No. 21-365

IN THE

Supreme Court of the United States

BRANCH BANKING AND 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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Issue I: Sanctity of contract: whether a successor bank can unilaterally impose unexpected new terms on certain account holders without following the change-of-terms procedure required by the original contract that the account holders had with the predecessor bank.

Issue II: Whether the Sixth Circuit correctly predicted that the Tennessee Supreme Court would conclude, based on the specific facts of the present case and under ordinary principles of Tennessee contract law, that there was no mutual assent and no meeting of the minds to form a binding agreement, where a successor bank purported to unilaterally amend certain account agreements that the account holders had made with its predecessor bank, under the following fact-specific circumstances:

1. **Fact 1:** The record did not establish that the Bank followed the procedure required by the account agreement for making changes in the terms of the agreement (notice mailed in the monthly statement or posted in the bank), with the trial court specifically finding that the Petitioner "did not follow the procedures for effectuating an amendment to the [original contract]. . . ." Pet. App. 16a, 51a, fn 4.

2. **Fact 2:** The Bank improperly attempted to put the burden on the account holders to find and object to a new dispute resolution provision – within what the Sixth Circuit correctly referred to as "an agreement that ultimately stretched to 33 pages" – or risk being found to have agreed to them.

3. **Fact 3:** The attempted amendment would have unexpectedly imposed a dispute resolution provision where the original account agreement made no mention of dispute resolution, and the amendment was thus not reasonable because it was not reasonably related to the terms of the original agreement and exceeded the scope of the change-of-terms provision.

4. **Fact 4:** If the account holders had closed their accounts in response to the Bank's attempted amendment, which the Bank argues that they were required to do if they wished to avoid the dispute resolution provision, and other unfavorable provisions, it would have obviated the very essence of their accounts: the promise of a guaranteed 6.5% interest rate which could not be obtained elsewhere.

5. **Fact 5:** The Bank, pursuant to a unilateral notice that it claims to have sent, purported to revoke the guaranteed 6.5% interest rate and to replace it with an interest rate of .01%.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state that neither Sevier County Federal Teachers Credit Union nor any other Respondent has a parent corporation nor is there any publicly held company owning 10% or more of the corporation's stock.

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REASONS FOR DENYING CERTIORARI

In the decision below, the Sixth Circuit rejected a successor bank's attempt to unilaterally add numerous terms, including an arbitration provision, to certain account agreements without following the procedure required by the agreement for making changes in the terms (notice mailed in the monthly statement or posted in the bank). The Sixth Circuit's opinion is straightforward and does not conflict with this Court's precedent, does not disfavor arbitration, does not create a split of authority with other states, and does not present a question of exceptional importance warranting certiorari. The court's opinion merely applies Tennessee contract law principles to the unique facts of the case and holds the arbitration provisions at issue not to be part of the agreement between the parties. The decision does not infringe on any prior holding of this Court, does not target arbitration, and does not run afoul of the Federal Arbitration Act ("FAA"). Accordingly, the Petition for a Writ of Certiorari should be denied.

I. Contrary to Petitioner's characterization of this case, the Sixth Circuit merely applied Tennessee state law to interpret and enforce particular contract terms between Petitioner and its account holders.

The Petition attempts to skew the Sixth Circuit's decision and manufactures an issue that would supposedly be addressed should the Court grant certiorari. As the facts of this case do not present the issues raised by the Petitioner and the court below did not rule on the narrow issue Petitioner presents, Respondent wishes to correct several misstatements of fact and law which may bear upon the Court's review if certiorari were granted.

Petitioner sets up a straw man having to do with the uncontroversial principle that the FAA requires courts to place arbitration agreements on an "equal footing with all other contracts." Pet. 1. The Petitioner mischaracterizes the Sixth Circuit's Opinion as holding "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." Pet. 1.

This characterization is misleading for a number of reasons. Rather than announcing a "rule" that would apply in a sweeping way, the Sixth Circuit merely predicted that the Tennessee Supreme Court would hold that there was no mutual assent to arbitrate under the specific facts of the case at bar. Those circumstances included the fact that the original contract – not with the Petitioner but with a predecessor bank – included a provision that the Bank was required to follow a certain procedure to change the terms of the agreement, and that the record did not establish that the Petitioner had followed that procedure. Unsaid by the Petitioner is the fact that the procedure in the change-of-terms provision would have to be followed whether the change had to do with arbitration or any other subject. As such, the holding below did not "single out" arbitration agreements for disfavored treatment but was generally applicable to any and all attempted changes to the agreements.

Also misleading is the notion that the Petitioner merely attempted to add an arbitration provision to its *own* standard-form contract, when it was in reality attempting to revoke and replace the account agreement

that its predecessor bank had made with its account holders many years before. In doing so, Petitioner was attempting to revoke the two-page account agreement that its predecessor bank had made with the account holders many years before and replace it with its own standard-form contract that "ultimately stretched to 33 pages", as noted by the Sixth Circuit.[1] The attempted amendment included not only an arbitration provision, but also a severe limitation on damages, the manner in which potential claims could be presented, and numerous other terms, despite the fact that there had been no dispute resolution provision, and no limitation or restriction on possible damages in the original account agreement.

Rather than singling out arbitration, the Sixth Circuit merely held that the unilateral addition of a dispute resolution provision to an agreement that had no such provision was unexpected and unreasonable. This principle – contrary to the assertions set forth in the Petition – did not single out arbitration, but would apply equally to any attempted dispute resolution provision such as the following:

1. A dispute resolution provision that would eliminate the right to a trial by jury without requiring arbitration;

2. A dispute resolution provision that would require litigation arising out of the contract to be brought in some far-flung or out-of-state location, whether Charlotte, North Carolina (the Petitioner's headquarters); New York, New York; or Timbuktu;

1. Pet. App. 15a.

3. A dispute resolution provision that would impose the law of some other jurisdiction, for instance the law of North Carolina; or

4. A dispute resolution provision that would limit the damages that might be recovered (as the Petitioner purports to have done here).

These are not contrived or "patently objectionable and utterly fanciful contracts," such as this Court warned against in *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806 (2017), but are likely examples of provisions that could appear in contracts that would be governed by the Sixth Circuit's holding. Any of these circumstances, and many more, would be outside the universe of terms that were included in the original two-page account agreement and would thus be unexpected and unreasonable because they were not reasonably related to the terms of the original agreement and exceeded the scope of the change-of-terms provision, not to mention the fact that they were not accomplished in the manner required by the account agreement (notice mailed in the monthly statement or posted in the bank). All of these things would be disallowed or "forbidden," to use the Petitioner's more dramatic term. The same would be true of other efforts to unreasonably amend the agreement by adding other unexpected terms, unrelated to dispute resolution, that were not contemplated by the original account agreement. For instance:

1. The elimination of the guaranteed 6.5% interest rate (which is the ultimate issue at the heart of this litigation);

2. A requirement that depositors must maintain a $100,000 or other large balance;

3. A monthly "service charge" of, say, $100; or

4. A thirty-day wait period between withdrawals greater than $10.

These and other hypothetical amendments would also have been disallowed or "forbidden", because the Petitioner did not follow the required change-of-terms procedure mandated within the original agreement.

The requirement that the Petitioner must follow the agreed-upon procedure for amending the contract is a simple application of Tennessee contract law that does not single out arbitration in any way. It would apply across the board to any and all amendments that the Petitioner might attempt.

The two-page First National Bank of Gatlinburg account agreement had to do with things like the procedure for stop payment orders, insufficient funds charges, and the like. Without recognizing this complication, the Petition baldly states, as if it were a true and established fact, that "[i]n 2001, BB&T modified the contract to include an arbitration provision." Pet. 1. In making this claim, the Petitioner ignores the fact that the Sixth Circuit found, as a matter of fact, that Petitioner did *not* so modify the contract because the record did *not* establish that it followed the change-of-terms procedure required by the account agreement and because, in any event, the account holders did not *assent* to this change, as discussed above. Pet. App. 11a-21a. In that regard, as specifically noted by

the Sixth Circuit, the trial court specifically found that the Petitioner "did not follow the procedures for effectuating an amendment to the [original contract]. . . ." Pet. App. 16a, 51a, fn 4.

II. The Sixth Circuit decision is a narrow holding applying Tennessee law to specific change-of-terms language in a particular contract and did not create a "heightened standard" for arbitration agreements.

Petitioner mischaracterizes the holding in *Badie v. Bank of America*, 67 Cal. App. 4th 779 (Cal. Ct. App. 1998), as improperly adopting an "anti-arbitration rule" that "demands a heightened showing of mutual assent before a contract may be amended to include an arbitration requirement." [Pet. 1]. That is not the case at all. No doubt the court in *Badie* held that the arbitration provision there in question had not been agreed upon under ordinary principles of contract law, but that does not amount to being an "anti-arbitration rule." To the contrary, the court specifically recognized that the law favors contracts for arbitration and quoted this Court's statement that there is a "liberal federal policy favoring arbitration agreements…." *Badie*, 67 Cal. App. 4th at 788. But, like the Sixth Circuit in the case at bar, the *Badie* court noted that even though there is a liberal policy favoring arbitration, "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate...." *Id.*

There is nothing to be seen in *Badie* of any supposed requirement of a "heightened showing of mutual assent." The *Badie* court merely followed the well-established

principle that "where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." *Badie*, 37 Cal. App. 4th at 795. The court then noted that "[t]he essence of the good faith covenant is objectively reasonable conduct" and that in order for a change to be "objectively reasonable" the change would have to be "within the reasonable contemplation of the parties at the time of [contract] formation." *Id.* at 796. Accordingly, the court held that a party does not act in an objectively reasonable manner when it "add[s] an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into." *Id.* As is true in the case at bar, the holding in *Badie* is supported by the fact that all the terms, conditions, services, and features discussed in the original agreements pertain to matters that were "integral to the Bank/creditor relationship," while "the method and forum for dispute resolution—a matter which is collateral to that relationship—is not discussed at all." *Id.* at 800.

The holding in *Badie*, therefore, did not single out arbitration but would apply across the board to any "entirely new term" that was not within the reasonable contemplation of the parties when the contract was entered into. The fact that the court went on to state that this was "particularly true 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" does not take away from the fact that the rule applies across the board to all such "entirely new terms" that were not contemplated by the parties when the contract was formed. *Id.* at 800.

To reiterate, contrary to the Petitioner's assertion, there was no mention in *Badie* of a supposed necessity for a "heightened showing" of mutual assent for a contract having to do with arbitration.

We will add that, in *Badie,* the bank had followed the change-of-terms provision in the contract. Here, the bank, the Petitioner, did not. Thus, the Petitioner here did not even clear the first hurdle. The record is clear that there could be no finding that the contract was validly changed or that there was mutual assent between the parties even before the Petitioner reaches the second hurdle, *i.e.,* the Sixth Circuit's fact-based finding that the purported "change" was a unilateral addition of an "entirely new term" that was not within the reasonable contemplation of the parties when the contract was entered into.

Petitioner attempts to broaden the Sixth Circuit's decision to create the appearance that it would apply to any and all companies and any and all fact situations:

> 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. 1-2.

But in making this argument the Petitioner faces the same problems as before. First, it again overlooks the fact that its attempted changes to the contract, arbitration or otherwise, could not be effective because it simply did not comply with the change-of-terms provision required by the account agreement. And second, it overlooks the fact that the holding would apply, not just to the addition of an arbitration provision, but to *any* dispute resolution provision, as well as to other attempted changes that were not contemplated in the agreement, unrelated to dispute resolution, for example, the elimination of a favorable rate of interest, an onerous minimum deposit requirement, or the imposition of a $100 month service charge.

Petitioner argues that certiorari is warranted because the decision below supposedly "stands in defiance of this Court's clearly established FAA precedent," because the decision below supposedly conflicts with the non-controversial principle that efforts to add arbitration provisions "cannot be subject to a more demanding standard than any other contractual amendment," and because the question is "exceptionally important" due to the "increasing popularity of arbitration. . . ." Pet. 2.

As discussed above, the Sixth Circuit's decision in no way stands in defiance of any precedent of this Court because it does not single out, target, disfavor, or proportionally invalidate agreements to arbitrate. Instead, the principle underlying the decision applies evenly across the board to all attempted unilateral amendments of contracts, whether related to arbitration or otherwise. Nevertheless, even if it were true that the arbitration question that the Petitioner has attempted to artificially create was "exceptionally important," the

Court would never reach that question in this appeal because the Petitioner did not clear the first hurdle: it did not establish that it had followed the change-of-terms procedure that is required by the account agreement for any change in terms, arbitration or otherwise.

The Petition ignores the fact that, at the time the Petitioner acquired the Respondents' accounts, there was an existing, long-standing contract which the Petitioner was required to abide by. There are three provisions of that original account agreement that are most germane to today's situation: 1) the contract required the bank to pay the account holders an interest rate of no less than 6.5% on the funds in their accounts, 2) the contract required the bank to follow a certain procedure (notice mailed in the monthly statement or posted in the bank) to make any changes in the terms of the agreement, and 3) the contract, as all contracts do, contained an implied duty of good faith and fair dealing not to make unreasonable changes to the agreement and not to add new terms that are unrelated to the original agreement. Petitioner claims the right to breach each of these three provisions with impunity by 1) unilaterally revoking the 6.5% interest rate and replacing it with the rate of 0.01%, 2) unilaterally making changes to the contract simply by announcing them however it may choose, and 3) unilaterally imposing whatever new terms it wanted.

Petitioner's "Question Presented" omits ["oh so coincidentally", as the Petitioner put it in another context (Pet. 12 and 15)], any discussion of the principle of sanctity of contract or the fact that the parties had a long-standing contract (actually signed and agreed-upon by the parties) that had a provision as to how the terms of the contract

could be changed, and that the Petitioner, in its haste to impose its preferred "standard-form contract" and to reduce the account holders' interest rate from 6.5% to .01%, did not follow that provision. This original contract that the account holders made with First National Bank of Gatlinburg, agreed to by both parties, must be honored on the "same footing as other contracts." This principle is not a "state-law barrier" to arbitration; it is a "state-law barrier" to breach of contract.

The Petitioner raises the specter that the economy is "saturated" with change-of-terms provisions and that the "increasing popularity of arbitration" means that the "exceptionally important" question supposedly presented in the case at bar will "recur", resulting in "immense uncertainty." Pet. 19. This appears to be hyperbole if not histrionics. Is the banking community really "saturated" with contracts from 1989 that require changes to be made by posting in the bank or mailing with the monthly statement? And isn't it more likely that banks, when wanting to change any contractual provisions or include additional terms – perhaps including dispute resolution provisions – would comply with the contractually necessary procedural requirements to do so?

Notably, although the Petitioner stresses the point that the panel below was "divided," it does not mention the fact that *not even one* Sixth Circuit judge requested a vote on the suggestion for rehearing *en banc*. Pet. 1. Rather "[t]he petition was circulated to the full court," and"[n]o judge has requested a vote on the suggestion for rehearing en banc." Pet. App. 69a-70a.

III. There is no split of authority justifying review by this Court when different jurisdictions apply their own state laws to distinct facts.

Petitioner argues that the decision below creates a "split of authority" with the Supreme Courts of Alabama and Mississippi, claiming that these courts have "reached the opposite conclusion" as the Sixth Circuit. But in both of the cases that the Petitioner cites, in contrast to the case at bar, the party seeking to enforce the arbitration provision had followed the change-of-terms provision of the agreement in question.

In *SouthTrust Bank*, the signature card stated that the customer agreed to be "subject to the Rules and Regulations as may now or hereafter be adopted by the Bank." There was no requirement in this contract that a proposed change had to be mailed in the monthly statement or posted in the bank before it would be effective: the agreement merely stated that the change would be effective when it was "adopted" by the bank. *SouthTrust Bank v. Williams*, 775 So. 2d 184, 185 (Ala. 2000). Moreover, there was no contention that the Bank did not properly adopt the amendment to the Rules and Regulations that added the arbitration provision. That being the case, it would not be fair to say that the Alabama Supreme Court "reached the opposite conclusion" as the Sixth Circuit. To the contrary, the Petitioner's emphasis on this argument serves to underscore the fact that it did not comply with the change-of-terms provision required by the account agreement here in question, in contrast to the bank in *SouthTrust Bank*, which did. As mentioned above, given the fact that the Petitioner here did not establish that it had complied with the required change-of-terms

provision, the Court would never reach the arbitration question that the Petitioner raises here.

In *Virgil v. Southwest Mississippi Electric Power Association*, the Petitioner's other supposed "split of authority" case, the party attempting to enforce the arbitration provision was not a bank, but was instead an electric power association or cooperative, and the document in question was the membership application which stated that the applicant would become a member of the cooperative and would be bound by the charter, the bylaws, and the rules and regulations of the cooperative as "may from time to time, be adopted by the Association." *Virgil v. Sw. Mississippi Elec. Power Ass'n*, 296 So. 3d 53, 56 (Miss. 2020), *reh'g denied* (May 28, 2020). The Association, acting through the elected board, thereafter amended the bylaws to include a provision requiring the arbitration of disputes. *Id.,* at 56 and 60.

As was true in *SouthTrust Bank*, the Association was not required to mail the proposed changes in the bylaws to the members, or to post them anywhere, before they would be effective. To the contrary, the changes in the bylaws at issue in that case became effective as soon as they were approved by the elected board. As mentioned, the plaintiffs were members of the Association, fully bound not only by the bylaws of the Association, but also the charter. The plaintiffs, being members of the Association, were thus standing on different ground than a mere customer or account holder, such as we have in the case at bar. Moreover, in *Virgil,* unlike the present case, the cause of action was not breach of contract, but was instead based on the violation of a Mississippi statute. Accordingly, it would appear to have little relevance to the present case

where the Respondents assert that the Bank has breached the contract by changing the guaranteed 6.5% interest rate to .01%, by failing to follow the required procedure for making a change in the terms of the agreement, and by failing to abide by the covenant of good faith and fair dealing to only make reasonable changes in the terms of the agreement and not to add new terms that were unrelated to the original agreement.

CONCLUSION

For the foregoing reasons, the Respondents request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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