

No. 25-7070

**In the United States Court of Appeals
for the Ninth Circuit**

BLANCHE PHLAUM; JASON JONES,
individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

NAVY FEDERAL CREDIT UNION,
Defendant-Appellee,

and

DOES, 1-100 INCLUSIVE,
Defendants.

On Appeal from the United States District Court
for the Central District of California
Case No. 5:24-cv-00765-JGB-DTB (The Hon. Jesus G. Bernal)

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TABLE OF CONTENTS

Table of authorities.....	iii
Introduction.....	1
Jurisdictional statement	3
Statement of the issue	4
Statement of the case.....	4
I. Background.....	4
A. The Automated Clearing House	4
B. Hidden insufficient-funds fees are a major source of profit for banks	7
C. The only way consumers can learn about a financial institution’s fee practices is through accurate notice.	10
II. Factual Background	11
A. Navy Federal’s Contract.....	11
B. The <i>Lambert</i> Litigation.....	13
C. This Case	15
Standard of review.....	18
Summary of argument.....	18
Argument.....	20
I. Navy Federal’s contract unambiguously permits it to charge only a single insufficient-funds fee for each payment authorized by a customer	20
A. The ordinary meaning of the contract’s terms allows Navy Federal to charge only one fee per payment authorized.....	20

B.	Established principles of contract construction further demonstrate that the contract permits only a single insufficient-funds fee for each check or ACH payment.....	25
II.	Even if the contract does not unambiguously support Mr. Jones’s reading, the district court’s dismissal was erroneous.....	33
III.	The district court’s conclusion that the contract unambiguously permitted duplicate insufficient-funds fees was flawed	38
Conclusion.....		41

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Cases

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<i>Appalachian Regional Healthcare v. Cunningham</i> , 806 S.E.2d 380 (Va. 2017)	21
<i>Babcock & Wilcox Co. v. Areva NP, Inc.</i> , 788 S.E.2d 237 (2016).....	24
<i>Bryant v. Selective Insurance Co. of the Southeast</i> , 2011 WL 7493434 (Va. Cir. Ct. Feb. 3, 2011).....	30
<i>Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia</i> , 715 F.3d 501 (4th Cir. 2013).....	35
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<i>Coleman v. Alaska Federal Credit Union</i> , 2020 WL 1866261 (D. Ala. Apr. 14, 2020)	37, 38
<i>Dillon v. BMO Harris Bank, N.A.</i> , 856 F.3d 330 (4th Cir. 2017).....	4
<i>Doe I v. Wal-Mart Stores, Inc.</i> , 572 F.3d 677 (9th Cir. 2009).....	18
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<i>Encarnacion v. Workers Credit Union</i> , 2022 WL 16574051 (D. Mass. Apr. 14, 2022).....	38
<i>Erie Insurance Exchange v. EPC MD 15, LLC</i> , 822 S.E. 2d 351 (Va. 2019)	24, 31

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<i>Mahoney v. NationsBank of Virginia, N.A.</i> , 455 S.E.2d 5 (Va. 1995)	35
<i>Martin & Martin, Inc. v. Bradley Enterprises, Inc.</i> , 504 S.E.2d 849 (Va. 1998).....	35
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<i>Mawyer v. Atlantic Union Bank,</i> 2022 WL 1049311 (E.D. Va. Apr. 7, 2022)	38
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<i>Morris v. Bank of America,</i> 2019 WL 1274928 (W.D.N.C. Jan. 8, 2019)	38
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<i>Perez v. Mortgage Electronic Registration Systems, Inc.,</i> 959 F.3d 334 (9th Cir. 2020)	18
<i>Petrey v. Visions Federal Credit Union,</i> 2021 WL 2364971 (N.D.N.Y. June 9, 2021)	38
<i>Pettibone Wood Manufacturing Co. v. Pioneer Construction Co.,</i> 122 S.E.2d 885 (Va. 1961)	31
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<i>Roberts v. Capital One, N.A.,</i> 719 F. App'x 33 (2d Cir. 2017)	30, 33
<i>Roy v. ESL Federal Credit Union,</i> 2020 WL 5849297 (W.D.N.Y. Sept. 30, 2020)	38
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<i>Tims v. LGE Community Credit Union,</i> 935 F.3d 1228 (11th Cir. 2019).....	9

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12 C.F.R. § 707.3	32
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INTRODUCTION

Millions of Americans depend on checking accounts to keep funds on hand to cover their daily expenses. But the convenience these accounts provide consumers is, of course, not unlimited; if an account's balance is too low to cover a payment that the account holder attempts, the financial institution may decline it. And many financial institutions go a step further and impose a fee for that attempted payment. Such "insufficient-funds fees" have become a major source of profit for financial institutions at the expense of their most vulnerable customers.

Like many financial institutions, defendant Navy Federal Credit Union charges insufficient-funds fees when a consumer attempts a payment that is declined for insufficient funds. But it does not stop there. Not only does Navy Federal charge a fee if a customer makes a payment for which he has insufficient funds, it also charges *additional* fees each time a merchant resubmits a failed payment attempt—something many merchants do as a matter of course, without a consumer's knowledge.

That, of course, is not how reasonable consumers expect insufficient-funds fees to work. As federal regulators have cautioned, consumers cannot reasonably avoid fees they have no reason to anticipate. And because stacking insufficient-funds fees can cause substantial harm to consumers—especially those with low incomes—

financial institutions that employ these practices must, at a minimum, plainly explain their fee practices in their account agreements.

But Navy Federal’s contract with its customers says nothing that could reasonably alert a consumer to its practice of charging multiple insufficient-funds fees per transaction. It does just the opposite. Navy Federal’s contract promises to impose only “a” single fee for each declined payment—whether a “refused check” or “returned debit item.” Despite that promise, it takes advantage of the fact that merchants routinely resubmit payment requests multiple times and charges an additional fee for each request. By charging multiple fees where it promises to charge only one, Navy Federal breaches its contract with its customers.

The district court below nevertheless held that the contract unambiguously permits Navy Federal’s fee practices. In its one-paragraph analysis of the contract, the court did not look to the ordinary meanings of the terms “check” or “debit item” or how a reasonable consumer would have interpreted them. It didn’t consider the way those terms are used elsewhere in Navy Federal’s contract, or the fact that Navy Federal itself had modified its contract for other consumers to make its fee practices explicit. And it ignored evidence, alleged in the complaint, of how the relevant terms are used throughout the banking industry. Instead, the court simply announced that the terms “check” and “debit item” encompass “re-submitted requests” by a third party “based on the same check or debit.”

That’s wrong. Both inside and outside the banking industry, the terms “check” and “debit item” refer to an account holder’s instruction to pay from their *own* account—not a third party’s request for payment. So the district court incorrectly concluded that the contract unambiguously allows Navy Federal to charge multiple fees for a customer’s authorization of a single payment. The contract in fact unambiguously provides the opposite. And even if the contract were ambiguous, dismissal on the pleadings would be inappropriate. Resolution of any ambiguity is a question of fact, for which a court may consider extrinsic evidence. And ultimately, any remaining ambiguity must be construed strictly against Navy Federal, the drafter. This Court should therefore reverse the district court’s decision.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d) because this is a putative class action in which there are more than 100 members of the proposed class, at least one proposed member is a citizen of a different state than the defendant, and the aggregate amount in controversy exceeds \$5 million. ER-27. The district court entered an order dismissing all the plaintiff’s claims with prejudice on October 10, 2025. ER-4. Mr. Jones timely filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on November 6, 2025. ER-159. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because the district court dismissed all of the plaintiff’s claims with prejudice. ER-6.

STATEMENT OF THE ISSUE

Does Navy Federal’s contract, which authorizes “a fee” “for each refused check” or “returned debit item,” unambiguously permit it to charge multiple insufficient-funds fees for a customer’s authorization of a single payment?

STATEMENT OF THE CASE

I. Background

A. The Automated Clearing House

The Automated Clearing House (ACH) is “a transaction processing system that facilitates electronic transfer of funds between financial institutions, usually on behalf of account holders.” *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 332 (4th Cir. 2017).¹ Rather than needing to rely on paper checks, through ACH people can transfer money directly between bank accounts. See National Automated Clearing House Association (NACHA), *Direct Deposit & Direct Payment Benefits Consumers*, <https://perma.cc/MK38-VSG2>. Whether they realize it or not, most Americans use the system—to automatically deposit their paychecks, pay their bills, or transfer funds to someone else. *Id.*

Every ACH payment begins with the consumer, who must authorize the payment “in writing.” 15 U.S.C. § 1693e(a). Once a merchant receives a consumer’s

¹ Unless otherwise specified, all internal quotation marks, citations, alterations, and emphases are omitted.

authorization for a payment, its bank can submit a request for payment to the ACH network, which is forwarded by the network to the consumer's bank. *See* NACHA, *History of Nacha and the ACH Network*, <https://perma.cc/YJW5-Q6NY>. If all goes smoothly, the consumer's bank will then debit the consumer's account for the amount of the payment. *See id.*

But all does not always go smoothly. Rules set forth by the National Automated Clearing House Association (NACHA)—the organization that manages the ACH network—allow a bank to “return” an ACH payment request for many reasons. Stax Payments, *Understanding an ACH Return and How to Handle It*, <https://perma.cc/HW8A-TQAU>. Many of the reasons reflect technical problems with the request, such as the merchant's failure to properly fill out the required fields. Modern Treasury, *See What are ACH Return Codes* (May 14, 2022), <https://perma.cc/VPA3-Z4PP>. A bank may also return a payment request if, for example, the consumer has not authorized the transaction, or if there are insufficient funds in the consumer's account. *See id.* Under NACHA's terminology, a request for payment via the ACH network is called an “Entry,” and a bank's return of an “Entry” without payment is called a “Return Entry.” *See* ER-23 §§ 2.13, 8.37 [hereinafter *NACHA Operating Rules & Guidelines*].

When an entry is returned for insufficient funds, NACHA's rules allow a merchant to try again by “reinitiating” (or “re-presenting”) the returned entry. *See id.*

§ 2.13.4. To ensure that the receiving bank recognizes that the merchant's payment request is a "reinitiated" entry (rather than a new one), the transaction must include the label "RETRY PYMT." *See id.* § 2.13.4.2. Although a merchant may alternatively initiate a *new* entry to collect funds related to a returned entry, it can do so *only* if it first "obtains a new authorization" from the account holder "after" the entry is returned. NACHA, *ACH Operations Bulletin #1-2014: Questionable ACH Debit Origination: Roles and Responsibilities of ODFIs and RDFIs* 8 (Sept. 30, 2014), <https://perma.cc/3Z3Q-FV3U>. The rules prohibit a merchant from altering a previously returned entry to look like a new entry. *Id.*

Although re-presented requests for payment are "highly unlikely to succeed," they are nevertheless very common. CFPB, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 82 Fed. Reg. 54,472, 54,473, 54,508, 54,721 (Nov. 17, 2017). After a first request for payment is returned, payday lenders, for example, submit a second request 75% of the time and a third request 66% of the time. *Id.* at 54,489, 54,724. And although NACHA allows only two "re-presented" payment requests on the same returned entry, that requirement "is difficult to monitor and enforce." *Id.* at 54,728. Thus, a returned entry is commonly presented for payment three or more times. *See id.* at 54,721, 54,724.

B. Hidden insufficient-funds fees are a major source of profit for banks.

Checking accounts are supposed to provide consumers with a safe “entry point to the financial mainstream.” See PEW Center on the States, *Overdraft America: Confusion and Concerns About Bank Practices* 2 (May 2012), <https://perma.cc/E3PG-CEYL>. By enabling consumers to keep funds on hand to cover daily expenses, they function like cash rather than debt. See E. Napoletano, *When to Open Multiple Bank Accounts*, *Forbes* (Jul. 15, 2020), <https://perma.cc/99K8-PRNA>. And they provide an easy way to budget conservatively—enabling consumers to limit their spending to money they actually have as they get on their financial feet.

At least, that’s how they used to work. Historically, if a consumer’s account didn’t have enough money to cover a particular check or debit transaction, that transaction would simply be declined. See Marc Anthony Fusaro, *Are “Bounced Check Loans” Really Loans? Theory, Evidence and Policy*, 50 *Q. Rev. of Econ. & Fin.* 492, 493 n.4 (Nov. 2010). But just declining transactions wasn’t very profitable for financial institutions. So they started charging hefty fees instead—anytime a consumer might dip below their account balance.

Sometimes, financial institutions advance the consumer enough money to cover the overdraft—a service for which they typically charge an “overdraft” fee. See CFPB, *A Closer Look: Overdraft and the Impact of Opting-In* (Jan. 19, 2017), <https://perma.cc/V8ME-KKGF>. But other times, financial institutions simply

reject the payment. And although a financial institution in that case provides no service of value to the consumer, it will nevertheless often assess a charge in the same amount as the overdraft fee, called a “non-sufficient-funds” (NSF) or “insufficient-funds” fee. *See id.*

Some financial institutions even assess multiple insufficient-funds fees for a single transaction—charging a fee each time a merchant re-presents a failed ACH transaction for payment. Consumers “typically have no control over” whether a merchant will re-present “a returned ACH transaction or check.” OCC Bulletin 2023-12, *Overdraft Protection Programs: Risk Management Practices* (Apr. 26, 2023), <https://perma.cc/AHQ3-YUNX>. So consumers may be charged multiple fees for the same attempted transaction without any opportunity to prevent those duplicate fees from being charged. *See* CFPB, *Supervisory Highlights Junk Fees Update Special Edition* 4 (Oct. 2023), <https://perma.cc/2HLS-7P27>.

Today, overdraft and insufficient-funds fees make up a substantial share of the total revenues financial institutions generate through consumer checking accounts. *See* CFPB, *Study of Overdraft Programs* 14 (Jun. 2013), <https://perma.cc/DT3L-YBNG>. The typical overdraft fee is now about \$35—seven times what it once was. *See* CFPB, *Overdraft Lending: Very Large Financial Institutions*, 89 Fed. Reg. 13,852, 13,852 (proposed Feb. 23, 2024). That means the dollar amount of the fee imposed often exceeds the dollar amount of the overdraft. *See* CFPB, *Supervisory Highlights Junk Fees* at 7. And

“multiple fees may be assessed in a single day for a series of small-dollar transactions.” Fed. Reserve Sys., *Electronic Fund Transfers*, 74 Fed. Reg. 59,033, 59,034 (Nov. 17, 2009). So, before they know it, consumers can (and do) end up paying hundreds of dollars of fees.

Indeed, overdraft and insufficient-funds fees have become so profitable that financial institutions deliberately seek out customers they think are likely to incur them. *See, e.g.,* Anthony Malakian, *Overdraft and ATM Fees Rise, As Economy Slumps*, *American Banker* (June 1, 2008), <https://perma.cc/6FSB-EKPW> (“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.”). By 2007, some of the largest retail banks got nearly half of their revenue from these sorts of fees. *See* Yuki Noguchi, *Rising Bank Fees Squeeze Consumers*, *National Public Radio* (June 26, 2008), <https://perma.cc/98EV-LV86>. And by 2022, “overdraft and NSF fees comprised 53% of all fees that the institutions [the CFPB monitors] charged to consumer checking accounts.” CFPB, *Supervisory Highlights Junk Fees* at 8.

These practices come “at a significant and sometimes unexpected cost to consumers.” *Tims v. LGE Cmty. Credit Union*, 935 F.3d 1228, 1234 (11th Cir. 2019). And they place an extreme burden on those who live paycheck to paycheck, or “on the margins of solvency”—the very people who depend on checking accounts as an

avenue into the financial mainstream. Eric Halperin et al., *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts*, Center for Responsible Lending 2 (Jan. 25, 2007), <https://perma.cc/L5NM-DC56>. These vulnerable consumers pay a disproportionate amount of overdraft fees collected. *See* CFPB, *Study of Overdraft Programs* at 18; FDIC, *Study of Bank Overdraft Programs*, at IV-V (Nov. 2008), <https://perma.cc/XW2T-Y7AX>.

C. The only way consumers can learn about a financial institution’s fee practices is through accurate notice.

Over the past few years, federal agencies have recognized that financial institutions’ assessment of multiple insufficient-funds fees per transaction is often unanticipated and “unfair.” CFPB, *Supervisory Highlights Junk Fees* at 3–4. “This practice of charging an additional fee each time a single transaction (e.g., an ACH transaction or check) is presented for payment by a third party without further action by the customer” results in fees that “customers cannot reasonably avoid.” OCC Bulletin 2023-12; *see also* CFPB, *Supervisory Highlights Junk Fees* at 5 (concluding that such fees are not “reasonably avoidable by consumers, where consumers did not have a meaningful opportunity to prevent another fee after the first failed” attempt); National Credit Union Administration, *Consumer Harm Stemming from Certain Overdraft and Non-Sufficient Funds Fee Practices* (Dec. 2024), <https://perma.cc/E4CT-RDUN> (“Credit union members typically have no control over when a returned ACH transaction or check will be presented again”).

Relatedly, consumers do not expect banks to assess “an additional fee each time a third party resubmits the same transaction for payment after a bank returns the transaction for non-sufficient funds.” OCC Bulletin 2023-12. And when consumers have “no reason to anticipate” a fee practice, they have no way to “reasonably avoid” incurring the fees charged. CFPB, *Supervisory Highlights Junk Fees* at 9.

Financial institutions therefore must “clearly explain that multiple or additional fees ... may result from multiple presentments of the same transaction.” OCC Bulletin 2023-12. The failure to do so “has the potential to mislead reasonable customers” and can be considered an unfair and deceptive practice. FDIC, *Supervisory Guidance on Multiple Re-Presentation NSF Fees* 1 (Rev. June 2023), <https://perma.cc/ZKN6-L24Q>; see also National Credit Union Administration, *Consumer Harm Stemming from Certain Overdraft and Non-Sufficient Funds Fee Practices*.

II. Factual Background

A. Navy Federal’s Contract

Defendant Navy Federal Credit Union is among the many financial institutions that charge multiple insufficient-funds fees for a single transaction. But unlike other financial institutions, it does so even though its contract authorizes it to assess only a single fee per transaction.

Its contract with customers consists of several parts, including a document titled “Important Disclosures,” ER-66, and a “Schedule of Fees and Charges,” ER-77. *See also* ER-35. The “Important Disclosures” identify the circumstances in which Navy Federal charges fees for insufficient funds. *See* ER-69. It states that “Navy Federal is authorized to refuse checks that exceed funds available in the checking account.” *Id.* It then provides that “[a] fee will be assessed in the amount shown on Navy Federal’s current Schedule of Fees and Charges *for each refused check.*” *Id.* (emphasis added). The contract has a similar policy for ACH payments. Under the contract, “Navy Federal may return debits to the checking account (e.g. an ACH payment) if the amount of the debit exceeds funds available in the checking account.” *Id.* And once again, it provides that “[a] fee may be assessed ... *for each returned debit item.*” *Id.* (emphasis added). The Schedule of Fees and Charges, in turn, discloses Navy Federal’s “[n]on-sufficient funds fee for checks and ACH Debit” as \$29. ER-77.

Unlike Navy Federal, other financial institutions that “charg[e] more than one fee for the same item” “make clear in their contracts” that they do so. ER-40. One bank, for example, specifies that an insufficient-funds fee will be imposed “each time an item and transaction resubmitted for payment is returned,” and it clarifies that “[i]tems” returned for insufficient funds “may be resubmitted one or more times.” ER-40–41. Another’s contract provides that a consumer “may be charged more than

one ... [insufficient-funds] fee if a merchant submits a single transaction multiple times after it has been rejected or returned.” ER-41. Yet another financial institution specifies that a consumer “may be charged an [insufficient-funds] fee each time a check or ACH is presented to us, even if it was previously submitted and rejected.” *Id.*; see also ER-42.

B. The Lambert Litigation

1. In 2019, Ruby Lambert sued Navy Federal in the U.S. District Court for the Eastern District of Virginia on behalf of herself and a class of similarly situated Navy Federal customers. Complaint, *Lambert v. Navy Federal Credit Union*, No. 19-103 (E.D. Va. Jan. 28, 2019). She acknowledged that her contract with Navy Federal permitted the financial institution to reject a transaction and charge a \$29 fee if there were insufficient funds in her account to cover the transaction. *Id.* at ¶¶ 3, 5. But she alleged that Navy Federal assessed *multiple* charges for the same authorized payment. *Id.* at ¶¶ 1, 70–78. For example, in 2018, Ms. Lambert authorized a single \$97 ACH payment from her Navy Federal account to her insurance company. *Id.* at ¶ 22. When the insurance company submitted its request for payment, however, Navy Federal returned it for insufficient funds and charged Ms. Lambert a \$29 insufficient-funds fee. *Id.* at ¶ 23. Two days later—although Ms. Lambert did not ask for it or even know about it—the insurance company re-submitted the same request. *Id.* at ¶ 24. For that second submission, Navy Federal charged Ms. Lambert *another* \$29

insufficient-funds fee. *Id.* at ¶ 24. In total, Navy Federal charged her \$58 in fees for the single failed payment, well over half the amount of the payment she was trying to make. *Id.* at ¶ 25.

By charging multiple fees for one authorized payment, Ms. Lambert alleged, Navy Federal had breached its contract because that contract provided that “[a] fee may be assessed ... for *each returned debit item.*” *Id.* at ¶ 33. Although Navy Federal’s contract did not define the term “debit item,” Ms. Lambert alleged that the term could only mean one thing: A customer’s authorization of a payment from that customer’s account. *Id.* at ¶ 34. A single authorized payment, she explained, cannot reasonably be interpreted as a separate “debit item”—subject to a separate fee—every time a merchant requests payment on it. *Id.*

2. The district court disagreed. It granted Navy Federal’s motion to dismiss on the theory that the contract “unambiguously” authorized Navy Federal “to impose fees in the way that it did.” *Lambert v. Navy Federal Credit Union*, 2019 WL 3843064, at *3 (E.D. Va. Aug. 14, 2019). In the district court’s view, the term “debit item” includes a merchant’s “re-presentation of a previously rejected request.” *Id.* at *5. Without looking to any ordinary definitions of the term or considering industry usage, the court ruled that “debit item” as used in the contract “clearly refers to a transaction that *attempts* to withdraw money from the account.” *Id.* at *4. And so, the court held, the contract’s authorization of a fee for “each returned debit item”

unambiguously gives Navy Federal the right to charge a fee each time a debit request is denied for insufficient funds, even if the request is “by the same merchant, in the same amount, and for the same purpose.” *Id.* Ms. Lambert appealed to the Fourth Circuit. *Lambert v. Navy Federal Credit Union*, No. 19-1993 (4th Cir. Sept. 1, 2019).

After the appeal was fully briefed—but before the Fourth Circuit had the opportunity to rule—Navy Federal settled. ER-29. Although Navy Federal stopped short of admitting wrongdoing, it agreed to compensate its customers for its practice of charging multiple fees for one authorized payment, paying out \$16 million to class members who had been charged fees through October 27, 2020. ER-30, 104, 141. It also agreed to change its contract to unambiguously give it authority to charge the fee practices challenged in *Lambert*. The revised contract provides that Navy Federal will “assess a nonsufficient funds ... fee” “[e]ach time” it “refuse[s] a check” or “return[s] a debit” “for insufficient funds.” ER-38. Importantly, it expressly informs consumers that they “may be charged multiple [insufficient-funds] fees in connection with” a “single check” or “single debit” “that has been returned for insufficient funds multiple times.” *Id.*

C. This Case

1. Navy Federal, however, did not even attempt to start using the new contract until January 2021—two months after the end of the class period. ER-30, 38–39.² And during that gap, Navy Federal did not change its behavior. It continued charging duplicative insufficient-funds fees, despite the contract’s unambiguous promise that only “a” single “fee” would be charged for “each” “refused check” or “returned debit item.” ER-36–37, 43.

Jason Jones was one of Navy Federal’s customers during that gap. ER-27. On multiple occasions before Navy Federal started using its new contract, but after the period covered by the *Lambert* settlement, Navy Federal charged Mr. Jones a \$29 insufficient-funds fee not just for declined payments, but also for previously declined payments that merchants *resubmitted*. ER-43.

So he sued. Mr. Jones alleged, like Ms. Lambert had before, that Navy Federal breached its contract and violated its duty of good faith and fair dealing when it imposed multiple fees for a single transaction. ER-43, 55. Mr. Jones also sought to represent a class of other Navy Federal customers charged the same fees,

² Indeed, existing customers were not notified of any purported contract amendment at that time. ER-30–31, 40.

but only for the two-month period after the end of the *Lambert* class period and before the new contract took effect.³ ER-44.

3. The district court granted Navy Federal’s motion to dismiss under Rule 12(b)(6). Although it rejected Navy Federal’s argument that claims like Mr. Jones’s—asserting that Navy Federal violated its contract after the *Lambert* class period but before the imposition of the new contract—were released by the *Lambert* settlement agreement, ER-89, it concluded that “the plain language of the contract demonstrates no breach occurred,” ER-8. As the court saw it, the contract’s authorization of a fee for “each refused check” or “each returned debit item” unambiguously gave Navy Federal the right to charge a fee “every time a check or debit item is refused,” including “re-submitted requests based on the same check or debit.” ER-7.

The court’s one-paragraph analysis of the contract did not look to the definitions of the terms “check,” “debit,” or “debit item”—nor did it consider how a reasonable consumer would have interpreted them. It did not consider the way those terms were used elsewhere in Navy Federal’s contract. And it ignored the contracts from other financial institutions identified in the complaint—along with Navy

³ Mr. Jones also alleged that Navy Federal’s conduct violated certain common law and statutory rights that are not at issue in this appeal. ER-56–58, 61–62. A different Navy Federal customer, Blanche Phlaum, was a plaintiff in an earlier version of the complaint. ER-80. She was dismissed from the lawsuit, ER-94, and her claims are not at issue in this appeal either.

Federal’s own amended contract—which unambiguously authorize fees for re-presented payment requests. *See* ER-40–42. Instead, the court simply asserted that “[a] re-submitted check or debit is still, itself, a check or debit independent from the previously submitted check or debit.” ER-7. From that premise, the court concluded that the terms “each check” and “each ... debit” as used in the contract “cover ... resubmissions.” *Id.*

STANDARD OF REVIEW

This Court reviews de novo the dismissal of a complaint for failure to state a claim. *See Perez v. Mortg. Elect. Registration Sys., Inc.*, 959 F.3d 334, 337 (9th Cir. 2020). The court “accept[s] the factual allegations in the complaint as true and construe[s] them in the light most favorable to the plaintiff.” *Ryan S. v. UnitedHealth Grp., Inc.*, 98 F.4th 965, 970 (9th Cir. 2024) (alterations in original).

The Court also reviews de novo a district court’s interpretation of a contract, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009), and its determination “[w]hether contract language is ambiguous,” *Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000) (quoting *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000)). A court may grant a motion to dismiss in a contract dispute if the terms of the contract are unambiguous. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1118 (9th Cir. 2018). “If a contract is ambiguous,” however, “it presents a question of fact inappropriate for resolution on a motion to dismiss.” *Id.*

SUMMARY OF ARGUMENT

I. The district court’s conclusion that Navy Federal’s contract unambiguously allows it to charge multiple fees for a single transaction violates the bedrock principle of contract interpretation that a contract’s language must be given its ordinary meaning. Navy Federal’s contract entitles it to charge “a” fee for “each” “refused check” or “returned debit item.” The terms “check” and “debit item” both refer to payments a *customer* has authorized—not, as the district court believed, a third party’s re-submission of a previously declined payment. And the established trade meaning of the term “item”—which again conveys an order by the *account holder* to pay—reinforces this point. So the contract unambiguously permits Navy Federal to charge only one fee per check, and one fee per ACH payment authorized by a customer.

II. Even if there were some doubt about the contract’s meaning, the district court should have denied Navy Federal’s motion to dismiss. Mr. Jones’s interpretation of the terms “check” and “debit item” accord with their plain and industry-accepted meaning, making his reading, at a minimum, plausible. If Navy Federal’s reading is plausible too, the contract is, at best, ambiguous. And under Virginia law, resolving such ambiguity is a question of fact for which a court may consider extrinsic evidence, precluding dismissal on a motion for failure to state a claim. Indeed, even if the contract unambiguously supported Navy Federal’s reading, Mr. Jones’s allegations that other banking-industry contracts use the key

terms in this context in exactly the sense that he understood it here renders dismissal on the pleadings inappropriate. And ultimately, any ambiguity would need to be resolved against Navy Federal, the drafter. That’s why the vast majority of courts to consider similar breach-of-contract claims have denied financial institutions’ motions to dismiss. This Court should do the same.

ARGUMENT

I. Navy Federal’s contract unambiguously permits it to charge only a single insufficient-funds fee for each payment authorized by a customer.

Navy Federal’s contract unambiguously permits it to charge only a single insufficient-funds fee each time a consumer authorizes a payment—whether check or ACH—from their account. That’s clear from the contract’s plain language. In ordinary usage, “check” and “debit item” both refer to orders by an account holder to make a make a payment. That ordinary meaning is reinforced by other parts of the contract, which repeatedly link the concept of a “debit” to an account holder’s authorization of a payment. And it’s reinforced by common usage in the banking industry, which understands an account holder’s authorization to be a single “item,” no matter how many times a merchant resubmits it.

A. The ordinary meaning of the contract’s terms allows Navy Federal to charge only one fee per payment authorized.

Navy Federal’s contract says that “[a] fee may be assessed” for “each” “refused check” or “returned debit item.” ER-36–37, 69 (emphasis added). Although the

contract does not define “check” or “debit item,” the terms, both in ordinary use and in their more specialized banking sense, can mean only one thing—an account holder’s authorization of a payment from their account. Each time Mr. Jones authorized a payment, then, the contract allowed Navy Federal to charge him, at most, a single fee. When it instead on numerous occasions charged *multiple* fees based on that single payment authorization, Navy Federal breached the contract’s unambiguous terms.

1. Under Virginia law, courts interpreting an undefined term in a contract begin with the “usual, ordinary, and popular meaning” of the text. *Appalachian Reg’l Healthcare v. Cunningham*, 806 S.E.2d 380, 383–84 (Va. 2017). In ordinary use, a “check” is “an unconditional order in writing ... requiring the bank ... to pay on demand a sum certain in money to a designated person.” Check, *Black’s Law Dictionary* (12 ed. 2024). As that definition makes clear, a check is a physical object presented for payment—it is “in writing,” “addressed to a bank,” and “signed by the person giving it.” *Id.*; see also Check, *The Merriam-Webster.com Dictionary*, <https://perma.cc/TUS5-U5GX> (“a written order directing a bank to pay money as instructed”). So under the ordinary meaning of “check,” there is only one check per slip of paper presented for payment, even if that piece of paper is presented to a bank multiple times.

The term “debit,” for its part, is an “instruction that one gives to a bank to pay money directly from one’s account,” often, as with automatic bill payments, “to

a particular person, business, or other organization.” Debit, *Black’s Law Dictionary* (12th ed. 2024); *see also* Direct Debit, *Dictionary of Finance and Banking* (4th ed. 2008) (a “form of standing order given to a bank by an account holder to pay regular amounts” from a checking account); *see also* Debit, *The Merriam-Webster.com Dictionary*, <https://perma.cc/XXA2-ZBY5> (“a charge against a bank deposit account”). In that sense, a “debit” is a method of payment—an alternative to a check or credit card. Under that ordinary meaning, Mr. Jones made only one “debit” each time he authorized a payment, and Navy Federal was therefore permitted by the contract to charge him only one fee.⁴

2. That Mr. Jones made only one “debit” each time he authorized a payment is further supported by the fact that the contract refers not simply to “debits,” but “debit *items*.” “Item” in ordinary use is a “single article or unit in a collection, enumeration, or series.” Item, *American Heritage Dictionary* (5th ed. 2020). And the contract’s use of the term “item” elsewhere sheds further light on that term’s meaning throughout. When discussing the order in which Navy Federal posts transactions to an account, the contract lists several “items”—including “Automated

⁴ In an accounting sense, a “debit” is a “sum charged as due or owing” on an account ledger, especially “a decrease in the amount of money in a bank account, as because one has withdrawn money from it.” Debit, *Black’s Law Dictionary* (12th ed. 2024). That meaning, however, does not apply here. A “*returned* debit item” is not “charged as due” to a bank customer’s account and does not “decrease” the funds in that account. Rather, it is returned unpaid. Accordingly, neither Navy Federal nor Mr. Jones have argued for that reading of “debit” here.

Clearing House (ACH) debits,” “debit card transactions,” and “checks written.” ER-69. Those “items” share a common characteristic: They are instructions by an account holder to make payments from the account. The general term “item” thus must be understood in that sense too. *See Washington & Old Dominion Ry. v. Westinghouse Elec. & Mfg. Co.*, 89 S.E. 131, 133 (Va. 1916) (explaining that, under the “ejusdem generis rule, ... general terms of a statute or contract are subordinated by the sense of the preceding and connected particulars”). Put it all together: By stating that a fee can be charged for a “debit item,” the contract allows a fee to be charged only when an account holder instructs that a payment be made from her account.

3. The contract’s provision for fees based on ACH payments should also be read in light of the fees charged for checks that exceed an account’s available balance. *See Floyd v. N. Neck Ins.*, 427 S.E.2d 193, 196 (Va. 1993) (every provision of a contract “should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done”). The contract states that “[a] fee will be assessed ... for *each* refused check.” ER-69 (emphasis added). By tying the fee to “each” check, the agreement allows Navy Federal to charge only a single fee for a single bounced check—even if the check recipient presents the check for payment multiple times.

The same logic applies to ACH payments. Again, the contract provides that “[a] fee may be assessed ... for each returned debit item.” *Id.* A “re-presented”

request for payment is not, as a second check would have been, a *separate* authorized payment that happened to share the same merchant, amount, and purpose as the first. Rather, it is a resubmission of the *same* authorized payment request that had already been returned—and for which customers like Mr. Jones had already been charged a fee. That has to be true because ACH payments can be authorized only in writing, 15 U.S.C. § 1693e, and customers authorize only one payment per transaction, not two, NACHA, *History of Nacha and the ACHA Network*. Re-submitted ACH payments, on the other hand, are initiated by a third party without the consumer’s input or knowledge. *See* OCC Bulletin 2023-12. So a re-submitted ACH payment request is nothing like a second check that a customer could have written for the same amount to the same merchant. Rather, it is like an already-rejected check that the merchant submitted for payment a second time. And for that, the contract authorizes only a single fee.

4. In interpreting the disputed term “debit item,” the Court should also consider that term in the context of “the contract as a whole, striving not to ‘place emphasis on isolated terms’ wrenched from the larger contractual context.” *Erie Insurance Exch. v. EPC MD 15, LLC*, 822 S.E. 2d 351, 356 (Va. 2019) (quoting *Babcock & Wilcox Co. v. Areva NP, Inc.*, 788 S.E.2d 237, 244 (2016)). Here, that context makes clear that a “check” or “debit item” is a payment authorized by an account holder—not a third party’s failed attempt to obtain payment.

The contract repeatedly links the concept of a “debit” to the accountholder’s authorization. For example, the contract explains that an “ACH debit might be made as a result of an *authorization you gave* a third party to automatically transfer funds from your account to pay your monthly insurance premium, utility bills, or car payment.” ER-72 (emphasis added). The contract makes other references to the action of the accountholder (not of the merchant)—providing for example that, if Navy Federal declines to pay an overdraft, “*your transaction* will be declined and/or your check/ACH will be returned, unpaid.” ER-6g (emphasis added); *see also id.* (referring to “*your overdraft*” (emphasis added)). And, in discussing how an account’s available balance is determined, the contract lists “items” as including “scheduled Bill Pay transactions” and “checks that you have written but that have not yet cleared your account”—in other words, “transactions that have been *authorized* but may not yet have been processed.” ER-6g (emphasis added). The only possible meaning of “item” in that context is a payment “authorized” by the account holder, not a merchant’s request for payment. Nothing in the contract “even hints” at the possibility that Navy Federal might charge multiple fees based on a customer’s authorization of just one payment. *Cf. Williamsburg Power Co. v. City of Williamsburg*, 124 S.E. 215, 218 (Va. 1924).

B. Established principles of contract construction further demonstrate that the contract permits only a single insufficient-funds fee for each check or ACH payment.

In addition to the contract’s plain meaning, settled canons of contract law foreclose the district court’s reading of Navy Federal’s contract to permit multiple insufficient-funds fees based on a single check or ACH payment.

1. First, Virginia courts look to “the usage and custom of the trade” to establish the meaning of disputed terms. *Walker v. Gateway Milling Co.*, 92 S.E. 826, 827 (Va. 1917). Industry custom does not “add to or contradict the language used” in the contract, “but simply interprets and explains its meaning.” *Id.* at 827–28. That meaning is deemed to be incorporated into a contract “unless the terms of the writing clearly exclude” it. *Westmoreland-LG&E Partners v. Va. Elec. & Power Co.*, 486 S.E.2d 289, 293 (Va. 1997).

When it comes to technical terms, courts may look to the term’s “established trade meaning.” *Walker*, 92 S.E. at 827. An “item,” in its trade usage, is a “negotiable instrument or a promise or order to pay money handled by a bank for collection or payment.” Item, *Black’s Law Dictionary*; see also Va. Code § 8.4–104(9) (defining “item” the same way under Virginia’s version of the Uniform Commercial Code); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 716 (9th Cir. 2012) (using “debit item” in that sense). The term thus again conveys an order *by the account holder* to pay—not a third party’s resubmission of a previous payment request.

This industry usage is also consistent with the nature of a merchant’s second request for payment under the rules set forth by the National Automated Clearing House Association (NACHA). Under the rules’ terminology, a merchant’s request for payment via the ACH network, pursuant to an instruction for payment by the consumer, is called an “Entry,” which the rules provide “shall be deemed an ‘item’ within the meaning of” the Uniform Commercial Code. *See NACHA Operating Rules & Guidelines* § 8.37; *see also* Va. Code § 8.4-104(9). When a bank returns an entry, the rules allow a merchant to “reinitiate” the returned entry for payment—that is, they allow a merchant to present the *same* entry for payment a second or third time. *See NACHA Operating Rules & Guidelines* § 2.13.4.1. To ensure that the re-presented entry is treated as a resubmission rather than as a new entry, NACHA requires that it “contain the identical data as the original” and include the label “RETRY PYMT.” NACHA, *ACH Operations Bulletin #1-2014* at 6; *NACHA Operating Rules & Guidelines* § 2.13.4.2. NACHA’s rules specifically prohibit a merchant from altering a re-presented entry in an attempt to make it look like a customer has authorized a new payment request. *See* NACHA, *ACH Operations Bulletin #1-2014* at 6–7 (“Any modification of [the data] in an attempt to make an Entry appear as a new Entry rather than as a reinitiated Entry will be treated as a violation of the NACHA Rules.”). And NACHA’s rules prohibit a merchant from initiating a *new* entry to

collect funds related to a *returned* entry without first “obtain[ing] a new authorization” to do so from the account holder. NACHA, *ACH Operations Bulletin #1-2014* at 8.

The rules thus make clear that a “reinitiated” (or “re-presented”) entry is just another request for payment of the original entry, not a separate entry (i.e., “item”) that could trigger an additional insufficient-funds fee. In other words, if a debit item fails to go through due to insufficient funds, the merchant can try again. But there is only ever a single debit item, presented multiple times.

2. Examples of this industry usage abound. The complaint alleges that the term “item” is commonly used throughout the banking industry in a manner that directly contradicts the district court’s interpretation of Navy Federal’s contract. ER-40–42. Those allegations—which this Court at this stage of the case must accept as true—make clear the error of the district court’s conclusion that the term “debit item” in Navy Federal’s contract unambiguously covers such requests. In each of the bank contracts discussed in the complaint, the term “item” is used in a manner unambiguously contrary to the district court’s reading of the term here.

For example, one credit union’s contract unambiguously provides that the credit union charges a fee each time a check or ACH payment is presented—and it makes clear that an account holder’s authorization for payment is a single “item” no matter how many times a merchant requests payment on it. The contract states that a fee will be assessed “each time an item is presented for payment *even if the same item*

is presented for payment multiple times.” ER-42 (emphasis added); *see also id.* (“For example, if you wrote a check to a merchant who submitted the payment to us and we returned *the item* (resulting in a NSF fee), the merchant may re-present *the check* for payment.” (emphasis added)).

Banks do it too. One bank’s contract states that it may charge a fee “each time an item ... resubmitted for payment is returned due to insufficient ... funds.” ER 40–41. And another’s provides that the bank “cannot dictate whether or not (or how many times) a merchant will *resubmit a previously presented item.*” ER-41 (emphasis added). Those contracts all use “item” to refer to the transaction itself—not each individual presentment thereof. “[I]f each presentment” were itself a separate “item,” these contracts would become “redundant.” *Gardner v. Flagstar Bank, FSB*, 2025 WL 1721191, at *6 (6th Cir. June 20, 2025). *See* ER-40 (noting that one bank’s contract distinguishes between fees charged “per item” and those charged “per presentment”); ER-41–42 (highlighting one bank’s disclosure that “[a]n item may be presented multiple times for the payment”).⁵

⁵ There are numerous other examples of such usage. One bank’s contract, for instance, states: “We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.” BP Federal Credit Union, *Membership and Account Agreement* 4, <https://perma.cc/5UVC-JSg6>. Another likewise states: “If multiple attempts are made to submit a returned item for payment, multiple fees may be charged to you.” Citizens Bank, *Personal Deposit Account Agreement* 13, <https://perma.cc/5S2Y-7CN2>.

3. That established trade usage is backed up by the principle of Virginia contract law that the “words of a contract [are] given a reasonable construction, where it is possible, rather than an unreasonable one.” *Allemong v. Augusta Nat’l Bank*, 48 S.E. 897, 899 (Va. 1904); *see also Am. Realty Tr. v. Chase Manhattan Bank, N.A.*, 281 S.E.2d 825, 831 (Va. 1981) (“[A]ny interpretation adopted by the court must be reasonable and just.”). And the proper measurement of reasonableness is what a “reasonable consumer” would expect. *Bryant v. Selective Ins. Co. of Se.*, 2011 WL 7493434, at *4 (Va. Cir. Ct. Feb. 3, 2011); *see Restatement (Second) of Contracts* § 211(2) cmt. e (1981) (“[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it.”).

Here, a reasonable consumer would expect to be charged, at most, a *single* fee for a single payment that exceeds the available funds in their account, regardless of whether that payment is re-presented multiple times. ER-38. A “reasonable consumer likely considers” a payment request to be complete when it is made, “not when their bank’s back-office operations are completed.” *Roberts v. Capital One, N.A.*, 719 F. App’x 33, 37 (2d Cir. 2017). So no reasonable consumer would expect that they could be charged fees well after they made a payment, based on actions by the merchant out of their control. The district court’s reading of the contract to permit a customer’s single payment to incur multiple insufficient-funds fees thus “makes little sense from the account-holder’s point of view.” *Id.*

The district court’s reading runs afoul of this principle—that the contract must be interpreted in light of a consumer’s reasonable expectations—because it conditions the fees charged to its customers on the actions of third parties, over which the customers have no control. And “[a]n interpretation that would place one party at the mercy of the other should, if at all possible, be avoided.” *Pettibone Wood Mfg. Co. v. Pioneer Const. Co.*, 122 S.E.2d 885, 889 (Va. 1961). Here, Navy Federal charged Mr. Jones a fee for a merchant’s unilateral decision to resubmit its request for payment—a decision for which it provided Mr. Jones no warning or notice. *See* ER-43. If a merchant had requested payment a third (or fourth) time, under the district court’s interpretation, Navy Federal could have charged Mr. Jones again (and again). No reasonable consumer would expect they could incur fees for actions they did not take and were powerless to prevent.

4. Finally, the contract must be read in light of the heavily regulated nature of the banking industry. “In Virginia ... and generally in other jurisdictions throughout the country, it is settled that relevant statutes and regulations existing at the time a contract is made become a part of it and must be read into it just as if they were expressly referred to or incorporated in its terms.” *Gen. Elec. Co. v. Moretz*, 270 F.2d 780, 787 (4th Cir. 1959); *see also Erie Ins. Exch.*, 822 S.E.2d at 356–357 (interpreting a contract against the “background principles” of law governing limited liability

companies). Two principles of banking law shed light on the contract’s meaning here.

First, the Electronic Funds Transfers Act (EFTA) requires that ACH payments from a consumer’s account be authorized by the consumer “in writing.” 15 U.S.C. § 1693e(a). NACHA’s rules likewise prohibit a merchant from initiating a new entry to collect funds related to a returned entry without first “obtain[ing] a new authorization” to do so from the account holder. NACHA, *ACH Operations Bulletin #1-2014* at 8. In light of those requirements, the only reasonable reading of “debit item” is as a payment that the account holder has expressly authorized.

Second, the law requires financial institutions to clearly disclose fees charged on an account. EFTA requires that “any charges for electronic fund transfers or for the right to make such transfers” be disclosed in “readily understandable language.” 15 U.S.C. §§ 1693c(a), 1693c(a)(4). The Truth in Savings Act requires credit unions to “clearly and conspicuously” disclose the “amount of any fee that may be imposed ... and the conditions under which the fee may be imposed.” 12 C.F.R. §§ 707.3(a), 707.4(b)(4). And the OCC has recognized that a financial institution’s failure to “clearly explain” that multiple fees “may result from multiple presentments of the same transaction” can constitute a “deceptive” practice under federal law. OCC Bulletin 2013-12; *see also* FDIC, *Consumer Compliance Supervisory Highlights* 8–9 (Mar. 2022), <https://perma.cc/4WEN-NJ2H> (similar). A reasonable customer would thus

expect any fees authorized by a bank’s contract to be set forth in a clear and conspicuous manner. Navy Federal never informed Mr. Jones he could incur \$58 in fees (or more) as a result of a single transaction at all—let alone “clearly and conspicuously.”

As already explained, other financial institutions that charge multiple fees based on the same transaction disclose their practice of charging such fees unambiguously. *See supra* 28–29. There are many ways that Navy Federal could have described the circumstances giving rise to such a fee, but stating that it does so for “each returned debit item” is not one of them. *See Wilson v. Holyfield*, 313 S.E.2d 396, 398 (Va. 1984) (“It is the function of the court to construe the contract made by the parties, not to make a contract for them.”).

II. Even if the contract does not unambiguously support Mr. Jones’s reading, the district court’s dismissal was erroneous.

1. The plain language of Navy Federal’s contract unambiguously fails to give Navy Federal the right to charge multiple insufficient-funds fees for an account holder’s authorization of a single payment. But even if it didn’t, the contract’s language would—at the very least—demonstrate the contract’s ambiguity. Under Virginia law, “[c]ontract language is ambiguous when it may be understood in more than one way.” *Va. Fuel Corp. v. Lambert Coal Co.*, 781 S.E.2d 162, 166 (Va. 2016). Mr. Jones’s understanding of “debit item” as a transaction that *he* authorized and initiated is at least a reasonable understanding of the contract. *See Roberts*, 719 F. App’x at 36

(“[I]t would hardly be implausible for a consumer to think that ‘a transaction’” in a bank contract “refers to the consumer’s transaction with a merchant”). That has to be true because, as already explained, many financial institutions’ contracts use the same language in a way that unambiguously means exactly what Mr. Jones says it does. *See supra* 28–29. Nobody could claim that those contracts’ use of that language is unreasonable.

Indeed, even contracts that “on their face” seem “clear” may, “in connection with the business to which they pertain, be ambiguous.” *Walker*, 92 S.E. at 828. Under Virginia law, evidence of industry practice or trade usage is always relevant to show that a contract term has an “accepted and established trade meaning.” *Id.* at 827. And it is admissible for that purpose “even though the phrases or terms themselves are unambiguous.” *Doswell Ltd. P’ship v. Virginia Elec. & Power Co.*, 468 S.E.2d 84, 90 (Va. 1996); *see also Chas. H. Tompkins Co. v. Lumbermens Mut. Cas. Co.*, 732 F. Supp. 1368, 1374 (E.D. Va. 1990) (“In Virginia, it is settled beyond dispute that ... ambiguity is no longer a prerequisite before custom and usage may be used to supplement or explain a contract”). The district court accordingly erred by dismissing the complaint without considering Mr. Jones’s allegations of trade usage.

Resolution of such an ambiguity under Virginia law is a question of fact for which a court may consider extrinsic evidence. *See Providence Square Assocs., L.L.C. v. G.D.F., Inc.*, 211 F.3d 846, 850 (4th Cir. 2000); *Shoup v. Shoup*, 525 S.E.2d 61, 63–64 (Va.

2000). “If, from the evidence presented, reasonable people could draw different conclusions as to reasonable expectations of the parties, the question of the meaning of the contract” is “properly presented to a jury for resolution.” *Foreign Mission Bd. of S. Baptist Convention v. Wade*, 409 S.E.2d 144, 146 (Va. 1991). The need for “construction of ambiguous contract provisions” therefore “precludes dismissal on a motion for failure to state a claim.” *Martin Marietta Corp. v. International Telecomm. Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992).

Ultimately, “[i]n the event of an ambiguity in the written contract,” Virginia law provides that the “ambiguity must be construed against the drafter of the agreement.” *Martin & Martin, Inc. v. Bradley Enterprises, Inc.*, 504 S.E.2d 849, 851 (Va. 1998); *see also Cent. Tel. Co. of Virginia v. Sprint Commc’ns Co. of Virginia*, 715 F.3d 501, 517 (4th Cir. 2013). As the author of its form contract, Navy Federal could easily have written it to authorize fees for each third-party payment request. It clearly knew how—it revised its contract to unambiguously do so, expressly informing consumers in a subsequent version of the contract that they “may be charged multiple [insufficient-funds] fees in connection with a” “single check” or “single debit” that “has been returned for insufficient funds multiple times.” ER-38; *see supra* 15. But Navy Federal’s contract with Mr. Jones “did not so provide,” and under Virginia law that failure must be read strictly against it. *Mahoney v. NationsBank of Virginia, N.A.*, 455 S.E.2d 5, 9 (Va. 1995); *see also Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*,

505 F.2d 989, 1001 n.10 (2d Cir. 1974) (holding that contract modification was “evidence of the ambiguity” of the original contract).

2. For that reason, courts have consistently denied the efforts of financial institutions to dismiss disputes over the meaning of their insufficient-funds-fee practices at the pleadings stage. In *Gardner v. Flagstar Bank, FSB*, for example, the Sixth Circuit was confronted with a contract that permitted a bank to charge a fee “whenever a depositor’s available balance is insufficient ‘to pay an Item.’” 2025 WL 1721191, at *5. The contract stated that an “item” “means any order, instruction or authorization to pay, transfer or withdraw funds or money from [an] account.” *Id.* And the contract expressly permitted such a fee upon an item being “presented to” the bank. *Id.* at *6.

Even so, the court rejected the bank’s argument that its contract unambiguously permitted multiple insufficient-funds fees for a single transaction and denied its motion to dismiss. “Implicit in [the bank’s] reading,” the court observed, “is that a merchant can itself ‘order, instruct[], or authoriz[e]’ payment—in this case by representing a transaction.” *Id.* But, the court recognized, “[t]hat is not how a bank account normally works.” *Id.* Rather, “the *depositor* generally tells his bank to pay the merchant.” *Id.* A reasonable consumer therefore could “have fairly interpreted [the contract] to permit just one fee per transaction.” *Id.* at *7.

The contract in *Varga v. American Airlines Credit Union*—similar to the contract here—permitted the bank to assess “a fee for each item” for which the accountholder had insufficient funds. 2020 WL 8881747, at *5 (C.D. Cal. Dec. 1, 2020). Once again, the credit union argued that this contract language unambiguously permitted it to charge multiple fees on the same transaction. And once again, the court disagreed, concluding that the contract “could lead a consumer to believe that only one fee (indicated by the singular ‘a fee’) would be levied for each item the consumer attempted to purchase, not for each attempt by the merchant to process the transaction.” *Id.* at *5.

The court reached the same result in *Watson v. Suffolk Fed. Credit Union*, denying a credit union’s motion to dismiss where the contract said a fee may be assessed for “each check, draft, item, ... or any other electronic withdrawal or transfer transaction that is drawn on an insufficient available account balance.” 2022 WL 523543, at *1 (E.D.N.Y. Feb. 22, 2022). That provision, the court found, could “reasonably be interpreted to allow [the credit union] to charge only one [insufficient-funds] fee related to an ACH request by a customer”—“regardless of how many times the transaction is processed.” *Id.* at *4. *See also Coleman v. Alaska Fed. Credit Union*, 2020 WL 1866261, at *2–4 (D. Ala. Apr. 14, 2020) (finding ambiguous a contract providing that a “fee will be assessed for *each returned item*” (emphasis added)).

Those courts are not alone. *See, e.g., Johnson v. Flagstar Bank, NA*, 2024 WL 943944, at *3 (C.D. Cal. Jan. 22, 2024); *Encarnacion v. Workers Credit Union*, 2022 WL 16574051, at *3 (D. Mass. Apr. 14, 2022); *Mawyer v. Atl. Union Bank*, 2022 WL 1049311, at *1 (E.D. Va. Apr. 7, 2022); *Lamoureux v. Trustco Bank*, 592 F. Supp. 3d 14, 35–36 (N.D.N.Y. 2022); *Fludd v. South State Bank*, 566 F. Supp. 3d 471, 488 (D.S.C. 2021); *Roy v. ESL Fed. Credit Union*, 2020 WL 5849297, at *8 (W.D.N.Y. Sept. 30, 2020); *Petrey v. Visions Fed. Credit Union*, 2021 WL 2364971, at *5 (N.D.N.Y. June 9, 2021).⁶

Indeed, multiple courts have found contracts ambiguous even where the contract said the financial institution would charge an insufficient-funds fee whenever an item was “presented.” *See Gardner*, 2025 WL 1721191, at *6 (fee may be assessed whenever “an Item is presented to” the bank); *Smith*, 2021 WL 4173655, at *1 (fee may be assessed “[i]f a check, item, or transaction is presented without sufficient funds in your account to pay”); *Mawyer*, 2022 WL 1049311, at *2 (E.D. Va. Apr. 7, 2022) (similar); *Coleman*, 2020 WL 1866261, at *2 (fee may be assessed “[i]f available funds are not in the account when a debit is presented for payment”).

⁶ There’s more. *See, e.g., Smith v. Jovia Financial Credit Union*, 2021 WL 4173655, at *5 (E.D.N.Y. Mar. 3, 2021), *report and recommendation adopted by* 2021 WL 4173069 (E.D.N.Y. Sept. 14, 2021); *Wilkins v. Simmons Bank*, 2020 WL 7249030, at *1 (N.D. Ark. Dec. 9, 2020); *McNeil v. Capital One Bank, NA*, 2020 WL 5802363, at *2 (E.D.N.Y. Sept. 29, 2020); *Morris v. Bank of Am.*, 2019 WL 1274928, at *2 (W.D.N.C. Jan. 8, 2019), *report and recommendation adopted in relevant part by* 2019 WL 1421166 (W.D.N.C. Mar. 29, 2019).

The case law is “entirely lopsided.” *Gardner*, 2025 WL 1721191, at *6. The vast majority of courts to have considered the issue have held that contract provisions similar to Navy Federal’s are, at best, ambiguous—and have therefore denied financial institutions’ motions to dismiss breach-of-contract claims similar to Navy Federal’s.

III. The district court’s conclusion that the contract unambiguously permitted duplicate insufficient-funds fees was flawed.

Not only did the district court disregard the plain language of the contract, which unambiguously permits Navy Federal to charge only a single insufficient-funds fee per payment request. It went a step further, breaking from the consensus of other courts and holding that the contract unambiguously favored *Navy Federal’s* reading. Its reasons for doing so were deeply flawed.

1. The court’s reasoning—a single paragraph—is sparse. Without looking to common or trade definitions of the contract’s terms or considering how a reasonable consumer would have understood them, the court simply announced that the terms “check” and “debit item” include “re-submitted requests based on the same check or debit.” ER-7. From that premise, it concluded that Navy Federal’s contract permitted it to charge Mr. Jones a fee any time a request to withdraw money from his account failed for insufficient funds—even where those requests were resubmissions of previously declined transactions made without Mr. Jones’s knowledge. *See id.*

The definitions the court adopted do not accord with any ordinary use of the contract's terms. A company's resubmission of a request for payment is not an "instruction ... to pay money directly from one's account"—it is a *third party's* request to honor a *previous* such instruction. Debit, *Black's Law Dictionary*. And a "re-submitted request" by a third party is not a "debit *item*," which the contract makes clear encompasses only payment requests authorized by the accountholder himself. So a failed attempt by a third party to withdraw money from an account is not a "debit item" as that term is typically used.

The district court understood that the fee for ACH payments and checks must be understood the same way, but it reached the wrong conclusion on both. The court reasoned that "[a] re-submitted check or debit" is itself "a check or debit independent from the previously submitted check or debit." ER-7. That makes no sense. If a customer writes a second check to some merchant, that is a new, independent check. But if the merchant submits a bounced check to a bank a second time, it's hard to see how that resubmitted check could possibly be considered a new check "independent" from itself.

2. The sole support that the district court offered for its definition of "check" and "debit item" was *Lambert*. See ER-7 (citing *Lambert v. Navy Fed. Credit Union*, 2019 WL 3843064 (E.D. Va. Aug. 14, 2019)). In *Lambert*, the district court held that the term "debit item" clearly refers to a transaction that attempts to withdraw money from

the account.” *Id.* at *4. It therefore considered each “attempt” by a merchant to withdraw money to be a “debit item,” even though such attempts were made without the consumer’s knowledge or a new instruction to do so.

In the *Lambert* court’s view, because the contract lists “Automated Clearing House (ACH) debits” as one such “item,” it thought it was “clear ... that ACH debit requests, such as the two submitted by [the merchant], qualify as ‘debit items.’” *Id.* at *3. But the court did not explain how it read the contract’s reference to a *customer’s* ACH “debits” as unambiguously including a *third party’s* “debit request.” The court also relied on its belief that “[b]oth parties” in that case “agree[d] that an ‘item’ is a request or invitation for payment.” *Id.* That misses the point—the key question is *who* requested the payment. A “debit item” under the contract is a *customer’s* request for payment, not a request for payment by a third party. To the extent the plaintiff in *Lambert* conceded that a request for payment by *anyone* constitutes an “item” under the contract, Mr. Jones certainly has not.

Anyway, *Lambert* is an outlier. Court after court has rejected the position that contracts like Navy Federal’s unambiguously permit duplicate insufficient-funds fees. *See supra* at 36–38 & n.6 (collecting cases). This Court should do the same.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,051 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

March 3, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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