. We would be taking a first view  
13 of it.

14 MS. GOLDSMITH: I'm sorry.

15 QUESTION: But you didn't -- you -- we would not  
16 be reviewing anything that the court below determined. We  
17 would be accepting a new argument that has not been aired  
18 below, and that's not review.

19 MS. GOLDSMITH: I think that in Connecticut v.  
20 Doebr, for instance, this Court acknowledged that there  
21 are circumstances that this Court wants to make sure that  
22 the right rule of law is handed down. And if the  
23 questions are intertwined, the -- the issues that were  
24 raised below and an alternate argument in support of the  
25 decision is raised before this Court, if it's a matter of

1 importance, if it's a matter that the lower courts need  
2 direction on, if it's a matter that has been --

3 QUESTION: Usually if we're asked to affirm on  
4 an alternate ground, it's a ground that the court of  
5 appeals passed on as kind of an alternate ground. Here,  
6 the court of appeals didn't pass on this at all.

7 MS. GOLDSMITH: I agree. And like I said, I --  
8 I believe in the Connecticut v. Doeher case, this Court  
9 acknowledged that alternately we cannot put form over  
10 substance, and we need to make sure that the right rule of  
11 law is passed down.

12 And I believe Justice Scalia, as a concurring  
13 comment in U.S. v. Burke, said there's got to be play in  
14 the joints, that even if it is not something that came to  
15 the Court procedurally, if it is something that -- that  
16 meets the three factors I was enumerating from Connecticut  
17 v. Doeher, the Court will entertain an argument.

18 QUESTION: It isn't just a procedural point, Ms.  
19 Goldsmith. We do better if we have an opinion of the  
20 court of appeals on the subject than if we're just  
21 launching it into -- for the first time ourselves.

22 MS. GOLDSMITH: And I would agree, and -- and  
23 the only defense that I have to that is that this is a  
24 matter that has been fully briefed and argued by counsel  
25 before this Court. And when -- when the case got taken in

1 by this Court, everyone said to me, you have to remember  
2 why they took it in, and -- and my understanding is is  
3 because the regulation has been challenged. And --

4 QUESTION: What other argument is there? I  
5 don't understand. I thought -- and I'm just mixed up  
6 about this. I thought that there is a Z regulation. It's  
7 called Regulation Z. And I thought Regulation Z says the  
8 following is not part of the finance charge, a charge for  
9 exceeding a credit limit. Now, are we talking about  
10 something in this case that is not a charge for exceeding  
11 a credit limit?

12 MS. GOLDSMITH: I believe so.

13 QUESTION: What?

14 MS. GOLDSMITH: I think that a fee denominated  
15 an over-limit fee that is actually an anticipated cost for  
16 approving an extension of credit is in fact a finance  
17 charge.

18 QUESTION: Does it say on the paper this is a  
19 charge for exceeding a credit limit?

20 MS. GOLDSMITH: I believe they called it an  
21 over-limit fee assessment.

22 QUESTION: All right. And so it's called an  
23 over-limit fee assessment and you pay it if you exceed the  
24 credit limit. You don't pay it if you exceed the credit  
25 limit, or do you?

1 MS. GOLDSMITH: I think that's a factual  
2 question. I -- I think --

3 QUESTION: Oh, okay. Well, what is the answer  
4 to the factual question? Do you pay for exceeding the  
5 credit limit or do you not pay it for exceeding the credit  
6 limit?

7 MS. GOLDSMITH: I believe the facts of this case  
8 -- this is not a fee that was imposed for the unilateral  
9 act of exceeding a credit limit.

10 QUESTION: Okay. So --

11 QUESTION: It depends, doesn't it, on --

12 QUESTION: -- there's a new argument, the first  
13 time in this Court, that this is not a fee for exceeding a  
14 credit limit. Was it made below in any form?

15 MS. GOLDSMITH: I believe the allegations of our  
16 complaint have always been clear.

17 QUESTION: Oh, yes, but, I mean -- that may be.  
18 I'm just asking, have you ever told any court before today  
19 that this is not the -- I'm not -- it sounds sarcastic,  
20 but I don't mean it to be sarcastic. I want to know.  
21 Have you ever before argued in this case, told a judge and  
22 -- that this is not a fee, quote, for exceeding a credit  
23 limit? End quote.

24 MS. GOLDSMITH: No.

25 QUESTION: No.

1                   QUESTION: Ms. Goldsmith, we wouldn't resolve a  
2 whole lot in this case, however, if we didn't reach that  
3 question, would we?

4                   MS. GOLDSMITH: I don't believe we would.

5                   QUESTION: We -- we'd just have another case a  
6 little bit down the line, perhaps with the same parties  
7 before the Court, arguing this -- this follow-on question.  
8 Right?

9                   MS. GOLDSMITH: I believe absolutely. I think  
10 that what we realized is that the arguments that we were  
11 making in the court below, which -- which we stand by,  
12 were premature.

13                  QUESTION: If we don't resolve it, we've  
14 essentially wasted our time.

15                  What -- what -- doesn't it depend upon what the  
16 regulation means by credit limit? It could mean that  
17 limit set forth in the -- in the agreement with the credit  
18 card company, past which there is no obligation on the  
19 part of the company to extend you any further credit. It  
20 could -- it could reasonably mean that. Indeed, that --  
21 that's what I would normally think it does mean. Or it  
22 could mean what you want it to mean, whatever limit the  
23 company later places upon your desire to -- to go ahead.

24                  Now, why should we accept your interpretation of  
25 it rather than the interpretation of the agency? We



1 usually do accept the agency's interpretation of its own  
2 regulation.

3 MS. GOLDSMITH: I don't believe that our  
4 interpretation conflicts with that of the Federal Reserve  
5 Board. If -- if we look at the plain language of the  
6 regulation --

7 QUESTION: We wouldn't be arguing here. I  
8 mean --

9 MS. GOLDSMITH: I believe what the -- what the  
10 Federal Reserve Board has said is that when you have a fee  
11 for a unilateral act of default, that that fee is properly  
12 excluded from the finance charge. I believe in the --

13 QUESTION: Well, don't we have to accept the  
14 Government's position? It's representing the agency, is  
15 it not?

16 MS. GOLDSMITH: Absolutely.

17 QUESTION: So it is the agency position.

18 MS. GOLDSMITH: I don't believe that you will  
19 find in the Government's brief an argument that the fee  
20 alleged in this case necessarily fits within the terms of  
21 section 226.4(c)(2). In fact, I believe several times,  
22 pages 17, 18 of the Government's brief, they talk about  
23 how over-limit fees were included as a penalty fee in that  
24 portion of the regulation.

25 That gets us back to the complaint. Was the fee

1 charged here a penalty fee or was it a fee for an  
2 anticipated, approved extension of credit?

3 QUESTION: I didn't think that was the  
4 Government's argument in my -- as I read it. I thought  
5 there are some words here. For exceeding a -- it says,  
6 for exceeding a credit limit. And as I understood the  
7 argument -- I might not have perfectly well -- is -- I  
8 thought that their argument is basically when you exceed a  
9 credit limit, the company doesn't want you to do it.  
10 Okay? So it says, no. And if you do it, we're not going  
11 to cancel you out, but we will charge you a penalty. Now,  
12 sometimes it's what you say. Sometimes the company would  
13 love you to do it and get the extra money. In fact, they  
14 might make profits on that. So they'd love you to do it.  
15 But trying to distinguish between those two instances is  
16 too difficult, and because it's too difficult, we are  
17 going to have a blanket rule, and the blanket rule is if  
18 you fall within these words, exceeding a credit limit,  
19 this is not a finance charge.

20 Now, that's what I understood it to be, a  
21 typical administrative agency argument. And they say  
22 Chevron, Mead, et cetera, we win. All right.

23 Now, suppose let me -- for the purpose of  
24 answering, please assume that you do have a charge here  
25 that falls within the term, exceeding a credit limit.

1 What is your response to the argument that I just made?

2 MS. GOLDSMITH: I think if we assume that this  
3 fee is a fee for exceeding a credit limit, then we need to  
4 look at the nature of the fee and determine whether or not  
5 that is obviously repugnant to the statute. And I think  
6 part of -- of what we have been accused of doing is  
7 creating an impossible factual distinction. Some would be  
8 disclosed as a finance charge, some would not.

9 And I direct the Court to the regulation itself  
10 that draws that factual distinction as to late fees. The  
11 -- the Federal Reserve Board went out of its way, in both  
12 the language of the regulation and the commentary, to say  
13 if this is a unilateral act of default, you have paid late  
14 or not in the amount that you were supposed to pay and we  
15 absolutely did not authorize that, that must -- that would  
16 be excluded from the finance charge. But if the creditor  
17 acquiesced in that in any way, that is a finance charge.

18 And what our position is is that a late fee --

19 QUESTION: I mean, you say the agency said this?  
20 Where -- where did the agency say that?

21 MS. GOLDSMITH: In both the regulation itself  
22 and the commentary. In the commentary --

23 QUESTION: What -- what portion of the  
24 regulation says that?

25 MS. GOLDSMITH: Section 226.4(c)(2) in the

1 portion that says actual unanticipated late payments. And  
2 in the commentary, the -- the board has defined actual,  
3 and it's the qualification of actual unanticipated goes to  
4 the question is this a unilateral act of default or is  
5 this something that the creditor acquiesced in. So our --  
6 our point is is that if you look at --

7 QUESTION: I suppose that depends on what --  
8 what time period unanticipated refers to.

9 MS. GOLDSMITH: I believe that the commentary  
10 helps explain that for us.

11 QUESTION: Okay. What does the commentary say?

12 MS. GOLDSMITH: The commentary says if this is  
13 truly a late fee because you have paid and the creditor  
14 could do nothing about it, then that is going to be an  
15 actual unanticipated late fee. But if this is something  
16 that month after month after month you paid late every  
17 month and they could be deemed to have acquiesced in that  
18 late payment, that must be disclosed as part of the  
19 finance charge.

20 QUESTION: Where -- where is that in -- in your  
21 brief?

22 MS. GOLDSMITH: The portion of the commentary --  
23 to be perfectly honest, I don't know if the -- if the  
24 commentary is reprinted in the appendix. The regulation  
25 language is --

1           QUESTION: Gee, if it's that central, I would  
2 have thought it ought to have been there. It's new to me.  
3 Where -- where is it?

4           MS. GOLDSMITH: I don't know, Your Honor.

5           QUESTION: You don't know what you just said?

6           MS. GOLDSMITH: I don't know where in the  
7 appendix it is is what I don't know. I know that section  
8 226.4(c)(2) -- the commentary specifically outlines the  
9 fact that there is a distinction between acts of default  
10 and -- and acquiesced -- oh, thank you very much.

11           What counsel was handing me is the actual CFR.  
12 I mean, the commentary is at 12CFR Section 226.4(c)(2).  
13 What I don't believe is that is reprinted in full anywhere  
14 in the appendix or in the briefing. I thought that's what  
15 your question was.

16           QUESTION: Yes, sort of. I -- I'd like to know  
17 what it is that you're -- you're saying makes your case.  
18 I -- I don't have the text in front of me and you say it's  
19 nowhere to be found in all of these voluminous materials  
20 that we have for this case.

21           MS. GOLDSMITH: I was trying to give an analogy  
22 as to late fees which is somewhat tangential to the issue.  
23 What the point is is that a late fee -- you have to start  
24 with what the concept of an extension of credit is. And  
25 -- and we do outline this in our brief, that we're talking

1 about each and every time a consumer seeks to make a  
2 purchase, they're essentially saying may I have an  
3 extension of credit to cover this purchase.

4 QUESTION: May I ask you a question about that?  
5 If -- if you are correct in your analysis, why isn't the  
6 answer to the problem that you raise here is simply that  
7 they are not entitled to charge you any fee at all, no  
8 matter what you call it? Because if I understand your --  
9 and I may not, but if I understand your argument, your  
10 argument is they agreed to my charging beyond the limit in  
11 the agreement as we originally negotiated it. They said  
12 it's okay. And if that is the case, why isn't your  
13 argument and your remedy simply they can't charge me any  
14 penalty at all for that? They agreed to it. And we never  
15 even get into the question that we've got in this case.

16 MS. GOLDSMITH: I think the answer to the  
17 question is is that this is really no different than a  
18 request to -- to -- a request to make a purchase below the  
19 credit limit versus a request to make a purchase above it.  
20 Either way, they could charge you a fee. I mean, that's  
21 -- that's what --

22 QUESTION: No.

23 MS. GOLDSMITH: -- credit is.

24 QUESTION: But if your point -- and I think I'm  
25 not getting your point, but if your point is that they

1 approved this in the sense that they said, yes, we will  
2 honor this -- they're telling you in -- in effect -- we  
3 will honor this charge and that that, in effect, is a  
4 renegotiation of your credit limit with the bank, then it  
5 would follow that they can't charge you any penalty at  
6 all. The only thing they can make you do is pay what you  
7 have charged. And if that's the case, we don't need to  
8 get into this -- this complicated question about  
9 Regulation Z. All you have to say is, I don't owe you a  
10 cent for exceeding the credit limit. Why isn't that the  
11 answer to your question or to your problem?

12 MS. GOLDSMITH: I think two things. First of  
13 all, we have never claimed that this is a renegotiation of  
14 the credit limit. We have always taken the position that  
15 there is a distinction between renegotiating your credit  
16 limit and getting an extension of credit that happens to  
17 take you over your credit limit. So that -- that's the  
18 first issue.

19 The second issue is --

20 QUESTION: So you're saying, yes, it violates  
21 the contract, but it's okay to violate the contract  
22 because they -- they approved in advance this charge.

23 MS. GOLDSMITH: We do not feel that it's a  
24 violation of the contract if they allow you to do it.

25 QUESTION: Then if it's not a violation of the

1 contract because they allowed you to do it, why do you  
2 concede that they can charge you any fee at all for doing  
3 that?

4 MS. GOLDSMITH: I'm not conceding that they can  
5 charge you a penalty on top a finance charge, but what I'm  
6 saying is that anytime a creditor extends credit, they may  
7 charge a fee and --

8 QUESTION: Okay.

9 MS. GOLDSMITH: -- as a credit.

10 QUESTION: They may, but in the original  
11 contract with you in the -- the -- at the -- at the  
12 beginning of your relationship with the bank, they didn't  
13 spell out the particular situation that you're describing  
14 here. They said, in -- if I understand it, if you go over  
15 the limit, we charge you X dollars, and -- and that was  
16 the extent of it. You're fighting about whether the X  
17 dollars should be classified as a finance charge or  
18 something else, but your argument now is a different kind  
19 of argument.

20 Your argument now is they, in some sense,  
21 approved my going over the limit. If that does not change  
22 the original agreement, then what difference does it make?  
23 If it does change the original agreement, then why isn't  
24 your remedy simply to say you can't charge me a fee at all  
25 for going over the limit?



1 MS. GOLDSMITH: I believe what we have always  
2 said is that this extension of credit was like any other  
3 extension of credit on the card. Whether Ms. Pfennig goes  
4 in 2 weeks before her -- her credit limit was exceeded and  
5 says, may I have enough credit to make this purchase, and  
6 they say, yes, and contractually we know --

7 QUESTION: Yes, but your -- your argument is  
8 that the extension of credit in this case is an agreement  
9 to exceed the credit limit. Isn't that your argument?

10 MS. GOLDSMITH: I don't think so.

11 QUESTION: I thought your argument, Ms.  
12 Goldsmith, was that the contract provides that any  
13 extension of credit over the credit limit shall be subject  
14 to the regular percentage plus the \$15 penalty. Right? I  
15 mean, you acknowledge that there is an agreement at the  
16 outset as to what the finance charge will be for this  
17 added extension of credit. It'll be the regular rate plus  
18 the penalty.

19 MS. GOLDSMITH: I don't --

20 QUESTION: If that's not your argument, then --  
21 then I think Justice Souter has to be correct.

22 MS. GOLDSMITH: I think at this stage of -- of  
23 the litigation, since we have not conducted any discovery,  
24 we have not seen the actual cardholder agreement to know  
25 what it says with regard to over-limit fees. So I don't

1 think I can answer the question in that regard.

2 QUESTION: Didn't -- didn't Ms. Pfennig get a  
3 copy? I mean, the -- isn't it on her monthly bill?

4 MS. GOLDSMITH: On her bill it will tell her  
5 what her contract rate is, but the initial disclosures --  
6 I believe she had this card 7-8 years before this happened  
7 and it is not in the record.

8 QUESTION: I thought -- I thought the terms have  
9 to be disclosed monthly in addition to when the credit  
10 card is new.

11 MS. GOLDSMITH: What has to be -- and -- and I  
12 believe that -- that Mr. Waxman explained this, that you  
13 have your initial disclosures that come with the card when  
14 you originally get it. What has to be disclosed on a  
15 periodic basis is an itemization of each extension of  
16 credit that you've received, a total that you've received,  
17 plus your -- your APR. Those types of terms of what the  
18 cost of credit is on a monthly basis are going to be on  
19 your periodic statement.

20 I believe what -- what Justice Scalia's question  
21 was is what does the credit card agreement say as to is  
22 she going to be charged a flat fee, is she going to be  
23 charged a flat fee plus the finance charge, and that is  
24 not in the record. We don't have that.

25 QUESTION: And if that's not in the record, how

1 can you make the argument you're making? Because the  
2 argument you're making depends on whether, in effect, the  
3 -- the agreement is Justice Scalia's suggestion or my  
4 suggestion. And if that's not in the record and you don't  
5 know, how do we get into this at all?

6 MS. GOLDSMITH: I think the confusion is coming  
7 in because ultimately what is or is not labeled in an  
8 over-limit fee may not be a fee for exceeding a credit  
9 limit as that term has been used in the regulations.

10 QUESTION: And the only way we can tell that is  
11 to look at the contract, isn't it?

12 MS. GOLDSMITH: I don't believe so.

13 QUESTION: No?

14 MS. GOLDSMITH: I believe that if you look at  
15 section 1637(b)(2) that describes how each and every  
16 extension of credit needs to be itemized, we're talking  
17 about a singular event, an extension of credit. She says  
18 may I make this purchase. May I have an extension of  
19 credit to cover this purchase, and they say yes. And in  
20 everyday experience, we all know that means you're going  
21 to be charged something for that extension of credit.  
22 It's going to be charged a finance charge.

23 QUESTION: Are you talking about just an  
24 ordinary credit card transaction where you go in and say,  
25 look, I'm buying a pair of gloves and I want to put them

1 on my credit card? This you're describing as a request  
2 for an extension of credit?

3 MS. GOLDSMITH: Absolutely.

4 QUESTION: Okay. So we're starting back that  
5 simply. Then how did we get so complicated?

6 MS. GOLDSMITH: I'm not quite sure.

7 (Laughter.)

8 QUESTION: Well, one reason it's complicated, if  
9 I understand your position, you're objecting both to the  
10 fee and to the later statements imposing an interest  
11 charge on the fee, aren't you?

12 MS. GOLDSMITH: I think it's triple dipping,  
13 yes. I think that, as Justice Ginsburg pointed out, they  
14 -- they charge you for the extension of credit. You get a  
15 finance charge on your actual extension of credit. They  
16 impose a penalty fee, and then they charge a finance  
17 charge on the penalty fee --

18 QUESTION: If that's in the contract, so what?  
19 A deal is a deal. If you agree, I pay 10 percent up to  
20 this amount, if I go over that amount, I pay 10 percent  
21 plus \$15, if that's in the contract, isn't that perfectly  
22 fair?

23 MS. GOLDSMITH: I think --

24 QUESTION: And you don't know whether it's in  
25 the contract. So you can't say it's unfair.

1 MS. GOLDSMITH: But this is not a breach of  
2 contract case. This is a Truth in Lending Act case, and  
3 the only thing the Truth in Lending Act --

4 QUESTION: Whether it is or not, you shouldn't  
5 call it unfair if you don't know.

6 MS. GOLDSMITH: I don't recall using the word  
7 unfair. I'm sorry.

8 I -- I believe that Truth in Lending is about  
9 disclosure as to whether or not they have to --

10 QUESTION: Could I interrupt with this one  
11 question? I want to be sure I get it out before the  
12 argument is over. Would you explain to me what difference  
13 it makes, in terms of notice to the consumer, whether one  
14 calls it a -- an other charge or a finance charge? In  
15 either event, doesn't the consumer get exactly the same  
16 notice?

17 MS. GOLDSMITH: I don't believe so because when  
18 it is charged as a flat fee as an other charge, besides  
19 the fact that there's interest charged on top of it, the  
20 consumer is in a position that they then need to compare  
21 cost of credit, one, as a dollar figure, the other as an  
22 APR. And while I believe Ms. McDowell said that the  
23 primary purpose of TILA is to create bright line rules for  
24 the credit card industry, I think there is significant  
25 support, as this Court has stated, that one of the primary

1 objectives is making sure the consumer can understand the  
2 cost of credit. And -- and Congress has said we --

3 QUESTION: But why would the consumer understand  
4 the cost of credit any better by labeling it a finance  
5 charge rather than an other charge? That I haven't -- you  
6 haven't explained to me.

7 MS. GOLDSMITH: Because Congress said we want  
8 that to be an apples-to-apples comparison. So Ms. Pfennig  
9 can know that the extensions of credit she received up  
10 till now were charged at 18.49 percent. She knows that  
11 the extension of credit she received over her credit limit  
12 was \$29 --

13 QUESTION: So how does that work? I -- I exceed  
14 my credit by \$15. My colleague exceeds his credit by \$42.  
15 Each of us is charged a \$15 late fee. What's the interest  
16 rate? And, of course, there are an infinite number of  
17 possibilities. So I guess I'd get a -- a statement that  
18 would be every conceivable possibility of how much I go  
19 over with interest rates ranging from like .2 percent to  
20 48,000 percent. So, I mean, how -- how is this supposed  
21 to work?

22 MS. GOLDSMITH: The simple answer is I don't  
23 know. Ultimately I think the Federal Reserve Board does  
24 have to offer the direction of how this will be disclosed,  
25 but I think the important thing -- and I believe --

1                   QUESTION: I think that's why Justice Stevens  
2 might have thought it's going to confuse the consumer if  
3 you win, not help the consumer.

4                   QUESTION: I would think it's much more  
5 informative to the consumer to know that my interest rate  
6 for all of the things up to the -- my credit limit has  
7 been this past month so much, and -- and then see a  
8 separate charge, God, I got socked 15 bucks for going over  
9 my credit limit. You think you're helping the consumer by  
10 -- by taking that \$15 separate charge and just mushing it  
11 into the general overall credit limit so that instead of  
12 thinking he's being charged 10 percent, he thinks he's  
13 being charged 11 -- 11 percent, and he doesn't know  
14 anything about the late -- about the -- the going over his  
15 over limit fee? I don't think that helps him at all.

16                  MS. GOLDSMITH: But I don't believe that that's  
17 necessarily how it would be done. I believe that, Justice  
18 Breyer, you had said earlier about how certain -- there  
19 are instances where certain fees are disclosed  
20 differently. You can have a situation where a cash  
21 advance is calculated at a different APR than the contract  
22 rate of the finance charge. An ATM fee might be charged  
23 at a different -- a different APR than something else.  
24 And those are itemized at the bottom. You wouldn't  
25 necessarily not let them know that this was a charge

1 incident to something over the credit limit, but you would  
2 put it in apples-to-apples comparison, which I believe --

3 QUESTION: But, of course, the difficulty for  
4 you is all you have to say is that the view I was taking  
5 somewhat by argument is a reasonable one, and if it's a  
6 reasonable one, I guess it's a reasonable interpretation  
7 of the statute. And therefore, Regulation Z doesn't  
8 violate it.

9 Now -- now, you haven't been able to show us how  
10 we'd get on the opposite interpretation. We didn't even  
11 know what the statement would look like. So it's very  
12 hard for me to say it's not reasonable what the -- what  
13 the -- that Regulation Z, isn't it?

14 MS. GOLDSMITH: I think that ultimately depends  
15 on -- on the construction of the regulation. We -- we  
16 seem to want to parse out for exceeding a credit limit  
17 without looking at the context of the regulation that  
18 these are acts of default. And what we have alleged in  
19 the complaint, which ultimately is controlling here, is  
20 not an act of default. So in that instance, the  
21 regulation is not triggered and it's premature for us to  
22 decide whether or not it was rationally based.

23 QUESTION: The one thing that the -- the board  
24 has said is we don't want these individual to make every  
25 extension of credit or what -- to do this kind of thing on



1 a case-by-case basis. That's why we're establishing these  
2 categories. And your interpretation was making the credit  
3 card company has to know and every one is going to be a  
4 knock-down, drag-out, specific facts of the case. And  
5 that's exactly, it seems to me, what the board didn't want  
6 to have happen.

7 MS. GOLDSMITH: And I think that gets back to  
8 Justice -- Justice Kennedy's question of quite some time  
9 ago. Where I was trying to go is that there is a  
10 distinction in the nature of a late fee and an over-limit  
11 fee. And the -- the Federal Reserve Board went out of its  
12 way to create that factual distinction as to late fees.  
13 And late fees, by nature, are on the periphery of the cost  
14 of an extension of credit. While the total has to be  
15 disclosed and your late payment is associated with whether  
16 or not you paid toward the total, an over-limit fee by its  
17 nature is tied to a specified extension of credit. May I  
18 have this extension of credit, which happens to take me  
19 over the credit limit? Yes, you may, but we are going to  
20 charge you a fee for that.

21 And I think that's the distinction, is that to  
22 the extent we have to get to -- let's just assume the  
23 regulation controls here. Does it make sense? Is it  
24 rationally based to create a factual distinction as to  
25 late fees which are on the periphery of the cost of an

1 extension of credit and not do so for an over-limit fee  
2 that goes to the very core of what the finance charge is  
3 supposed to disclose?

4 QUESTION: Now you're going back to the  
5 regulation itself is no good.

6 MS. GOLDSMITH: To the extent that it controls  
7 here, which I'm not sure it does, I think yes. And that  
8 -- that decision comes down the nature of the fee and  
9 whether or not it is so integrally tied to the cost of an  
10 extension of credit that it has to be disclosed as part of  
11 the finance charge, and we think that it does.

12 QUESTION: Ms. McDowell said that -- that in  
13 dollars and cents, there's no difference to the customer  
14 using -- there is a dollars and cents difference, I take  
15 it, and would you explain what it is?

16 MS. GOLDSMITH: Yes. With all due respect, I  
17 believe she said -- may I finish the question?

18 QUESTION: I think you've answered it.

19 Mr. Waxman, you have 3 minutes remaining.

20 MS. GOLDSMITH: Thank you.

21 REBUTTAL ARGUMENT OF SETH P. WAXMAN

22 ON BEHALF OF THE PETITIONERS

23 MR. WAXMAN: The question of whether or not we  
24 disclosed this fee properly within the regulation was  
25 passed on by the lower court. It is the law of the case.

1 The lower court held, as the second part of its ruling,  
2 that, quote, unequivocally the regulation required us to  
3 disclose this fee as an other charge.

4 Now, Justice Scalia is correct that how you  
5 interpret the Fed's bright line regulation which says, at  
6 page 2 of our blue brief, the following charges are not  
7 finance charges. Charges for exceeding a credit limit, of  
8 course, depends on what credit limit means, and credit  
9 limit is a term of art. Everybody in the industry  
10 understands it. Even the respondent at page 1 of her  
11 brief, she says, quote, in the middle of the page, a  
12 credit limit represents the amount of credit the card  
13 issuer has preapproved the consumer to obtain. There's no  
14 possible allegation in this case that she ever asked for  
15 an extension of her credit limit or received an extension  
16 of her credit limit.

17 And there is a reason that the board came up  
18 with an absolute bright line rule, and the reason is that  
19 before 1980, when Congress mandated classifications in  
20 order to simplify things for creditors and consumers, the  
21 Federal Reserve Board confronted -- confronted questions  
22 like many of the hypotheticals that Justice Stevens and  
23 others have asked here. Well, what if -- what if they  
24 knew that it was going to exceed it and what if somebody  
25 actually called and asked permission. I don't want to be

1 embarrassed in the store. Will you authorize this?

2           The board literally -- and some of -- many of  
3 these letter interpretations are cited in the briefs in  
4 this case, although not all of them. The board drove  
5 itself crazy trying to answer all of these hypotheticals  
6 and came up with a set of letter rulings, exacerbated by  
7 the Federal courts also trying to come up with their own  
8 interpretations, that made it impossible for issuers to  
9 come up with formulaic disclosures that would prevent them  
10 from being socked with huge class action awards and  
11 allowed them to present information that consumers could  
12 compare.

13           And so Congress said in 1980 we want bright line  
14 classifications, and that's exactly what the board did.  
15 In 1980, the board said that it was amending its  
16 regulations to, quote, substitute where possible precise,  
17 easily applied rules for principles that create ambiguity  
18 and --

19           QUESTION: Thank you, Mr. Waxman.

20           MR. WAXMAN: Thank you, Your Honor.

21           CHIEF JUSTICE REHNQUIST: The case is submitted.

22           (Whereupon, at 11:03 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25