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**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2025-CA-01370**

ROBERT H. FULLER,
Plaintiff-Appellant,

v.

CADENCE BANK,
Defendant-Appellee.

On Appeal from the Circuit Court of Union County, Mississippi
Third Judicial District, Case No. 73CI1:25-cv-00153-GFT

**PROPOSED BRIEF OF
THE MISSISSIPPI BANKERS ASSOCIATION,
THE TENNESSEE AND MISSISSIPPI CREDIT UNION ASSOCIATION,
AND
THE AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE CADENCE BANK**

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CERTIFICATE OF INTERESTED PERSONS

NO. 2025-CA-01370

The undersigned counsel of record for amici curiae, the Mississippi Bankers Association, the Tennessee and Mississippi Credit Union Association, and the American Bankers Association, certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal.

In addition to the persons and entities identified by the parties in their respective certificates, amici identify the following:

1. Mississippi Bankers Association, amicus curiae;
2. Tennessee and Mississippi Credit Union Association, amicus curiae;
3. American Bankers Association, amicus curiae;
4. Kaytie Pickett and Jones Walker LLP, counsel for amici curiae; and
5. The members of the Mississippi Bankers Association, the Tennessee and Mississippi Credit Union Association, and the American Bankers Association, comprising banks, credit unions, and other financial institutions doing business in the State of Mississippi and throughout the United States.

So certified, this the ____ day of _____, 2026.

By: /s/ Kaytie M. Pickett
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*Mississippi Credit Union Association, and
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IDENTITY AND INTEREST OF AMICI CURIAE

The Mississippi Bankers Association (“MBA”), the Tennessee and Mississippi Credit Union Association (the “Association”), and the American Bankers Association (“ABA”) respectfully submit this joint brief as amici curiae in support of Appellee Cadence Bank.

The MBA, founded in 1889, is the primary trade association representing the banking industry within the State of Mississippi, whose membership includes more than 75 community banks, regional banks, and savings institutions operating in Mississippi. The MBA’s mission is to represent the collective interests of Mississippi’s banking industry and promote sound, uniform, and workable standards that govern the millions of deposit relationships that Mississippi banks maintain with their customers. The MBA also frequently appears as amicus curiae in cases, such as this one, that present questions of exceptional importance to the banking industry statewide.

The Association, formed in 2026 of two organizations (Tennessee Credit Union League (est. 1934) and Mississippi Credit Union Association (est. 1937)), is the primary trade association representing the credit union industry within the States of Mississippi and Tennessee. Its membership includes 55 credit unions operating in Mississippi and 127 credit unions operating in Tennessee. The Association represents the collective interests of credit unions throughout Tennessee and Mississippi. The Association advocates for sound, consistent, and workable legal and regulatory standards governing the millions of member relationships maintained by credit unions in the two states. In furtherance of these interests, the Association regularly

participates as amicus curiae in matters presenting issues of substantial importance to credit unions and the financial services industry. This case presents such issues and implicates matters of significant statewide importance to the Association's members and the consumers they serve.

The ABA is the voice of the nation's banking industry. Its members, located in each of the fifty states and the District of Columbia, include community, regional, and money-center banks, as well as savings associations, trust companies, and their affiliates. Together, ABA members hold a substantial majority of the United States banking industry's domestic assets. The ABA regularly appears as amicus curiae in cases raising issues important to the banking industry nationwide, and it has a particular interest in the enforceability of arbitration agreements that its members rely on to structure their operations and resolve customer disputes efficiently.

Amici have a direct and significant interest in the central issue of this appeal: whether a financial institution can amend an arbitration clause in the terms and conditions of a deposit account by giving notice to the customer, followed by the customer's continued use of the account. National and community financial institutions operating in Mississippi regularly amend their deposit agreements in this way, because it would be manifestly impracticable to do otherwise. If this Court were to decide that deposit agreements cannot be amended by notice and continued use, or that arbitration provisions are the only exceptions, the ruling would affect all lower courts in the State and disturb the established practices of the banking industry.

The parties have thoroughly briefed the record-specific grounds for affirmance. Amici write separately to provide the industry-wide perspective that the parties cannot: to explain why notice-and-continued-use amendments are both legally sound and a commercial necessity, and why *Union Planters Bank, N.A. v. Rogers*, 912 So. 2d 116 (Miss. 2005), cannot be reconciled with the Federal Arbitration Act's equal-footing command.

No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution to its preparation or submission.

STATEMENT OF THE ISSUE ADDRESSED BY AMICI

Mississippi law unambiguously allows a deposit agreement to be amended by notice-and-continued use, but *Union Planters Bank, N.A. v. Rogers*, 912 So. 2d 116 (Miss. 2005), held that this method of amendment is insufficient for arbitration clauses. Yet the Supreme Court of the United States has held repeatedly that the Federal Arbitration Act demands that arbitration clauses be treated like any other contractual terms. This is the equal-footing doctrine, which this Court has recognized. *See R.K. Metals, LLC v. E & E Co.*, 404 So. 3d 123, 128 (Miss. 2025). To the extent *Rogers* conflicts with the equal-footing doctrine, should it be overruled?

SUMMARY OF THE ARGUMENT

There is no question that this Court should uphold the trial court's order to compel arbitration. Amici, however, urge that this Court should go further and unambiguously hold that a financial institution can amend any term of a deposit agreement, including an arbitration clause, through notice-and-continued use, and to

the extent *Union Planters Bank, N.A. v. Rogers*, 912 So. 2d 116 (Miss. 2005), holds otherwise, it is overruled.

A bank's mailing updated terms is an offer to modify an at-will service contract; the customer accepts this offer by continuing to use the account. Mississippi and federal courts applying Mississippi law have consistently upheld this method of amendment, including for arbitration clauses. *See Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001). Requiring financial institutions to obtain a fresh physical signature from each customer whenever a term changes would harm the consumers Mr. Fuller purports to protect.

The FAA's equal-footing principle forbids state courts from subjecting arbitration agreements to defenses or formation rules that do not apply to contracts generally. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017). *Rogers* did what the FAA forbids: it treated the addition of an arbitration clause as "something much more significant and of a different character" than any other amendment. This Court has since recognized the equal-footing doctrine. *See R.K. Metals, LLC v. E & E Co.*, 404 So. 3d 123, 128 (Miss. 2025). The Court should take this opportunity to disavow *Rogers's* arbitration-specific rule and confirm that financial institutions may amend their deposit agreements, arbitration provisions included, through notice and continued use.

ARGUMENT

I. Amendment of a deposit agreement by notice and continued use is legally valid and commercially indispensable.

A. Notice-and-continued-use amendment is a settled application of ordinary contract law.

Arbitration is a matter of contract, and whether the parties agreed to arbitrate is determined under ordinary Mississippi principles of contract formation. Mississippi law has long recognized that a party may manifest assent through conduct as well as a signature. An offer and acceptance may be shown by a party's acts, and a "definite and unequivocal course of conduct" demonstrating assent is as binding as a written acceptance. *Edwards v. Wurster Oil Co.*, 688 So. 2d 772, 775 (Miss. 1997); *see also Logan v. RedMed LLC*, 377 So. 3d 956, 965 (Miss. 2024). Mississippi courts continue to apply this rule, holding that a party's conduct may establish assent even where a signature is absent, ineffective, or disputed. *Brown v. Petro*, 424 So. 3d 380, 387-88 (Miss. Ct. App. 2025). Federal courts applying Mississippi law likewise recognize that parties may consent to and ratify agreements through their conduct. *See, e.g., QBE Ins. Corp. v. Indus. Corrosion Control, Inc.*, No. 1:07CV35-LG-JMR, 2007 U.S. Dist. LEXIS 90034, at *8-9 (S.D. Miss. Dec. 5, 2007); *Kuebler v. Union Planters Mortg.*, No. 3:05CV125-D-A, 2006 U.S. Dist. LEXIS 99253, at *8-9 (N.D. Miss. Nov. 22, 2006).

These principles apply directly to deposit agreements, which create at-will, ongoing banking relationships. When a financial institution provides notice of amended terms and advises that continued use of an account constitutes acceptance, the customer assents by continuing the relationship. As the Fifth Circuit explained,

such notice is an invitation to continue the relationship under new terms, which the customer accepts through continued use. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173-74 (5th Cir. 2004). Leading authorities on commercial transactions and banking law recognize the same rule: because a deposit agreement is terminable at will, it may be modified upon reasonable notice, with the customer accepting or rejecting the modification by continuing or discontinuing the relationship. 1 *Law of Electronic Commercial Transactions* § 8.10; 1 *Law of Bank Deposits, Collections, & Credit Cards* § 3.13.

Consistent with these settled principles, Mississippi and federal courts applying Mississippi law have repeatedly enforced deposit-agreement amendments adopted through notice and continued account use, including amendments adding arbitration provisions. In *Herrington v. Union Planters Bank, N.A.*, the court held that the absence of a signed signature card was immaterial because the customer accepted the arbitration provision by continuing to use the account. 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001). Likewise, *Bank One, N.A. v. Coates* enforced an arbitration amendment where the bank notified customers of the amendment and the customer instead continued the account relationship. *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001), *aff'd*, 34 F. App'x 964 (5th Cir. 2002). These decisions reflect the settled rule that a contract may be modified by a later agreement formed through notice and continued performance.

The Uniform Commercial Code, as adopted in Mississippi, reinforces the same principle. The UCC defines an “agreement” to include bargains established by implication from course of dealing and course of performance. Miss. Code Ann. § 75-1-201. It further recognizes that deposit-account terms may arise through “adoption, ratification, estoppel or the like.” Miss. Code Ann. § 75-4-103 cmt. 2. The Mississippi Legislature has likewise provided that continued use of a revolving credit account constitutes consent to modified terms. Miss. Code Ann. § 75-17-19. In short, Mississippi law recognizes notice-and-continued-use amendments and permits enforcement of arbitration provisions added to an ongoing deposit relationship through that process.

B. Notice-and-continued-use amendment is a practical necessity, and the signature-for-every-change rule Appellant proposes is impossible.

Deposit agreements are long-lived, relational contracts that must adapt to an evolving legal, regulatory, technological, and commercial environment. Financial institutions must update the terms governing their accounts when new products like electronic payments and mobile banking emerge, laws and regulations change, new security measures like multi-factor authentication are developed to protect consumers, or industry mergers occur. A single financial institution might hold hundreds of thousands or even millions of individual accounts. The only practical way to keep those agreements current is to notify customers and assume ongoing use equals consent.

Requiring a new physical signature from every customer each time a financial institution changes a term in the deposit agreement would halt ordinary banking

practices. It would compel institutions to bring millions of customers into branches or close their accounts if they did not appear, regardless of how long-standing that relationship was. This burden would affect consumers as much as financial institutions: customers would have to bear the cost and inconvenience of signing new paperwork for each routine update, or risk losing access to accounts they depend on for paychecks, bill payments, and automatic drafts. Expecting a signature for every change would isolate Mississippi banking from the mainstream practice across the Southeast¹ and strip Mississippians of the innovations and protections that periodic amendments provide.

Mr. Fuller’s account illustrates this point. The record shows that his deposit agreement explicitly permitted amendments “upon reasonable notice,” that Cadence mailed him the updated 2021 Terms and reminded him of them through multiple mailings afterward, and that he continued to use his account for years, signing four separate wire authorizations that included the governing terms. Overall, the notice-and-continued-use method was properly applied here. However, the broader industry significance of this issue is why this appeal matters beyond Mr. Fuller: the Court’s decision will determine how every financial institution in the state updates every deposit account.

¹ See, e.g., *SouthTrust Bank v. Williams*, 775 So. 2d 184, 191 (Ala. 2000); *NCO Portfolio Mgmt. v. Walker*, 08-1011 (La. App. 3 Cir 02/04/09), 3 So. 3d 628, 637; *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000).

II. To the extent *Rogers* exempts arbitration provisions from notice-and-continued-use amendment, it is preempted by the Federal Arbitration Act.

The Federal Arbitration Act (FAA) preempts unfavorable “legal rules that ‘apply only to arbitration.’” *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 581 U.S. 246, 251 (2017). The FAA also “requires courts to place arbitration ‘on equal footing with all other contracts.’” *Id.* at 248 (quoting *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015)). This command is codified in Section 2, which permits challenges to an arbitration agreement only “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Supreme Court of the United States has repeatedly interpreted this savings clause to “permit[] agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred*, 581 U.S. at 251 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

The FAA preempts not only rules that discriminate against arbitration on their face, but also any rule that “covertly accomplishes the same objective by disfavoring contracts that ... have the defining features of arbitration agreements.” *Id.* A state may not, for example, demand a heightened or “clear-statement” showing of assent for arbitration that it does not demand for other contract terms. *Id.* at 251–56; *see also Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 431–32 (5th Cir. 2004) (state courts “may not treat arbitration clauses differently than other contract terms”). The Supreme Court of the United States has not hesitated to reverse state court decisions or invalidate state

statutes that disregard the equal-footing principle. *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531-32 (2012) (per curiam); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022).

Here, *Rogers* “takes its meaning precisely from the fact that . . . arbitrat[ion] is at issue.” *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987). In *Rogers*, this Court held that although a bank may bind customers to amended deposit terms through notice and continued use, an arbitration clause is different: “waiving the right to have access to the courts is something much more significant and of a different character than changing the terms and conditions of a bank account, assent for which can be obtained simply by the continued use of the account.” 912 So. 2d at 120. That is the crux of the constitutional problem. *Rogers* expressly permitted notice-and-continued-use assent for every deposit term *except* an arbitration provision, for which it demanded a heightened, affirmative “waiver.” That kind of arbitration-specific assent rule is what the FAA forbids. A rule that provides that continued use is enough to add any term *other than an arbitration term* does not “apply generally”; it “single[s] out arbitration.” *Kindred*, 581 U.S. at 251 & n.2.

Rogers’s reliance on waiver cases does not save its reasoning. The FAA looks to how the rule operates, not to its origin. The rule that *Rogers* applied produced an arbitration-only formation requirement, which *Kindred* forbids. And the equal-footing doctrine is not new: it predates *Rogers* by decades. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Casarotto*, 517 U.S. at 687. This Court has since reaffirmed

that “arbitration agreements and other contract terms should be on equal footing.” *R.K. Metals, LLC v. E & E Co.*, 404 So. 3d 123, 128 (Miss. 2025). *Rogers*’s arbitration-specific rule cannot be squared with that principle. The FAA permits no lesser treatment of arbitration. Indeed, framing an arbitration clause as a “waiver of a fundamental right” requiring wet-ink signatures, while permitting all other banking terms to be updated via notice, is the exact covert discrimination the FAA preempts.

The Court can affirm on the narrow ground that *Rogers* is distinguishable, as Cadence explains. But *stare decisis* does not demand that the Court leave intact a holding in obvious conflict with the Supreme Court of the United States’ binding interpretation of the FAA. *Rogers*’ departure from the equal-footing doctrine is “not only manifestly wrong, but mischievous.” *Univ. of Miss. Med. Ctr. v. Carter*, No. 2024-IA-00038-SCT, 2026 Miss. LEXIS 225, at *21 (2026) (Coleman, J., concurring) (citing *Caves v. Yarbrough*, 991 So. 2d 142, 153 (Miss. 2008)). Leaving that holding in place invites continued uncertainty every time a financial institution seeks to enforce an arbitration agreement, spawning precisely the threshold litigation that arbitration is designed to avoid. Because the question is one of exceptional and recurring importance to the entire banking industry, the Court should resolve it clearly.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Appellee Cadence Bank, amici curiae the Mississippi Bankers Association, the Tennessee and Mississippi Credit Union Association, and the American Bankers Association respectfully request that this Court affirm the trial court’s order compelling arbitration and confirm that financial institutions may amend their deposit

agreements, including by adding arbitration provisions, through notice to the customer and the customer's continued use of the account.

Respectfully submitted, this the ____ day of _____, 2026.

**MISSISSIPPI BANKERS ASSOCIATION,
TENNESSEE AND MISSISSIPPI
CREDIT UNION ASSOCIATION, and
AMERICAN BANKERS ASSOCIATION**

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CERTIFICATE OF SERVICE

I, Kaytie Pickett, counsel for amici curiae, hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record, and that I have caused a true and correct copy of the foregoing to be served upon the following:

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This the ____ day of _____, 2026.

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