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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN BANKERS ASSOCIATION, BANK POLICY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF AMERICAN BANKERS ASSOCIATION, BANK POLICY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the American Bankers Association, the Bank Policy Institute, the Chamber of Commerce of the United States of America, and the Consumer Bankers Association (collectively, "Moving Parties") respectfully move this Court for leave to file the accompanying Brief as *Amici Curiae* in support of Petitioner Branch Banking & Trust Company ("Petitioner"). Counsel for Petitioner consented in writing to the filing of the Brief. Counsel for Respondents did not consent, necessitating this Motion.

A. The Moving Parties

The American Bankers Association is the voice of the nation's $22.8 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly $19 trillion in deposits and extend $11 trillion in loans.

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Its members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small

business loans, and are an engine for financial innovation and economic growth.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Founded in 1919, the Consumer Bankers Association ("CBA") is the trade association for today's leaders in retail banking—banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

B. The Moving Parties' Interest in This Case

The Moving Parties have a substantial interest in the outcome of this case. At issue is whether the FAA "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." (Pet., Question Presented, at i). Change of terms procedures have been used for decades by banks, credit card issuers and other companies in a wide variety of industries to help them keep pace with ever-changing financial, regulatory, social and technological developments and to compete efficiently and effectively with one another. Numerous members of the Moving Parties, 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 through change of terms procedures.

Nevertheless, in this case, the United States Court of Appeals for the Sixth Circuit refused to enforce an arbitration provision that was added to the bank's account agreement *precisely because* the added term was an "arbitration" provision. This creation of a unique rule not applicable to other types of contract changes contravened the FAA and the numerous decisions of this Court holding that arbitration provisions must not be singled out for special negative treatment.

The Sixth Circuit's decision casts a cloud of uncertainty over the enforceability of countless millions of arbitration provisions that members of the Moving Parties have already implemented through change of terms procedures or plan to implement in the future. It also threatens to deprive members of the Moving Parties and their customers of the many proven benefits of arbitration and to saddle them with all of the costs, delays, and inefficiencies that are inherent in court litigation.

The Sixth Circuit's decision is aberrant and demands review and reversal by this Court. Review should also be granted so that other courts are not emboldened to flout the commands of the FAA and to

prevent the Sixth Circuit's decision from encouraging judicial hostility towards arbitration, which the FAA was enacted to foreclose.

For all of these reasons, which are discussed in greater detail in the accompanying Brief, the Moving Parties desire to be heard on the important issue raised by Petitioner.

WHEREFORE, the American Bankers Association, the Bank Policy Institute, the Chamber of Commerce of the United States of America, and the Consumer Bankers Association respectfully request that the Court grant them leave to file the accompanying Brief as *Amici Curiae*.

Respectfully submitted,

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INTRODUCTION

Amici Curiae American Bankers Association, Bank Policy Institute, Chamber of Commerce of the United States of America, and Consumer Bankers Association (collectively, "*Amici*") respectfully submit this brief in support of Petitioner Branch Banking & Trust Company ("Petitioner").[1]

INTERESTS OF *AMICI CURIAE*

The American Bankers Association is the voice of the nation's $22.8 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly $19 trillion in deposits and extend $11 trillion in loans.

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Its members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business

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[1] No counsel for any party authored this Brief in whole or in part. No counsel, party, or person other than *Amici Curiae*, their members or their counsel made any monetary contribution intended to fund the preparation or submission of the Brief. All counsel of record received written notice on September 17, 2021 of *Amici*'s intent to file this Brief. Counsel for Petitioner consented, but counsel for Respondents did not consent. Accordingly, Amici have filed the accompanying Motion seeking leave to file this Brief.

federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Founded in 1919, the Consumer Bankers Association ("CBA") is the trade association for today's leaders in retail banking—banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

Members of *Amici* that utilize arbitration agreements in their consumer contracts do so because it is a faster, more efficient, more cost-effective and less adversarial method of resolving disputes than court litigation, it minimizes the disruption and loss of good will that often results from litigation, and it substantially reduces litigation costs and court system burdens. Arbitration is also a more convenient method than court litigation for resolving customer disputes. This Court has often acknowledged the many benefits of arbitration. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) ("[i]n individual

arbitration, 'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes'") (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. *See* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals'). Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. *See, e.g.*, H. R. Rep. No. 97-542, p. 13 (1982) ('The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .'"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

For these reasons, members of *Amici* have included arbitration provisions in millions of their bank and credit card account contracts with customers. Many of those arbitration provisions were implemented through

change of terms procedures. Account agreements typically contain an "amendments" or "changes" clause that authorizes the bank to make changes to the agreement after giving notice to its customers and provides that the customer's continued use of the account will constitute acceptance of the changes. Such change of terms procedures are not new. On the contrary, they have been used for many decades by banks, credit card issuers and other companies in a wide variety of industries to help them keep pace with ever-changing financial, regulatory, social and technological developments and to compete efficiently and effectively with one another. Numerous members of *Amici*, 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 through change of terms procedures.

Nevertheless, in this case, the Sixth Circuit refused to enforce an arbitration provision that was added to the bank's account agreement through a change of terms procedure *precisely because* the added term was an "arbitration" provision. It devised a special rule not applicable to other types of contract changes: an arbitration provision cannot be added to an account agreement through a change of terms procedure if the original agreement did not already address the subject of dispute resolution. This singling out of arbitration for special treatment contravened the FAA. *See, e.g.*, *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state could not require special notice requirements for arbitration agreements but not for other contracts).

By subjecting arbitration to a "more demanding standard than any other contractual amendment"

(Pet., p. 2), the Sixth Circuit's opinion casts a cloud of uncertainty over the enforceability of countless millions of arbitration provisions that members of *Amici* have already implemented through change of terms procedures or plan to implement in the future. The opinion thus threatens to deprive members of *Amici* and their customers of the many proven benefits of arbitration and to saddle them with all of the costs, delays, and inefficiencies that are inherent in court litigation. Litigating an arbitrable claim in court causes irreparable harm because the parties are "deprived of the inexpensive and expeditious means by which the parties had agreed to resolve their disputes." *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984).

Review should be granted to reinforce that arbitration agreements must be placed on the same footing as other contract provisions and to prevent other courts from following the Sixth Circuit's aberrant decision. In the absence of review, the decision will encourage other courts that still harbor distrust of arbitration to use "state law contract principles" to flout and displace the FAA. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (judicial hostility towards arbitration manifests itself in "'a great variety' of 'devices and formulas . . .'") (citation omitted).

ARGUMENT

Members of *Amici* who utilize arbitration provisions in their bank and financial services contracts rely on the consistent and uniform application of the FAA. Section 2 of the FAA, 9 U.S.C. § 2, provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA embodies a liberal federal policy favoring

arbitration agreements and preempts inconsistent state laws. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). All state and federal courts "must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 18 (2012) (citations omitted).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted); *accord*, *Concepcion*, 563 U.S. at 339 (the FAA was enacted by Congress to reverse "widespread judicial hostility to arbitration agreements"). Accordingly, under the FAA, arbitration must not be singled out for special negative treatment. *See, e.g.*, *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. at 687 ("Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration") (emphasis by the Court). "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act [the FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 281.

I. Consumers Benefit Significantly from the Addition of Arbitration Provisions to Their Bank Account Agreements Through Change of Terms Procedures

Change of terms procedures have long been used by virtually all financial services institutions in the country, and both consumers and the companies they do business with benefit from their use. "Banks must have the discretion to make reasonable adjustments to lending rates, fees, and other terms in order to serve their communities and customers . . . ." Board of Governors of the Federal Reserve System, Supervisory Letter to Banks, SR 95-36, re "Bank Lending Terms and Standards" (June 19, 1995). Change of terms procedures are an integral part of banking practices as various consumer protection regulations recognize.[2]

Courts have traditionally upheld the validity of change of terms procedures to add a variety of business terms to deposit, credit card and other

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[2] *See, e.g.*, 12 C.F.R. § 1005.8(a) (2020) (Regulation E) ("A financial institution shall mail or deliver a written notice to the consumer, at least 21 days before the effective date, of any change in a term or condition required to be disclosed under § 1005.7(b) of this part if the change would result in: (i) Increased fees for the consumer; (ii) Increased liability for the consumer; (iii) Fewer types of available electronic fund transfers; or (iv) Stricter limitations on the frequency or dollar amount of transfers."); *id.* § 1030.5(a)(1) (2020) (Regulation DD) ("A depository institution shall give advance notice to affected consumers of any change in a term required to be disclosed under § 1030.4(b) of this part if the change may reduce the annual percentage yield or adversely affect the consumer. The notice shall include the effective date of the change. The notice shall be mailed or delivered at least 30 calendar days before the effective date of the change.").

consumer-facing agreements.[3] Moreover, in stark contrast to the Sixth Circuit's decision herein, scores of courts have also approved the use of change of terms procedures to add arbitration provisions to such agreements.[4] Many of the millions of consumer

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[3] *See, e.g., Peterson v. Wells Fargo Bank*, 556 F. Supp. 1100, 1102-03 (N.D. Cal. 1981) (increase of annual finance charge on credit cards); *Samuels v. Old Kent Bank*, No. 96 C 6667, 1997 U.S. Dist. LEXIS 11485, at *14-22 (N.D. Ill. July 31, 1997) (cancellation of credit card rewards program); *Grasso v. First USA Bank*, 713 A.2d 304, 308-11 (Del. Super. 1998) (change in credit card rate and fees); *Fineman v. Citicorp USA, Inc.*, 485 N.E.2d 591, 593 (Ill. App. 1985) (increase in credit card annual fee); *Garber v. Harris Trust & Savings Bank*, 432 N.E.2d 1309, 1310-12 (Ill. App. 1982) (increase of minimum monthly payment on credit card); *Beck v. First Nat'l Bank of Minneapolis*, 270 N.W.2d 281, 287 (Minn. 1978) (increase of interest rate on checking account overdraft loans).

[4] *See, e.g., Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234 n. 11 (11th Cir. 2012); *Lloyd v. MBNA Am. Bank, N.A.*, Civ. Action No. 00-109, 2001 U.S. Dist. LEXIS 8279, at *2-4 (D. Del. Feb. 22, 2001), *aff'd*, No. 01-1752, 27 F. App'x 82 (3d Cir. 2002); *Valle v. ATM Nat., LLC*, No. 14-CV-7993-KBF, 2015 U.S. Dist. LEXIS 11788, at *7-8 (S.D.N.Y. Jan. 30, 2015); *Kurz v. Chase Manhattan Bank USA*, 319 F. Supp. 2d 457, 464-65 (S.D.N.Y. 2004); *Beneficial Nat'l Bank, USA v. Payton*, 214 F. Supp. 2d 679, 686-87 (S.D. Miss. 2001); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831-33 (S.D. Miss. 2001); *Pick v. Discover Fin. Servs., Inc.*, No. Civ. A. 00-935-SLR, 2001 U.S. Dist. LEXIS 15777, at *14-16 (D. Del. Sept. 28, 2001); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1030 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001); *Kennedy v. Conseco Fin. Corp.*, No. 00 C 43992001, U.S. Dist. LEXIS 27059, at *1-3 (N.D. Ill. Jan. 11, 2001); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577 (W.D.N.C. 2000); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 629 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Frerichs v. Credential Services Int'l*, No. 98 C 3684, 1999 U.S. Dist. LEXIS 22811, at *11-18 (N.D. Ill. Sept. 30, 1999); *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410, 1413-14 (M.D. Ala.

arbitration agreements in use today[5] were implemented through change of terms procedures.

The Sixth Circuit found that Petitioner's addition of an arbitration provision to the plaintiffs' account agreement was "unreasonable." Sevier Cnty Schs. Fed. Credit Union v. Branch Banking & Trust Co., 990 F.3d 470, 480-81 (6th Cir. 2021). That was an error: the use of change of terms procedures to add an arbitration provision to an account agreement benefits account holders in three significant ways. First, empirical research confirms that arbitration is faster and less expensive and produces better results for consumers than court litigation. A November 2020 study by the U.S. Chamber Institute for Legal Reform of 101,244 consumer disputes that terminated between January 1, 2014 and June 30, 2020 concluded that:

> **1. Consumers are more likely to win in arbitration than in court**. Consumers initiated and prevailed in 44% of all consumer arbitrations that were terminated with

1998); *Ex Parte Colquitt*, 808 So. 2d 1018, 1020, 1024 (Ala. 2001); *SouthTrust Bank v. Williams*, 775 So. 2d 184, 190-91 (Ala. 2000); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1258-60 (Del. Super. 2001); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 491-92 (Ill. App. 2003); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E. 2d 886, 896 (Ill. App. 2003); *Virgil v. Sw. Miss. Elec. Power Ass'n*, 296 So. 3d 53, 63 (Miss. 2020); *Tsadilas v. Providian Nat'l Bank*, 13 A.D.3d 190, 190-91 (N.Y. App. Div. 2004); *Joseph v. MBNA Am. Bank*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002).

[5] *See* I. Szalai, *The Prevalence of Arbitration Agreements by America's Top Companies*, 52 UC Davis Law Review Online 233, 234 (Feb. 2019) (finding that in 2018 at least 826,537,000 consumer arbitration agreements were in force), available at https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf (last accessed on Oct. 7, 2021).

awards during January 2014—June 2020. During the same period, consumers initiated and prevailed in 30% of all consumer litigation cases that were terminated with judgments.

2. Consumers receive higher awards in arbitration than in litigation. The median award in arbitrations that consumers initiated and won was $20,019, compared to just $6,565 in litigation they initiated. The mean award to consumers was $68,198 in arbitration compared with $57,285 in litigation.

3. Consumer arbitration is faster than litigation. It took a mean time of 299 days for consumers to initiate and terminate a dispute with an award in arbitration compared with 429 days in litigation. The median number of days for consumers to initiate and complete a dispute with an award was 251 days in arbitration compared with 311 days in litigation.[6]

Moreover, because arbitration involves far fewer procedures and complexities than court litigation, it is usually "cheaper for both parties than going to court." *Id.* The Consumer Financial Protection Bureau's 728-page empirical study of consumer arbitration, completed in March 2015, likewise found that arbitration

[6] U.S. Chamber Institute for Legal Reform, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration*, at p. 4 (Nov. 2020) (emphasis in original), available at https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf (last accessed on Oct. 7, 2021).

is faster and less expensive than class action litigation and results in greater recoveries for consumers.[7]

Second, arbitration enables banks, credit card companies and other financial services businesses to mitigate the ever-spiraling costs of class action and other complex litigation, and those savings are passed on to their customers. Arbitration lowers businesses' dispute resolution costs because, *inter alia*: it utilizes a nationally uniform set of procedures, thus saving interstate businesses the costs of adapting to different procedural rules in different states; it reduces the amount of time and money the parties spend on discovery; it typically takes place on an individual, bilateral basis; and there is only limited appellate review.[8] Consumers benefit in the form of lower prices for goods and services. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) ("it stands to reason that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares . . .").[9] Conversely, without arbitration,

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[7] *See* Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd Frank Wall Street Reform and Consumer Protection Act 1028(a) (Mar. 2015), available at http://www.consumerfinance.gov/data-research/researchreports/arbitration-study-report-to-congress-2015, § 1 at pp. 13-14, § 4 at pp. 10-11 (American Arbitration Association caps consumer's share of the administrative and arbitrator fees at $200); § 5 at pp. 13, 41 (consumer's average recovery was 166 times as much as the average putative class member's recovery); and § 6 at pp. 9, 37, 43 (individual consumer arbitration is up to 12 times faster than consumer class action litigation) (last accessed on Oct. 7, 2021).

[8] Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90-91 (2001) (hereinafter, *Paying the Price*].

[9] *See also Metro East Center for Conditioning and Health v. Quest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002) (the "benefits

companies' litigation costs increase, and there is a corresponding need to increase revenue or reduce value, so that customers pay more or get less. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Unstable Foundation: Our Broken Class Action System and How to Fix It*, at p. 3 (Oct. 2017) (class action lawsuits "impose[] substantial costs on the parties sued, including the fees of defense lawyers and the costs of discovery if the lawsuit survives a motion to dismiss. These costs are inevitably passed on to customers, shareholders, or other innocent parties.").[10]

Third, there are important intangibles associated with arbitration. For example, in arbitration, consumers can speak directly to an arbitrator sitting at a conference table, unencumbered by the cold, intimidating formalities of a courtroom and the rigid court rules governing procedure and evidence. They can also choose arbitrators with expertise in the subject matter of the dispute. Unlike most court trials, scheduling of arbitration hearings is flexible and accommodates the needs and availabilities of the parties. Consumers can even participate by telephone or virtually

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of arbitration are reflected in a lower cost of doing business that is passed along to customers"); *Provencher v. Dell*, 409 F. Supp. 2d 1196, 1203 n. 9 (C.D. Cal. 2006) ("it is likely that consumers actually benefit in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration provision in its contracts"); Ware, *Paying the Price*, *supra* n. 8, at 89-90 ("[r]elative to litigation, arbitration provides opportunities for a business to save on its dispute-resolution costs. If arbitration does, in fact, lower these costs then arbitration lowers the prices (and interest rates) consumers pay because competition forces businesses to pass their cost-savings on to consumers").

[10] Available at https://instituteforlegalreform.com/research/unstable-foundationour-broken-class-action-system-and-how-to-fix-it/ (last accessed on Oct. 7, 2021).

while thousands of miles away. Such conveniences and efficiencies do not exist in court, which can be daunting and frustrating to non-lawyers and fraught with unpleasantries and delays.

II. The Sixth Circuit's Imposition of Heightened Standards for Adding Arbitration Provisions to Bank Account Agreements Contravenes the FAA and Demands Review and Reversal by this Court

In denying Petitioner's motion to compel arbitration, the Sixth Circuit relied heavily on a state intermediate appellate court decision, *Badie v. Bank of America*, 67 Cal. App. 4th 779 (Ct. App. 1998), which it described as "seminal" and "materially indistinguishable." 990 F.3d at 479. However, the court's reliance on *Badie* was entirely misplaced, as *Badie* contravened the FAA in several critical respects.

1. *Badie* held that a bank cannot add an arbitration provision to its customer account agreements unless the account holder's original agreement already addressed the subject of dispute resolution. The *Badie* court consciously singled out arbitration provisions for special treatment and distinguished such provisions from other terms that a bank might change:

> A narrow interpretation of the change of terms provision, which limits its operation to matters that are integral to the Bank/creditor relationship, does not render the provision inoperative or cause it to be mere surplusage. The Bank may still invoke it to modify fees, grace periods, annual percentage rates and so forth, subject to the Bank's duty of good faith

> and fair dealing . . . . It is not our purpose here to catalog all the matters that are integral to the Bank/creditor relationship and therefore subject to modification pursuant to the change of terms provision, but *we do conclude that imposition of an ADR provision like the one involved here is not one of them*.

67 Cal. App. 4th at 803 (emphasis added). The Sixth Circuit was "persuaded that the Tennessee Supreme Court would follow the logic of *Badie*." 990 F.3d at 480. The issue, however, is whether *Badie*'s analysis, which the Sixth Circuit adopted, was consistent with the FAA. Plainly, it was not.

To foist heightened requirements on arbitration provisions simply because they are arbitration provisions contravenes the core FAA premise that courts and legislatures must not discriminate against arbitration. *See, e.g.*, *Doctors' Assoc., Inc. v. Casarotto*, 517 U.S. at 687 (state could not require special notice requirements for arbitration agreements but not for other contracts). The FAA "command[s] that an arbitration agreement is enforceable just as any other contract . . . . " *Vaden v. Discover Bank*, 556 U.S. 49, 51 (2009). Thus, "courts [must] place arbitration agreements 'on equal footing with all other contracts' . . . 'and enforce them according to their terms.'" *Concepcion*, 333 U.S. at 339 (citations omitted). *See also Virgil v. Sw. Miss. Elec. Power Ass'n*, 296 So. 3d at 63 (enforcing contractual amendment allowing arbitration because "singl[ing] out the arbitration provision for disfavored treatment" would "have a disproportionate effect on arbitration" and "violate[] *Concepcion* and [*Kindred Nursing*]"); *SouthTrust Bank v. Williams*, 775 So. 2d at 191 & n. 7 (rejecting *Badie* because *Casarotto* precluded it "from subjecting arbitration

provisions to special scrutiny"); M. McDonald and K. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 62 Ala. Law. 56, 58 (2001) ("Banks and credit card issuers routinely amend deposit and revolving credit account terms through change in terms clauses to insert new price terms, changing interest rates, cash advance charges, new services, and numerous other terms. The legal effect of these changes is, of course, never questioned . . . . To the extent *Badie* rejected the addition of the arbitration provision merely because it was an arbitration provision, it obviously runs afoul of *Casarotto*. In short, *Badie* is bad from a policy standpoint in that it hampers financial institutions' ability to effectively and practically change their account agreements, and *Badie* is bad from a legal standpoint in that it flatly contradicts *Casarotto*.").

2. *Badie* targeted arbitration for special treatment because the addition of an arbitration provision to the bank's account agreement "would amount to waiver of their [the customers'] constitutionally based right to a jury trial" in a contract of adhesion. 67 Cal. App. 4th at 803-04. According to *Badie*, the addition of an arbitration provision is "particularly" unreasonable where the original account agreement did not address dispute resolution because it is "a new term [that] deprives the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution." *Id.* at 796. The Sixth Circuit found *Badie*'s rationale "especially pertinent" in denying Petitioner's motion to compel arbitration in this case. 990 F.3d at 481.

Once again, *Badie*'s analysis, which the Sixth Circuit adopted, contravened the FAA. As this Court has observed, "the times in which consumer contracts

were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346-47. Moreover, the fact that arbitration effects a waiver of the right to a jury trial does not justify the imposition of a heightened standard for assent. *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183-84 (3d Cir. 1998) (rejecting argument that special "knowing and voluntary" standard applies to acceptance of arbitration clause); *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate"); *Edelist v. MBNA Am. Bank, N.A.*, 790 A.2d at 1260 ("arbitration agreements, even in adhesion contracts, can effectively waive the right to a jury trial"); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 361-62 (Tenn. Ct. App. 2001) (rejecting argument that claims alleging violation of the Tennessee Consumer Protection Act (TCPA) should not be subject to arbitration because of the TCPA provision requiring a "knowing and intelligent" waiver of the right to bring an action in court; "[t]o the extent the TCPA prohibits arbitration because it is an unlawful waiver of Plaintiff's right to proceed in a judicial forum, the TCPA is preempted by the FAA").

3. In analyzing the issue of contract formation, the *Badie* court applied state law rules of contract interpretation in a way that targeted arbitration provisions and resulted in the denial of arbitration, and it eschewed consideration of the FAA's pro-arbitration policies.[11] *See Badie*, 67 Cal. App. 4th at 790

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[11] Under the FAA, there is a presumption favoring arbitrability that can be negated only expressly or by clear implication. *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, AFL-CIO*, 430 U.S. 243, 255 (1977). Thus, "questions of arbitrability must be addressed with a healthy regard

("Whether there is an agreement to submit disputes to arbitration or reference does not turn on the existence of a public policy favoring ADR . . . . That policy . . . does not even come into play unless it is first determined that the Bank's customers *agreed* to use some form of ADR to resolve disputes regarding their deposit and credit card accounts . . . .").

However, as this Court has held, the FAA preempts state laws that impose special burdens on the *formation* of arbitration agreements as well as their enforceability. *See Casarotto*, 517 U.S. at 688 (FAA preempted state law that imposed "threshold limitations" on the formation of agreements to arbitrate). While the formation of an arbitration agreement is determined by generally applicable state contract law, *see, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 & n. 8 (2010), state law must be applied in a manner consistent with the FAA. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1422, 1428 (2017) (the FAA applies not only to the enforcement of arbitration agreements, but also to "their initial 'valid[ity]'—that is, what it takes to enter into them." To hold otherwise, "would make it trivially easy for States to undermine the [FAA]—indeed, to wholly defeat it.") (citations omitted).

a. The *Badie* court found that whether the parties intended to permit an arbitration provision to be added to the account agreement was "ambiguous." *See Badie*, 67 Cal. App. 4th at 800-01 ("Based solely on the language of the credit account agreement, we can-

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for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 24. Any doubts regarding the arbitrability of claims must be resolved in favor of arbitration. *United Steel Workers of Am. v. Warrior & Gulf Navigating Co.*, 363 U.S. 574, 582-83 (1960).

not conclude that either party's interpretation of the change of terms provision is clearly untenable . . . . [T]he credit account agreement is reasonably susceptible to the interpretations offered by both sides."). The court then construed the ambiguous language by applying state-law canons of construction, resorting finally "to the rule that ambiguous contract language must be interpreted most strongly against the party who prepared it (Civ. Code, § 1654), a rule that applies with particular force to the interpretation of contracts of adhesion, like the account agreements here . . . ." *Id.* at 803. The *Badie* court continued:

> Application of this rule strengthens our conviction that the parties did not intend that the change of terms provision should permit the Bank to add new contract terms that differ *in kind* from the terms and conditions included in the original agreements . . . . To reach the contrary conclusion, i.e., that the original account agreements *did* authorize addition of the ADR clause, we would have to assume that by agreeing to the change of terms provision, the Bank's customers intended to permit a modification that would amount to waiver of their constitutionally based right to a jury trial.

Id. at 803-04 (emphasis by the court).

However, under the FAA, state laws of contract construction such as *contra proferentem* cannot be applied in a way that singles out arbitration for special treatment. *See DirecTV, Inc. v. Imburgia*, 577 U.S. 47, 58-59 (2015) ("[T]he reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was . . . . California's interpretation of the phrase 'law of your state' does

not place arbitration contracts 'on equal footing with all other contracts' . . . . For that reason, it does not give 'due regard . . . to the federal policy favoring arbitration.' . . . .Thus, the Court of Appeal's interpretation is pre-empted by the Federal Arbitration Act . . . . [T]he Federal Arbitration Act preempts decisions that take their 'meaning precisely from the fact that a contract to arbitrate is at issue'"). As this Court further explained in *Lamps Plus, Inc. v. Varela*:

> The Ninth Circuit reached a contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*. The rule applies "only as a last resort" when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation . . . . At that point, *contra proferentem* resolves the ambiguity against the drafter based on public policy factors, primarily equitable considerations about the parties' relative bargaining strength . . . .
>
> Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties. When a contract is ambiguous, *contra proferentem* provides a default rule based on public policy considerations; "it can scarcely be said to be designed to ascertain the meanings attached by the parties.". . . .
>
> Our opinion today . . . is consistent with a long line of cases holding that the FAA provides

> the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration . . . . In those cases, we did not seek to resolve the ambiguity by asking who drafted the agreement. Instead, we held that the FAA itself provided the rule. As in those cases, the FAA provides the default rule for resolving ambiguity here.

139 S. Ct. at 1417-19.

Badie contravened the FAA by applying California's *contra proferentem* rule—a rule based on public policy considerations—to determine whether the parties agreed to arbitrate, while ignoring the default rules for resolving ambiguity provided by the FAA. *Badie* created an "anti-arbitration rule . . . which demands a heightened showing of mutual assent before a contract may be amended to include an arbitration agreement." (Pet., p. 1). It contravened the FAA because it "hinge[d] 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, and "derive[d] [its] meaning from the fact that an agreement to arbitrate . . . [was] at issue," *Concepcion*, 563 U.S. at 339.

It is an unfortunate circumstance that businesses must continue to come to this Court to vindicate their rights under the FAA. But the very judicial hostility to arbitration agreements that prompted Congress to enact the FAA nearly 100 years ago lives on to this day. It is thus no surprise that this Court has repeatedly been called upon to act in recent decades, nor that this Court has gamely stepped up to the plate

to do so. Given the tremendous uncertainty caused by the Sixth Circuit's approach for *Amici* operating in Tennessee and elsewhere, *Amici* respectfully urge this Court to grant the petition and reverse.

CONCLUSION

For the forgoing reasons and the reasons set forth by Petitioner, *Amici Curiae* respectfully request that the Petition be granted.

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