No.

IN THE

Supreme Court of the United States

CONTINENTAL FINANCE COMPANY, LLC AND CONTINENTAL PURCHASING LLC,
Petitioners,

v.

TIFFANY JOHNSON AND TRACY I. CRIDER, Individually and on Behalf of All Others Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Fredrick S. Levin
ORRICK, HERRINGTON & SUTCLIFFE LLP
120 Broadway, 4th Floor
Santa Monica, CA 90401

Edmund Hirschfeld
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-3745
nhirschfeld@orrick.com

Counsel for Petitioners

QUESTIONS PRESENTED

The Fourth Circuit refused to compel arbitration because it applied a rule of Maryland law that requires arbitration provisions, unlike any other contractual term, to contain their own unique exchange of consideration. The question presented is:

Does the Federal Arbitration Act, 9 U.S.C. § 2, permit courts to apply a heightened consideration standard solely to contractual arbitration provisions?

RELATED PROCEEDINGS

Johnson et al. v. Continental Finance Company, LLC et al., Nos. 23-2047, -2049 (4th Cir. judgment entered March 11, 2025)

Johnson et al. v. Continental Finance Company, LLC et al., Nos. 8:22-cv-02001-PX, 8:23-cv-00854-PX (D. Md. judgment entered September 7, 2023)

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INTRODUCTION

The Federal Arbitration Act ("FAA") preempts unfavorable "legal rules that 'apply only to arbitration.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017) (quoting *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011)). The Fourth Circuit has violated that "equal-treatment principle," *id.*, and squarely split from other courts of appeals, by endorsing a rule of Maryland contract law that holds arbitration provisions to a higher consideration standard than any other contractual term. This Court should grant certiorari to clarify that the FAA does not permit—and its own prior decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), certainly does not compel—such unequal treatment.

The Maryland rule at issue plainly discriminates against arbitration. It is a bedrock principle of modern contract law that "[a] single performance or return promise may ... furnish consideration for any number of promises." Restatement (Second) of Contracts § 80 cmt. A. In keeping with that principle, Maryland generally recognizes that a contract's various terms may each draw adequate consideration from the same underlying exchange between parties—typically, one party's payment for the other's services. But Maryland applies a special, more demanding rule to arbitration provisions: They *cannot* draw consideration from the "underlying" exchange of payment for services, and instead must contain their own *independent* exchange of consideration—namely, mutual "promises to arbitrate." *Cheek v. United Healthcare of Mid-Atl., Inc.*, 835 A.2d 656, 665 (Md.

2003). The Fourth Circuit applied that rule here to invalidate the arbitration provisions within credit card agreements that were broadly supported by adequate consideration (the exchange of payment for credit services).

Maryland purports to derive its unequal treatment of arbitration provisions from, of all places, *Prima Paint*. But that decision says nothing of the kind. It holds only that a fraudulent inducement defense to the enforcement of a contract should be decided by an arbitrator, rather than a court, where the purported fraud *was not "directed to the arbitration clause"* embedded within the contract. 388 U.S. at 402 (emphasis added). In other words, *if*—and only if—the alleged fraud did not infect the exchange of consideration that supports the arbitration clause, courts should enforce the arbitration clause and send the fraud defense to arbitration. Maryland—and, ultimately, the Fourth Circuit—has mistaken that mere *possibility* of a severable arbitration clause for a *requirement*, wrongly inferring that an arbitration clause must *always* contain its own unique consideration such that it would be unaffected by fraud directed at other portions of the contract. That is not what *Prima Paint* ruled.

Other circuits have made exactly that point when rejecting the arbitration-specific consideration standard at issue here. The Sixth Circuit holds that although *Prima Paint* contemplates that arbitration provisions *could* contain their own independent consideration, it "does not *require* separate consideration for an arbitration provision contained within a valid contract." *Wilson Elec. Contractors, Inc. v. Minnotte*

Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989). Reading *Prima Paint* to support an elevated consideration standard for arbitration provisions, the Sixth Circuit has cautioned, would "clearly be inappropriate" in light of this Court's instruction to "rigorously enforce agreements to arbitrate" under the FAA. *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). The Second and Eighth Circuits have echoed that warning, agreeing with the Sixth Circuit that "a doctrine that required separate consideration for arbitration clauses might risk running afoul" of the FAA's "strong federal policy favoring arbitration." *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 453 (2d Cir. 1995); *see Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792 (8th Cir. 1998).

Indeed, even *the Fourth Circuit itself* has rejected this same arbitration-specific consideration standard—just when enforcing North Carolina's law rather than Maryland's. In that context, the Fourth Circuit held (and still holds) that "*Prima Paint* does not stand for the proposition that the district court may look to an arbitration provision in isolation to determine if that provision is independently supported by consideration," precisely because "federal courts must not 'singl[e] out arbitration provisions for suspect status.'" *Senior Mgmt., Inc. v. Capps*, 240 F. App'x 550, 553 (4th Cir. 2007) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

By endorsing Maryland's unequal treatment of arbitration provisions, therefore, the Fourth Circuit has abandoned the FAA's equal-treatment principle, misread *Prima Paint*, split from every other circuit to rule on the issue, and even defied *its own* application

of the FAA within North Carolina. That is plainly wrong. And it undercuts countless contractual relationships within Maryland, putting arbitration provisions—core to most modern transactions—at a unique disadvantage within the state. Indeed, as Judge Niemeyer emphasized in dissent, the Fourth Circuit's hostility to arbitration provisions in this case has erroneously invalidated a "legal and widespread commercial arrangement" that is core to "the credit card industry," among others, and entirely "consistent with general contract law." Pet. App. 29a, 32a. With the Fourth Circuit unwilling to address the problem *en banc*, the time has come for this Court to step in and restore fidelity to the FAA.

OPINIONS AND ORDERS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-34a) is reported at 131 F.4th 169. The district court's decision (Pet. App. 35a-54a) is reported at 690 F. Supp. 3d 520. The decision of the Fourth Circuit denying Continental's petition for rehearing en banc is unpublished but reproduced at Pet. App. 55a-57.

JURISDICTION

The Fourth Circuit issued its decision on March 11, 2025, and denied a timely petition for rehearing en banc on April 8, 2025. Pet. App. 1a-34a, 55a-57a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of Title 9 of the U.S. Code 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

STATEMENT OF THE CASE

Respondents Accept Cardholder Agreements That Include An Arbitration Provision, Use Their Bank-Issued Credit Cards to Borrow Money, And Then Attempt To Evade Arbitration By Invoking Maryland's Heightened Consideration Standard

Petitioner Continental Finance Company, LLC (together with Petitioner Continental Purchasing, LLC, "Continental") services credit cards on behalf of two state-chartered, federally insured banks. When Respondents applied for and used their respective bank-issued cards, each accepted a materially identical Cardholder Agreement that includes the following Arbitration Provision: "Unless you opt out of this

Provision in the manner set forth below in subpart (p), any claim that arises out of or in any way relates to the Agreement, your Account, or this Provision (the 'Claim(s)') shall be resolved exclusively by binding bilateral arbitration …." Pet. App. 6a. Respondents did not opt out of the Arbitration Provision.

Nonetheless, when Respondents later decided to assert claims that their credit cards were issued unlawfully, they sought to evade arbitration. Respondents instead filed separate, but now consolidated, putative class-action lawsuits against Continental in Maryland state court. Respondents advance two mutually inconsistent theories: that Continental assisted with their acquisition of bank-issued credit cards without a license, violating the Maryland Credit Services Business Act, and that Continental itself "*de facto*" issued the credit cards and charged interest rates that only a bank would be permitted to impose, in violation of the Maryland Consumer Loan Law. Pet. App. 5a-6a; Pet. App. 36a-37a.

Continental removed Respondents' actions to the District of Maryland and moved to compel arbitration. Pet. App. 6a. There is no dispute that the language of the Arbitration Provision covers their claims, as Respondents' theories plainly "relate to" their credit card accounts. Pet. App. 6a. Respondents also "expressly disclaim the argument" that "the underlying Cardholder Agreement" was not validly formed. Pet. App. 25a (Wynn, J., concurring). Respondents oppose arbitration solely on the ground that, notwithstanding the valid formation of the Cardholder Agreement as a whole, its Arbitration Provision is "lacking in

adequate consideration" under Maryland law. Pet. App. 40a.

Respondents' challenge relies on Maryland's heightened standard for consideration regarding arbitration provisions. That standard demands that "an arbitration provision must be supported by consideration independent of the contract underlying it, namely, mutual obligation[s]" to arbitrate. Pet. App. 47a (quotation marks omitted). Maryland does not apply that demanding test to any other type of contractual term. All other provisions, including agreements like a "covenant not to compete," may draw adequate consideration from the broader exchange underlying the contract, typically the payment of money for services. *Cheek*, 835 A.2d at 665. But not where arbitration is concerned. In that context alone, Maryland law does not "look outside the arbitration provision 'to determine whether consideration exists to support an agreement to arbitrate.'" Pet. App. 47a (quoting *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 291 (4th Cir. 2022)).

Maryland purports to draw its arbitration-specific consideration standard from this Court's decision in *Prima Paint*. *See Cheek*, 835 A.2d at 664. But *Prima Paint* never even mentioned consideration. It merely resolved a circuit split as to "whether a claim of fraud in the inducement of the entire contract" puts the making of an embedded arbitration clause "in issue," and thus requires judicial review, where the purported fraud was *not "directed to the arbitration clause itself."* 388 U.S. at 402 (emphasis added). The question, in other words, was whether courts need to resolve a fraudulent inducement defense that does

not call into question "the making" of a contract's arbitration clause. *Id.* at 403. *Prima Paint* ruled that in those circumstances, courts should enforce the arbitration clause and refer the fraudulent inducement defense to the arbitrator. *Id.* As the Court later clarified, if an arbitration provision is capable of standing on its own, then courts must—"as a matter of substantive federal arbitration law"—treat it as "severable from the remainder of the contract" when deciding a motion to compel arbitration. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006). The Court so ruled in light of "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404.

Maryland courts have read *Prima Paint* to mean that a contract's arbitration provision must *always* be an "independently enforceable contract." *Cheek*, 835 A.2d at 665 (quotation marks omitted). On that basis, they have fashioned their uniquely demanding consideration standard requiring every arbitration provision (but no other contractual term) to contain its own separate, independently sufficient exchange of consideration. *Id.*

The District Court Denies Arbitration By Applying Maryland's Heightened Consideration Standard For Arbitration Provisions

The District Court denied Continental's motion to compel, ruling that Maryland's heightened consideration standard invalidated the Arbitration Provision. On its face, the Arbitration Provision contains mutual

promises to arbitrate—Respondents and the banks committed to "binding bilateral arbitration" for all covered claims. Pet. App. 6a. In the District Court's view, however, the banks had not meaningfully promised to arbitrate because of a change-in-terms clause located elsewhere in the Cardholder Agreement outside the Arbitration Provision. Pet. App. 49a-51a. That separate clause provided that the banks could "change any term of this Agreement … upon such notice to you as is required by law." Pet. App. 38a. The District Court concluded that the change-in-terms clause was part of the "separate" Arbitration Provision, and that it so significantly qualified the banks' promise to arbitrate as to render it "illusory." Pet. App. 51a. Under Maryland law, nothing else the banks provided to Respondents—including the extension of credit in exchange for payment—could qualify as consideration for the Arbitration Provision.

The Fourth Circuit Affirms, Declining To Reconsider Its Endorsement Of Maryland's Heightened Consideration Standard For Arbitration Provisions

The Fourth Circuit affirmed in a divided decision. Prior panels had endorsed Maryland's heightened consideration standard as consistent with the FAA, while acknowledging that the way it singles out arbitration "gives us pause." *Noohi v. Toll Bros. Inc.*, 708 F.3d 599, 612 (4th Cir. 2013); *see Coady*, 32 F.4th at 291. The panel majority here reiterated support for Maryland's rule "that an arbitration agreement is an 'independently enforceable contract' and that courts should not go 'beyond the confines of the arbitration agreement itself' when determining if an agreement

was formed." Pet. App. 19a (quoting *Cheek*, 835 A.2d at 664-65). The majority therefore considered only one possible form of consideration for the Arbitration Provision: Respondents' and the banks' mutual promises to arbitrate.

Like the District Court, the panel majority concluded such consideration was lacking because the banks' promises to arbitrate were "illusory" in light of the broader Cardholder Agreement's change-in-terms clause. Pet. App. 22a. Although that change clause is a universal provision applicable throughout the Cardholder Agreement, the majority decided that it should be considered part of the "separate" Arbitration Provision on the ground that "the terms of the arbitration agreement" should not be "artificially limited to the words that happen to appear under the 'arbitration provision' heading." Pet. App. 19a-20a. At the same time, however, the panel majority *declined* to incorporate two other universal provisions that would have moderated the impact of the change-in-terms clause on the Arbitration Provision: the Cardholder Agreement's choice-of-law and severability provisions. *See* Pet. App. 17a-20a. Having selectively incorporated terms in that way, the panel majority read the Arbitration Provision as permitting the banks to withdraw their promise to arbitrate upon "notice … required by law." Pet. App. 18a. In the majority's view, that notice requirement did not "impose[ ] any kind of limitation" on the bank's ability to withdraw their promises, rendering them illusory. Pet. App. 21a.

Judge Wynn, who supplied the majority's second vote, wrote a separate concurrence emphasizing the

decisive role that Maryland's arbitration-specific consideration standard played in the decision. He acknowledged that *every other term* in the "broader contract" might find adequate consideration in the "provision of services in exchange for payment." Pet. App. 26a-27a. But that form of consideration was uniquely off limits for the Arbitration Provision, which, "under Maryland law," had to contain its own "separate" consideration. Pet. App. 27a (quoting *Cheek*, 835 A.2d at 668 & n.6).

Judge Niemeyer dissented. He would have held that the banks' promises to arbitrate were not "illusory," such that the Arbitration Provision was supported by adequate consideration even under Maryland's heightened test. Pet. App. 32a. Judge Niemeyer acknowledged that the banks had authority to change terms in the Cardholder Agreements, subject to the "universal practice" of providing notice and allowing consumers to decide whether to "assent." Pet. App. 28a, 34a. In his view, however, that standard "contractual structure" did not vitiate the banks' promises to arbitrate. Pet. App. 29a.

Continental recognized that the three-judge panel was bound to follow prior panel decisions endorsing Maryland's heightened consideration standard. Continental therefore did not seek to overturn that standard until the rehearing stage, when it filed a timely petition for en banc review urging the full Fourth Circuit to align with other courts of appeals by rejecting the heightened consideration standard (and its underlying distortion of *Prima Paint*) under the FAA. The full Fourth Circuit denied the petition without comment. Pet. App. 55a-57a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split On Whether The FAA Permits A Heightened Consideration Standard For Arbitration Provisions.

The circuits squarely disagree on the question presented—whether the FAA permits an arbitration-specific consideration standard that requires arbitration provisions, but no other contractual term, to contain their own independent exchange of consideration. That split is particularly worthy of this Court's review because it stems from disagreement about the meaning of *Prima Paint*, one of the Court's foundational precedents on the FAA's scope.

The Fourth Circuit stands alone in permitting such an arbitration-specific rule. When it endorsed Maryland's heightened consideration standard, the Fourth Circuit acknowledged that it "gives us pause." *Noohi*, 708 F.3d at 612; *see Coady*, 32 F.4th at 291. "In a basic sense," the court conceded, "the *Cheek* rule does single out an arbitration provision in a larger contract" by treating it differently from any other contractual term. *Noohi*, 708 F.3d at 612. But the Fourth Circuit concluded that such singling out does not run afoul of the FAA's equal-treatment principle because Maryland law "treat[s] an arbitration provision like any *stand-alone contract*," which would be required to contain its own independent consideration. *Id.* (emphasis added). The Fourth Circuit even suggested that holding arbitration provisions to a more demanding consideration standard than other terms should be "viewed as *encouraging* arbitration." *Id.*

The Fourth Circuit reaffirmed that holding here. The panel majority relied on Maryland's rule that an arbitration provision must satisfy the requirements of an "independently enforceable contract." Pet. App. 19a-20a. Judge Wynn then wrote separately to emphasize that "an arbitration provision contained within a broader contract is a separate agreement that requires separate consideration in order to be legally formed." Pet. App. 26a (citing *Noohi*, 708 F.3d at 609). And the Fourth Circuit denied Continental's petition for rehearing en banc, which asked the court to reconsider its endorsement of Maryland's arbitration-specific consideration standard. Pet. App. 55a-57a.

No other court of appeals allows such a rule. The Sixth Circuit has invalidated exactly the same arbitration-specific consideration standard under the FAA. *Wilson*, 878 F.2d at 169. In doing so, it considered and rejected the purported basis for Maryland's law—namely, that *Prima Paint* should be read to "*require* separate consideration for an arbitration provision contained within a valid contract." *Id.* In the Sixth Circuit's view, *Prima Paint* means only that "an arbitration clause" *may*, in certain circumstances, be "an independent contract that is separable from the main contract in which it is found." *Id.* Construing the decision to *mandate* that sort of independence (and the separate consideration it requires) would distort *Prima Paint* in a way that clashes with, rather than furthers, the FAA's "federal policy favoring arbitration." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

The Sixth Circuit instead holds that an arbitration provision, like any other contractual term, may

be adequately supported by the exchange of "consideration" underlying "the contract as a whole." *Id.* Requiring arbitration provisions to contain their own independent consideration, the Sixth Circuit cautioned, would be a rule "pervaded by 'the old judicial hostility to arbitration.'" *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989)). That equal-treatment ruling remains a vital feature of FAA jurisprudence in the Sixth Circuit. *See Ozormoor v. T-Mobile USA, Inc.*, 354 F. App'x 972, 975 (6th Cir. 2009); *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 452-54 (6th Cir. 2005).

Federal courts across the country have followed suit. The Second Circuit, citing Sixth Circuit law, has cautioned that "[a] doctrine that required separate consideration for arbitration clauses might risk running afoul" of the FAA's "strong federal policy favoring arbitration." *Doctor's Assocs.*, 66 F.3d at 453 (citing *Wilson*, 878 F.2d at 169). District courts within the Second Circuit have rejected arbitration-specific consideration standards on exactly that ground. *See, e.g.*, *McCrae v. Oak St. Health, Inc.*, No. 24-CV-1670 (JPO), 2025 WL 415389, at *4 (S.D.N.Y. Feb. 6, 2025) (arbitration clause cannot be required to "have all of the essential elements of a contract, including consideration" (quoting *Doctor's Assocs.*, 66 F.3d at 453)). The Eighth Circuit, in turn, agrees with the Second Circuit that such standards "risk running afoul of [the strong federal policy favoring arbitration]." *Barker*, 154 F.3d at 792 (quoting *Doctor's Assocs.*, 66 F.3d at 453). Again, district courts within the Eighth Circuit have rejected arbitration-specific consideration standards on that basis. *See, e.g.*, *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 4:06-CV-0032 GTE,

2008 WL 830262, at *10 (E.D. Ark. Mar. 25, 2008) ("Arkansas law requiring mutuality within the arbitration paragraph itself is preempted by the FAA because it places the arbitration clause on unequal footing with other contract terms that do not each have to be mutual."). So have district courts in other circuits. *See, e.g.*, *Diversified Roofing Corp. v. Pulte Home Corp.*, No. CV12-1880 PHX DGC, 2012 WL 6628962, at *5 (D. Ariz. Dec. 19, 2012) (ruling that "under § 2 of the FAA," "separate consideration is not required to enforce each provision of the contract").

Indeed, even *the Fourth Circuit* has rejected an arbitration-specific consideration standard as preempted by the FAA—just when reviewing North Carolina's law rather than Maryland's. The plaintiff in *Senior Management* cited *Prima Paint* "to support" a proposed rule that courts "should separately view the arbitration provision" in a contract governed by North Carolina law "to determine if that provision is supported by consideration" in its own right. 240 F. App'x at 553. In that context (unlike here), the Fourth Circuit aligned with the Second, Sixth, and Eighth Circuits, concluding that *Prima Paint* does not require courts to "look to an arbitration provision in isolation to determine if that provision is independently supported by consideration." *Id.* Such a reading, the Fourth Circuit emphasized, would clash not only with the narrow holding of *Prima Paint*, but with the FAA's mandate "that federal courts must not 'singl[e] out arbitration provisions for suspect status.'" *Id.* (quoting *Casarotto,* 517 U.S. at 687).

In short, the question presented has produced a sharp divide between the Fourth Circuit and other

courts of appeals—and an irreconcilable inconsistency in how the Fourth Circuit applies the FAA to different states within its jurisdiction. Those conflicts are deeply embedded, with the Fourth Circuit refusing to address either through en banc review. Only this Court can resolve them.

II. The Fourth Circuit Is Wrong.

Certiorari is further warranted because the Fourth Circuit is violating the FAA, and this Court's related precedent, by applying an arbitration-specific consideration standard. The FAA "requires courts to place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing*, 581 U.S. at 248 (quoting *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015)); *see* 9 U.S.C. § 2. That means the arbitration provision within a contract must be treated as favorably as neighboring terms. *Kindred Nursing*, for example, struck down a Kentucky doctrine that treated a "non-specific" power of attorney as sufficient authorization to accept most contractual terms, but required a further "clear[ ] statement" to authorize acceptance of arbitration provisions in particular. 581 U.S. at 250-51. The Court explained that such a heightened standard for arbitration provisions "flouted the FAA's command to place [arbitration] agreements on an equal footing." *Id.* at 255-56. Similarly, *DIRECTV* rejected an interpretive framework in which contractual language requiring compliance with the "law of your state" would encompass only currently valid law for most contractual terms, but would extend to outdated, "invalidated" law for arbitration provisions. 577 U.S. at 56, 58. Again, that "unique" hurdle for

arbitration violated the FAA's "equal footing" requirement. *Id.* at 55, 58.

The Fourth Circuit should have rejected Maryland's arbitration-specific consideration standard on the same grounds. That standard expressly subjects arbitration provisions to a stricter test than any other contractual term, requiring them to contain their own "separate consideration" even as neighboring terms may instead draw support from the underlying "provision of services in exchange for payment." Pet. App. 26a-27a; *see Cheek*, 835 A.2d at 665 (distinguishing less demanding consideration standard for "covenant not to compete"). That is the opposite of equal footing.

As the Fourth Circuit has elsewhere acknowledged, nothing in *Prima Paint* compels such differential treatment. *See Senior Management*, 240 F. App'x at 553. *Prima Paint* simply held that *if* the "making of" an arbitration provision is unaffected by alleged fraudulent inducement "directed to" *other* portions of a contract, courts should enforce the arbitration provision and leave the fraudulent inducement dispute for the arbitrator to resolve. 388 U.S. at 402-03. That narrow ruling does not "*require* separate consideration for an arbitration provision contained within a valid contract." *Wilson*, 878 F.2d at 169. *Prima Paint* merely recognizes that an arbitration clause *may* qualify as "an independent contract that is separable from the main contract in which it is found," and directs courts to enforce the clause in those circumstances notwithstanding fraudulent inducement challenges to neighboring provisions. *Id.*; *see Senior Management*, 240 F. App'x at 553. That ruling advanced "the unmistakably clear congressional

purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. The Fourth Circuit's ruling here does just the opposite, voiding the parties' selection of arbitration by applying a uniquely hostile consideration test.

The Fourth Circuit's cursory efforts to square that test with the FAA fall short. The court has suggested that its approach is faithful to the FAA's equal-treatment principle because it "treat[s] an arbitration provision like any *stand-alone contract*." *Noohi*, 708 F.3d at 612 (emphasis added). But that was the wrong comparison. As *Kindred Nursing* and *DIRECTV* make clear, a contract's arbitration provision must be on equal footing with *other contractual terms*. The Fourth Circuit is violating that principle by requiring arbitration provisions alone to constitute standalone contracts in their own right. It is no answer that, having drawn that impermissible distinction, the Fourth Circuit treats arbitration provisions like other standalone contracts. That simply restates the problem.

Contrary to the Fourth Circuit's suggestion, nothing about this heightened consideration standard for arbitration provisions could be "viewed as *encouraging* arbitration." *Id.* The Fourth Circuit appears to mean that contracting parties would have to commit more comprehensively to arbitration in order to ensure their agreement would be enforceable. *See id.* But that is just hostility to arbitration by another name. After all, the clear-statement rule in *Kindred Nursing* required parties to commit more

comprehensively to arbitration authority in a power of attorney. 581 U.S. at 250-51. That is exactly the sort of unequal treatment that the FAA forecloses.

On top of all that, the Fourth Circuit's rule creates impracticable line-drawing challenges that exacerbate the bias against arbitration provisions. Those provisions are often incorporated into larger contracts with overarching clauses that inform the meaning of every term. Here, for example, the Cardholder Agreement contained universal change-in-terms, choice-of-law, and severability clauses that applied throughout the contract. *See* Pet. App. 17a-20a. When courts single out the arbitration provision as a "separate" contract under Maryland law, does it include those overarching clauses, or are they part of the larger contract from which the arbitration provision is "independent"?

The Fourth Circuit's answer here was murky at best. The panel majority noted vaguely that "the terms of the arbitration agreement" should not be "artificially limited to the words that happen to appear under the 'arbitration provision' heading." Pet. App. 19a-20a. It then determined, without further explanation, that the Arbitration Provision should be said to *include* the Cardholder Agreement's change-in-terms clause (which undercut consideration) but *exclude* the choice-of-law and severability clauses (which could have salvaged it). Pet. App. 17a-20a. The panel offered no rationale for picking and choosing in that way. Its haphazard approach deepens the conflict with other courts of appeals—the Tenth Circuit has held that the same type of universal change-in-terms provision is part of the "entire" broader

contract, "rather than just the arbitration provisions." *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1211 (10th Cir. 2016). Even more fundamentally, the confusion on this point demonstrates that the Fourth Circuit's rule quickly becomes incoherent when put into practice.

III. The Question Presented Is Important And Recurring.

The question presented cuts to the core of the FAA's equal-treatment principle. This Court has repeatedly granted certiorari to enforce that important rule of law and root out "the old judicial hostility to arbitration." *Rodriguez de Quijas*, 490 U.S. at 480; *see, e.g.*, *Kindred Nursing*, 581 U.S. at 251; *DIRECTV*, 577 U.S. at 54; *Concepcion,* 563 U.S. at 339. Review is just as essential here.

That is particularly true because a heightened standard for consideration affects *all arbitration provisions* in commercial contracts deemed to be subject to Maryland law. Unlike the unequal power-of-attorney rule in *Kindred Nursing* and the unequal construction of "law of your state" in *DIRECTV*, which applied only in select circumstances, the Fourth Circuit's ruling here subjects *every* arbitration provision to a uniquely demanding consideration test. That means the issue recurs even more frequently. And as Judge Niemeyer emphasized in dissent, it has already invalidated a "legal and widespread commercial arrangement" that is core to "the credit card industry," among others. Pet. App. 29a, 32a.

IV. This Case Presents An Ideal Vehicle To Address The Questions Presented.

This case presents an excellent vehicle for resolving the split over whether the FAA permits an arbitration-specific consideration standard. The Fourth Circuit squarely relied on that standard to invalidate the Arbitration Provision. As Judge Wynn emphasized, the majority voted as it did solely because the exchange of "payment" for credit "services," which plainly provides consideration for the broader Cardholder Agreement, "cannot 'serve as the consideration for the separate bilateral agreement to arbitrate.'" Pet. App. 27a (quoting *Cheek*, 835 A.2d at 668 n.6). If this Court grants certiorari and rejects Maryland's heightened consideration test under the FAA, there should be no question that the Arbitration Provision is enforceable based on that broader consideration.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Fredrick S. Levin
ORRICK, HERRINGTON & SUTCLIFFE LLP
120 Broadway, 4th Floor
Santa Monica, CA 90401

Edmund Hirschfeld
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-3745
nhirschfeld@orrick.com

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