No.

IN THE

Supreme Court of the United States

THE GOLDEN 1 CREDIT UNION,

Petitioner,

v.

DWAINE BURGARDT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., requires courts to treat agreements to arbitrate like any other contract, and it displaces any aspect of state law that singles out arbitration agreements for disfavored treatment. In *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), this Court made clear that state common-law rules violate the FAA when they make it harder to enter into an arbitration agreement than another contract. The Court explained that more demanding treatment cannot be justified by arguing that arbitration effectively waives the right to a jury trial.

The question presented is:

Whether a special rule that prohibits parties from adding an arbitration provision to a contract by mutual assent manifested by conduct, when such modifications are permitted under ordinary contract law principles, discriminates against arbitration and is contrary to the FAA?

CORPORATE DISCLOSURE STATEMENT

Petitioner The Golden 1 Credit Union was the appellant in the California Court of Appeal and is the defendant in the underlying action. The Golden 1 Credit Union is a not-for-profit financial cooperative. It has no parent corporations and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Dwaine Burgardt v. The Golden 1 Credit Union, No. 34-2019-00263962-CU-BC-GDS (Sacramento County Superior Court) (judgment entered July 10, 2020);

The Golden 1 Credit Union v. Dwaine Burgardt, No. C092637 (California Court of Appeal, Third Appellate District) (judgment entered Feb. 14, 2022); and

Dwaine Burgardt v. The Golden 1 Credit Union, No. S273807 (California Supreme Court) (petition for review denied May 11, 2022).

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INTRODUCTION

In clear contravention of the Federal Arbitration Act (FAA), the California Court of Appeal has held that contract modifications to add arbitration provisions are governed by different, much more demanding rules than all other contract modifications. As in other states, in California parties may generally modify or add a term to their agreements by manifesting mutual assent to such a modification. One common method of obtaining such assent is by providing notice of a proposed change along with a reasonable opportunity to reject that proposal by opting out with no strings attached. But, in California, based on the Court of Appeal's reasoning, this long-accepted method of contract modification would no longer be available to parties who wish to add an arbitration clause. Instead, under the Court of Appeal decision here, an arbitration-specific rule bars adding an arbitration clause by mutual assent via opt-out, unless the original contract language expressly reserved the right to later modify the contract to add an arbitration clause.

This arbitration-specific carve-out from ordinary contract modification principles is irreconcilable with this Court's precedents repeatedly enforcing the FAA's command that courts treat arbitration agreements like any other contract. California's anti-arbitration approach conflicts with authority from other states refusing to create an arbitration exception from the ability to modify a contract through an opt-out procedure. It also conflicts with a California federal

district court's evaluation of the exact same arbitration provision at issue here, adopted in exactly the same way.

Left in place, the California anti-arbitration rule will wreak havoc on parties seeking to modify their contracts, as those parties try to figure out which set of conflicting rules courts might later apply to determine the validity of their contract modifications. This Court's review is needed to provide the clarity necessary for parties to conform their conduct to the law. And given the clear failure of the lower court to heed this Court's repeated explanations that the FAA requires arbitration agreements to be placed on equal footing with other contracts, the Court may wish to consider summary reversal.

OPINIONS AND ORDERS BELOW

The California Court of Appeal's opinion (Pet. App. 2a-27a) is unreported. The California Supreme Court's order denying a petition for review (Pet. App. 1a) and the opinion of the Sacramento Superior Court (Pet. App. 28a-38a) are also unreported.

JURISDICTION

The California Court of Appeal filed its opinion on February 14, 2022. The California Supreme Court denied a timely petition for review on May 11, 2022. On July 13, 2022, this Court extended the time to petition for a writ of certiorari to September 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act § 2:

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

9 U.S.C. § 2

STATEMENT OF THE CASE

Burgardt Becomes A Golden 1 Member.

Golden 1, founded in 1933, is a not-for-profit financial cooperative. AA52.[1] It operates as a credit union for the mutual benefit and general welfare of its members and distributes its earnings to those members as patrons. *Id.*; *see also* Cal. Fin. Code § 14002. The credit union is governed by its members "on a democratic basis," Cal. Fin. Code § 14002, meaning its members have equal say in the governance of the credit union regardless of how much money they have borrowed or deposited. *See* The Golden 1 Credit Union, *How do credit unions differ from banks?*, https://tinyurl.com/2pctwhcv (last visited Sept. 6, 2022).

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[1] Citations to "AA" are to the Appellant's Appendix filed in the California Court of Appeal.

Dwaine Burgardt became a member of Golden 1 in 2013, when he opened an account at a Golden 1 branch. Pet. App. 4a. In doing so, he signed an "Application for Membership," attesting that (among other things) he had received and would read Golden 1's account disclosures, which set out the terms and conditions of his account. *Id*. Burgardt also assumed an obligation to examine his monthly banking statements with "reasonable promptness." AA72.

In 2014, Burgardt signed up to receive his banking statements exclusively electronically and online. Pet. App. 4a. When doing so, he affirmatively consented to electronic delivery of all disclosures and notices. Pet. App. 4a-5a. As a courtesy, Golden 1 each month sent Burgardt an email reminder notifying him when his online statement was available for viewing. Pet. App. 5a.

Golden 1 Proposes Adding An Arbitration Provision And Gives Existing Members The Opportunity To Opt Out.

In 2019, Golden 1 proposed adding an arbitration clause to all its member agreements. Pet. App. 6a-7a. Golden 1 provided notice of this proposed term in one of two ways, based on how members had chosen to receive their monthly statements. Pet. App. 7a-8a. For members who had chosen to receive paper statements in the mail, Golden 1 sent a paper notice containing the arbitration provision as a one-page insert accompanying the monthly mailed statement. Pet. App. 7a; AA179.

For members like Burgardt who had chosen to receive online statements and notices, Golden 1 provided the online equivalent of an insert with the mailed statement. Golden 1 posts those members' monthly statements on the "View Statements" page of its online banking portal. Pet. App. 7a. The top of the "View Statements" page contains the bolded heading: "Statement Inserts." *Id.* Golden 1 included the arbitration notice under the "Statement Inserts" heading on the "View Statements" page in blue, hyperlinked text entitled "Arbitration Provision." Pet. App. 8a. When Golden 1 members went to look at their online statements—as they committed to do each month with "reasonable promptness"—they would see, and could click on, the "Arbitration Provision" hyperlink. Clicking on that link would bring up a one-page PDF providing notice of the arbitration provision—the same document mailed to members who receive paper statements. *Id.*; *see also* AA179.

The one-page document was entitled "Dispute Resolution: Arbitration Provision." AA179. It explained the proposed arbitration provision that would take effect unless members opted out. Under the proposed term, Golden 1 and its members would attempt to resolve any disputes informally, but if such efforts were unsuccessful, "then you and we agree that [disputes] will be resolved as provided in this Arbitration Provision," on an individual rather than class basis. Pet. App. 6a; AA179.

The notice expressly advised, in bolded and capitalized text, that the arbitration provision limited the rights to bring suit in court, to a jury trial, to partici-

pate in a class action, to conduct discovery, and to appeal. AA179. It further advised that both Golden 1 and its members retained the right to seek relief in small-claims court for any claims within that court's jurisdiction and noted that claims under the Military Lending Act were not subject to arbitration. *Id.*

The notice also described a procedure for opting out of arbitration. In a paragraph under the bolded heading "Who Can Opt Out," the notice explained that anyone who had become a member of Golden 1 on or before June 30, 2019 could reject the proposed arbitration provision by submitting a written opt-out request no later than August 31, 2019. Pet. App. 6a-7a. There were no strings attached to the opt-out option. AA179.

An additional paragraph under the bolded heading "How to Opt Out" provided more detailed instructions for members interested in opting out. *Id.* Those instructions included the URL address for a website where members could download an opt-out form (also available at Golden 1 branches); the notice informed members they could return this form by mail, in person, or electronically, through the Golden 1 online banking portal. *Id.*

In July 2019, Golden 1 sent Burgardt his regular monthly email notification that his online statement was available for review. Pet. App. 5a, 7a. At that time, his "View Statements" page contained the statement insert providing notice of Golden 1's arbitration provision. Golden 1's banking logs showed that Burgardt logged into his online banking account six times in July 2019. Pet. App. 8a. Burgardt did not opt

out of the arbitration provision and continued to use his Golden 1 account. *Id.*

Burgardt Sues Golden 1, And The Superior Court Denies Arbitration.

In September 2019, Burgardt filed a putative class action against Golden 1 regarding insufficient-funds fees. Pet. App. 3a. Golden 1 moved to compel arbitration, explaining that Burgardt had assented to the arbitration provision when he was provided notice and failed to opt out of the proposed addition of the arbitration term. AA42-44. Opposing the motion, Burgardt claimed he did not receive adequate notice of the arbitration provision. AA191; AA203. Burgardt first disputed he received actual notice. AA203. And with respect to constructive notice, Burgardt contended that Golden 1's online notice was deficient. AA191-94.

The Superior Court denied the motion to compel. Applying cases that considered when generic website users can be bound to a website's terms and conditions, it agreed with Burgardt that he received insufficient notice for his failure to opt out of the arbitration agreement to constitute assent. Pet. App. 35a-39a.

The Court Of Appeal Holds Golden 1 Could Not Add An Arbitration Clause By Mutual Assent.

Golden 1 appealed, explaining that the electronic notice provided to Burgardt was consistent with his express election to receive electronic banking state-

ments, disclosures, and notices. For this reason, it argued, the cases cited by the Superior Court regarding generic user interactions with websites were inapposite. In support of its position, Golden 1 cited *Needleman v. Golden 1 Credit Union*, 474 F. Supp. 3d 1097 (N.D. Cal. 2020), a decision issued *after* the Superior Court's ruling in this case. There, a federal district court held Golden 1's 2019 modification of its member agreements to add an arbitration provision was enforceable. *Id*. at 1103-06.

On appeal, the Court of Appeal agreed with Golden 1 that the cases cited by the Superior Court were not germane. Pet. App. 13a-14a. But the Court nonetheless affirmed based on a different theory regarding what is required to modify a contract to add an arbitration clause. The Court held that a party cannot add an arbitration provision to an existing agreement—as would be allowed under ordinary contract principles of mutual assent demonstrated by conduct—unless the original contract language expressly contemplated the future addition of an arbitration provision. Pet. App. 15a-23a. The Court grounded this arbitration-specific rule in California's *Badie* doctrine. *See* Pet. App. 15a (citing *Badie v. Bank of Am*., 67 Cal. App. 4th 779, 803 (1998)). Under *Badie*, California courts limit the circumstances in which an arbitration provision may be added *unilaterally*—that is, without express or implied consent of the other contracting party to the specific modification—under a so-called "change-of-terms" provision in the original contract. *Badie* requires a heightened showing that the change-of-terms provision contemplated adding an arbitration clause because the addition of an arbitration clause would deprive customers

of "their constitutionally based right to a jury trial." *Id.* at 801. The decision of the Court of Appeal here, however, extended that rule beyond unilateral contract modifications to proposed contract modifications where the parties manifest mutual assent to the change through their conduct.

The Court of Appeal thus ruled that Golden 1 could not add an arbitration clause by proposing the addition of the term with an opt-out option, which is permissible under normal contract principles. The court said Golden 1 could not do so because the prior contract language had not specifically reserved the right to add an arbitration provision. Pet. App. 22a-23a.[2]

Golden 1 then filed a petition for review with the California Supreme Court, which denied the petition. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Precedent And The Decisions Of Other State Courts.

California's hostility to the addition of arbitration clauses to existing contracts defies the FAA and this Court's repeated holdings that the FAA preempts

[2] Given this broader legal ruling, the Court of Appeal found no need to address, under ordinary contract-modification principles, either the sufficiency of Golden 1's notice of the addition of the arbitration clause or the effect of Burgardt's failure to object to or opt out of the proposed addition.

state-law rules that discriminate against arbitration agreements.

This Court has repeatedly explained that, under the FAA, states are required to treat arbitration agreements like any other contract. In *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), this Court confirmed that state common-law rules violate the FAA when they make it harder to enter into an arbitration agreement than other contracts—especially when the stated reason for the difference is that waiving the right to a jury trial should be subjected to extra scrutiny. § I.A. That is what the California court did here: It carved out an arbitration-specific exception to ordinary principles of contract modification. § I.B. That exception conflicts with decisions of other state courts rejecting similar exceptions and adds to the existing substantial confusion in the law. § I.C.

The Court should grant review to bring the law of the nation's most populous state into compliance with this Court's precedent, while resolving a split of authority regarding California's misguided rule.

A. The FAA and this Court's precedents require that arbitration agreements be treated like other contracts.

Under the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This fundamental "equal-treatment principle," *Kindred Nursing*, 137 S. Ct. at 1426, means that "courts must place arbitration

agreements on an equal footing with other contracts," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). While "agreements to arbitrate [can] be invalidated by 'generally applicable contract defenses,'" they may not be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* Thus, the FAA "displaces any rule that … disfavor[s] contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426. And "the primary characteristic of an arbitration agreement" is "waiver of the right to go to court and receive a jury trial." *Id.* at 1427. A state rule disfavoring arbitration clauses on that basis cannot be squared with the FAA. *Id.*

This Court's decision in *Kindred Nursing* encapsulates these principles. Respondent Janis Clark held a valid power of attorney on behalf of her elderly mother. 137 S. Ct. at 1425. That power of attorney gave Clark "broad authority" to enter into "any and all … contracts, deeds, or agreements." *Id.* Exercising that power of attorney, Clark entered into an arbitration agreement with a nursing home. *Id.* Clark later sued the nursing home, which moved to dismiss on the basis of the arbitration agreement. *Id.*

The Kentucky Supreme Court held that the "extremely broad, universal delegation of authority" in Clark's power of attorney made it "impossible to say that entering into [an] arbitration agreement was not covered." *Id.* at 1426 (quoting *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 327 (Ky. 2015)) (alteration in original). The Kentucky court nevertheless found the arbitration agreement unenforceable. To

justify that result, it crafted a "clear-statement" rule: A power of attorney must *expressly* grant permission for an agent to deprive a principal of the right to an "adjudication by judge or jury." *Id.* It justified this rule on what it viewed as the unique role of the right to trial by jury: In its words, "the drafters of our Constitution deemed the right to a jury trial to be inviolate, a right that cannot be taken away; and, indeed, a right that is sacred, thus denoting that right and that right alone as a divine God-given right." *Whisman*, 478 S.W.3d at 329.

This Court unanimously held that the Kentucky court's reasoning and resulting clear-statement rule ran afoul of the FAA. The Kentucky court did exactly what this Court has explained the FAA forbids: It "adopt[ed] a legal rule hinging 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. In so holding, this Court rejected the argument that the Kentucky clear-statement rule treated *all* fundamental rights the same. According to the Kentucky court, a principal could no more contract away the right to a jury trial via arbitration agreement than contractually limit "the principal's right to worship freely," provide "consent to an arranged marriage," or "bind the principal to personal servitude." *Whisman*, 478 S.W.3d at 328. This Court was not moved by this "slim set of both patently objectionable and utterly fanciful" examples. *Kindred Nursing*, 137 S. Ct. at 1427. In fact, "[p]lacing arbitration agreements within that class" of examples "reveals the kind of 'hostility to arbitration' that led Congress to enact the FAA." *Id.* at 1428. A rule "applicable to arbitration agreements

and black swans" is not a generally appliable rule compliant with the FAA. *Id*.

B. In conflict with *Kindred Nursing*, the decision below carves out an exception from ordinary principles of contract modification for arbitration agreements.

1. California courts have crafted similar arbitration-hostile clear-statement rules for contract modifications that add arbitration clauses. As in *Kindred Nursing*, this Court should squarely reject the California rule applied below.

The hostility of California courts to adding arbitration clauses to an existing contract did not begin in this case. The demanding rule for adding arbitration clauses applied here has its origin in the context of unilateral contract modifications. When it comes to adding most contract provisions to an existing contract, California courts hold a party can generally use a broad change-of-terms provision to reserve the right to make unilateral changes to a contract in the future. *See, e.g., Busch v. Globe Indus*., 200 Cal. App. 2d 315, 320 (1962); *Hunt v. Mahoney*, 82 Cal. App. 2d 540, 546 (1947). But arbitration clauses are treated differently. California courts hold that a party to a contract cannot add an *arbitration* clause to a contract pursuant to a change-of-terms provision unless the parties in the original contract expressly and specifically reserved the right to add an arbitration term. *See Badie*, 67 Cal. App. 4th 779.

The California courts have been candid that the reason for this rule is because arbitration is special.

They emphasize that arbitration provisions must be treated differently from other agreements because arbitration deprives people of "their constitutionally based right to a jury trial." *E.g.*, *id.* at 801; *id.* at 806 ("[T]he right to select a judicial forum, whether a bench trial or a jury trial, as distinguished from arbitration or some other method of dispute resolution, is a substantial right not lightly to be deemed waived."). And "waiver of the right to a jury trial," according to *Badie*, must "appear in clear and unmistakable form." *Id.* at 804.[3] That is the same justification for singling out arbitration clauses for harsher treatment that this Court rejected in *Kindred Nursing*. 137 S. Ct. at 1427.

2. Remarkably, here the California appellate court went even further than *Badie*, holding that parties cannot modify a contract, even with *mutual assent* manifested by conduct, to add an arbitration provision unless the original contract language expressly reserves the right to add an arbitration clause. Pet. App. 15a-16a, 18a. Whatever possible justification there may be for *Badie*'s requirement that the right to *unilaterally* add an arbitration clause be

[3] *See also Brennan v. U.S. Telepacific Corp.*, No. G046225, 2013 WL 341112, at *5 (Cal. Ct. App. Jan. 30, 2013), as modified on denial of reh'g (Feb. 25, 2013) (following *Badie*); *L&B Real Est. v. Wells Fargo Bank, N.A.*, No. B191120, 2008 WL 2486815, at *11-12 (Cal. Ct. App. June 23, 2008) (same).

expressly reserved, extending that rule to modifications by mutual assent makes no sense and cannot be squared with the FAA.[4]

The rule's irrationality—and blatant hostility to arbitration clauses—is clear by examining the ordinary rules that would apply to a party seeking to add a different type of contract provision by acts amounting to mutual assent. In California, parties can always agree to add contract terms (other than arbitration clauses) by mutual consent. *See* Cal. Civ. Code § 1698; *Busch*, 200 Cal. App. 2d at 320. And they can make changes based on the tacit assent of a party who is given notice and a reasonable chance to reject a proposed change, but then fails to act. *See Russell v. Union Oil Co.*, 7 Cal. App. 3d 110, 114 (1970) (assent "may be manifested by conduct"); *S. Cal. Acoustics Co. v. C. V. Holder, Inc.*, 71 Cal. 2d 719, 722 (1969) (discussing silence as acceptance); *Durgin v. Kaplan*, 68 Cal. 2d 81, 91 (1968) (similar); *see also* Restatement (Second) of Contracts §§ 19, 69 (1981); Restatement of the Law, Consumer Contracts § 3 (2019) (tentative draft).

Applying these settled contract law principles (that apply in California and nationwide), courts in

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[4] The Court of Appeal repeatedly recognized that Golden 1 was not arguing that the credit union could unilaterally add the arbitration clause at issue. Instead, Golden 1 argued that the contract had been modified to add the arbitration clause by mutual assent under ordinary contract principles. Pet. App. 9a (modification requires "manifestation of mutual assent"); Pet. App. 12a (citing cases on mutual assent); *id.* (notice is "the touchstone for assent to a contract").

California easily conclude that, in an established contractual relationship, providing notice of a proposed modification along with an opt-out right manifests mutual assent to the change, so long as the notice is adequate and the counterparty does not opt out. *See, e.g., Hart v. Charter Commc'ns, Inc.* 814 F. App'x 211, 214 (9th Cir. 2020); *Needleman*, 474 F. Supp. 3d at 1105; *see also Ackerberg v. Citicorp USA, Inc.*, 898 F. Supp. 2d 1172, 1174, 1176 (N.D. Cal. 2012) (collecting cases); *Lacour v. Marshalls of CA, LLC*, No. 20-CV-07641, 2021 WL 1700204, at *4 (N.D. Cal. Apr. 29, 2021) (same). And any questions of adequate notice and implied assent are resolved by ordinary principles of contract formation and modification. Thus, if a credit union proposed adding a clause requiring members to maintain a minimum balance in their accounts and permitted members to decline the modification without consequence, California courts would not require that the original contract had expressly anticipated the possibility for the change to be made.

If parties to a contract are trying to add an arbitration clause, however, it is no longer sufficient under the California court's decision to modify that contract by offering a proposed additional term with an opt-out procedure, in the way described above. If the original contract language does not expressly reserve the right to later add an arbitration agreement, none can be added even by mutual assent manifested by conduct.

Applying this arbitration-hostile rule, the California appellate court deemed wholly irrelevant the common actions or inactions that courts would treat as evidence of mutual assent for other types of contract

modifications. Pet. App. 12a-14a, 19a. For example, in other contexts, under ordinary contract modification rules, a court would have analyzed whether there was adequate notice of the proposed change and whether the actions or inactions of Burgardt were sufficient to establish mutual assent. *See, e.g., Needleman*, 473 F. Supp. 3d at 1103-05. But none of that mattered to the Court of Appeal under its special anti-arbitration approach. Instead, the only relevant question was whether Golden 1 had, in the original contract language, expressly reserved the right to modify the agreement to add an arbitration provision, Pet. App. 17a-19a—a question that would never be asked if the contract modification involved a different type of contract term. And because Golden 1's original 2013 agreement with Burgardt did not expressly reserve that right to add an arbitration clause, the Court of Appeal held the parties could not modify the contract later to add an arbitration provision. *Id.*

This naked hostility to the addition of arbitration clauses cannot be allowed to stand. It cannot be reconciled with the FAA's command that arbitration agreements be treated just like any other contract. It is an arbitration-hostile rule, predicated on precisely the same reasoning that this Court rejected in *Kindred Nursing*. As in *Kindred Nursing*, this Court should grant review and hold that the FAA bars applying different contract modification rules when arbitration clauses are in play.

C. There is substantial disagreement and confusion among courts nationwide regarding the addition of an arbitration clause to an existing contract.

California courts' approach to modifying a contract to add an arbitration clause adds to the substantial confusion that exists among the courts nationwide on that subject.

1. As discussed above, the California appellate court here adopted an arbitration-specific rule that bars adding an arbitration clause by mutual assent manifested by conduct (here providing notice of the new term with an opportunity to opt out), unless the original contract language expressly reserved the right to later modify the contract to add an arbitration clause. That ruling conflicts with the decision of the Alabama Supreme Court that specifically addressed and rejected arguments that modification by mutual assent should work differently where a party is seeking to add an arbitration clause.

In Alabama, as in virtually every state, contracts can be modified by actions that demonstrate assent by both parties. For example, continuing a consumer-business relationship after receiving notice of a new term governing that relationship "implicitly assent[s]" to the new term. *SouthTrust Bank v. Williams*, 775 So. 2d 184, 189 (Ala. 2000). In *SouthTrust Bank*, the Supreme Court of Alabama was asked to adopt a harsher rule for adding an arbitration clause through actions (or inactions) manifesting the assent of both parties to a new term. The Alabama Supreme

Court refused to do so. The court recognized that imposing a different, more demanding rule for the addition of an arbitration clause would violate the FAA. *See id*. at 190-91. As the Alabama court held, "Federal law prohibits this Court from subjecting arbitration provisions to special scrutiny." *Id*. at 191. The court thus held that the plaintiffs had assented to an arbitration provision by continuing to use their accounts after receiving notice of that arbitration term. *Id*. In so holding, *SouthTrust Bank* expressly rejected the reasoning of *Badie*. *See id*. at 191 n.7.

2. The ruling here also creates a square conflict with the California federal district courts. In *Needleman*, a federal court examined the *very same* arbitration agreement at issue here in a case that a different Golden 1 member filed against the credit union. It applied ordinary contract modification principles and held that the arbitration clause, added through the same notice and opt-out procedure provided to Burgardt, was valid and enforceable. 474 F. Supp. 3d at 1105-08. *Needleman*'s holding is consistent with other federal district courts in California, which have routinely upheld arbitration provisions added through the notice and opt-out procedures used here, *see supra* at 16, but now stand in conflict with the arbitration-hostile rule articulated by the Court of Appeal in this case.

3. The confusion on this subject extends far beyond California. As explained above, the rule articulated in *Badie* forms the foundation for the harsh rule the appellate court applied in this case. *See supra* at 13-14. *Badie*'s reasoning is itself the subject of considerable disagreement and confusion nationwide.

For example, the Mississippi Supreme Court rejected *Badie*'s rationale as inconsistent with the FAA in a recent decision. *See Virgil v. Sw. Miss. Elec. Power Ass'n*, 296 So. 3d 53 (Miss. 2020). There, an energy cooperative's bylaws gave it the authority to unilaterally amend the bylaws; the board later amended its bylaws to add an arbitration provision, among other things. *Id.* at 59-60. The Mississippi Supreme Court explained that invalidating the arbitration bylaw but not the other bylaws amended pursuant to the same authority would "single[] out the arbitration provision for disfavored treatment, in violation of *Concepcion*." *Id.* at 63.

Notwithstanding the clear tension between *Badie* and the FAA, however, some state courts—and even federal courts—continue to unquestioningly follow *Badie*'s lead. *See Sevier Cnty. Schs. Fed. Credit Union v. Branch Banking & Tr. Co.*, 990 F.3d 470 (6th Cir. 2021) (Tennessee law); *Kortum-Managhan v. Herbergers*, 204 P.3d 693, 698 (Mont. 2009); *Maestle v. Best Buy Co.*, 2005-Ohio-4120 ¶ 19 (Ct. App. Aug. 11, 2005); *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 428 (N.C. Ct. App. 2004) (Arizona law); *Discover Bank v. Shea*, 827 A.2d 358, 362 (N.J. Super. 2001). Other courts decline to follow *Badie* when the party seeking to add an arbitration clause provides notice and the right to opt out, as was the case here, recognizing that such a modification procedure is proper. *See Ackerberg*, 898 F. Supp. 2d at 1176 (rejecting *Badie*'s logic when parties to a contract are given a reasonably opportunity to opt out); *Valle v. ATM Nat'l, LLC*, No. 14-CV-7993 KBF, 2015 WL 413449, at *4 (S.D.N.Y. Jan. 30, 2015) (similar); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 833 (S.D. Miss. 2001), *aff'd*, 34 F. App'x

964 (distinguishing *Badie* in the unconscionability context). Other courts, however, say opt-outs make no difference to *Badie*'s application. *See, e.g.*, *Follman v. World Fin. Network Nat'l Bank*, 721 F. Supp. 2d 158, 164 n. 4 (E.D.N.Y. 2010).

Thus, there is outright conflict and substantial confusion among courts across the county in how to deal with a case like the one presented here, where an account holder is provided notice of a proposed arbitration clause and given a chance to opt out of the proposed change. In California, at least if the action is brought in state court, the arbitration clause is unenforceable under the Court of Appeal's reasoning. In Alabama and Mississippi state courts, as well as federal courts throughout the country, it is enforceable under ordinary contract principles (examining the reasonableness of the notice and the opt-out option).

This Court should grant review to resolve this long-simmering conflict and resolve the current state of confusion regarding the addition of arbitration clauses to an existing contract.

II. The Court's Intervention Is Necessary To Protect Settled Expectations And Prevent States From Departing From The FAA.

This Court's intervention is warranted for three compelling reasons.

A. The decision below holds the use of a well-accepted and long-practiced method of modifying contracts unenforceable in the arbitration context. For

years parties had amended contracts to add arbitration provisions by providing notice and an opportunity to opt out following accepted contract principles of acceptance by mutual assent. They did so "relying upon" this Court's FAA precedent requiring arbitration agreements to be treated on equal footing as other contract provisions. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). And, consistent with the FAA, federal courts in California called upon to interpret such agreements had held them enforceable. *See*, *e.g., Hart*, 814 F. App'x at 213-14; *Needleman*, 474 F. Supp. 3d at 1103-05; *see also Ackerberg*, 898 F. Supp. 2d at 1176 (collecting cases); *Lacour*, 2021 WL 1700204, at *4 (same).

The decision below upends this settled law (and numerous parties' settled expectations) that arbitration agreements entered into years ago pursuant to established contract principles will be enforceable. It also creates significant uncertainty about what, if anything, parties to an existing contract may do to add an arbitration clause 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." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

It is imperative that this Court make clear that states must apply the same generally applicable contract modification methods (such as proposing the new term and offering a reasonable chance to opt out before the new term goes into effect) to adding arbitration clauses. Absent that clarity, companies that have added arbitration clauses to existing agreements through such methods will face uncertainty

and increased litigation regarding the enforceability of those clauses. And parties wanting to add an arbitration clause to an existing agreement by mutual assent will not have a clear path for doing so.

This rule asymmetrically burdens state and federally chartered credit unions who in the past have not included arbitration clauses in their member agreements and thus may add arbitration clauses now only by modifying existing agreements. Adding such clauses has become necessary for many credit unions to keep costs low for members. Credit unions have recently been adversely targeted for expensive class action lawsuits that increase costs (which, in a financial cooperative like a credit union, are ultimately borne by its members) precisely because, unlike for-profit banks, they often do not have arbitration agreements with their members. *See, e.g.*, Peter B. Rutledge & Christopher R. Drahozal, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. Empirical L. Stud. 536, 558 (2012) (collecting empirical data and concluding that "credit unions use arbitration clauses at a much lower rate than banks"). It is no comfort that the California court elected not to publish its decision—despite recognizing it was extending *Badie* into a new realm. The fact that the California appellate court departed from settled contract principles to strike down an arbitration agreement in one instance is enough to call into question the enforceability of countless similar agreements. And it will create significant uncertainty and confusion for those negotiating new arbitration agreements today. This uncertainty alone is intolerable

and frustrates the FAA's purpose of ensuring a predictable, affordable, and efficient dispute resolution mechanism.

B. This Court's intervention is also required to correct the distortion created by a square conflict between the ruling below and a California federal district court decision interpreting the very same arbitration agreement. As noted above, in *Needleman v. Golden 1 Credit Union*, the federal district court held the same arbitration agreement, adopted through the same notice and opt-out procedure, valid and enforceable. 474 F. Supp. 3d at 1103-05. The conflict between *Needleman* and the decision in this case will lead to substantial forum shopping in the nation's largest state.

California plaintiffs who want to avoid similar arbitration agreements will bring lawsuits in state court, and petitioner and other companies domiciled in California will be unable to remove those cases to federal court. But competitors that are domiciled elsewhere will be able to remove such cases to federal court and enforce their arbitration agreements.

Such a conflict between state and federal courts in a single state warranted this Court's review in *Kindred Nursing* and *Imburgia*. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) (observing that "the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal"); Petition for Writ of Certiorari, *Kindred Nursing Centers Ltd. Partnership v. Clark,* No. 16-32, 2016 WL 3640709, at *17-19 (U.S. July 1, 2016) (noting conflict between Kentucky state

and federal courts). And this Court's intervention is necessary here as well to ensure that parties may benefit from the FAA's uniform national policy favoring arbitration regardless of whether they are sued in state or federal court.

C. Finally, this Court's intervention is required to stem the erosion of this Court's FAA precedents. If left unchecked, the ruling opens the door for more courts hostile to arbitration to probe for openings in this Court's otherwise clear directive not to discriminate against arbitration. The California rule normally permitting contract modification through notice and an opportunity to opt out is not unique. It is widely embraced across states and by the Restatement. *See* Restatement (Second) of Contracts §§ 19, 69 (1981) (collecting authorities endorsing assent by conduct, including the failure to opt of a proposed term).

This risk of erosion is not merely hypothetical. Since *Badie* has remained on the books undisturbed, California courts have begun expanding its reach—in this very case. And other courts have begun to adopt the *Badie* clear-statement rule—a unique rule that the court explicitly justified on the discredited theory that arbitration provisions are unique because they deprive people of "their constitutionally based right to a jury trial." *Badie*, 67 Cal. App. 4th at 801; *see Sevier Cnty.*, 990 F.3d at 476, 479-81 (Tennessee law); *Maestle*, 2005-Ohio-4120 at ¶¶ 17-19 (Ohio law); *Follman*, 721 F. Supp. 2d at 165 (Ohio law); *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 194-98 (E.D.N.Y. 2004) (Virginia law). Indeed, Courts have gone so far as to describe the *Badie* rule as a "seminal"

principle, thus encouraging further expansion and encroachment. *Sevier Cnty*, 990 F.3d at 479.

In similar circumstances, this Court has promptly intervened to stem the tide. *E.g.*, *Kindred Nursing*, 137 S. Ct. at 1426. It has recognized that because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," "[i]t is a matter of great importance" that state courts "adhere to a correct interpretation of the legislation." *Nitro-Lift Tech., LLC v. Howard*, 568 U.S. 17, 17-18 (2012). And it has frequently granted summary reversal to secure its controlling precedents. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (vacating West Virginia decision "both incorrect and inconsistent with clear instruction in the precedents of this Court"); *Nitro-Lift*, 568 U.S. at 20 (summarily vacating the "Oklahoma Supreme Court's decision disregard[ing] this Court's precedents on the FAA"); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (summarily vacating Florida Court of Appeal decision that "failed to give effect to the plain meaning of the [Federal Arbitration] Act"); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam) (summarily reversing Alabama Supreme Court decision inconsistent with FAA precedent).

The California court's egregious disregard of the FAA's obligation not to disfavor obligation similarly warrants summary reversal, or plenary review, here.

III. This Case Is An Ideal Vehicle.

This case presents an ideal vehicle for this Court to ensure compliance with *Kindred Nursing* and *Imburgia*. The decision below rests squarely and exclusively on a rule that disfavors arbitration by prohibiting the addition of arbitration provisions based on implied consent unless the original agreement expressly reserved the right to do so when California courts permit contract modifications by implied consent in other contexts.

By contrast, the recent petition in *Branch Banking & Trust Company v. Sevier County Schools Federal Credit Union*, No. 21-365, that presented a related question suffered from multiple vehicle problems. To begin, *Sevier County* was a diversity case in which the Sixth Circuit merely guessed as to how it expected Tennessee courts to resolve the arbitration question presented in that case. 990 F.3d at 480-81. Here, in contrast, the California court has squarely held that California law prohibits modifying a contract to add an arbitration provision through a generally applicable method of contract acceptance by implied assent, and the California Supreme Court has allowed that reading of California law to stand.

Moreover, the Sixth Circuit's decision rested on case-specific factors that have no application here. The court there found it "unclear" whether the bank had followed the contractually specified procedure for unilaterally modifying the parties' agreement. *Id*. at 477. And very different from the case here, the arbitration modification there was proposed as a coercive

choice. Plaintiffs could either agree to add the arbitration provision or give up a highly valuable perpetual 6.5% interest rate; there was no opt-out option. *Sevier Cnty.*, 990 F.3d at 480.

Here, the opt-out option offered to Burgardt was not coercive. Golden 1 permitted Burgardt to decline the proposed addition of an arbitration clause without consequence. Moreover, the California appellate court here made clear that the reasonableness of the notice and opt-out provided was not the basis of its ruling; rather that issue was entirely irrelevant in its view. This case, thus, nicely tees up the question of whether the FAA allows courts to deviate from ordinary contract principles (that permit modification by mutual assent as manifested by conduct) and instead require parties to expressly reserve the right to add an arbitration clause in the original contract, in order to later add such a term by mutual assent in the form of notice and the right to opt out.

CONCLUSION

This Court should summarily reverse the decision below or, in the alternative, grant certiorari.

Respectfully submitted,

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