No. _____

IN THE

Supreme Court of the United States

BRANCH BANKING & TRUST COMPANY,

Petitioner,

v.

SEVIER COUNTY SCHOOLS FEDERAL CREDIT UNION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

John S. Hicks
Christopher E. Thorsen
Nicholas W. Diegel
BAKER DONELSON BEARMAN, CALDWELL BERKOWITZ, P.C.
211 Commerce Street, Suite 800
Nashville, TN 37201
(615) 726-5600

Thomas H. Dupree Jr.
Counsel of Record
Matt Gregory
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner

Question Presented

Whether the Federal Arbitration Act displaces a state common-law rule forbidding companies from adding an arbitration requirement to their standard-form contract with customers unless the contract already includes a dispute-resolution clause.

Parties To The Proceeding And Rule 29.6 Statement

Petitioner Branch Banking & Trust Company (BB&T) was the appellee in the Court of Appeals and is the defendant in the underlying action.

Respondents Sevier County Schools Federal Credit Union, Susanne Munson, Geoffrey Wolpert, Charles McGaha, Charlene McGaha, Robin Nichols, Gregory Nichols, Rex Nichols, and Sarah Morrison were appellants in the Court of Appeals and are the plaintiffs in the underlying action.

Pursuant to this Court's Rule 29.6, Petitioner states that:

Petitioner Branch Banking & Trust Company is now known as Truist Bank.

Truist Bank is a wholly owned subsidiary of Truist Financial Corporation, which is a publicly traded corporation.

Statement Of Related Proceedings

The proceedings directly related to this petition are:

Sevier County Schools Federal Credit Union, et al. v. Branch Banking & Trust Company, No. 3:19-cv-138 (E.D. Tenn.) (judgment entered January 10, 2020); and

Sevier County Schools Federal Credit Union, et al. v. Branch Banking & Trust Company, No. 20-5174 (6th Cir.) (judgment entered March 5, 2021).

Table of Contents

Page

Introduction 1

Opinions Below 3

Jurisdiction 3

Constitutional And Statutory Provisions Involved 3

Statement Of The Case 4

I. Background 4

II. This Lawsuit 7

III. The Sixth Circuit's Decision 8

Reasons For Granting The Petition 10

I. The Sixth Circuit's Opinion Conflicts With This Court's Precedent. 10

A. This Court Has Repeatedly Held That The FAA Displaces State-Law Rules That Disfavor Arbitration 11

B. The Sixth Circuit Enforced A State-Law Rule That Disfavors Arbitration 13

C. The Sixth Circuit's Disregard Of This Court's Precedent Warrants Summary Reversal 16

II. The Sixth Circuit's Decision Creates A Split Of Authority With The Supreme Courts Of Alabama And Mississippi. 17

III. This Case Presents A Question Of Exceptional Importance That Will Arise Frequently.. 19

Conclusion 20

Table Of Appendices

Page

APPENDIX A: Opinion and Judgment of the U.S. Court of Appeals for the Sixth Circuit (Mar. 5, 2021) 1a

APPENDIX B: Memorandum Opinion of the U.S. District Court for the Eastern District of Tennessee (Jan. 10, 2020) 38a

APPENDIX C: Order of the U.S. Court of Appeals for the Sixth Circuit Denying Petition for Rehearing En Banc (Apr. 7, 2021) 69a

Table Of Authorities

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 11

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) .... passim

Badie v. Bank of America,
67 Cal. App. 4th 779 (Cal. Ct. App. 1998) 1, 2, 8, 9, 14

DIRECTV, Inc. v. Imburgia,
577 U.S. 47 (2015) 17

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 11, 12, 15, 18

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 11, 12

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 19

Kindred Nursing Ctrs. Ltd. P'ship v. Clark,
137 S. Ct. 1421 (2017) 1, 12, 13, 14, 15

KPMG LLP v. Cocchi,
565 U.S. 18 (2011) 17

Lamps Plus, Inc. v. Varela,
139 S. Ct. 1407 (2019) 14

Marmet Health Care Ctr., Inc. v. Brown,
565 U.S. 530 (2012) 17

Nitro-Lift Techs., LLC v. Howard,
568 U.S. 17 (2012) 17

Perry v. Thomas,
482 U.S. 483 (1987) 12

Southland Corp. v. Keating,
465 U.S. 1 (1984) 9

SouthTrust Bank v. Williams,
775 So. 2d 184 (Ala. 2000) 18

Virgil v. Sw. Miss. Elec. Power Ass'n,
296 So. 3d 53 (Miss. 2020) 18, 19

Constitutional And Statutory Provisions

U.S. CONST. ART. VI, CL. 2 4

9 U.S.C. § 2 .... 4, 12

Other Authorities

A. Daniel Woska, *Arbitration Clauses in Consumer Retail Installment Sales Contracts After the* Green Tree Financial v. Randolph *Decision*, 55 Consumer Financial L.Q. Rep. 107 (2001) 15

T. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 Am. Rev. Int'l Arb. 233 (2007) 17

Introduction

The Federal Arbitration Act "requires courts to place arbitration agreements on equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (quotation marks omitted). Here, a divided Sixth Circuit panel held that an arbitration agreement was unenforceable based on a state common-law rule that forbids companies from adding arbitration provisions to their standard-form contracts with customers—unless the contract already contains a dispute-resolution provision. The Sixth Circuit's decision is directly at odds with this Court's recent arbitration decisions and with the law in other courts.

This case concerns petitioner BB&T's deposit agreement—a standard-form contract between the bank and its accountholders. Respondents signed a deposit agreement when they opened their bank accounts in the late 1980s and early 1990s. In 2001, BB&T modified the contract to include an arbitration provision. Respondents did not object to the change and maintained their accounts with BB&T for the next 18 years. When respondents sued BB&T in 2019 over an interest-rate reduction on respondents' accounts, BB&T moved to compel arbitration.

A panel of the Sixth Circuit, over a dissent by Judge Griffin, held the arbitration provision unenforceable. The panel adopted and enforced the anti-arbitration rule from *Badie v. Bank of America*, 67 Cal. App. 4th 779 (Cal. Ct. App. 1998), which demands a heightened showing of mutual assent before a contract may be amended to include an arbitration requirement. Following *Badie*, the Sixth Circuit held that companies may not unilaterally modify their standard-form contracts to require

arbitration—even pursuant to a contractual "change-of-terms" provision—unless the customer's *original* contract included a dispute-resolution provision that specifically "'alerted [the] customer to the possibility that the [company] might one day in the future invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer.'" Pet. App. 17a (quoting *Badie*, 67 Cal. App. 4th at 801) (emphasis omitted).

The Sixth Circuit's adoption of a rule that singles out arbitration agreements and subjects them to heightened contract-formation requirements conflicts with *Kindred Nursing* and other recent precedents from this Court holding that arbitration agreements cannot be "disfavored" or subjected to more demanding requirements than other contracts. The panel opinion did not cite, let alone distinguish, any of this Court's modern FAA precedents.

This Court's review is warranted for at least three reasons. *First*, the Sixth Circuit's decision stands in defiance of this Court's clearly established FAA precedent. *Second*, the Sixth Circuit's decision conflicts with decisions from other courts holding that, under the FAA, contractual amendments adding arbitration requirements cannot be subject to a more demanding standard than any other contractual amendment. *Third*, the question presented is exceptionally important because the increasing popularity of arbitration has led many companies to modify their standard-form contracts with consumers to require arbitration as a low-cost and expedient method of dispute resolution, yet the Sixth Circuit's decision calls into question the validity of these agreements that had long been understood as enforceable.

The Sixth Circuit declared a contractual amendment providing for arbitration to be unenforceable based on a state common-law rule that targets, disfavors, and disproportionately invalidates agreements to arbitrate. The petition for certiorari should be granted.

Opinions Below

The Sixth Circuit's opinion (Pet. App. 1a–35a) is reported at 990 F.3d 470 (6th Cir. 2021). The opinion of the United States District Court for the Eastern District of Tennessee (Pet. App. 38a–68a) is reported at 432 F. Supp. 3d 735 (E.D. Tenn. 2020).

Jurisdiction

The Sixth Circuit filed its opinion on March 5, 2021, and denied a timely petition for rehearing on April 7, 2021. Pursuant to this Court's March 19, 2020 and July 19, 2021 standing orders, the deadline for this petition for certiorari was extended to September 7, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions Involved

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Statement Of The Case

I. Background

Respondents are former and current BB&T accountholders who reside in Tennessee. Pet. App. 39a. In the late 1980s and early 1990s, they opened money-market accounts with First National Bank of Gatlinburg, the predecessor of petitioner BB&T. Pet. App. 39a–40a. Respondents allege that they were promised that the annual interest rate on the accounts would never fall below 6.5%. Pet. App. 3a.

When respondents opened their accounts, they signed the standard-form deposit agreement with First National. That contract did not require arbitration or contain a dispute-resolution provision. But it expressly allowed First National to change the terms of the contract after providing notice to accountholders. Pet. App. 4a. Specifically, the contract provided that:

> Changes in the terms of this agreement may be made by the financial institution from time to time and shall become effective upon the earlier

> of (a) the expiration of a thirty-day period of posting such changes in the financial institution, or (b) the mailing or delivery of notice thereof to the depositor by the notice in the depositor's monthly statement for one month.

Pet. App. 40a.

In 1992, First National announced that it was discontinuing the 6.5% money-market accounts, and gave accountholders various options for moving their funds to new accounts. Pet. App. 40a. Respondents transferred their funds to "Maintenance Accounts" that would continue earning 6.5% interest, but to which they could not add any new funds. Pet. App. 41a.

In 1997, First National merged with BankFirst of Tennessee. Pet. App. 41a. Four years later, BB&T acquired BankFirst and converted respondents' accounts to "Money Rate Savings Accounts." *Id.*

At the time of its 2001 acquisition, BB&T sent respondents and its other new accountholders a welcome letter that included BB&T's standard "Bank Services Agreement." Pet. App. 41a. The Bank Services Agreement provided that accountholders agreed to its terms by continuing to maintain their accounts with BB&T. *Id.* Like respondents' original contracts with First National, the Bank Services Agreement further provided that: (1) BB&T could amend the Agreement's terms through written notice to accountholders; and (2) continued use of an account

following notice of a change constituted acceptance. Pet. App. 41a–42a.[1]

The Bank Services Agreement also included an arbitration provision stating:

> You and the bank each have the option of requiring that any dispute or controversy concerning your account be decided by binding arbitration[.]

Pet. App. 42a. Respondents continued using their new BB&T accounts. Pet. App. 59a–60a.

In 2004, BB&T amended the Bank Services Agreement, including the arbitration provision. Pet. App. 42a. The new arbitration provision stated:

> Any claim or dispute ("Claim") by either you or us against the other arising from or relating in any way to your account . . . will, at the election of either you or us, be resolved by binding arbitration.

Pet. App. 42a. As with the prior version of the Bank Services Agreement, the amended version provided that continued use of the account constituted agreement to the amended terms. *Id.* Respondents continued using their accounts. Pet. App. 43a.

In 2017, BB&T again amended the Bank Services Agreement, including the arbitration provision. Pet. App. 43a–44a. The amendment added new language

---

[1] Respondents have disputed that all of them received copies of the welcome letter, Bank Services Agreement, or subsequent modifications to the Agreement, but the Sixth Circuit's opinion did not turn on that factual dispute. *See* Pet. App. 18a. The court held the arbitration agreement was unenforceable regardless. *See* Pet. App. 17a–21a.

in enlarged type directing attention to the arbitration provision:

> IT IS IMPORTANT THAT YOU READ THIS ARBITRATION PROVISION CAREFULLY. IT PROVIDES THAT YOU MAY BE REQUIRED TO SETTLE A CLAIM OR DISPUTE THROUGH ARBITRATION, EVEN IF YOU PREFER TO LITIGATE SUCH CLAIMS IN COURT. YOU ARE WAIVING RIGHTS YOU MAY HAVE TO LITIGATE THE CLAIMS IN A COURT OR BEFORE A JURY.

Pet. App. 43a. Once again, BB&T notified accountholders that if they continued using their accounts, that would constitute acceptance of the amended terms in the Bank Services Agreement. Pet. App. 44a. Respondents continued using their accounts. *Id.*

II. This Lawsuit

In 2018, BB&T notified respondents that the annual interest rate on their accounts (now almost 30 years old) would be reduced. Pet. App. 45a. Respondents sued, alleging that BB&T breached its contract by lowering their interest rate below 6.5%. BB&T removed the case from Tennessee state court to the Eastern District of Tennessee, and moved to compel arbitration under the Bank Services Agreement, which by then had included an arbitration provision for nearly two decades.

The district court granted BB&T's motion. It explained that "Tennessee law recognizes the validity of unilateral contracts, in which acceptance is indicated by action under the contract." Pet. App. 55a (quotation marks omitted). The Bank Services Agreement and each of its relevant amendments

provided that continuing to hold accounts with BB&T would operate as acceptance. Pet. App. 59a. And respondents had continued to use their accounts without objecting to the arbitration provision "throughout the course of nearly two decades." Pet. App. 59a–60a. The court concluded that respondents' "continued use of their accounts" constituted "assent to the terms of the Bank[] Services Agreement," including the requirement that any disputes be subject to arbitration. Pet. App. 60a.

III. The Sixth Circuit's Decision

The panel majority (Judges Moore and Gilman) reversed, holding that the arbitration agreement was unenforceable for lack of mutual assent. Pet. App. 3a–21a.

In the majority's view, it did not matter that respondents had continued using their BB&T accounts for 20 years without complaint after the Bank Services Agreement was modified to include an arbitration provision. In deeming the provision unenforceable, the court adopted and relied on a decision predating this Court's modern arbitration caselaw—*Badie v. Bank of America*, 67 Cal. App. 4th 779 (Cal. Ct. App. 1998)—which the court praised as "a seminal case" on whether banks may amend their agreements with accountholders to require arbitration. Pet. App. 17a–21a. *Badie* held that a bank cannot add an arbitration provision to a standard-form contract unless the customer's *original* contract already included a dispute-resolution provision or otherwise "'alerted [the] customer to the possibility that the Bank might one day in the future invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer.'"

Pet. App. 17a (quoting *Badie*, 67 Cal. App. 4th at 801) (emphasis omitted).

Here, the original contracts between respondents and First National, dating back to the 1980s, "made no mention of dispute resolution, much less of limiting [respondents'] right to go to court." Pet. App. 17a. Thus, the court reasoned, BB&T could not show that respondents had agreed to the arbitration provision in the 2001 Bank Services Agreement (or to the 2004 and 2017 amended versions) by continuing to use their accounts.

The court also held that BB&T's modification of the Bank Services Agreement to allow for arbitration violated "the implied covenant of good faith and fair dealing." Pet. App. 20a–21a. The court held it unreasonable as a matter of law for a company to add an "entirely new term" to its standard-form contracts "*where the new term deprives the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution*." Pet. App. 20a (quoting *Badie*, 67 Cal. App. 4th at 796) (emphasis added by Sixth Circuit).

The court did not acknowledge any of this Court's repeated holdings that courts may refuse to enforce arbitration agreements only on grounds that apply to contracts generally. Other than a bare passing reference to *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Pet. App. 9a, the court failed to cite any of this Court's cases interpreting the FAA.

Judge Griffin dissented. He explained that under Tennessee law that governs contracts in general, "acting in a manner that indicates acceptance of a contract is generally deemed to be acceptance." Pet. App. 22a (quotation marks and alteration omitted). He emphasized that BB&T repeatedly gave notice to

respondents that their continued use of their accounts constituted acceptance of the amended terms of service—including the arbitration requirement—and respondents "never objected to any agreement or amendment and continued to maintain their accounts[.]" Pet. App. 23a–24a. Thus, in Judge Griffin's view, the district court had correctly held that the arbitration agreement was valid and must be enforced. Pet. App. 22a.

Reasons For Granting The Petition

The Sixth Circuit's decision and the *Badie* rule are starkly and indisputably inconsistent with this Court's modern FAA precedents. The decision below also conflicts with decisions of other courts that have held that the FAA prohibits courts from imposing heightened state-law standards when parties seek to add an arbitration clause to an existing contract. And the question presented is exceptionally important, as many companies in the financial services sector and other consumer-facing industries have amended their standard-form contracts with customers to require that disputes be settled through arbitration.

I. The Sixth Circuit's Opinion Conflicts With This Court's Precedent.

The Sixth Circuit adopted and enforced a state common-law rule that discriminates against arbitration. The court approved a heightened standard for establishing mutual assent to a contractual amendment providing for arbitration: the parties will not be deemed to have agreed to the amendment unless the contract already contained a dispute-resolution clause, or otherwise alerted the parties to the possibility that the contract might someday be modified to require arbitration. That

holding directly conflicts with *Kindred Nursing* and the many other cases in which this Court has held that the FAA displaces state laws that disfavor arbitration, either expressly or in practical effect.

A. This Court Has Repeatedly Held That The FAA Displaces State-Law Rules That Disfavor Arbitration.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). This Court has "repeatedly described the Act as 'embodying a national policy favoring arbitration,' and 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" *Id.* at 345–46 (citations and alterations omitted). A "basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). The FAA is based on Congress's policy judgment that arbitration offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Congress "intended courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts." *Allied-Bruce*, 513 U.S. at 271 (alteration, citations, and quotation marks omitted). This Court has "several times said" that the Act forbids courts "from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). "The 'goals and policies' of the FAA, this Court's precedent indicates, are antithetical to

threshold limitations placed specifically and solely on arbitration provisions." *Id.* at 688.

The FAA displaces rules that openly discriminate against arbitration as well as "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426. The FAA prohibits courts from holding arbitration agreements unenforceable based on state-law rules "that target arbitration either by name or more subtle methods." *Epic Sys.*, 138 S. Ct. at 1622.

To be sure, the FAA's savings clause allows courts to decline to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. But the savings clause is limited to generally applicable contract rules; it does not permit "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. For example, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot.'" *Id.* at 341 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)) (alteration omitted). Nor can a state-law rule impose on arbitration agreements "a special notice requirement not applicable to contracts generally." *Doctor's Assocs.*, 517 U.S. at 687.

In *Kindred Nursing*, the Court held that the FAA displaced a Kentucky law that held arbitration agreements to a higher standard for contract formation. Kentucky law provided that "a power of attorney could not entitle a representative to enter

into an arbitration agreement without *specifically* saying so." 137 S. Ct. at 1426 (emphasis in original). The state court had reasoned that requiring a heightened showing for contract formation in this context was justified as a way to protect the right to a jury trial by ensuring that the right was not waived inadvertently. This Court nonetheless held that the Kentucky rule disfavored arbitration and could not be the basis for declining to enforce the agreement to arbitrate. It made no difference that the state-law barrier to arbitration occurred at the contract-formation stage. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Id*. at 1428.

B. The Sixth Circuit Enforced A State-Law Rule That Disfavors Arbitration.

The Sixth Circuit's decision conflicts with *Kindred Nursing* and the many cases from this Court barring courts from applying state-law rules that discriminate against arbitration or subject arbitration agreements to heightened standards.

1. The Sixth Circuit nullified an arbitration provision that BB&T had added to its standard-form deposit agreement in 2001 on the basis that the *original* deposit agreement did not contain a dispute-resolution clause or otherwise "alert[]" respondents "to the possibility that the Bank might one day in the future . . . add a clause that would allow it to *impose* [arbitration] on the customer." Pet. App. 17a (quotation marks omitted). Absent the requisite "alert[]," the court explained, a bank cannot exercise its "unilateral right to change the terms of a contract" "where the new term deprives the other party of the

right to a jury trial and the right to select a judicial forum for dispute resolution." Pet. App. 20a (quoting *Badie*, 67 Cal. App. 4th at 796) (emphasis omitted).

That holding, which rested on the court's adoption of *Badie* as a rule of Tennessee law, is directly at odds with *Kindred Nursing*. It is beyond dispute that a rule barring companies from adding an arbitration provision to a contract unless the original contract specifically alerted customers that arbitration might someday be required is a rule that disfavors arbitration. It "hing[es] on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing*, 137 S. Ct. at 1427. Because the rule "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339, the FAA prevents courts from applying the rule to declare an arbitration provision unenforceable.

This case is indistinguishable from *Kindred Nursing*. There, the Kentucky rule imposed a more demanding standard for forming agreements to arbitrate: A person signing with power of attorney needed specific authorization to agree to arbitrate. 137 S. Ct. at 1426. Here too, the Tennessee rule imposes a more demanding standard for forming agreements to arbitrate: An arbitration provision cannot be added to a contract unless the original contract provided notice that arbitration might someday be required. Pet. App. 17a–18a, 20a–21a.

The Sixth Circuit's decision also conflicts with other decisions from this Court holding that the FAA displaces state laws that disfavor arbitration. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418

(2019); *Concepcion*, 563 U.S. at 339; *Doctor's Assocs.*, 517 U.S. at 687.

2. The Sixth Circuit's conclusion cannot be defended on the rationale that it was enforcing a general rule that applies to all types of contract modifications. The court held that a contractual amendment is unenforceable "where the new term deprives the other party of the right to a jury trial" (Pet. App. 20a (quotation marks and emphasis omitted))—a narrow category of amendments "that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426. In fact, the court even placed in italics the language from *Badie* to emphasize that a heightened standard for contract formation was warranted because the arbitration agreement deprived respondents of their right to a jury trial. *See* Pet. App. 20a.

The court further made clear the arbitration-specific nature of the *Badie* rule when it considered how the outcome might differ if BB&T had given accountholders "a meaningful opportunity to opt out of the arbitration provision." Pet. App. 18a (quotation marks omitted). And the court cited four district court cases applying *Badie*—all of them involving amendments adding arbitration provisions. Pet. App. 18a–19a. In short, *Badie* is not a rule of general applicability. Rather, it is a rule that specifically targets arbitration agreements for destruction. *See* A. Daniel Woska, *Arbitration Clauses in Consumer Retail Installment Sales Contracts After the* Green Tree Financial v. Randolph *Decision*, 55 Consumer Financial L.Q. Rep. 107, 114 (2001) ("By rejecting a change in terms procedure that is universally

accepted for other contract modifications, the *Badie* court appears to have violated [the FAA's] mandate.").

Moreover, this Court has held that even state laws of general applicability are displaced by the FAA when they "have a disproportionate impact" on arbitration provisions. *Concepcion*, 563 U.S. at 342. Were it otherwise, courts could avoid FAA preemption by invoking rules that nominally apply to other kinds of agreements, but in reality are primarily used to invalidate agreements to arbitrate. Here, the *Badie* rule targets amendments to consumer contracts that (1) are alleged to materially diminish the customer's rights and (2) concern a topic that was not addressed in the original agreement. The rule plainly has a disproportionate effect on amendments that add an arbitration provision because such amendments almost always fall within these two narrow categories. Amendments that add an arbitration provision materially affect rights that a customer would otherwise have (namely, the right to a jury trial), and they will almost always be the first time a contract addresses the issue. If the contract already contained a dispute-resolution provision, there would be little need to add an arbitration requirement. Few if any other kinds of contractual amendments both materially affect a customer's rights *and* are unlikely to have been addressed in the parties' original contract. Accordingly, an amendment to add an arbitration provision is disproportionately subject to automatic invalidation under *Badie*.

C. The Sixth Circuit's Disregard Of This Court's Precedent Warrants Summary Reversal.

This is not a case where a lower court attempted to apply this Court's precedents to a new situation and

simply reached the wrong result. Instead, the Sixth Circuit's opinion ignores this Court's modern FAA precedents altogether; it does not discuss or even cite any of this Court's repeated holdings that courts must place arbitration agreements on equal footing with other kinds of contracts. Rather than looking to this Court's controlling decisions in cases like *Kindred Nursing* or *Concepcion*, the Sixth Circuit relied instead on *Badie*, a decades-old California Court of Appeal decision. The Sixth Circuit's embrace of the California rule is especially remarkable in light of this Court's consistent holdings rejecting California courts' unwillingness to enforce arbitration agreements. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58–59 (2015); *Concepcion*, 563 U.S. at 352; T. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 Am. Rev. Int'l Arb. 233, 239–40 & n.30 (2007) (citing *Badie* as an example of "Golden State Animosity" to this Court's FAA precedent).

In similar circumstances, this Court has ordered summary reversal where the lower court has simply refused to apply well-settled FAA precedents. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam); *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 18 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam). Here too, because the Sixth Circuit ignored well-settled law governing the enforcement of arbitration agreements, summary reversal would be warranted.

II. The Sixth Circuit's Decision Creates A Split Of Authority With The Supreme Courts Of Alabama And Mississippi.

Under the Sixth Circuit's holding, a bank's general ability to amend the terms of its standard-

form agreement does *not* include the authority to add an arbitration requirement unless the original contract specifically alerted accountholders to the possibility. Pet. App. 17a. Both the Alabama Supreme Court and the Mississippi Supreme Court have reached the opposite conclusion.

In *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000), the Alabama Supreme Court held that the plaintiffs implicitly assented to an arbitration provision that a bank had adopted "pursuant to a change-in-terms clause" by continuing to use their accounts after notice of the change. *Id*. at 188, 190–91. The court rejected *Badie* as "distinguishable" and "not . . . controlling." *Id.* at 191 n.7. "Amendments to the conditions of unilateral-contract relationships with notice of the changed conditions are not inconsistent with the general law of contracts," the court explained, and "[f]ederal law prohibits this Court from subjecting arbitration provisions to special scrutiny." *Id.* at 190–91 (citing *Doctor's Assocs.*, 517 U.S. 681).

Likewise, in *Virgil v. Southwestern Mississippi Electric Power Association*, 296 So. 3d 53 (Miss. 2020), the Mississippi Supreme Court rejected the plaintiffs' argument that they were not bound to the terms of bylaws that an electric cooperative was authorized to amend "from time to time." *Id*. at 56, 62. "While the arbitration provision was not included in the bylaws when Plaintiffs signed the membership application, Plaintiffs knew that the bylaws could be amended." *Id.* at 62. The plaintiffs' argument that the cooperative's unilateral addition of an arbitration provision to the bylaws was unconscionable "single[d] out the arbitration provision for disfavored treatment" and would "have a disproportionate effect on

arbitration," and, therefore, "violate[d] *Concepcion* and [*Kindred Nursing*]." *Id.* at 63.

The Sixth Circuit's holding—imposing a heightened mutual-assent requirement when parties seek to amend an existing contract by adding an arbitration provision—is directly at odds with the rulings of these two state supreme courts. This Court should grant review to resolve the split and ensure that the FAA applies uniformly across the nation.

III. This Case Presents A Question Of Exceptional Importance That Will Arise Frequently.

The question presented is exceptionally important because arbitration provisions are common in consumer contracts throughout the financial services industry and elsewhere. "[T]he times in which consumer contracts were anything other than adhesive are long past," *Concepcion*, 563 U.S. at 346–47, and "the economy is saturated with contracts that contain change-in-terms provisions of the sort involved here," *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173 (5th Cir. 2004).

The increasing popularity of arbitration as a dispute-resolution mechanism means that the question presented will recur. The Sixth Circuit's decision creates immense uncertainty by calling into question arbitration provisions in consumer contracts that have been in place for decades and that, until now, had been widely understood to be enforceable.

The Sixth Circuit's holding also encourages other courts to refuse to enforce arbitration provisions in standard-form consumer contracts. Absent intervention from this Court, lower courts long hostile to arbitration could latch onto the Sixth Circuit's

application of the *Badie* rule as the latest "device[] and formula[]" for avoiding arbitration. *Concepcion*, 563 U.S. at 342 (quotation marks omitted). In fact, the Sixth Circuit's opinion invites copycat rulings, describing *Badie* as a "seminal case" on arbitration that can be imported into any state's contract law. Pet. App. 17a. The result will be uneven treatment of identical arbitration requirements in consumer contracts throughout the economy—exactly what the FAA is supposed to prevent.

Conclusion

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

John S. Hicks
Christopher E. Thorsen
Nicholas W. Diegel
BAKER DONELSON BEARMAN,
CALDWELL BERKOWITZ, P.C.
211 Commerce Street, Suite 800
Nashville, TN 37201
(615) 726-5600

Thomas H. Dupree Jr.
Counsel of Record
Matt Gregory
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioner

September 7, 2021