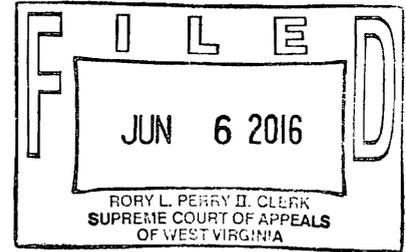


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0005



**CITIZENS TELECOMMUNICATIONS
COMPANY OF WEST VIRGINIA d/b/a
FRONTIER COMMUNICATIONS OF
WEST VIRGINIA, and FRONTIER WEST
VIRGINIA INC.**

Petitioners

v.

On Petition for Appeal from an Order
of the Circuit Court of Lincoln County
(14-C-115)

**MICHAEL SHERIDAN, APRIL
MORGAN, TRISHA COOKE, and
RICHARD BENNIS,**

Respondents

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INTRODUCTION

Plaintiffs do not dispute that they each received a physical copy of Frontier's Terms and Conditions—which contains the arbitration provision at issue—nearly two years before they filed suit. They do not dispute that they had the opportunity to review those Terms at any point during those two years. They do not dispute that the Terms specify that continuing to pay for and receive Frontier's Internet service would constitute acceptance of the Terms. And they do not dispute that they each have continued to pay for and receive Frontier's Internet service.

Under settled West Virginia law, these undisputed facts establish that Plaintiffs each formed a valid unilateral contract with Frontier.

Plaintiffs go to great lengths to avoid this basic application of West Virginia contract law. But their arguments are deeply flawed. For starters, they ignore West Virginia's recognition of unilateral contracts, which reflects the modern reality that parties can agree to a contract by performing under it and accepting its benefits. They also object that they did not *sign* a contract, as though commerce in this State were trapped in another century. But it has long been the law that pen-to-paper signatures are not required. Assent can be and often is manifested by conduct.

Equally unavailing, Plaintiffs attempt to avoid the universally recognized principle that the failure of a party to read a contract does not excuse that party from his or her obligations under the agreement. Finally, their argument that the Terms and Conditions provided with their November 2012 bills did not afford them sufficient notice of the arbitration provision rests on a handful of inapposite cases that are hostile to arbitration in violation of the Federal Arbitration Act and that conflict with decisions from across the country.

Plaintiffs' effort to avoid their commitments to arbitrate would require this Court to create new rules of contract formation that subject arbitration agreements to greater scrutiny than other contract provisions, but Section 2 of the FAA prohibits that approach. As the U.S. Supreme Court

reiterated just a few months ago, the FAA requires state courts to “place[] arbitration contracts on equal footing with all other contracts.” *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quotation marks omitted). The importance of faithful adherence to the Supreme Court’s precedents by the neutral application of state law is why Justice Breyer, who dissented in *AT&T Mobility LLC v. Concepcion*, nonetheless wrote for the *Imburgia* majority that the California Court of Appeal had overstepped its bounds in distorting generally applicable state law to avoid enforcement of the parties’ arbitration agreement. Here, encouraged by the Plaintiffs, the Circuit Court did precisely the same thing. That decision should be reversed.

Sensing this inevitable conclusion, Plaintiffs argue front and center that the parties had “no contract” at all. Resp. Br. 1–4. Yet a relationship under which one party provides another with a service in return for consideration, such as the one between Plaintiffs and Frontier, is nothing less than a contract. *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691–92 (N.D. W. Va. 2005) (citing *Cook v. Hecks Inc.*, 176 W. Va. 368, 373–74, 342 S.E.2d 453, 458 (1986)). Ironically, Plaintiffs themselves admit that they had “contracts for internet services” from Frontier. A.R. 35–36, 39, 41–43. (Indeed, plaintiffs’ original complaint asserted a breach of contract claim.) The question for this Court is whether those contracts have terms and conditions, including the arbitration clause, under ordinary rules of contract formation. They do.

Finally, Plaintiffs do not seriously defend many of the erroneous conclusions reached by the Circuit Court and highlighted in Frontier’s other assignments of error, instead treating those conclusions as mere “observations”—thereby waiving Plaintiffs’ arguments on those scores. And the minimal defenses that Plaintiffs do offer again contradict the FAA and settled case law.

For these reasons, this Court should reverse the Circuit Court’s decision.

I. FRONTIER’S TERMS CONSTITUTE A FULLY ENFORCEABLE UNILATERAL CONTRACT UNDER SETTLED WEST VIRGINIA LAW.

A. Plaintiffs Accepted The Frontier Terms Sent To Them In November 2012.

In arguing that they did not enter into arbitration agreements, Plaintiffs veer off on a lengthy tangent about online browsewrap contracts (Resp. Br. 16–20) and rely on a handful of stale, out-of-state cases that rest on judicial suspicion of arbitration (*id.* at 27–30). Plaintiffs’ arguments, however, fail on basic principles of contract law alone.

1. West Virginia recognizes unilateral contracts and acceptance by conduct.

Although Plaintiffs attack Frontier’s method of contract formation (*see generally* Resp. Br. 20–32), they have not disputed that principles of West Virginia law governing unilateral contracts and acceptance by conduct apply here. Under those principles, the physical, printed copy of Frontier’s Terms that Frontier sent each of the Plaintiffs in November 2012 was an offer to modify the contractual relationship between the parties, which is governed by the same rules as offers to contract generally. *See, e.g.*, Syl. Pt. 2, *Wheeling Downs Racing Ass’n v. W. Va. Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973). Frontier, as “the master of [its] offer” (Restatement (Second) of Contracts § 29 cmt. a (1981)), specified in the ***first paragraph*** of the Terms that “BY USING OR PAYING FOR FRONTIER INTERNET SERVICES OR EQUIPMENT, YOU ARE AGREEING TO THESE TERMS AND CONDITIONS.” A.R. 281 (capitalization in original). Likewise, Plaintiffs’ November 2012 bills accompanying the printed copy of the Terms informed Plaintiffs that “[b]y using and paying for Frontier Internet services, you are agreeing to these revised Terms and Conditions and the requirement that disputes be resolved by individual arbitration instead of class actions and/or jury trials.” A.R. 278; *see also* A.R. 140–143, 171–174, 203–207, 233–236. It is undisputed that Plaintiffs continued to pay for and use Frontier’s Internet service after receiving these terms—thereby accepting the offer in the very manner specified by the Terms. *See* Pet. Br. 3–5.

That is exactly how a unilateral contract is formed under West Virginia law. A “unilateral contract” is one “where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise.” *Cook*, 176 W. Va. at 373, 342 S.E.2d 348. “[A]cceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror.” *First Nat’l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 641–42, 153 S.E.2d 172, 176–77 (1967); *see also New v. GameStop, Inc.*, 232 W. Va. 564, 572–73, 753 S.E.2d 62, 70–71 (2013) (per curiam) (“acceptance may be by word, act or conduct” as long as it “evince[s] the intention of the parties to contract”); *Schultz*, 376 F. Supp. 2d at 691 (a plaintiff “accept[s] the terms and conditions” associated with a service by “activating and/or continuing [to] use” that service); *cf. Hill v. Gateway 2000*, 105 F.3d 1147, 1148 (7th Cir. 1997) (“A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.”).

Plaintiffs concede that “[c]ertainly assent *can* be found by acts and conduct of the offeree.” Resp. Br. 20.¹ But they nonetheless protest that the Terms and Conditions provided to them with

¹ Plaintiffs attempt to distinguish *Cook* as a case that (they say) is “not about formation” of contracts. Resp. Br. 22. That assertion is belied by *Cook* itself, in which this Court spent several pages setting forth the standards for “the existence of a contract.” 176 W. Va. at 371–75, 342 S.E.2d at 456–60. Nor do Plaintiffs explain why, as *Cook* held, an employee’s continuing to work can constitute acceptance of an offer for unilateral contract, but a customer’s continuing to pay for and use a service like Frontier’s cannot. Indeed, a federal court in Minnesota relied on a similar analogy in upholding an earlier version of Frontier’s arbitration provision. *See Rasschaert v. Frontier Commc’ns Corp.*, 2013 WL 1149549, at *6–7 (D. Minn. Mar. 19, 2013).

Plaintiffs also seek to distinguish *Schultz* on its facts (Resp. Br. 24), but the facts are not meaningfully distinguishable. Plaintiffs point to the court’s observation, by way of background, that the customer verbally accepted AT&T’s terms when he upgraded his phone. *See Schultz*, 376 F. Supp. 2d at 687–88. But the court’s analysis of contract formation was not dependent on that fact; on the contrary, the court held that “by activating and/or continuing [to] use” a service, a plaintiff thereby “accept[s] the terms and conditions associated with that service.” *Id.* at 691. Moreover, Plaintiffs do not—and could not—quarrel with the court’s considered explanation of West Virginia law on unilateral contracts. *See id.* at 691–92.

their November 2012 bills was “insufficiently presented” to constitute a binding offer to contract. Resp. Br. 20–24 (quoting A.R. 18). They are wrong for several reasons.

First, Plaintiffs’ objection that they did not knowingly assent to the arbitration provision in the physical copy of Frontier’s Terms that they received (Resp. Br. 20–24, 26) boils down to an argument that Frontier was required to take special steps to highlight the arbitration provision in particular. But that argument conflicts with Section 2 of the FAA, which “forbids states from subjecting arbitration clauses to ‘special notice requirement[s]’ that do not apply generally to all contracts.” Pet. Br. 22 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

Plaintiffs have no response to Frontier’s showing or the Supreme Court’s opinion in *Casarotto*. Instead, they resort to sowing confusion. They assert in one breath that the Circuit Court did not rely on the placement of the arbitration provision in Frontier’s printed Terms in ruling on contract formation. Resp. Br. 26. But in their next breath, they state that “an observation as to the length of the insert or the size of its font was not irrelevant.” *Id.* at 26 n.13; *see also id.* at 22 (echoing the Circuit Court’s statement that there was no assent based on its observation that in the November 2012 bill, “the provisions denoted as ‘Dispute Resolution by Binding Arbitration’ is stated beginning at the bottom of page 4 and continues to the top of page 6”). Plaintiffs cannot have it both ways.

In any event, the Circuit Court’s Order speaks for itself, and makes clear that the lower court based its conclusion that Frontier had not put Plaintiffs “on proper notice that Frontier intended to form a binding contract as to arbitration” because the provision was printed on “the six-page, miniscule-font Terms and Conditions” and identified by “language on the fourth page of their monthly bills.” A.R. 18, 20. Despite Plaintiffs’ efforts to downplay the Circuit Court’s reasoning as a stray “observation,” the Circuit Court did exactly what *Casarotto* and the FAA prohibit: subject arbitration provisions to a heightened standard of notice. *See* Pet. Br. 22–23.

Second, the Circuit Court’s “observation” is inaccurate. Like the Circuit Court, Plaintiffs improperly conflate the earlier notices of Frontier’s *online* Terms that they received on their September 2011 and January 2012 bills with the complete *physical copy* of Frontier’s Terms that they received in November 2012. *See* Resp. Br. 21–22. The physical terms that Frontier provided in November 2012 were presented in a separate document titled—in large, boldfaced capital letters—“RESIDENTIAL INTERNET SERVICE TERMS AND CONDITIONS.” A.R. 281. And the *second sentence* of the Terms—on the first page, not the fourth—contains an admonition that “THIS AGREEMENT REQUIRES THAT ANY DISPUTE BE RESOLVED BY BINDING ARBITRATION ON AN INDIVIDUAL BASIS[.]” *Id.* Because the *very first paragraph* of Frontier’s Terms specifically notifies customers of the arbitration provision in boldfaced capital letters, Plaintiffs’ assertion that they “must now conduct line by line reviews of each and every bill each and every month” rings hollow. Resp. Br. 21.

Third, Plaintiffs may not avoid the formation of a contract by asserting that they did not *read* the arbitration provision contained in the Terms that they undisputedly received in November 2012. Pet. Br. 14–16. Plaintiffs suggest that the duty to read contractual terms available to them—a duty long established under West Virginia contract law and indeed, all of American contract law—has no bearing on contract formation. Resp. Br. 19–20. Yet that is contrary to common sense and their own conduct manifesting assent to Frontier’s Terms: Because “[o]ne who has accepted benefits under a contract” is regarded as having “ratifie[d] the agreement” (*Hamilton v. McCall Drilling Co.*, 131 W. Va. 750, 754, 50 S.E.2d 482, 484–85 (1948)), Plaintiffs cannot avoid their obligations under their relationship with Frontier simply by stating that they did not read the written documents that Frontier mailed to them. *See also Schultz*, 376 F. Supp. 2d at 692 (applying the principle that “[a] contract need not be read to be effective” to the formation of a unilateral contract) (quoting *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997)).

Plaintiffs also suggest that the duty applies only when a party actually signs an agreement. But that is wholly inconsistent with the principle that neither West Virginia law nor the FAA requires a signature for an arbitration agreement (or contracts in general) to be effective. *See* Part I.A.2, *infra*. Nor are Plaintiffs correct to argue that the duty to read their contracts was excused because Plaintiffs “had no reason to know that Frontier had extended an offer to contract in the first place.” Resp. Br. 20. The record shows otherwise. As noted above and in Frontier’s opening brief, the copy of Frontier’s Terms that Plaintiffs received in November 2012 was a conspicuously titled, stand-alone document that informed customers like Plaintiffs about the arbitration provision from the outset.

Finally, Plaintiffs are incorrect in their insistence that this case is just like *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013). *See* Resp. Br. 23–24. As Frontier has explained, *U-Haul* did not address the issue of a customer’s manifestation of assent to a contract or a contract modification through continued use and payment for a service. Pet. Br. 19–20. Rather, *U-Haul* involved a situation in which U-Haul tried to introduce an arbitration provision by incorporating it by reference into a separate agreement that renters signed at the time of rental—yet U-Haul did not provide the customer with the arbitration provision until *after* the renter executed the rental agreement, so the renters who believed that they had finalized their agreement with U-Haul had no way to know that they were purportedly agreeing to arbitration. 232 W. Va. at 437, 752 S.E.2d at 591. Moreover, this Court was troubled by U-Haul’s efforts to disguise the import of the addendum by slipping it into a folder and by “design[ing] [it] to look more like a document folder advertising U–Haul products, services, and drop-off procedures, rather than a legally binding contractual agreement.” *Id.* at 444, 752 S.E.2d at 598.

Here, by contrast, the hard copy of Frontier’s Terms that Plaintiffs received in November 2012 was conspicuously labeled and clearly contractual in nature. Nor did Frontier incorporate

any separate documents by reference. The Terms sent to Plaintiffs, which include the arbitration provision, form *the single* agreement governing the relationship between Plaintiffs and Frontier. Plaintiffs fail to address these critical differences.

In sum, under well-established principles of contract formation, this Court should hold that the parties entered into a unilateral contract. It included a fair arbitration clause, and Plaintiffs are bound by its terms.

2. *West Virginia does not require a signature to manifest assent.*

Plaintiffs also argue that they are not bound to arbitrate because, in their view, assent is less likely to be present without “the traditional means of a signature.” Resp. Br. 24–26. That argument not only runs headlong into West Virginia’s settled recognition of assent by conduct—and decades of modern commerce—but is unsupported by the sole case they cite, *Ely v. Phillips*, 89 W. Va. 580, 109 S.E. 808 (1921). *Ely*—a nearly century-old decision—involved the sale of a parcel of real estate jointly owned by three parties. The deed of sale was signed by two of the sellers, but not the third. This Court held that this was insufficient under the *statute of frauds*: “a contract of sale of real estate by two or more persons, to be sufficient under the statute of frauds must be signed by all of them.” 89 W. Va. at 584, 109 S.E. at 810. Thus, the ruling that a contract is “incomplete” until it is “signed by all of the parties” (*id.*) was referring to all of the parties *on the same side* of a real estate transaction—not a general requirement that *all* contracts require written signatures. What is more, the FAA forbids conditioning the formation of an arbitration agreement on the presence of a signature: Under the FAA, arbitration agreements need only be “written,” not signed. *See* Pet. Br. 19 (collecting cases).

In short, a unilateral contract, including its arbitration clause, was formed under established principles of contract law. This Court should so hold.

3. *Including revised terms along with a customer's monthly bill is a valid method of contract formation.*

Plaintiffs attempt to distract the Court from the fact that they each received the conspicuously marked Terms sent to them in November 2012 by repeatedly deriding the insert containing those Terms as a “bill stuffer.” Resp. Br. 27–32. Even if Plaintiffs’ use of that pejorative term were accurate, however, “a ‘bill stuffer’ notice of change of terms is not an inherently invalid method of assenting” to contracts, “including the modification, addition, or deletion of terms.” *Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1199 (S.D. Cal. 2013) (holding that “an agreement to arbitrate exists between [plaintiff] and Defendants” because plaintiff “continued to use her credit account after she received the ‘bill stuffer’ notices”). Indeed, numerous courts across the country have held that a business may include revised Terms in a mailing to customers, and that customers may manifest assent to those Terms by continuing to pay for and use the services at issue after receiving the mailing. Pet. Br. 24 & n.1 (collecting cases). The eight cases Frontier cited in its opening brief—all of which are consistent with ordinary contract formation principles that apply equally to offers to contract or offers to modify an existing contract—directly contradict Plaintiffs’ bald (and inaccurate) assertion that “Frontier fails to cite any cases on point.” Resp. Br. 27. Those cases hold that customers “assent[] to be bound by the arbitration provisions by holding open their accounts after [receiving] notice of the amendment.” *S. Trust Bank v. Williams*, 775 So. 2d 184, 189–91 (Ala. 2000).

Plaintiffs seek to distinguish *Williams* solely on the ground that the plaintiff “had twice *signed* agreements indicating they understood that the rules governing the parties’ contract might be changed or amended” prior to receiving the amendment containing the arbitration provision. Resp. Br. 31. But as noted above, a signature is not required to form a valid contract, and the earlier versions of Frontier’s Terms, like those at issue in *Williams*, expressly provided that Frontier may propose changes to the Terms by giving customers’ at least 30 days’ notice of the

revision. *See* Pet. Br. 3 (citing A.R. 248, 267, 271). Moreover, Plaintiffs entirely ignore the five other cases Frontier cited (*id.* at 24 n.1) that have upheld including revised terms in a mailing to customers, who manifest assent by continuing to use the services at issue. For example:

- One federal court held that “[t]he absence of the plaintiffs’ signature on” the mailed amendment containing the arbitration provision “does not alter the fact that the plaintiffs accepted the terms of the arbitration provision by continuing to utilize their accounts.” *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000), *aff’d per curiam*, 265 F.3d 1059 (5th Cir. 2001).
- Another federal court enforced an arbitration provision contained in a revised agreement mailed to a customer because she “d[id] not dispute” that “defendant mailed to her billing address the proposed arbitration amendment”; “d[id] not deny receiving the amendment”; and “d[id] not deny that she failed to reject the proposed amendment” and instead continued to use her account. *Jaimez v. MBNA Am. Bank, N.A.*, 2006 WL 470587, at *3 (D. Kan. Feb. 27, 2006).
- A New York court rejected many of the cases that Plaintiffs cite here as well as the arguments “that the Arbitration Agreement was ‘buried’ in [the plaintiff’s] monthly statement, or that it was sent in a ‘secretive’ or ‘covert’ manner.” *Johnson v. Chase Manhattan Bank USA, N.A.*, 784 N.Y.S.2d 921 (table), 2004 WL 413213, at *6–7 (Super. Ct. Feb. 27, 2004), *aff’d*, 786 N.Y.S.2d 302 (App. Div. 2004).

Rather than confronting these cases, Plaintiffs instead cite the same handful of cases reflecting hostility to arbitration that the Circuit Court adopted without addressing Frontier’s counterarguments. Resp. Br. 27–30; *see also* Pet. Br. 24–27 (discussing why those cases are inapposite). Indeed, Plaintiffs barely acknowledge that even the Ninth Circuit—not viewed as a reflexively pro-arbitration court—has declared their lead case, *Kortum-Managhan v. Herbergs*

NBGL, 204 P.3d 693 (Mont. 2009), to be preempted by the FAA, because it improperly disfavors arbitration agreements and mandates special notice of arbitration provisions. *See* Pet. Br. 25 (citing *Mortensen v. Bresnan Commc 'ns LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013)). Indeed, they insist—without so much as mentioning the Ninth Circuit’s decision in *Mortensen*—that this preempted rule is “valid.” Resp. Br. 28.

Plaintiffs do attempt to rehabilitate *Kortum-Managhan*, asserting that its conclusion that “making a change in a credit agreement by way of a ‘bill stuffer’ does not provide sufficient notice to the consumer” did not rest on anti-arbitration animus. Resp. Br. 28 (quoting *Kortum-Managhan*, 204 P.3d at 700). But that is flatly wrong. The heart of the Montana court’s reasoning was that “the addition of an arbitration clause in the instant case was not within [the plaintiff’s] reasonable expectations,” and that “[t]he ‘bill stuffer’ in this case is ambiguous and misleading because it seeks to waive the cardholder’s fundamental constitutional rights with a clause blended into the end of a document when bold type, capital letters and larger fonts are used to draw attention to other clauses.” *Kortum-Managhan*, 204 P.3d at 698, 700. That is precisely the type of hostility to arbitration that the FAA forbids, as Justice Ginsburg’s opinion for the U.S. Supreme Court in *Casarotto*—overturning a previous decision by the Montana court that had also defied federal law—makes clear.

Plaintiffs fare no better in trying to cleanse their other cases of their improper hostility towards arbitration. For example, while they assert that the court in *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424 (N.C. Ct. App. 2004), “expressly rejected any public policy arguments” (Resp. Br. 29), that court explicitly “appl[ied] the same principles and analyses relied upon by the California court in *Badie [v. Bank of America]*, 79 Cal. Rptr. 2d 273 (Ct. App. 1998).” *Sears Roebuck*, 593 S.E.2d at 429. And Plaintiffs do not deny that the analysis in *Badie* was based on judicial hostility towards arbitration. *See* Pet. Br. 25–26 & n.2. As one court put it in holding that a business could

amend a credit card agreement to add an arbitration provision by mailing “a pamphlet containing the revised credit card agreement” to customers: “We do not agree with *Badie*.” *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 889, 900 (Ill. Ct. App. 2003).

The remainder of Plaintiffs’ cited cases are likewise wrong, for the reasons Frontier previously explained in its opening brief (at 26–27). *See also Sacchi v. Verizon Online LLC*, 2015 WL 765940, at *7 & n.9 (S.D.N.Y. Feb. 23, 2015) (rejecting Plaintiffs’ cited case of *Discover Bank v. Shea*, 362 N.J. Super. 200 (Ch. Div. 2001), as “neither binding nor necessarily persuasive,” and instead recognizing “that notice of amendments via email and billing statements are valid”) (quotation marks omitted). This Court therefore should hold that a valid and enforceable contract was formed by Frontier mailing Plaintiffs the written Terms with their bills and Plaintiffs’ continued payment for and use of Frontier’s services after receiving those Terms.

4. *The FAA forecloses Plaintiffs’ request for the Court to apply heightened standards of contract formation.*

The common thread running through Plaintiffs’ attacks on arbitration (discussed above) is that they invite this Court to deviate from West Virginia’s ordinary principles of contract formation: unilateral contracts should be disregarded (pp. 3–8); conspicuous terms ignored (pp. 5–8); signatures required (p. 8); and heightened standards for mailed offers imposed (pp. 9–12).

But none of that is the law. Section 2 of the FAA forbids subjecting arbitration agreements—or the contracts in which they are contained—to heightened standards of contract formation. Yet that is precisely what the Circuit Court did here, and what Plaintiffs urge this Court to ratify. That invitation should be rejected. As the U.S. Supreme Court reiterated just a few months ago, the FAA requires state courts to “place[] arbitration contracts on equal footing with all other contracts.” *Imburgia*, 136 S. Ct. at 468 (quotation marks omitted). Thus, a “court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration

agreements under state law.” *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). In keeping with these bedrock principles, a federal court in West Virginia has underscored that “[s]tate-law principles derived from West Virginia law cannot be used to invalidate [an a]greement based solely on the fact that it contains an arbitration provision.” *Tominak v. Capoullez*, 2014 WL 123138, at *2 (N.D. W. Va. Jan. 13, 2014).

In suggesting otherwise, Plaintiffs cite this Court’s decision in *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 666–67, 724 S.E.2d 250, 271 (2011), *rev’d in part sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam), asserting that West Virginia courts “indulge every reasonable presumption against waiver of a fundamental constitutional right.” Resp. Br. 30 n.14. But *Brown* involved an unconscionability challenge, not a challenge to contract formation—and a portion of its holding was summarily reversed by the U.S. Supreme Court. Moreover, *Brown* itself recognized that “[a] state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment . . . stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted.” Syl. Pt. 8, *Brown*, 228 W. Va. 646, 724 S.E.2d 250. In short, this Court should apply ordinary principles of contract formation and hold that a unilateral contract was created, and the Circuit Court’s Order thus should be reversed.

B. Plaintiffs Also Accepted Frontier’s Online Terms.

It is enough to decide this case in Frontier’s favor that in November 2012 Frontier sent each of the Plaintiffs a full, printed, physical copy of the entire Terms, which clearly spelled out the arbitration provision and the manner of acceptance. Perhaps to distract from that fact, Plaintiffs spend much time attacking “browsewrap agreements.” Resp. Br. 16–20. But even if Plaintiffs had never received the Terms and Conditions in November 2012—although it is undisputed that they did—they still would have been bound to arbitrate because in September 2011 and January 2012

Frontier provided each of them with repeated notices of the addition of the arbitration provision to their service agreements. *See* Pet. Br. 4, 20–21.

The notices printed on Frontier’s bills distinguish this case from the “browsewrap” cases on which Plaintiffs rely. Resp. Br. 16–20. As this Court has recognized, in the cases refusing to enforce browsewrap terms, “[a] party . . . gives his assent [to such agreements] *simply by using the website.*” *U-Haul*, 232 W. Va. at 440 n.7, 752 S.E.2d at 594 n.7 (quoting *Sw. Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)) (emphasis added). Plaintiffs concede this defining characteristic of browsewrap agreements (Resp. Br. 17), but fail to recognize that (i) the notices explicitly directing them to Frontier’s Terms take this case well outside the browsewrap context, in which (unlike here) consumers must discover website terms on their own; and (ii) they did not assent merely by passively visiting a website, but rather by using and paying for Frontier’s Internet service after receiving these repeated notices.

Indeed, Plaintiffs have no persuasive response to *Rasschaert v. Frontier Communications Corp.*, 2013 WL 1149549 (D. Minn. Mar. 19, 2013), which upheld Frontier’s arbitration agreement based on the same September 2011 and January 2012 notices. *See* Pet. Br. 20–21. They assault it as “wrongly decided” without any further explanation; fault the court for not discussing the “enforceability of browsewrap agreements” even though Frontier’s Terms are not a browsewrap agreement; and argue that the *Rasschaert* court applied a “unique interpretation” of “Minnesota employment law.” Resp. Br. 32. Tellingly, however, Plaintiffs are unable to point to any specific aspect of the analysis in *Rasschaert* (or Minnesota law) that is inapplicable here. Indeed, the chief point of Minnesota law relied upon in *Rasschaert* was simply that Minnesota recognizes unilateral contracts—just as West Virginia does. *See Rasschaert*, 2013 WL 1149549, at *9; *Cook*, 176 W. Va. at 373, 342 S.E.2d at 458.

Plaintiffs received far more notice of their terms of service than in the browsewrap context,

and any ignorance of those terms must be charged to Plaintiffs themselves. Time and time again, courts have held that “[a] customer on notice of contract terms available on the internet is bound by those terms.” *Burcham v. Expedia, Inc.*, 2009 WL 586513, at *2 (E.D. Mo. Mar. 6, 2009); *see also, e.g., Schwartz v. Comcast Corp.*, 256 F. App’x 515, 520 (3d Cir. 2007) (parties agreed to arbitrate where terms “were available . . . via the website”; rejecting argument that “contract was too difficult to find”); *Siebert v. Amateur Athletic Union of U.S., Inc.*, 422 F. Supp. 2d 1033, 1040 (D. Minn. 2006) (“Most courts which have considered the issue have upheld arbitration and forum selection clauses . . . [even] when the terms are provided online[] or only after plaintiffs have manifested assent.”). Similarly, Plaintiffs here accepted Frontier’s Terms and Conditions that were posted online.

II. PLAINTIFFS’ OTHER OBJECTIONS TO THE ENFORCEABILITY OF THEIR ARBITRATION AGREEMENTS ARE MERITLESS.

A. Frontier’s Colloquial Advertising References To “No Contract” Service Do Not Excuse Plaintiffs From Their Arbitration Agreements.

As they did in the Circuit Court, Plaintiffs argue that Frontier’s use of the phrase “no contract” in its advertisements should excuse them from their arbitration agreements. Resp. Br. 1–4, 33–34. The Circuit Court declined to rule on the issue, instead concluding “that it is not necessary to reach the . . . question.” *See id.* at 10–11 (quoting A.R. 13).

Plaintiffs’ argument also has no merit. It is well understood as a matter of everyday experience that many telecommunications providers require customers to enter into one- or two-year service commitments (known as “one-year contracts,” “two-year contracts,” and the like) for telephone, wireless, and Internet service. When customers are not required to enter into such service commitments, the relationship between the company and the customer is routinely described as a “no-contract” service, including by courts.

As one federal court has put it, the “use of the phrase ‘no contract’ in . . . advertising [for

the wireless service industry] is designed to differentiate prepaid services (which generally require no signed, annual commitment and no early termination fee) from postpaid services (which typically require term commitments of one or two years with an early termination fee).” *Cuadras v. MetroPCS Wireless, Inc.*, 2011 WL 11077125, at *6 & n.2 (C.D. Cal. Aug. 8, 2011) (rejecting argument that “no contract” advertisements mean that a customer could have believed provider “offered wireless service without any terms whatsoever,” because customer must have been “disabused of that notion when she received the T&Cs”); *see also, e.g., T-Mobile US, Inc. v. AIO Wireless LLC*, 991 F. Supp. 2d 888, 894 (S.D. Tex. 2014) (“The products and services at issue are wireless cellular phone communications not tied to particular devices or to long-term contracts with particular carriers. Such *no-contract services* are relatively new and the competition among service providers is intense.”) (emphasis added). Thus, as the U.S. Court of Appeals for the Third Circuit has explained in an analogous context, “it is impossible to infer that a reasonable adult in [plaintiff]’s position would believe that his contract with Comcast [for Internet service] consisted entirely of a single promise that the service would be ‘always on.’” *Schwartz*, 256 F. App’x at 519–20 (emphasis added); *see also Shupe v. Cricket Commcn’s, Inc.*, 2013 WL 68876, at *6 (D. Ariz. Jan. 7, 2013) (rejecting similar argument based on no-contract advertisements because there is no reason “why any reliance on any such advertisements should carry more weight than [plaintiff’s]’s receipt of the Terms and Conditions,” which “stated they constituted an agreement [between] [plaintiff] and the provider of her . . . service” and advised her “that when she started the service or the use of the service that she was accepting the Terms and Conditions”).

Perhaps even more important, Plaintiffs’ no-contract argument contradicts their own Complaint, in which Plaintiffs themselves repeatedly allege that they contracted with Frontier for Internet service. A.R. 35–36, 39, 41–43. These statements are “[j]udicial admissions . . . that are binding upon the party making them.” *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va.

286, 302, 517 S.E.2d 763, 779 (1999) (quoting *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995)); *see also Stewart v. Johnson*, 209 W. Va. 476, 483, 549 S.E.2d 670, 677 (2001) (recognizing that “statements made in pleadings” are “judicial admissions”) (quotation marks omitted). Plaintiffs should be held to their judicial admissions, which happen to coincide with common sense: Of course the parties had a contract governing their ongoing Internet service.

B. Frontier’s Arbitration Provision Is Supported By Consideration.

Plaintiffs have no persuasive response to Frontier’s showing that the Circuit Court erred by concluding that Frontier’s arbitration provision is illusory and lacking consideration. Pet. Br. 27–28. As we explained, Frontier’s arbitration provision is not illusory because it “actually bind[s] or obligate[s]” Frontier to arbitrate disputes and empowers the customer to reject any further changes. *Toney v. EQT Corp.*, 2014 WL 2681091, at *4 (W. Va. June 13, 2014) (mem.) (quoting *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005)). And there can be no dispute that the arbitration provision is supported by consideration because, as this Court has held, “mutual commitments to arbitrate *alone* constitute sufficient consideration to support the contract.” *Id.* at *3 (emphasis added) (citing Syl. Pt. 1, *Tabler v. Hoult*, 110 W. Va. 542, 158 S.E.2d 782 (1931)); *see also* Pet. Br. 28 (collecting cases).

Plaintiffs do not disagree with any of these cases—nor could they. They instead try to circumvent the cases by pointing out that a modification to a contract requires consideration. Resp. Br. 33 (citing *Bischoff v. Francesa*, 133 W. Va. 474, 489, 56 S.E.2d 865, 873–74 (1949)). That fundamental point of law is not in dispute. Here, however, the relevant modification was the addition of an arbitration provision to Frontier’s Terms, and (for the same reasons that this Court held in *Toney*) the consideration supporting that modification was the parties’ mutual agreement to arbitrate. Likewise, any suggestion by Plaintiffs that the modification of a contract involving an arbitration clause is governed by different standards than any other kind of contract would run

afoul of settled West Virginia law. See Syl. Pt. 2, *Wheeling Downs*, 157 W. Va. 93, 199 S.E.2d 308. As with any other kind of contract, a valid modification simply requires offer, acceptance, and consideration—all elements that were present in this case.

Plaintiffs cite *Monto v. Gillooly*, 107 W. Va. 151, 147 S.E. 542 (1929), in asserting that “merely showing the failure of plaintiff to protest” the modification of a contract will not suffice to show assent to the modification. Yet they fail to mention that in *Monto* this Court recognized that a party *may assent through performance*. Specifically, *Monto* involved a road construction contract that the defendant alleged was modified to require paving 9,600 feet of road with concrete instead of macadam, and the Court held that assent would have been established “had the plaintiff constructed the concrete pavement on the 9,600 feet.” 147 S.E. at 543. *Monto* thus is of no help to Plaintiffs, who did not merely fail to protest but instead affirmatively performed under the agreement, thereby assenting by paying for and using Frontier’s Internet service after receiving notice of the modification—the very manner of acceptance provided for in the Terms.

Plaintiffs’ only other argument is that they lacked notice of the modification. Resp. Br. 34 (“Frontier is constantly changing material terms behind the scenes without giving customers notice” and that Frontier uses “hidden terms”). But that contention is belied by undisputed facts in the record, which show that Frontier repeatedly provided Plaintiffs with notice of the revisions to the Terms governing Internet service—including the addition of an arbitration provision.

Simply put, Frontier provided Plaintiffs with Internet service for a price that Plaintiffs willingly paid. Under the Plaintiffs’ theory, the Terms and Conditions never could be changed. But legions of decisions say different. Frontier sent Plaintiffs a written notice of the change, and Plaintiffs accepted it by continuing to use and pay monthly for Frontier’s service. Yet again, this Court need only apply ordinary principles of contract law to hold that a contract was formed.

C. Frontier’s Arbitration Provision Covers Preexisting Claims.

Plaintiffs appear to concede Frontier’s third assignment of error: that the Circuit Court erred in holding that Frontier’s arbitration provision could not “require arbitration of pre-clause disputes.” A.R. 23. As they note, “Plaintiffs do not disagree that parties may contract to arbitrate pre-arbitration clause disputes.” Resp. Br. 13. That concession is for good reason: The FAA itself explicitly says that parties may agree to arbitrate “an existing controversy” (9 U.S.C. § 2), and numerous courts have accordingly held that parties may agree to arbitrate disputes that arose before the parties entered into the arbitration agreement. *See* Pet. Br. 30–31 (collecting cases). Plaintiffs also ignore that in *Concepcion* itself, the U.S. Supreme Court applied AT&T’s modified arbitration provision to a dispute that arose prior to the modification. *Id.* at 31.

Plaintiffs respond merely by reiterating their argument that they did not agree to arbitrate any disputes with Frontier. Resp. Br. 34. Because Plaintiffs’ objection to contract formation fails for all of the reasons discussed above and in Frontier’s opening brief, however, the Circuit Court’s erroneous ruling on this point must be reversed as well.

D. The Prohibition On Classwide Injunctive Relief In Frontier’s Arbitration Provision Is Fully Enforceable.

Finally, Plaintiffs decline to defend the Circuit Court’s conclusion that Frontier’s arbitration provision is unenforceable because it prohibits classwide injunctive relief. They now deem it merely “an observation of a fact” rather than a holding. Resp. Br. 13, 37. They nonetheless parrot the Circuit Court’s apparent views that they should be able to demand sweeping injunctive relief and that *Concepcion* and the FAA pose no barrier to that demand. *Id.* at 37–38. Yet they have no response to the numerous courts that have rejected similar arguments, concluding in light of *Concepcion* that an exception to arbitration for injunctive relief claims is preempted by the FAA. Pet. Br. 32–33 & n.5. And while they nonetheless advocate for a different state-law rule allowing them to demand classwide injunctive relief, *Concepcion*’s clear holding that “[s]tates

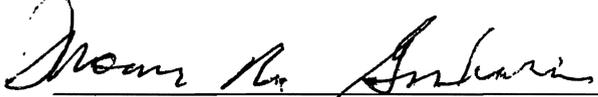
cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons” forecloses that request. 563 U.S. at 351. This Court should decline Plaintiffs’ invitation to disregard binding precedents of the United States Supreme Court.

CONCLUSION

It is telling that Plaintiffs urge that “[t]his Court need not delve into the general merits of arbitration or whether or not arbitration presents a good deal for Plaintiffs here” (Resp. Br. 38), but in nearly the same breath encourage this Court to deny enforcement to a consumer arbitration agreement that is undisputedly fair—and substantively valid under established United States Supreme Court precedent—by ignoring settled law on contract formation and clinging to cases that are impermissibly hostile to arbitration. This Court should reverse the Circuit Court’s order and remand with instructions to compel Plaintiffs to arbitrate their claims on an individual basis.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of June 2016, true and accurate copies of the foregoing **Petitioners' Reply Brief** were sent via First Class Mail to counsel for all other parties to this appeal, whose names and addresses are as follows:

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A handwritten signature in black ink, appearing to read "Thomas R. Goodwin", written over a horizontal line.

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