No. 21-365

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Rule 29.6 Statement

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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Introduction

The Sixth Circuit held an arbitration provision unenforceable based on a state-law rule that targets arbitration agreements and subjects them to a heightened standard for contract formation. The court held that a company may not "unilaterally add an arbitration provision to the account holder's original agreement" if "'the method and forum for dispute resolution'" was not addressed in the customer's original contract. Pet. App. 17a (quoting *Badie v. Bank of America*, 67 Cal. App. 4th 779, 800 (Cal. Ct. App. 1998)). As the panel majority put it, the arbitration agreement is unenforceable unless the original contract "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 [Alternative Dispute Resolution] on the customer." *Id*. (quotation marks and emphasis omitted).

If this does not constitute a rule "disfavoring" arbitration, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017), it is hard to imagine what would. Respondents do not dispute that the panel majority did not even acknowledge this Court's repeated instructions that the Federal Arbitration Act ("FAA") requires lower courts to place arbitration provisions on an "equal footing with all other contracts." *Id.* at 1424 (quotation marks omitted). This Court should summarily reverse the Sixth Circuit's adoption of a California rule that targets arbitration agreements for destruction.

Respondents attempt to manufacture a vehicle problem by contending that the basis for the Sixth Circuit's decision was actually BB&T's alleged failure to follow the change-of-terms provision in

respondents' original contracts. That is demonstrably incorrect. The court held the arbitration agreement unenforceable by adopting and applying California's *Badie* rule. The court explained that *it made no difference* whether BB&T complied with the change-of-terms provision in the original contracts, because even if BB&T had followed them to the letter, *Badie* would still invalidate the arbitration agreement because the original contracts did not address the topic of dispute resolution. *See* Pet. App. 17a–18a.

Next, respondents try to pass off *Badie* as articulating a general rule of contract law that applies to all kinds of contractual provisions. Opp. 3–6. But respondents fail to cite a single case applying the *Badie* rule to something other than an arbitration agreement. And respondents' list of strained hypotheticals—e.g., the *Badie* rule would apply to a company's decision to add a requirement that the parties litigate their disputes in "Timbuktu"—is the same rationale that this Court rejected in *Kindred Nursing*. *See* 137 S. Ct. at 1427–28.

Even if there were a case applying *Badie* to a contractual term other than an arbitration requirement—and respondents have identified no such case in the 31 years since *Badie* was decided—that would not salvage the rule, as the FAA displaces state-law rules that have "a disproportionate impact on arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011). In short, even if *Badie* could be said not to apply *solely* to arbitration agreements, it plainly has a *disproportionate impact* on them.

If the Court does not summarily reverse, then it should grant the petition to resolve the split of authority created by the Sixth Circuit's decision. The

Alabama and Mississippi Supreme Courts have both recognized that the FAA displaces arbitration-specific rules limiting a company's ability to add an arbitration requirement to its existing contracts. Respondents' only serious attempt to distinguish those holdings rests on the same flawed premise as their purported vehicle concerns—that the Sixth Circuit's decision actually turned on a factual dispute over compliance with the change-of-terms provision, not *Badie*'s categorical rule.

Certiorari is warranted to dispel the significant uncertainty created by the decision below. The Sixth Circuit's opinion calls into question the validity of existing arbitration agreements not just in the banking industry, but in any consumer-facing industry where companies over time have modified their standard-form customer contracts to provide for arbitration. *See* Amicus Br. of American Bankers Ass'n et al. at 4 (explaining that numerous companies, "relying on the core FAA principle that arbitration provisions must be placed on the same footing as other contract terms, have also added arbitration provisions to their customer account agreements").

At minimum, the Court should hold this case pending its forthcoming decision in *Morgan v. Sundance, Inc.*, No. 21-328 (cert. granted Nov. 15, 2021). In *Morgan*, the Court granted review on a question that mirrors the one presented here: whether a lower court violated the FAA's requirement that courts put arbitration provisions on equal footing with other contracts by applying an arbitration-focused rule. The Court's decision in *Morgan* will almost certainly affect the outcome in this case.

Argument

I. The Sixth Circuit's Decision Did Not Turn On The Change-Of-Terms Provision.

Respondents' attempt to manufacture a vehicle problem is strange and unpersuasive. They contend that the Sixth Circuit's decision did not turn on the *Badie* rule, but rather on the court's purported determination that BB&T did not follow the notice procedure required by the change-of-terms provision in respondents' original contacts with the predecessor bank. Opp. 2. This is obviously wrong. The Sixth Circuit made no such determination. There is nothing in the court's opinion that remotely supports respondents' wishful thinking.

The Sixth Circuit noted that there was conflicting evidence on whether BB&T complied with the change-of-terms provision, but emphasized that *it did not matter* because, under *Badie*, a court "could not 'assume . . . that notice alone'" could bind a depositor to an amendment adding an arbitration requirement. Pet. App. 18a (omission in original) (quoting *Badie*, 67 Cal. App. 4th at 793). Therefore, "whether BB&T made the changes to the [Bank Services Agreements] in a manner consistent with the original change-of-terms provision" was inconsequential, because *Badie* invalidated the arbitration agreements *even if* BB&T had complied with the change-of-terms provision. *Id*. In fact, the Sixth Circuit stated that the "major flaw in the district court's analysis" was "its failure to address" whether the amendments were substantively reasonable and consistent with the implied covenant of good faith and fair dealing, *not* whether BB&T complied with the change-of-terms provision. *Id*. at 14a–15a.

Respondents are also wrong in asserting that the Sixth Circuit "found, as a matter of fact," that BB&T did not comply with the change-of-terms provision. Opp. 5. To the contrary, the panel majority stated that "the record is unclear as to whether BB&T made the changes to the [Bank Services Agreements] in a manner consistent with the original change-of-terms provision." Pet. App. 18a; *see also id.* at 13a. Either way, the majority held, BB&T "violat[ed] the implied covenant of good faith and fair dealing in its *attempt* to use the original change-of-terms provision to force the Plaintiffs to arbitrate." *Id.* at 20a (emphasis added).

In short, as its opinion makes abundantly clear, the Sixth Circuit decided this case by applying *Badie*, which it described as a "seminal case on this point with facts materially indistinguishable from those present here." Pet. App. 17a. The question whether *Badie* is displaced by the FAA is therefore squarely presented.

II. The *Badie* Rule Disfavors Arbitration.

Respondents' next argument fares no better. They claim that the Sixth Circuit did not adopt a rule subjecting arbitration agreements to a more demanding contract-formation standard than other contracts. Opp. 3–6. Rather, they contend, "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." Opp. 3. But this proves that the *Badie* rule violates the FAA's nondiscrimination mandate. A rule that targets "dispute resolution provisions"—and provides that they cannot be added to contracts unless the original contract already contained a dispute-resolution provision—plainly has "a disproportionate

impact on arbitration agreements," *Concepcion*, 563 U.S. at 342, and is therefore displaced by the FAA.

Respondents insist that the *Badie* rule theoretically could apply to other "attempted dispute resolution provision[s]," such as a provision "that would eliminate the right to a trial by jury" or require litigation in "some far-flung or out-of-state location, whether Charlotte, North Carolina (the Petitioner's headquarters); New York, New York; or Timbuktu." Opp. 3. But even if this were so, the rule would still disproportionately impact arbitration agreements.

In fact, respondents are making the same argument that this Court rejected in *Kindred Nursing* and *Concepcion*. "[A] legal rule hinging on the primary characteristic of an arbitration agreement"—e.g., "a waiver of the right to go to court and receive a jury trial," or an agreement to litigate in a particular forum—is "exactly what *Concepcion* barred." *Kindred Nursing*, 137 S. Ct. at 1427. A rule that targets "dispute resolution provision[s]," Opp. 3, undeniably "hing[es] on the primary characteristic" of an arbitration provision—the requirement that parties resolve disputes through arbitration.

Respondents also contend that the *Badie* rule would bar a host of substantive changes to their original contracts, such as changes to their interest rate, a minimum balance requirement, a service charge, and a wait period for withdrawals. Opp. 4–5. But *Badie* would not apply to any of these changes. *Badie* applies only to amendments that are alleged to materially affect the customer's rights *and* concern a subject that was not addressed in the original agreement. 67 Cal. App. 4th at 796, 801, 803–05. None of the types of amendments respondents identify would materially affect substantive or constitutional

rights such as the right to a jury trial. Moreover, these subjects are usually addressed in the original contract and so would not need to be added via amendment. For example, in this case, the basis of respondents' lawsuit concerns BB&T's modification to the interest rate specified in the original contract.

Badie is an arbitration-specific rule, as evidenced by respondents' failure to cite a single case applying *Badie* outside the context of an arbitration agreement. Indeed, many courts and commenters have recognized the arbitration-specific nature of the rule. One court, for example, rejected a plaintiff's attempt to apply *Badie* to changes in the fees she paid for a checking account, noting that *Badie*'s reasoning was "strained" and "heavily emphasized that the change at issue was the insertion of an arbitration clause, which affects the right to a jury trial under the California Constitution." *Flores v. Bank of America, N.A.*, No. 1:18-cv-2527, 2019 WL 2470923, at *6–7 & n.5 (D. Colo. June 13, 2019); *see also* 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); 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.").

"[T]he judicial hostility towards arbitration" manifests itself in "'a great variety' of 'devices and formulas.'" *Concepcion*, 563 U.S. at 342. As

California's *Badie* rule and the panel majority's decision here illustrate, the creativity of lower courts in refusing to enforce arbitration agreements persists. Accordingly, this Court regularly rejects state-law rules that, like *Badie*, nominally apply in other contexts, but in reality are far "more likely to hold contracts to arbitrate" unenforceable than other kinds of contracts. *Id.*

The Court should do so again here, as the need for review is acute. As explained in the amicus brief submitted by the American Bankers Association, the United States Chamber of Commerce, the Bank Policy Institute, and the Consumer Bankers Association, "the Sixth Circuit's opinion casts a cloud of uncertainty over the enforceability of countless millions of arbitration provisions that [their members] have already implemented through change of terms procedures or plan to implement in the future." Amicus Br. at 5.

III. The Sixth Circuit's Decision Creates A Split Of Authority.

The Sixth Circuit's decision also creates a split of authority with the Supreme Courts of Alabama and Mississippi. Pet. 17–19 (discussing *SouthTrust Bank v. Williams*, 775 So. 2d 184 (Ala. 2000), and *Virgil v. Southwestern Mississippi Electric Power Association*, 296 So. 3d 53 (Miss. 2020)). Respondents' attempts to distinguish *SouthTrust* and *Virgil* fail.

Respondents argue that in *SouthTrust* and *Virgil*, "the party seeking to enforce the arbitration provision had followed the change-of-terms provision of the agreement in question." Opp. 12. As explained above, the Sixth Circuit did not hold that BB&T failed to follow the change-of-terms provision. And whether BB&T complied with the change-of-terms provision

has no bearing on the federal question presented—whether the FAA displaces the *Badie* rule. It made no difference to the Sixth Circuit whether BB&T followed the change-of-terms provision, because the arbitration agreement was unenforceable under *Badie*. Pet. App. 18a.

In both *SouthTrust* and *Virgil*, the courts held that a party's unilateral addition of an arbitration provision to a standard-form contract governing the party's relationship with customers is enforceable under generally applicable contract rules. *SouthTrust*, 775 So. 2d at 190–91; *Virgil*, 296 So. 3d at 62–63. In both cases, the plaintiffs argued that a different rule should apply to amendments adding an arbitration provision. *SouthTrust*, 775 So. 2d at 190–91; *Virgil*, 296 So. 3d at 62–63. And in both cases, the courts correctly held that the FAA did not allow applying a different standard to arbitration provisions sought to be added through amendment. *SouthTrust*, 775 So. 2d at 191 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)); *Virgil*, 296 So. 3d at 63 (citing *Concepcion*, 563 U.S. at 342–43; *Kindred Nursing*, 137 S. Ct. at 1424, 1428 n.2).

Here, in contrast, the Sixth Circuit held that a company may *not* unilaterally add an arbitration provision to a standard-form contract because, under *Badie*, enforcing the agreement would "*deprive[] the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution*." Pet. App. 20a (quotation marks omitted; emphasis added by Sixth Circuit). Unlike the Alabama and Mississippi Supreme Courts, the Sixth Circuit failed even to cite this Court's caselaw requiring courts to put arbitration agreements on an equal footing with other contracts under the FAA.

IV. If The Court Does Not Immediately Grant The Petition, Then It Should Hold The Case For *Morgan v. Sundance, Inc.*

On November 15, 2021, this Court granted certiorari in *Morgan v. Sundance, Inc.*, No. 21-328. Like this case, *Morgan* presents the question whether a lower court's decision "violate[s] this Court's instruction that lower courts must 'place arbitration agreements on an equal footing with other contracts.'" Pet. for Cert. at i (Question Presented), *Morgan v. Sundance, Inc.*, No. 21-328 (Aug. 27, 2021) (quoting *Concepcion*, 563 U.S. at 339). Unlike this case, however, *Morgan* involves a state-law rule that ostensibly favors, rather than disfavors, arbitration. *See id*. (arguing that a lower court applied an "arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice").[1]

This case provides a bookend to *Morgan*, and would enable this Court to clarify how far states may go in making it easier, or more difficult, to consent to arbitration. Moreover, although the issues here and in *Morgan* are similar, this case implicates a different split of authority that is unlikely to be resolved directly in *Morgan* itself. Accordingly, for the reasons explained above and in the petition for certiorari, the Court should grant this petition and reverse the Sixth Circuit's decision, either summarily or after briefing and argument.

At minimum, the Court should hold this case pending its decision in *Morgan*. In resolving *Morgan*, this Court will necessarily expound upon its prior

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[1] BB&T did not address *Morgan* in its petition because BB&T's petition was filed on September 7, 2021, about two months before the Court granted certiorari in *Morgan*.

holdings that the FAA displaces arbitration-specific rules of contract law, which will likely warrant vacatur and remand in this case if the Court has not already granted certiorari. Thus, if the Court does not immediately grant BB&T's petition, BB&T respectfully requests that the Court hold this case for *Morgan*.

Conclusion

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this case for *Morgan*.

Respectfully submitted.

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