

# No. 17-1762

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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TAWANNA M. ROBERTS, on behalf of herself and all others similarly situated,  
*Plaintiff-Appellant,*

v.

CAPITAL ONE, N.A.,

*Defendant-Appellee,*

CAPITAL ONE FINANCIAL CORPORATION,  
doing business as CAPITAL ONE BANK,

*Defendant.*

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On Appeal from the United States District Court  
for the Southern District of New York,  
Case No. 16-cv-4841 (The Honorable Lorna G. Schofield)

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**BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING,  
NATIONAL CONSUMER LAW CENTER, AND  
NEW ECONOMY PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT  
AND ARGUING FOR REVERSAL**

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August 7, 2017

## **RULE 26.1 DISCLOSURE STATEMENT**

With the exception of the Center for Responsible Lending (“CRL”), none of the *amici* has a parent corporation.

CRL is a nonprofit corporation and a supporting organization of its parent corporation, Center for Community Self-Help. Both organizations are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

None of the *amici*, or CRL’s parent organization, have issued shares or securities.

Respectfully submitted,

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2009).....15

## CONSENT TO FILE AS *AMICI CURIAE*

This brief is filed on motion pursuant to Fed. R. App. P. 29(a)(3). The parties consent to its filing.

### INTEREST OF *AMICI CURIAE*<sup>1</sup>

The **Center for Responsible Lending** (“CRL”) is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. CRL is an affiliate of Self-Help, a nonprofit community development financial institution. For thirty years, Self-Help has focused on creating asset building opportunities for low-income, rural, women-headed, and minority families. In total, Self-Help has provided over \$6 billion in financing to 70,000 homebuyers, small businesses, and nonprofits and currently serves more than 80,000 mostly low and moderate income families through 30 retail credit union branches in North Carolina, California, and Illinois.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(e) and Local Rule 29.1(b) of the United States Court of Appeals for the Second Circuit, counsel for *amici curiae* certifies that (a) no party’s counsel authored the proposed *amicus* brief in whole or in part; (b) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (c) no person—other than the *amici*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

CRL seeks to focus attention on abusive practices in connection with consumer financial transactions, including abusive overdraft practices by banks and credit unions. CRL's original research related to overdraft practices, dating back to 2004, has formed the basis for its policy work in this area. CRL's research reports include *Broken Banking* (May 2016), *Overdraft U: Student Bank Accounts Often Loaded with High Overdraft Fees* (March 2015), *The State of Lending in America & Its Impact on U.S. Households: High-Cost Overdraft Fees* (July 2013), *Banks Collect Overdraft Opt-ins Through Misleading Marketing* (April 2011), *Banks Target, Mislead Consumers as Overdraft Deadline Nears* (Aug. 5, 2010), *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years* (Oct. 6, 2009), *Shredded Security: Overdraft practices drain fees from older Americans* (June 18, 2008), *Out of Balance Consumers pay \$17.5 billion per year in fees for abusive overdraft loans* (July 11, 2007), and *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts*, (Jan. 25, 2007).

CRL has also regularly submitted comments to federal regulators addressing overdraft programs, including to the Consumer Financial Protection Bureau ("CFPB") on the impacts of overdraft programs on consumers (June 29, 2012); to the FDIC on its proposed overdraft supervisory guidelines (Sept. 27, 2011); and to

the Federal Reserve Board on its proposed rules to amend Regulation E (Mar. 30, 2009).

CRL's research on overdraft has been cited by regulators in discussion of reform of overdraft practices. *See, e.g.*, Federal Reserve Board, Electronic Funds Transfers Final Rule, 74 Fed. Reg. 59033, 59034, 59038. (Nov. 17, 2009). And CRL has testified before Congress on overdraft practices, including: Testimony of Michael C. Calhoun, President, CRL, *Protecting Consumers from Abusive Overdraft Fees: The Fairness and Accountability in Receiving Overdraft Coverage Act Before the U.S. Senate Banking Committee*, 111<sup>th</sup> Cong. (2009), <https://goo.gl/vnSkqq>; Testimony of Eric Halperin, Director, Washington Office and Litigation, CRL, *Overdraft Protection: Fair Practices for Consumers Before the U.S. House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit*, 110<sup>th</sup> Cong. (2007), <https://goo.gl/EGPzDf>.

The **National Consumer Law Center** (“NCLC”) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting fair and equal access to affordably priced credit and banking services in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Consumer Banking and Payments

Law, Fifth Edition. NCLC has published several reports on overdraft and banking access issues, including *Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees*, April 2013 and *Account Screening Consumer Reporting Agencies: A Banking Access Perspective*, Oct. 2015. NCLC appears regularly before Congress and state legislatures, submits comments during federal agency rulemakings, and has served on the Consumer Financial Protection Bureau's Consumer Advisory Board and the Federal Reserve System Consumer-Industry Advisory Committee. NCLC has also appeared regularly as an *amicus curiae* before federal courts of appeal as well as before the United States Supreme Court to provide its views in the hope that they may be of material assistance to the Court.

**New Economy Project** is a not-for-profit public interest organization that works with New York City community groups and low-income New Yorkers to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. Since its founding in 1995 (as the Neighborhood Economic Development Advocacy Project/NEDAP), New Economy Project has been at the forefront of community financial justice advocacy in NYC. The organization has provided direct legal assistance to thousands of low-income New Yorkers on a host of consumer financial justice issues—including unfair, deceptive, and abusive overdraft practices—through a legal hotline and community clinic; built the

capacity of legal services and community-based organizations to address consumer financial justice issues; and advocated for systemic reform. The organization has also issued reports on banking access and predatory financial services and lending practices, including banks' deceptive marketing of overdraft products; and conducts extensive know-your-rights education, particularly for low-income and immigrant New Yorkers, New Yorkers of color, women and seniors, focused on consumer finance issues. New Economy Project appears frequently before state and local legislatures, and has provided testimony on overdraft and related matters to U.S. Congressional committees and to the U.S. Consumer Financial Protection Bureau. The issues raised in this litigation are of vital interest to the individuals and communities the New Economy Project serves.

### **SUMMARY OF ARGUMENT**

Over the last 15 to 20 years, many financial institutions have betrayed the trust of their account holders by replacing what was once an occasional accommodation with an exploitative system of routine high-cost overdraft fees that drive account holders deep into debt. These fees are so lucrative for banks, particularly on debit cards, that banks push them on customers and use misleading representations to describe their purported benefits and the mechanics of how they work. Often, these representations lead reasonable consumers to believe they will not be charged an overdraft fee in circumstances when they will. These

misrepresentations help banks to maximize the number of individual overdraft fees they charge—at an unreasonable and disproportional \$35 each, totaling \$14 billion annually.

In the case at issue, Capital One’s (“the Bank”) account agreement states that an overdraft occurs when it “elects to pay” a transaction that exceeds a customer’s available balance. A reasonable consumer would understand this contract language to mean that the account balance that determines whether an overdraft fee is charged is the balance when the purchase is made—an understanding strongly reinforced by the Bank’s supplemental disclosures and marketing. Those more steeped in the mechanics of electronic payments would understand the contract language to mean precisely the same. There is only one moment when Capital One—or any other financial institution—may “elect to pay” a debit card transaction: when it chooses to authorize a transaction at the time of purchase. While the merchant may not present the authorized transaction to the bank for settlement until a few days later, Capital One—or any other financial institution—*must pay* the transaction at that time, regardless of whether there are sufficient funds in the account. Thus, by charging overdraft fees on transactions that the bank *elected to pay* when the available balance was sufficient, but that later settled against negative funds, Capital One led consumers to believe it would do

one thing while doing the opposite, inflicting significant financial hardship on affected customers in the process.

Ultimately, rather than help to smooth a financial shortfall, excessive overdraft fees leave banks' most vulnerable customers worse off, hitting lower income communities and communities of color particularly hard. After draining hundreds or thousands of dollars from a customer's account, these fees often lead to checking account closure, driving many out of the banking system altogether and ultimately increasing the ranks of the financially disenfranchised.<sup>2</sup>

## ARGUMENT

### **I. BANKS, OFTEN BOLSTERED BY MISLEADING REPRESENTATIONS, HAVE USED THE RISE OF DEBIT CARDS TO SIPHON HUNDREDS OF BILLIONS OF DOLLARS FROM THEIR CUSTOMERS.**

#### **A. Banks' high-cost overdraft programs drain billions in total, and thousands from many individual families, each year.**

Financial institutions typically charge an overdraft fee when a customer's account balance lacks sufficient funds to cover a transaction, but the institution chooses to pay the transaction anyway. Overdraft fees can be triggered by debit

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<sup>2</sup> Some financial institutions permit certain customers to avoid high overdraft fees by linking their accounts to overdraft lines of credit or a credit card. Other customers may link their account to a savings account to have funds transferred into their checking account to cover overdraft transactions. These services typically are far lower cost than the fee-per-transaction model, but they typically are available only to those with relatively strong credit histories or available savings. Other checking account holders are relegated to a predatory product.

card point-of-sale (POS) transactions, ATM withdrawals, electronic bill payments, and paper checks.

Banks typically charge a fee of about \$35 for each individual overdraft transaction they pay, regardless of the size of the transaction. When there are multiple overdraft transactions, fees often reach hundreds of dollars per day. The bank repays itself the fees and the overdrafts from the account holder's next deposit, typically within only three days, and ahead of any other payments the consumer must make during the new pay cycle. Consumer Financial Protection Bureau ("CFPB"), *CFPB Data Point: Checking account overdraft*, at 22 (July 2014), <https://goo.gl/azocrR>. This combination of high cost and short repayment period creates financial quicksand for the small percentage of consumers who incur the majority of overdraft fees.

Debit card transactions have become the most frequent trigger of overdrafts. CFPB, *A Closer Look: Overdraft and the Impact of Opting-In* (Jan. 19, 2017), <https://goo.gl/hBgGCf>. Yet unlike for checks and electronic bill payments, a declined debit card costs a consumer nothing. There is no fee, from either the bank or the merchant, for a declined debit card transaction; thus, the bank cannot legitimately purport to be "protecting" the customer from any alternative cost, like a non-sufficient funds fee ("NSF fee," charged when a check or electronic bill payment bounces) or a penalty fee from the merchant. (Indeed, when debit cards

first came into use, banks typically declined all debit card transactions when there were insufficient funds; *see* section I.B, *infra*.) Moreover, debit card transactions are typically small. They cause an average overdraft of only \$20, yet trigger a grossly disproportionate average fee of \$35. Rebecca Borné & Peter Smith, *The State of Lending in America & Its Impact on U.S. Households: High-Cost Overdraft Fees*, Center for Responsible Lending, at 3 (July 2013) <https://goo.gl/9NWHnA>.

In the aggregate, fee-based overdraft programs like Capital One's drain nearly \$14 billion annually from bank customers—nearly twice what Americans spend on eggs annually (\$7.4 billion) and more than they spend on books, newspapers, and magazines combined (\$13.1 billion). Rebecca Borné, et al., *Broken Banking*, Center for Responsible Lending, at 5 (May 2016), <https://goo.gl/y2i7Je>.

More striking is what some individual households pay in these fees. CFPB, *Data point: Frequent Overdrafters*, at 34 (Aug. 2017), <https://goo.gl/1GNcuZ>. Nearly three-fourths of overdraft and NSF fees are paid by only 8% of account holders, who incur ten or more fees per year, with many of those customers paying far more. *CFPB Data Point*, at 12. CFPB recently found that the *median* number of overdraft fees (excluding NSF fees) for one group of hard hit consumers was 37, or nearly \$1,300 annually, meaning some consumers pay much more still. CRL has

found that two million Americans pay *at least 20* overdraft fees annually, translating to \$700 *or more* annually. Borné & Smith, *The State of Lending in America*, at 12. (This figure does not include NSF fees, which drive costs to families higher.) Particularly for low-income families, \$700 a year in bank penalty fees can put crucial basic necessities out of reach.

And these fees often occur sporadically and unpredictably throughout the year. A single negative balance episode can trigger hundreds of dollars in fees in just a few days. For example, CRL has observed one consumer who was initially charged a \$35 overdraft fee for a \$4.17 purchase on one day followed immediately by fees for additional small-dollar purchases over the next several days. On a total of \$128 dollars in overdrawn funds, the consumer was charged \$210 in overdraft fees. Of this, \$105 was levied for three purchases of less than \$5 each. Borné, et al., *Broken Banking*, at 7. *See also* The Pew Charitable Trusts, *Overdrawn: Persistent Confusion and Concern about Bank Overdraft Practices*, at 6 (June 2014), <https://goo.gl/Exyduw> (a quarter of overdrafters reported paying \$90 or more in fees the last time they were overdrawn).

**B. Banks quietly replaced original courtesy overdraft coverage with a predatory business model, particularly on debit cards.**

It wasn't always this way. Overdraft coverage started as an ad hoc, occasional customer service whereby banks charged customers an overdraft fee to cover a paper check instead of bouncing it. But in the late 1990s and early 2000s,

banks began a concerted effort to grow fee revenue by dramatically increasing both the amount of the overdraft fee<sup>3</sup> and the number of overdraft fees paid.

Banks automated their ad hoc programs and hired consultants who provided specialized software and implementation strategies. The consultants publicly touted the dramatic increases in fee revenue their programs generated by implementing practices that caused more overdrafts. Moebs Services, Inc., *Overdraft – Introduction*, <http://www.moebs.com/services/no-bounce/overdraft-introduction> (last visited Aug. 7, 2017) (“overall fee income is increased by 200%”). Some consultants even offered the software at “no risk,” charging banks only a percentage of the increased fee revenue the software generated. Impact Financial Services, *How the [IMPACT Overdraft Privilege] Program Works* (last visited March 23, 2012) (on file with CRL).

By 2003, overdrafts were banks’ second most profitable “service” behind residential mortgages. Laura Thompson, *Bank Overdraft Programs Rankle Consumer Groups*, *American Banker*, May 20, 2003 (citing ABA Community Bank Competitive Survey Report, Feb. 2003). From 2004 to 2008, annual overdraft fees more than doubled from an already astounding \$10.3 billion to

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<sup>3</sup> From 1997 to 2007, the average overdraft fee banks charged increased from \$16.50, Federal Reserve Bulletin, *Retail Fees of Depository Institutions, 1997-2001*, 405, 409, to \$29, Bankrate, *2007 Courtesy Overdraft Study* (Dec. 19, 2017), <https://goo.gl/Saadkz>. Today, the average fee paid by consumers is \$35.

nearly \$24 billion.<sup>4</sup> Leslie Parrish, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years*, Center for Responsible Lending, at 4-6 (Oct. 2009), <https://goo.gl/PkxBTV>. Today, overdraft and NSF fees account for well over half (61%) of consumer deposit account service charges at large banks. CFPB, *CFPB Study of Overdraft Programs: A white paper of initial data findings*, at 15 (June 2013), <https://goo.gl/7vW4c8>.

At the same time, there was a shift in banks' attitudes toward overdrafting. Their official line remained that overdraft fees were intended to deter overdrafting, *see* Edward Yingling, President and CEO, American Bankers Association, Opinion, *Fees Are A Deterrent: Banks Offer Several Ways To Keep Consumers From Overdrawing*, USA TODAY, June 23, 2008, at 11A ("Just as a parking ticket discourages a driver from parking in a handicapped spot, overdraft fees are meant to discourage customers from overdrawing their accounts."). In reality, however, banks began to subtly encourage, and increasingly profit from, overdrafting: "Years ago, if you overdrew your account, we couldn't wait to close your account and throw you out. Now we have to go find those people and bring them in, because they are really valuable folks to have." Anthony Malakian,

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<sup>4</sup> The Federal Reserve's Regulation E amendments in 2010, discussed *infra*, led to a reduction in aggregate annual overdraft fees, but they have not curbed the fundamental problems with overdraft programs, *see CFPB Study of Overdraft Programs* at 61, and aggregate fees are again on the rise.

*Overdraft and ATM Fees Rise, As Economy Slumps*, American Banker, June 1, 2008 (quoting James Holly, President and CEO of Bank of the Sierra).

Increasing the number of overdrafts was achieved primarily by beginning to authorize debit card overdrafts. At their inception, debit cards were simply declined at the point-of-sale if customers lacked sufficient funds, at no cost to the consumer, who could then use another payment method or not make the purchase. Marc Anthony Fusaro, *Are “Bounced Check Loans” Really Loans? Theory, Evidence and Policy*, 50 Q Rev. of Econ. & Fin. 492, 493 n.4 (Feb. 2007), <https://goo.gl/gPyucB>. But by 2009, banks were routinely covering debit card overdrafts and charging a high fee for each one. Meanwhile, banks’ misleading marketing continued, and continues today, to promote debit cards as a non-debt alternative to credit cards. For example, Capital One’s website describes debit card use (as opposed to credit card use) as “not borrowing anything” and making it “more difficult to overextend yourself.” Capital One, *Credit Cards vs. Debit Cards*, <https://capt1.co/2v9vuLZ> (last visited Aug. 4, 2017). Although the page also notes that “overdrawing your account can result in high overdraft fees,” the overall net impression of the disclosure is that debit cards are the non-debt alternative to credit cards.<sup>5</sup>

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<sup>5</sup> Capital One’s website also includes a link to a chart with the following statements, inaccurate for a customer whose debit card transactions can trigger overdraft fees: that with debit cards, “you can really only spend the money you

This change was unexpected and unwanted. Fed. Reserve Board, Electronic Funds Transfers Final Rule, 74 Fed. Reg. 59033, 59035 (Nov. 17, 2009) (consumer testing found that “many customers are unaware” that they can overdraw with their debit card); Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, Center for Responsible Lending, at 3 (Apr. 16, 2008), <https://goo.gl/CwGveF> (80% of consumers would rather have their debit card transaction declined than covered for a fee).

**C. Banks have long compounded harm to consumers with additional deceptive practices, including manipulating transaction posting and available balance disclosures.**

Banks’ efforts to maximize overdraft fees did not stop there. Notoriously, banks began to routinely reorder debit card transactions from largest to smallest in order to deplete the account more quickly and trigger more overdraft fees. FDIC, *FDIC Study of Bank Overdraft Programs*, at 11 (Nov. 2008), <https://goo.gl/Ma3ZD1>; Consumer Federation of America, *Survey: Sixteen Largest Bank Overdraft Fees and Terms*, at 5 (updated July 31, 2009), <https://goo.gl/ebrnBN> (most large banks posted largest to smallest). But the justification for this practice—that it benefited customers by helping to ensure that

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have available to you” and that you have a “spending limit” of “[h]owever much is in the bank account connected to the card.” Michigan State University, *Do you know the difference between debit and credit cards* (Sept. 29, 2015), [http://msue.anr.msu.edu/news/debit\\_cards\\_versus\\_credit\\_cards](http://msue.anr.msu.edu/news/debit_cards_versus_credit_cards) (last visited Aug. 4, 2017).

larger, and thus likely more important, transactions, were paid—was debunked. Once the bank elected to authorize a debit card transaction, it was required to pay the transaction under the “must pay” rules, so *all* authorized debit card transactions were paid, and the only actual benefit of reordering was higher overdraft fee revenue for banks. *See, e.g., Gutierrez v. Wells Fargo*, 730 F.Supp.2d 1080 (N.D. Cal. 2010). Banks paid hundreds of millions of dollars related to lawsuits challenging this practice. National Consumer Law Center, Consumer Banking and Payments Law § 2.6.3.9.2.2 (5<sup>th</sup> ed. 2013), *updated at* [www.nclc.org/library](http://www.nclc.org/library).

In addition, banks misled consumers with the balance disclosed as “available” by including funds that the consumer clearly did not have and that, if accessed, would trigger overdraft fees. This was so problematic that the Federal Reserve enacted a rule requiring that the first balance shown be one that did not include funds available only through overdraft. Fed. Reserve Board, Truth in Savings Final Rule, 74 Fed. Reg. 5584 (Jan. 29, 2009); *see also* NCLC Manual, Consumer Banking and Payments Law, §2.6.3.9.1.

Indeed, and important to the case at issue, banks have long used the opacity of a customer’s true available balance as both sword and shield. They assert that the customer (not the bank) is in the best position to know his or her account balance, as though it should be a simple matter. Yingling, *supra*. Yet they also claim that the complexity around transaction processing prevents the bank from

being able to ensure an accurate “available balance” disclosure. American Bankers Association, *Comment Letter on Proposed Changes to Regulation DD*, at 9 (July 18, 2008), <https://goo.gl/ZJM1qa>.

The reality is that misleading disclosures related to available balances, like Capital One’s in this case, Section II, *supra*, exacerbate confusion around overdraft practices and often leave consumers surprised that they became overdrawn. A review of consumer complaints filed with the CFPB finds that confusion over the available balance is the most frequent overdraft-fee related complaint. Borné, et al., *Broken Banking*, at 8-9. Regulators have recognized this reality, noting that “consumers often lack information about key aspects of their account” and, for example, “cannot know with any degree of certainty when funds from a deposit or a credit from a returned purchase will be made available.” Fed. Reserve Board, Department of the Treasury—Office of Thrift Supervision, National Credit Union Administration, *Unfair and Deceptive Practices, Proposed Rule*, 73 Fed. Reg. 28904, 28929 (May 19, 2008).

#### **D. Banks responded to new regulations with new misleading representations.**

In 2010, the Federal Reserve took modest steps aimed to address overdraft fees on debit cards. It established requirements that banks not impose overdraft fees on debit cards without obtaining account holder consent (a nominal, one-time

“opt-in”). Fed. Reserve Board, Electronic Funds Transfers Final Rule, 74 Fed. Reg. 59033 (Nov. 17, 2009).

Banks responded to these rules with new misleading practices, launching a full-scale marketing assault to obtain customer “opt-ins.” Banks again relied on consultants, who promised to “[s]natch bank revenues from the jaws of Regulation E.” CRL, *Banks Target, Mislead Consumers as Overdraft Deadline Nears*, at 3 (Aug. 5, 2010), <https://goo.gl/oXTEmA> (citations omitted).

Banks used deceptive disclosures claiming overstated or fictional consequences of not opting in; obscured the availability of lower cost overdraft options; and targeted customers who had overdrawn most frequently, whom consultants called “frequent fliers.” Consultants even suggested offering customers cash for opting-in. *Id.*

Subsequent research found that those who “opted in” did so based largely on the misconceptions banks aggressively pushed. CRL, *Banks Collect Overdraft Opt-ins Through Misleading Marketing* (April 2011), <https://goo.gl/gHwdzX> (most account holders who opted in believed: (1) that opting-in to debit card overdraft coverage would prevent their paper checks from bouncing (it would not); or (2) that they would incur a fee if they did not opt-in and their debit card transaction were declined (they would incur no fee)). Nearly half of consumers who opted-in

did so simply to stop the aggressive opt-in solicitations via mail, phone, email, in-person, and on-line. *Id.*

The deception persists today. The CFPB has taken two recent actions against banks for using misleading sales tactics to obtain “opt-ins.” CFPB, Press Release, *[CFPB] Orders Santander Bank to Pay \$10 Million Fine for Illegal Overdraft Practices: Bank Deceptively Marketed Its Overdraft Service to Consumers, Violated “Opt-in” Rule*, July 14, 2016, <https://goo.gl/EDjfJ9>; CFPB, Press Release, *CFPB Sues TCF National Bank for Tricking Consumers Into Costly Overdraft Service: Bank Obscured Fees, Adopted Loose Definition of Consent to Preserve Overdraft Revenue*, Jan. 19, 2017, <https://goo.gl/jseDrs>.

Researchers have found that debit card overdraft fees remain unexpected and unwanted. For example, over half of consumers who had been charged an overdraft fee on a debit card transaction never recall having “opted-in,” Pew, *Overdrawn*, at 5, and more than two-thirds of those who have paid a debit card overdraft fee would have preferred to have had their transaction declined than to have had it approved for a \$35 fee. *Id.* at 10.

**E. The excessive size of the fee is the engine that drives banks’ deceptive practices.**

As noted earlier, the size of the overdraft fee has more than doubled since 1997, even as the cost of processing overdrafts has declined with greater

automation. This outsized fee creates a strong and perverse incentive for banks to encourage overdrafts with additional unfair and deceptive practices.

The \$35 average fee is vastly disproportionate to the cost to the financial institution of covering the transaction. The risk of loss to the bank—which is the highest bank cost involved in overdraft programs—is small. CFPB research found that the amount banks charged off from unpaid overdrafts represented only 14.4% of net overdraft fees. *CFPB Study of Overdraft Programs*, at 17. This statistic is unsurprising since the bank repays itself first from the customer's next incoming deposit. While the cost of charge-offs does not include processing and administrative costs, estimates of such costs range from 54 cents to \$3.50. Chi Chi Wu, *Restoring the Wisdom of the Common Law: Applying the Historical Rule Against Contractual Penalty Damages to Bank Overdraft Fees*, National Consumer Law Center, at 6 (April 2013), <https://goo.gl/p25SGA>. Even at the high end, this translates to less than \$10 of costs to the bank, which means the average overdraft fee of \$35 produces a profit of over \$25.

The \$35 fee is particularly unreasonable on debit card transactions because the typical debit card overdrafts are small and banks encourage, rather than deter, debit card overdrafts—even those they could easily decline at no cost to the customer.

Excessive penalty fees like overdraft fees are inconsistent with the anti-penalty doctrine under the common law of contracts because they far exceed the cost to the bank of “breach.” Wu, *Restoring the Wisdom of the Common Law*, at 19-20. This is especially so when the bank is able to prevent the “breach” entirely, and even still when its practices, and misleading representations of those practices, actively promote “breach.” *Id.*

## **II. CAPITAL ONE HAS ENCOURAGED OVERDRAFT FEES WHILE MISREPRESENTING THE CIRCUMSTANCES UNDER WHICH THEY ARE CHARGED.**

### **A. Capital One has an aggressive high-cost overdraft program on debit cards and is expanding it to previously safe accounts.**

Capital One has a high-cost overdraft program and is expanding it to accounts that were previously safe from overdraft fees. Charging high overdraft fees on debit card transactions is a widespread problem, but it is not universal. Some large banks have taken a different course. Three of the nation’s eight largest banks do not seek customer opt-ins to debit card overdraft fees on both point-of-sale transactions and ATM withdrawals. Citibank does not charge overdraft fees on debit cards at the point-of-sale or ATM, and Chase does not charge them at the ATM. Bank of America stopped point-of-sale overdraft fees in response to the Federal Reserve’s rule, citing consumer preference. Andrew Martin, *Bank of America to End Debit Overdraft Fees*, N.Y. Times, Mar. 9, 2010, <http://nyti.ms/2weAZGH> (“What our customers kept telling me is ‘just don’t let

me spend money that I don't have . . . .’ We wanted to help them avoid those unexpected overdraft fees” (quoting Susan Faulkner, deposit and card product executive)).

Capital One, on the other hand, is expanding its high-cost overdraft practices to previously safe accounts. In 2012, Capital One acquired ING Direct, which offered a checking account with no high-cost overdraft fees. Capital One continued to operate this product, which it calls “360 Checking,” with no high-cost overdraft fees until approximately this year. Today, it is marketing a high-cost overdraft program to customers with 360 accounts in an effort to sweep them out of safe products and into its high-cost program. The Bank labels the program “Next Day Grace” because it charges no fee for overdrafts that last only one day (Capital One, *Account Disclosures*, <https://capt11.co/2vKvK1n> (last visited Aug. 7, 2017)), but after one day, the charge is \$35 per overdraft transaction, up to \$140 per day. It labels the program as “NEW!” in its marketing materials. Capital One Marketing Email, on file with CRL. It also promotes overdrafts on debit card transactions, in particular, by calling the overdraft program on checks and electronic ACH transactions “Next Day Grace: Standard” and overdraft on all transactions, including debit card transactions, “Next Day Grace: Plus,” as though that’s the better value. Indeed, while the CFPB is urging banks to begin offering accounts without high overdraft fees, *see* CFPB, Press Release, *CFPB Takes Steps to*

*Improve Checking Account Access* (Feb. 3, 2016), <https://goo.gl/s8AoR3>, Capital One is moving in the opposite direction.

**B. Capital One’s account agreement language misrepresents its practice.**

Capital One’s account agreement states that an overdraft occurs when it “elects to pay” a transaction that exceeds a customer’s available balance. A reasonable consumer would understand this contract language to mean that the account balance that determines whether an overdraft fee is charged is the balance when the purchase is made. Those more steeped in the mechanics of electronic payments would understand the contract language to mean precisely the same. There is only one moment when Capital One—or any other financial institution—may “elect to pay” a debit card transaction: when it chooses to authorize a transaction at the time of purchase. While the merchant may not present the authorized transaction to the bank for settlement until a few days later, Capital One—or any other financial institution—*must pay* the transaction at that time, regardless of whether there are sufficient funds in the account. *See Electronic Funds Transfers Final Rule*, 74 Fed. Reg. at 59046; *CFPB Supervisory Highlights*, at 8 (Winter 2015), <https://goo.gl/9bV497>. Thus, by charging overdraft fees on transactions that the bank *elected to pay* when the available balance was sufficient, but that later settled against negative funds, Capital One led consumers to believe it

would do one thing while doing the opposite, inflicting significant financial hardship on affected customers in the process.

This sort of misrepresentation is not new—and it is clearly deceptive. In a recent CFPB report on its supervisory and examination procedures, the agency discusses three deposit account-related findings its examiners made during the period. *Id.* All three involve misleading representations related to overdraft fees triggered even when the available balance at authorization showed positive funds—scenarios similar to, or the same as, the issue in this case. In each instance, CFPB deemed the disclosures deceptive.

**C. Capital One’s other disclosures and marketing reinforce its misleading account agreement language.**

Capital One’s other disclosures and marketing reinforce its misleading account agreement language, bolstering the overall net impression that overdraft fees are not charged when debit cards are authorized with a sufficient available balance. (*See* Plaintiff/Appellant’s brief for examples additional to those discussed here.)

The Bank’s Electronic Funds Transfer Agreement states: “If we authorize the transaction, the funds will be debited from your primary checking account immediately or a hold may be placed on your account for up to several days after the purchase transaction has occurred.” JA 53. Along the same lines, the Bank’s web pages promoting debit cards state: “[W]ith a debit card, the store where you’re

shopping is paid with money deducted directly from your account *when the transaction goes through*” (emphasis added) and “Each time you use the [ATM or debit] card, the money is deducted—almost immediately—from your account. All of your transactions will be listed on your monthly statement—which is a great [sic] to help you keep track of your spending”). Capital One, *Credit Cards vs. Debit Cards*, <https://capt1.co/2v9vuLZ> (last visited Aug. 4, 2017); Capital One, *Types of Services: ATM and Debit Cards*, <https://goo.gl/eUu8Hf> (last visited Aug. 4, 2017).

These representations are examples of many that banks, including Capital One, have long made promoting debit cards as substitutes for cash. Banks introduced and continue to market debit cards as equivalent to, or a substitute for, cash, *see* VISA Debit Card Advertisement at <http://www.youtube.com/watch?v=V-L5QGllGfU> (last visited Aug. 7, 2017), and tout debit cards as having the added advantage (over cash) of allowing customers to track their purchases. *See, e.g.,* Chase, *Chase Debit Cards*, <https://www.chase.com/checking/debit-cards> (last visited Aug. 7, 2017) (debit cards are “[s]afer than cash,” and allow you to “[s]tay in control of your finances” by “review[ing] each debit card purchase in detail.” And indeed, consumers often believe that using their debit card is a substitute for cash. Borzekowski, et al., *Consumers’ Use of Debit Cards: Patterns, Preferences and Price Response*, at 10 (April 2006), <https://goo.gl/Nb1GAM> (noting that by

2004, nearly half of debit card users viewed debit cards as a substitute for cash). It is thus reasonable for consumers to expect debit cards to work similarly to cash, including in the chronological reduction of funds from their account balance as transactions are made.

**D. Plaintiff's overdrafts at issue in this case would have been paid even if Capital One had not obtained her "opt-in," but she would not have been charged any associated fees.**

Like all or most banks that charge debit card overdraft fees, Capital One has gotten "opt-ins" from some of its customers, and not from others. At the time of authorization—the only time any bank may make an "election" about payment—Capital One treats these two groups of customers the same if their account has sufficient funds: It authorizes the transaction. If the account lacks sufficient funds at settlement, however, the two groups are treated differently. The Bank pays the transaction because it has no election—it must. But customers who are not "opted in" are charged no fee for the overdraft because Regulation E's "opt-in" rule prohibits it, while customers opted-in, like Plaintiff, are charged \$35 per overdraft. *See* CFPB, *Data Point: Frequent Overdrafters*, at 29-30.

This differing treatment reinforces that the election of whether a transaction gets paid is clearly at authorization. It also illustrates that the "opt-in" status that banks push so hard often provides no benefit, and only additional fees. Had

Plaintiff not opted-in, her overdrafts at issue here would have been paid anyway, and they would have triggered no fees.

Capital One again uses misleading disclosures in its description of its overdraft program, including opting-in. A review of its website on overdraft “protection” could easily leave a reasonable customer believing that “opting-in” to overdraft fees on debit card transactions will serve to avoid a non-sufficient funds (NSF) fee from a declined debit card transaction (it would not, since there is no such fee), as it states: “Most banks charge a fee (usually \$25–\$35) if you have insufficient funds for a check, debit or ATM transaction. It is sometimes called a ‘non-sufficient funds’ or “‘NSF’ fee.” Capital One, *Overdraft Protection*, <https://capt11.co/2w1FOIC> (last visited Aug. 7, 2017). Capital One’s disclosures also imply opting in to debit card overdrafts will protect the customer from a bounced check (it would not, as the “opt-in” rule does not apply to those transactions).

### **III. UNFAIR OVERDRAFT PRACTICES STACK THE DECK AGAINST CONSUMERS, CAUSING LONG-TERM HARM TO BANKS’ MOST VULNERABLE CUSTOMERS.**

#### **A. Many customers try desperately to avoid overdrafts before being struck by disproportionate fees.**

Last year, CFPB made public the complaint narratives consumers have filed with the agency related to checking accounts, offering a qualitative look at consumer experiences with overdraft fees. One of the most salient themes within

these complaints is difficulty avoiding overdrafts even when consumers tried desperately to avoid them and, often, believed they had. The most common complaints were those where customers believed, based on an actual review of their available balance, that funds were available for transactions they made, but later learned the transactions had triggered overdraft fees. Borné et al., *Broken Banking*, at 8. This is the exact situation at issue in this case, where customers' reasonable expectations about their ability to avoid overdraft fees were based not only on the plain meaning of "available balance" but on Capital One's misleading representations.

**B. Excessive overdraft fees hit lower income consumers hardest and drive many consumers from the banking system altogether.**

Lower income consumers pay a disproportionate share of overdraft fees. *FDIC Study of Overdraft Programs*, at v; The Pew Charitable Trusts, *Heavy Overdrafters: A financial profile*, at 4-5 (Apr. 2016), <https://goo.gl/wdNRHF> (nearly 70% of heavy overdrafters make less than \$50,000 annually, and nearly one in four pay at least a week's worth of wages in overdraft fees annually). And excessive overdraft fees cause customers with low or fixed incomes "[s]erious financial harm." FDIC, Supervisory Guidance for Overdraft Protection Programs and Consumer Protection, FIL-81-2010 (Nov. 24, 2010).

Ultimately, overdraft fees drive many consumers out of the banking system altogether, often with long-term consequences. The Pew Charitable Trusts, *Why Americans Use Prepaid Cards: A Survey of Cardholders' Motivations and Views*, at 7 (Feb. 2014), <https://goo.gl/HgNTCS> (41% of prepaid card users who had ever had a checking account either closed their account or had an account closed by the institution because of overdraft or NSF fees); Pew, *Overdrawn*, at 6 (13% of consumers who had paid an overdraft fee in 2013 no longer had an account; 28% reported having closed a checking account in the past because of overdraft fees); *see also* Campbell, Martinez Jerez, and Tufano, *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*, at 6, 40-41, (June 6, 2008), <https://goo.gl/dkVM3d> (overdraft and NSF activity is the leading cause of involuntary account closure; banks may exacerbate closures to increase fees from penalty charges). Moreover, there is a high association between overdraft fees on debit cards and closed accounts. *CFPB Study of Overdraft Programs*, at 34 (customers whose debit cards could trigger overdraft fees were more than 2.5 times more likely to have their accounts involuntarily closed than those who were not “opted in” to debit card overdraft at several study banks).

The FDIC’s 2013 survey of unbanked and underbanked households indicates that approximately 778,800 households, and well over a million adults, who once had bank accounts are currently unbanked primarily because of high or

unpredictable fees. FDIC, *2013 FDIC National Survey of Unbanked and Underbanked Households*, at 4-6 (Oct. 2014), <https://goo.gl/Mdzxch>; *see also* Borné, et al., *Broken Banking*, at 13, n.19. It is likely that in the majority of those cases, the fees at issue were overdraft/NSF fees, as they are both the largest fees and comprise the majority of checking account service charge revenue.

Other data suggest even greater numbers of affected individuals. Once ejected from the banking system, the ejecting financial institution reports the account holder to a database, like Chexsystems or Early Warning Service (“EWS”)—a blacklist, essentially, where the consumer’s name remains for five years, often preventing the consumer from being offered a checking or savings account with another financial institution. *See* National Consumer Law Center and Cities for Financial Empowerment Fund, *Account Screening Consumer Reporting Agencies: A Banking Access Perspective* (Oct. 2015), <https://goo.gl/Zzcqu6>. Millions of consumers are affected, with one software company estimating that 2.3 million online applicants were denied accounts based on their Chexsystems, EWS, or similar screening report, in 2012 alone. *Id.* at 6. The large majority of consumers blacklisted are blacklisted because of overdrafts. Campbell, et al., *Bouncing Out*.

The costs of exclusion from the banking system can be profound. A banking relationship is important to household financial stability and asset-building. A checking account protects funds from physical risk, offers a relatively low-cost and

convenient way to conduct routine financial transactions, provides mechanisms for savings, and, for many families, is the gateway to a broader banking relationship that includes access to reasonably priced credit. *See* Borné, et al., *Broken Banking*, at 14.

### **C. Communities of color are disproportionately harmed by overdraft programs.**

Communities of color are disproportionately harmed by overdraft fees. Pew, *Heavy Overdrafters: A financial profile*, at 8 (African Americans are overrepresented among heavy overdrafters); Parrish, *Consumers Want Informed Choice* (frequent overdrafters are disproportionately non-white). Communities of color are also disproportionately unbanked. FDIC, *2015 FDIC National Survey of Unbanked and Underbanked Households*, at 15 (Oct. 20, 2016), <https://goo.gl/MUnc7L> (about 18 percent of African American and 16 percent of Latino households are unbanked, compared to three percent of white households).

Excessive overdraft fees, thus, make an already severe problem worse. Civil rights leaders have noted the cost of this financial disenfranchisement when urging banks to reform overdraft practices that harm the communities those leaders represent:

“Once a person is ejected from the mainstream financial system, it becomes difficult to reenter. And the unbanked and underbanked are more likely to end up with no choice except alternative financial services, which are often

more expensive and less secure than a responsible mainstream checking account.” Letters from Wade Henderson, President and CEO, Leadership Conference on Civil and Human Rights, et al., to John G. Stumpf, Wells Fargo (Nov. 29, 2010) and to Jamie Dimon, JP Morgan Chase (Nov. 29, 2010) (on file with CRL).

### CONCLUSION

For the reasons stated in Plaintiff-Appellant’s brief, and including the foregoing arguments in support by *amici curiae*, the district court should be reversed.

Respectfully submitted,

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August 7, 2017

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,843 words and thus complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it is no more than one-half the maximum length authorized by Local Rule 32.1(a)(4). In making this certification, the undersigned has relied upon the word count of the word-processing systems used to prepare this brief.

Respectfully submitted,

/s/ Rebecca K. Borné  
Rebecca K. Borné  
*Counsel for Amici Curiae*

August 7, 2017

## **CERTIFICATE OF SERVICE**

I hereby certify that I have delivered the foregoing to the Clerk of the Court for the United States Court of Appeals for the Second Circuit, and counsel for the Plaintiff-Appellant and Defendant-Appellee, via electronic mail on August 7, 2017.

/s/ Rebecca K. Borné  
Rebecca K. Borné