No. 24-1341

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVE FORD,
individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

GENESIS FINANCIAL SOLUTIONS, INC. and SPRING OAKS CAPITAL SPV, LLC,

Defendants-Appellants.

Appeal from Order of the United States District Court for the District of Maryland, No. 1:23-cv-02156 (Boardman, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 24-1341 Caption: Ford v. Genesis Financial Solutions, Inc. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Archis A. Parasharami Date: 6/28/2024

Counsel for: Amicus Curiae

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 24-1341 Caption: Ford v. Genesis Financial Solutions, Inc. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Financial Services Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: /s/ Archis A. Parasharami Date: 6/28/2024

Counsel for: Amicus Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America 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, like this one, that raise issues of concern to the nation's business community, such as the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Founded in 1916, the American Financial Services Association (AFSA) is the national trade association for the consumer credit industry and is committed to protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit,

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties consented to the filing of this brief.

including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA members and the credit products they offer are regulated under various state and federal statutory and regulatory schemes. AFSA members support reasonable regulation that protects consumers and allows markets to function, and they strive to ensure compliance with the various statutes and rules that apply to them.

Many of *amici*'s members and affiliates regularly rely on arbitration agreements. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. *Amici*'s members and affiliates have entered into millions of contractual relationships providing for arbitration precisely to achieve those benefits.

The district court's decision declaring the parties' arbitration agreement to be illusory rests on an erroneous reading of Maryland law—one that discriminates against arbitration agreements in violation of the FAA. And the court also went astray in failing to apply other contract terms agreed to by the parties, including a Utah choice-of-law clause. The resulting end-run around the parties' agreement to arbitrate, if permitted to stand, would undermine the predictable enforcement of commonplace

arbitration agreements, thus diminishing the availability of arbitration's benefits for companies and consumers alike. *Amici* therefore have a strong interest in this case and in reversal of the decision below, as well as other appeals raising similar issues pending before this Court.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The terms of the credit-card agreement in this case include a mutual agreement between the parties to arbitrate their respective disputes. The plaintiff does not deny that he accepted the agreement and used his credit card subject to the terms of the agreement.

Nonetheless, the district court concluded that no arbitration agreement existed at all because, in its view, a separate provision in the card agreement authorizing changes to the agreement's terms meant that the arbitration agreement was illusory and lacked consideration under a Maryland decision, *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003).

The district court's decision was wrong for multiple reasons.

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[2] *See Bailey v. Mercury Fin., LLC*, No. 23-2133; *Johnson v. Cont'l Fin. Co., LLC*, Nos. 23-2047 and 23-2049.

1. The district court first erred in treating the plaintiff's illusoriness challenge as a dispute over whether an arbitration agreement ever *existed*. There is no dispute that the card agreement, including its arbitration provision, was offered to and accepted by the plaintiff. There was unquestionably a meeting of the minds. The court nonetheless considered the illusoriness challenge as an attack on consideration that went to whether a contract to arbitrate was formed at all. Yet that challenge is different in kind from disputes over whether a consumer was on notice of and assented to the contract's terms in the first place. And courts have repeatedly recognized the difference: This Court and other federal courts of appeals have addressed similar illusoriness arguments based on change-in-terms clauses as defenses to the legal *validity or enforceability* of the contract—not questions about whether a contract *exists*. *See*, *e.g.*, *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 595 n.4 (4th Cir. 2023); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1317-18 (11th Cir. 2017); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016).

This difference matters, both here and in other cases. First, because plaintiff's challenge to the change-in-terms clause is not limited to the arbitration agreement in particular but instead is about the effect of that

clause on the contract in general, it goes to the validity of the contract as a whole and is for the arbitrator to decide under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). Moreover, the delegation clause in the arbitration agreement confirms that plaintiff's illusoriness challenge should have been sent to the arbitrator. And even if the court were correct to resolve that challenge, it erred in refusing to apply the parties' selection of Utah law, which would have upheld the change-in-terms clause against the illusoriness attack.

2. In addition, the district court's application of Maryland's *Cheek* rule violates the Federal Arbitration Act, because it rests on an unreasonable construction of the contract gerrymandered to improperly disfavor arbitration.

In particular, the district court gave short shrift to the meaningful limitations on the defendants' discretion to make changes that avoided the concerns present in *Cheek*. Specifically, unlike the agreement in *Cheek* that gave the defendant the "sole and absolute discretion" to modify its arbitration provision "at any time with or *without notice*," 835 A.2d at 142 (emphasis added), the agreement here authorizes changes

"[s]ubject to the limitations of applicable law" and requires notice of those changes "[i]f required by applicable law." JA72-73. The district court brushed aside those limitations, insisting that "applicable law" is limited to statutes and does not account for decisional law (like *Cheek* and its progeny).

That reading reflects an unreasonable anti-arbitration construction of the contract that violates the general principle of Maryland law that courts should interpret contracts to make them effective instead of illusory or unenforceable. *Questar Builders Inc. v. CB Flooring LLC*, 978 A.2d 651, 670 (Md. 2009). Indeed, the district court's rationale—that Maryland law requires notice of changes to make the arbitration agreement enforceable, yet that an agreement to provide notice "if required by applicable law" does not in fact call for the legally-required notice—engages in the same type of the "unique" and arbitration-disfavoring interpretation of a contract that the Supreme Court held violated the FAA in *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54-55 (2015).

For these reasons, the Court should reverse the decision below.

ARGUMENT

I. The District Court Erroneously Viewed The Plaintiff's Illusoriness Challenge As Going To The Existence Of The Arbitration Agreement.

A. An argument that a change-in-terms clause makes a contract illusory relates to the enforceability or validity of the contract, not whether the parties ever agreed to the contract's terms.

In the district court's view, the plaintiff's argument that the change-in-terms clause makes the arbitration agreement illusory raised a contract-formation question regarding "whether an arbitration agreement exists." JA413. But plaintiff did not dispute that he accepted the card agreement that was offered to him, including its arbitration provision. The same is true of other provisions in the contract, including the Utah choice-of-law clause and the change-in-terms clause. Instead, plaintiff challenges the enforceability of the contract terms he agreed to, alleging that they are "void and unenforceable." JA411 (quoting the complaint).

The issue presented in this case, and others pending before this Court raising similar illusoriness arguments, is therefore different in kind from the typical formation question that arises in arbitration cases—whether the contract terms were ever offered and accepted. As the Supreme Court has noted, "[t]he issue of the contract's validity is

different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006). The latter situation—whether an agreement was "concluded"—includes disputes over whether there was a lack of a signature (or other manifestation of assent), lack of mental capacity to contract, or lack of authority to sign on the alleged principal's behalf. *Id.*; *see also id.* at 448 (noting that the FAA's use of the word "contract" "obviously includes putative contracts"—that is, those an arbitrator may later conclude are invalid and unenforceable). Summarizing cases raising assent challenges of this kind, this Court has made the unremarkable observation "that if a party never assented to the overall contract containing the arbitration provision, then the party never assented to the arbitration provision." *Snowden v. CheckPoint Check Cashing,* 290 F.3d 631, 637 (4th Cir. 2002) (distinguishing contract validity defense based on allegedly usurious interest rates from a "claim that [plaintiff] failed to assent to the terms of the" contract).

By contrast, cases, including those from this Court, treat an illusoriness challenge based on a change-in-terms clause as a defense to the *enforceability* or *validity* of the contract terms, akin to unconscionability.

In *Amos v. Amazon Logistics, Inc.*, for example, the plaintiff argued that the unilateral-modification clause made the contract "'*unenforceable* as illusory and unconscionable.'" 74 F.4th 591, 595 n.4 (4th Cir. 2023) (emphasis added). This Court did not take issue with that characterization, describing both the illusoriness and unconscionability challenges as "contract defenses" that relate to whether the contract is "unenforceable." *Id.* And other courts have expressly considered the issue as a version of an unconscionability challenge. *See*, *e.g.*, *Larsen v. Citibank FSB*, 871 F.3d 1295, 1317-18 (11th Cir. 2017); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016). *But see Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251-52 (2d Cir. 2019) (treating the question of whether the contract lacked consideration—albeit not in the context of a change-in-terms clause—as one of "contract formation," not enforceability, but concluding that the arbitration agreement was supported by consideration).

In applying Maryland's *Cheek* rule, this Court has also described the issue as whether the contract is "unenforceable under Maryland law." *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 293 (4th Cir. 2022); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 605 (4th Cir. 2013) (using the term "unenforceable" six times). And the court in *Cheek* itself concluded that

the arbitration agreement was "unenforceable" because it lacked consideration. 835 A.2d at 664, 669.

B. The district court's erroneous treatment of the illusoriness challenge as a contract-formation issue rather than an enforceability issue led to several errors.

Properly characterizing the nature of the illusoriness challenge as an enforceability question—rather than asking whether the parties ever agreed to the contract terms in the first place—has at least four important consequences relevant to this case and the correct application of the FAA.

First, when, as here, the change-in-terms provision is located outside of the arbitration agreement and applies to the entire contract rather than specifically to the arbitration provision, an arbitrator should decide whether the contract as a whole is illusory.

The Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), addressed "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." *Id.* at 402. The Court answered that, under the FAA, the arbitrator must decide such claims. The Court explained that, because an arbitration agreement is

treated as an independent agreement separate from the underlying contract, the FAA "does not permit [a] federal court to consider claims of fraud in the inducement of the contract *generally*." *Id.* at 403-04 (emphasis added). Instead, a court may consider only claims of "fraud in the inducement of the arbitration clause itself." *Id.* at 403; *accord Snowden*, 290 F.3d at 637.

The Supreme Court reiterated that holding in *Buckeye Check Cashing*, explaining that *Prima Paint* establishes that (1) "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract"; and (2) "unless the challenge is to the arbitration clause *itself*, the issue of the contract's validity is considered by the arbitrator in the first instance." 546 U.S. at 445-46 (emphasis added).

The district court interpreted the plaintiff's illusoriness challenge to be specific to the arbitration provision. But saying it does not make it so. There is nothing arbitration-specific about plaintiff's interpretation of the change-in-terms clause. Under his (erroneous) interpretation of that clause, the entire contract would fail for lack of consideration—and plaintiff's argument is therefore no different than the type of validity defense

directed at the entire contract that *Prima Paint* and *Buckeye* held are for an arbitrator to decide.

As this Court remarked in *Amos* when confronted with a similar illusoriness argument based on allegations that Amazon had the "unilateral ability to modify portions of the Agreement," "we are satisfied" that the argument presents a "contract defense[]" that "relate[s] to the Agreement as a whole" and is therefore for the arbitrator to decide. 74 F.4th at 595 n.4; *see also*, *e.g.*, *Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) (applying *Prima Paint* to conclude that an arbitrator should decide the plaintiff's objection that "the agreement as a whole is void," including due to "lack of consideration").[3]

Second, and for similar reasons, the parties' delegation of enforceability and validity questions to an arbitrator provides an additional and independent basis for reversal. *See* Appellants Br. 16-20.

The Supreme Court has explained that the FAA not only directs courts to enforce agreements to arbitrate, but "also specifically direct[s] them to respect and enforce the parties' chosen arbitration procedures."

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[3] By contrast, the change-in-terms clause in *Cheek* was located within the arbitration provision and applied specifically to that provision. *Cheek*, 859 A.2d at 659-60.

Epic Sys. Corp. v. Lewis, 584 U.S. 497, 506 (2018). That ability to tailor arbitration agreements includes the ability to choose whether threshold disputes over the enforceability or validity of the arbitration provision (or the underlying contract) will be decided by a court or the arbitrator. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019). When the parties choose to allow an arbitrator to resolve those disputes, "the courts must respect the parties' decision as embodied in the contract." *Id.* at 65.

Third, even if the district court were correct in reaching the illusoriness challenge rather than honoring the delegation provision, it could not selectively examine *only* the change-in-terms clause in isolation as relevant to that challenge. Most notably, the district court refused to consider the choice-of-law provision selecting Utah law, because it viewed the choice-of-law clause as irrelevant to contract-formation issues. JA413-414.

But that position makes no sense, regardless of the district court's characterization. The choice-of-law clause was also offered to and accepted by the plaintiff, and it applies to the arbitration provision every bit as much as the change-in-terms clause does. Courts routinely give

effect to choice-of-law clauses to determine the law governing other contract defenses, such as unconscionability, directed at an arbitration provision.[4]

Whether the illusoriness issue is labeled as an issue of contract formation or enforceability, the district court should have given effect to the choice-of-law clause in deciding that issue—or at bare minimum undertaken a conflicts-of-law analysis to determine whether the choice of Utah law should be upheld rather than simply treating the provision as irrelevant. And the arbitration agreement is valid and enforceable under Utah law. *See* Appellants Br. 24-25.

Fourth, treating the issue as one of enforceability also triggers the longstanding principle that "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That is true "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 25. The Supreme Court reaffirmed that

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[4] *See, e.g.*, *Gay v. Creditinform*, 511 F.3d 369, 388-91 (3rd Cir. 2007); *Overstreet v. Contigroup Companies, Inc.*, 462 F.3d 409 (5th Cir. 2006); *Dziubla v. Cargill, Inc.*, 214 Fed. Appx. 658, 659 (9th Cir. 2006).

principle in *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 189 (2019). The Court need not invoke the principle here, however, because the arbitration agreement is valid and enforceable. *See* Part II, *infra*.

II. The District Court Erred In Determining That The Arbitration Agreement Is Illusory And Unenforceable.

Reversal is also warranted because the FAA preempts the district court's reading of the change-in-terms provision to defeat the parties' arbitration agreement. The Supreme Court has made clear that the FAA forbids courts from applying state contract rules in a way that discriminates against arbitration agreements, including "unique" and idiosyncratic readings of the contract to deny arbitration. *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54-55 (2015).

A. The FAA prohibits applying state-law rules in a fashion that disfavors arbitration.

The FAA reflects a "'liberal federal policy favoring arbitration agreements'" as a means of dispute resolution. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Moses H. Cone*, 460 U.S. at 24). The "principal purpose" of the FAA, as the Supreme Court has held time and again, is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Id.* at 344 (quoting *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468,

479 (1989)); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995) (same).

To that end, Section 2 of the FAA makes arbitration agreements "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. Section 2's savings clause prohibits courts from invaliding arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

In other words, the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687; *see also, e.g.*, *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 581 U.S. 246, 248 (2017); *Imburgia*, 577 U.S. at 54-55; *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam); *Concepcion*, 563 U.S. at 339; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Nor may States or courts apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; *accord Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 180 (4th Cir. 2013).

Finally, the FAA's preemptive force applies regardless of whether the discriminatory state-law rule is characterized as one of contract formation or of contract enforceability. In *Kindred*, the Supreme Court expressly held that discriminatory state-law rules making arbitration agreements harder to form than other contracts are just as impermissible as rules making arbitration agreements harder to enforce once formed: "the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them." 581 U.S. at 251. "Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 251-52.

As the Ninth Circuit recently summarized, *Kindred* and the U.S. Supreme Court's other cases have "made clear that the FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements, but also extends to state rules that discriminate against the *formation of arbitration agreements*." *Chamber of Commerce v. Bonta*, 62 F.4th 473, 483-84 (9th Cir. 2023) (emphasis added).

B. The district court engaged in an impermissibly anti-arbitration application of state law and interpretation of the contract.

The district court's determination that the arbitration provision is illusory and unenforceable under Maryland law violates these settled principles of federal law.

As an initial matter, the district court should not have applied Maryland law to decide the plaintiff's illusoriness challenge, given the parties' selection of Utah law. *See* pages 13-14, *supra*; Appellants Br. 21-25.

But even if Maryland law applies, the district court's application and extension of *Cheek* to the contract terms in this case was based on an impermissibly anti-arbitration construction of those terms. To be sure, this Court has held that the *Cheek* rule itself—which merely requires consideration for an arbitration agreement separate from the consideration supporting the underlying contract—is not preempted by the FAA. *See Coady*, 32 F.4th at 291 (holding arbitration provision allowing unfettered discretion to make changes without notice is illusory under *Cheek*); *Noohi*, 708 F.3d at 610, 612 (4th Cir. 2013) (same for

"simply one-sided" arbitration provision that required only the buyer and not the seller to arbitrate).

But the FAA bars discriminatory *application* of state-law rules even if the application is cloaked in the guise "of a doctrine normally thought to be generally applicable." *Concepcion*, 563 U.S. at 341. And while "the interpretation of a contract is ordinarily a matter of state law," state-law interpretations violate the FAA if they are "unique" or "restricted" to arbitration because "courts would not interpret contracts other than arbitration contracts the same way." *Imburgia*, 577 U.S. at 54-55.

The district court's reading of the change-in-terms provision ran afoul of the general contract principle—in Maryland and elsewhere—that contracts should be interpreted whenever possible in a manner "'which will make the contract effective rather than one that will make it *illusory* or unenforceable.'" *Questar Builders Inc. v. CB Flooring LLC*, 978 A.2d 651, 670 (Md. 2009) (emphasis added) (quoting *Kelley Constr. Co. v. Wash. Suburban Sanitary Comm'n*, 230 A.2d 672, 676 (Md. 1967)).

The contract here is most naturally and easily construed in a way that would give effect to the agreement and place it outside the holding in *Cheek*, which rested on the employer's "unfettered discretion" to "'alter,

amend, modify, or revoke the [Employment Arbitration] Policy at its sole and absolute discretion at *any time with or without notice*.'" *Holloman v. Circuit City Stores, Inc.*, 894 A.2d 547, 553-54 (Md. 2006) (alterations and emphasis in original) (quoting *Cheek*, 835 A.2d at 663).

Unlike in *Cheek*, the contract repeatedly limits defendants' discretion to modify the terms of the agreement:

- It allows the defendants to make changes only "[s]ubject to the limitations of applicable law";
- It obligates the defendants to provide notice of changes "[i]f required by applicable law"; and
- Significantly, it provides that the new or modified terms will apply only "[a]s of the effective date" and "subject to the limitations of applicable law."

JA72-73.[5]

[5] The change-in-terms clauses in two other appeals pending before this Court contain similar discretion-limiting language. *See Bailey v. Mercury Fin., LLC*, --- F. Supp. 3d ----, 2023 WL 6244591, at *1 (D. Md. Sept. 26, 2023) (agreement to provide notice "[w]hen required by law"), *appeal pending*, No. 23-2133; *Johnson v. Cont'l Fin. Co., LLC*, 690 F. Supp. 3d 520, 524 (D. Md. 2023) (agreement to provide "such notice to you as is required by law"), *appeals pending*, Nos. 23-2047 and 23-2049.

The district court acknowledged this language but read the phrase "applicable law" to refer only to "statute[s]," and to "not encompass case law" like *Cheek*. JA425. That unnaturally cramped reading of the word "law," which is ordinarily broadly understood to encompass decisional law (such as the common law), underscores that the district court's interpretation of the contract's terms reflects just the sort of "unique," anti-arbitration reading that is out of bounds under the FAA. *Imburgia*, 577 U.S. at 54-55. Indeed, in *Imburgia*, the Supreme Court held that a California state court's distorted interpretation of DIRECTV's agreement—viewing the phrase "law of your state" to include "*invalid* state law" and exclude federal law—ran afoul of the FAA. *Id.* at 55. The same is true of the district court's reading of the contract in this case.

Moreover, the district court's approach creates a paradox. On the district court's reading of the contract, there is no "applicable law" in Maryland that requires notice of changes, yet Maryland law invalidates an arbitration provision when the contract containing it permits changes without notice. The FAA does not authorize courts to engage in this type of interpretive gymnastics to avoid giving effect to the parties' agreement to arbitrate. *See Imburgia*, 577 U.S. at 54-55.

When Maryland decisional law is included in the term "applicable law," there is no doubt that the agreement here obligated defendants to provide notice of changes. The Maryland Court of Appeals upheld an arbitration provision that could be unilaterally modified *with notice*, distinguishing *Cheek* on that basis. *Holloman*, 894 A.2d at 553-54. And that is why the court in *Holloman rejected* the plaintiff's argument that "'notice [of the revised terms] does not provide consideration in Maryland.'" *Id.* at 554.

Courts in other jurisdictions have rejected similar arguments. Indeed, courts repeatedly have held that when a company must provide notice of changes to an arbitration clause, that fact alone defeats any illusoriness or unconscionability challenge.[6]

The district court also gave short shrift to the language in the change-in-terms provision making clear that any changes will apply only

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[6] *See, e.g.*, *Larsen*, 871 F.3d at 1317-18; *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 173-74 (5th Cir. 2004); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002); *Bryne v. Charter Commc'ns, Inc.*, 581 F. Supp. 3d 409, 419 (D. Conn. 2022); *El-Hage v. Comerica Bank*, 2020 WL 7389041, at *5 (E.D. Mich. Dec. 16, 2020); *Grasso Enters. v. CVS Health Corp.*, 2015 WL 6550548, at *6 (W.D. Tex. Oct. 28, 2015); *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, 2014 WL 7338914, at *2 (W.D. Okla. Dec. 22, 2014); *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1153 (D. Colo. 2012).

"[a]s of the effective date," preventing retroactive modification of the arbitration provision. JA73. As defendants explain in their brief (at 8), an accountholder would have the option to reject any updates to the arbitration provision prior to that effective date. These restrictions on the ability of defendants to retroactively modify the agreement easily address the concern in *Cheek* that the defendant in that case could "revoke the Employment Arbitration Policy even after arbitration is invoked, and even after a decision is rendered." 835 A.2d at 662.

Finally, while the terms of the change-in-terms provision here distinguish this case from *Cheek* by limiting defendants' discretion, the district court also gave short shrift to other constraints supplied by generally-applicable contract law. Several jurisdictions have recognized that "the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable." *Tompkins*, 840 F.3d at 1033; *see Larsen*, 871 F.3d at 1320-21. "Maryland contract law" recognizes the same principle outside of the arbitration context, with the Court of Appeals noting that "a party with discretion is limited to exercising that discretion in good faith and in accordance with fair dealing." *Questar*

Builders, 978 A.2d at 670. The FAA prohibits taking a different approach in the arbitration context.[7]

In sum, the FAA forecloses the district court's departure from generally applicable contract principles and its idiosyncratic, arbitration-defeating interpretation of the contract.

CONCLUSION

The Court should reverse the order below.

[7] The implied covenant of good faith and fair dealing cannot displace or contradict the express unambiguous terms of the agreement. *See id.* at 671. For example, the implied covenant of good faith and fair dealing could not salvage the provisions in *Coady* and *Cheek* expressly permitting modifications at any time and "without notice" or consent. But as discussed above (at 20 & n.5), the change-in-terms clauses in this and other pending appeals before the Court raising similar issues are far narrower and do not provide the defendants with unfettered discretion to modify the contracts' terms.

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Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(g), undersigned counsel certifies that this brief:

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Dated: June 28, 2024

/s/ *Archis A. Parasharami*
Archis A. Parasharami

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I certify that on this 28th day of June, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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