

No. 25-2007

**In the United States Court of Appeals
for the First Circuit**

PIZZA HAZEL, INC.; NUNAN FLORIST AND GREENHOUSES, INC.; SKIN
REJUVENATION CENTER AND SPA, INC., on behalf of themselves and others
similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN EXPRESS COMPANY; AMERICAN EXPRESS TRAVEL RELATED SERVICES
COMPANY, INC.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:24-cv-12505-AK (The Hon. Angel Kelley)

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RULE 26.1 DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1, Pizza Hazel, Inc., Nunan Florist and Greenhouses, Inc., and Skin Rejuvenation Center and Spa, Inc. state that they do not have parent corporations and that no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Table of authorities.....	iii
Introduction.....	1
Statement of the issues.....	4
Statement of the case.....	4
A. Factual background.....	4
B. Procedural background.....	9
1. The merchants bring suit under federal antitrust laws.....	9
2. Amex moves to compel arbitration, requesting that the court rule in its favor on the merits of illusoriness.....	9
3. The magistrate judge concludes that Amex’s arbitration provision is illusory and was never formed.....	11
4. Amex files objections, again asking the district court to rule in the company’s favor on the merits.....	12
5. The district court holds that Amex’s arbitration provision is illusory and was never formed.....	13
Standards of review.....	15
Summary of argument.....	16
Argument.....	20
I. The judges below properly addressed the merits of the merchants’ illusoriness challenge, as Amex asked them to do.....	20
A. Amex waived any challenge to the authority of the judges below to address illusoriness.....	20
B. Waiver aside, under Supreme Court precedent, courts must decide illusoriness challenges to arbitration contracts.....	25

1.	Courts must decide whether an arbitration contract was formed.....	25
2.	Even if illusoriness were a question of validity, rather than formation, it would still be for the court to decide	27
II.	Both judges below correctly held that Amex’s arbitration provision is illusory	30
A.	Amex can make (and has made) unilateral changes to its arbitration provision without any advance notice or the opportunity to opt out.....	31
B.	Amex can make (and has made) unilateral modifications that apply retroactively after a merchant has sought to invoke arbitration.....	36
C.	Amex’s argument about the duty of good faith and fair dealing is clearly waived—and also incorrect	41
III.	In the alternative, Amex’s arbitration provision is unenforceable because it is replete with provisions designed to block small merchants from vindicating their rights	46
	Conclusion	53

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Cases

A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Authority,
479 Mass. 419, 95 N.E.3d 547 (Mass. 2018).....26

Abernathy v. DoorDash, Inc.,
438 F. Supp. 3d 1062 (N.D. Cal. 2020) 6

Abrams v. Jamesway Corp.,
1990 WL 69148 (E.D. Pa. 1990).....51

AES-Apex Employer Services, Inc. v. Rotondo,
924 F.3d 857 (6th Cir. 2019)43

Air-Con, Inc. v. Daikin Applied Latin America, LLC,
21 F.4th 168 (1st Cir. 2021).....15

Alexander v. Anthony International, L.P.,
341 F.3d 256 (3d Cir. 2003)53

American Express Co. v. Italian Colors Restaurant,
570 U.S. 228 (2013).....5, 6

American Family Life Assurance Co. of New York v. Baker,
848 F. App’x 11 (2d Cir. 2021)..... 52

Arnold v. Homeaway, Inc.,
890 F.3d 546 (5th Cir. 2018).....29

Azuah v. Coverall North America, Inc.,
554 F.3d 7 (1st Cir. 2009).....51

Bassett v. Electronic Arts, Inc.,
93 F. Supp. 3d 95 (E.D.N.Y. 2015)..... 32, 33, 36, 45

Bekele v. Lyft, Inc.,
918 F.3d 181 (1st Cir. 2019).....48, 49

Biller v. S-H OpCo Greenwich Bay Manor, LLC,
961 F.3d 502 (1st Cir. 2020).....51

Borden v. Secretary of Health & Human Services,
836 F.2d 4 (1st Cir. 1987) 21, 43

Brady v. Williams Capital Group, L.P.,
14 N.Y.3d 459, 928 N.E.2d 383 (N.Y. 2010).....49

Byrne v. Charter Communications,
581 F. Supp. 3d 409 (D. Conn. 2022) 32

Canales v. CK Sales Co., LLC,
67 F.4th 38 (1st Cir. 2023).....15

Carey v. 24 Hour Fitness, USA, Inc.,
669 F.3d 202 (5th Cir. 2012)30, 37, 46

Chokel v. Genzyme Corp.,
449 Mass. 272, 867 N.E.2d 325 (Mass. 2007).....45

Coinbase, Inc. v. Suski,
602 U.S. 143 (2024). 17, 27, 28

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987)51

Curet-Velazquez v. ACEMLA de Puerto Rico, Inc.,
656 F.3d 47 (1st Cir. 2011) 15, 42, 43

Davila-Feliciano v. Puerto Rico State Insurance Fund,
683 F.3d 405 (1st Cir. 2012).....43

Day v. Fortune Hi-Tech Marketing, Inc.,
536 F. App'x 600 (6th Cir. 2013)..... 39, 41

Doe v. Princess Cruise Lines, Ltd.,
657 F.3d 1204 (11th Cir. 2011)..... 2, 16, 21

Domenichetti v. Salter School, LLC,
2013 WL 1748402 (D. Mass. 2013)..... 30, 32

Dorman v. Cohen,
66 A.D.2d 411, 413 N.Y.S.2d 377 (N.Y. App. Div. 1979) 27

Douglas v. Johnson Real Estate Investors, LLC,
470 F. App'x 823 (11th Cir. 2012) 30, 32

Dumais v. American Golf Corp.,
299 F.3d 1216, (10th Cir. 2002) 31

Emmanuel v. Handy Technologies, Inc.,
992 F.3d 1 (1st Cir. 2021)21

Floss v. Ryan’s Family Steak Houses, Inc.,
211 F.3d 306 (6th Cir. 2000) 31

GGNSC Chestnut Hill LLC v. Schrader,
2018 WL 1582555 (D. Mass. 2018)47

Gillman v. Chase Manhattan Bank, N.A.,
73 N.Y.2d 1, 1534 N.E.2d 824 (N.Y. 1988)47

Gonzalez v. Cheesecake Factory Restaurants, Inc.,
2024 WL 989881 (E.D.N.Y. 2024) 30

Good v. Uber Technologies, Inc.,
494 Mass. 116, 234 N.E.3d 262 (Mass. 2024) 47, 50

Granite Rock v. International Brotherhood Of Teamsters,
561 U.S. 287 (2010) 17, 25

Green Tree Financial Corp. v. Randolph,
531 U.S. 79 (2000)49

Green v. 119 W. 138th St. LLC,
37 N.Y.S.3d 491 (N.Y. App. Div. 2016) 47, 48

Grosvenor v. Qwest Corp.,
854 F. Supp. 2d 1021 (D. Colo. 2012)33

Guillemard-Ginorio v. Contreras-Gomez,
490 F.3d 31 (1st Cir. 2007) 19, 22, 23, 43

Heckman v. Live Nation Entertainment, Inc.,
686 F. Supp. 3d 939 (C.D. Cal. 2023) 52

In re Celsius Network LLC,
 647 B.R. 631 (Bankr. S.D.N.Y. 2023) 32

In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation,
 835 F.3d 1195 (10th Cir. 2016)..... 29

Ingle v. Circuit City Stores, Inc.,
 328 F.3d 1165 (9th Cir. 2003)48

Jackson v. Action for Boston Community Development, Inc.,
 403 Mass. 8, 525 N.E.2d 411 (Mass. 1988) 30

Johnson v. Continental Finance Co., LLC,
 131 F.4th 169 (4th Cir. 2025) 28, 41

Keating v. Secretary of Health and Human Services,
 848 F.2d 271 (1st Cir. 1988)15, 17, 24, 40

Kristian v. Comcast Corp.,
 446 F.3d 25 (1st Cir. 2006)..... 49, 50, 51

Lebowitz v. Dow Jones & Co.,
 847 F. Supp. 2d 599 (S.D.N.Y. 2012)..... 32, 33

Lebowitz v. Dow Jones & Co.,
 508 F. App'x 83 (2nd Cir. 2013) 32, 45

Lend Lease (US) Construction LMB Inc. v. Zurich American Insurance Co.,
 28 N.Y.3d 675, 71 N.E.3d 556 (N.Y. 2017) 27

Machado v. System4 LLC,
 465 Mass. 508, 989 N.E.2d 464 (2013)53

Machado v. System4 LLC,
 471 Mass. 204, 28 N.E.3d 401 (2015)..... 20, 47, 48, 52

Matter of G&J Fisheries, Inc.,
 67 F.4th 20 (1st Cir. 2023)..... 19, 42, 43

McNamara v. S.I. Logistics, Inc.,
 2018 WL 6573125 (D. Mass. 2018)*passim*

Miller v. Cartel,
 627 F. Supp. 3d 1043 (D.N.D. 2022).....51

Morgan v. Sundance, Inc.,
 596 U.S. 411 (2022) 15, 21

Narayan v. The Ritz-Carlton Dev. Co., Inc.,
 140 Haw. 343, 400 P.3d 544 (2017) 52

National Federation of the Blind v. The Container Store, Inc.,
 904 F.3d 70 (1st Cir. 2018)*passim*

Nino v. Jewelry Exchange, Inc.,
 609 F.3d 191 (3d Cir. 2010)52, 53

Padilla v. State Farm Mutual Automobile Insurance Co.,
 133 N.M. 661, 68 P.3d 901 (N.M. 2003) 52

Paul Revere Variable Annuity Insurance Co. v. Kirschhofer,
 226 F.3d 15 (1st Cir. 2000) 39, 50

Pazol v. Tough Mudder Inc.,
 93 Mass. App. Ct. 1109, 103 N.E.3d 1237 (2018)..... 26

Pearson v. John Hancock Mutual Life Insurance Co.,
 979 F.2d 254 (1st Cir. 1992) 26

Rent-A-Center. West, Inc., v. Jackson,
 561 U.S. 63 (2010).....22, 28

Serpa Corp. v. McWane, Inc.,
 199 F.3d 6 (1999)..... 35

Sparkle Hill, Inc. v. Interstate Mat Corp.,
 788 F.3d 25 (1st Cir. 2015)*passim*

Thompson v. Irwin Home Equity Corp.,
 300 F.3d 88 (1st Cir. 2002)51

Toth v. Everly Well, Inc.,
 118 F.4th 403 (1st Cir. 2024) 29

Triantos v. Guaetta & Benson, LLC,
 91 F.4th 556 (1st Cir. 2024) 16, 19, 43, 44

United States ex rel Dorsa v. Miraca Life Sciences, Inc.,
 33 F.4th 352 (6th Cir. 2022).....21

United States v. Mendoza-Maisonet,
 962 F.3d 1 (1st Cir. 2020)24

United States v. Okoye,
 731 F.3d 46 (1st Cir. 2013)50

Vaiano v. United National Corp.,
 733 F. Supp. 3d 32 (D. Mass. 2024)..... 32

Warner Theatre Associates Ltd. Partnership v. Metropolitan Life Insurance Co.,
 1997 WL 685334 (S.D.N.Y. 1997)44

Warner Theatre Associates Ltd., Partnership v. Metropolitan Life Insurance Co.,
 149 F.3d 134 (2d Cir. 1998).....44

Wu v. Uber Technologies, Inc.,
 186 N.Y.S.3d 500 (N.Y. Sup. Ct. 2022)..... 32

Wu v. Uber Technologies, Inc.,
 260 N.E.3d 1060 (N.Y. 2024) 32

Zapatha v. Dairy Mart, Inc.,
 381 Mass. 285, 408 N.E.2d 1370 (Mass. 1980).....47

Statutes and rules

28 U.S.C. § 1920.....51

Federal Rule of Civil Procedure 7224

Other authorities

3 Williston on Contracts § 7:11 (4th ed.) 26, 30

Merchant Services & Credit Card Processing For Small Businesses,
 American Express, <https://perma.cc/NU5Z-Z9FN> 9

Restatement (Second) of Contracts § 184 52

INTRODUCTION

It is a foundational rule of contract law that an illusory promise is no promise at all. When a party has reserved the right to escape its obligations by unilaterally changing the terms, it has not actually bound itself to a contract. This applies as much to arbitration agreements as other agreements. Courts have therefore held that arbitration provisions are illusory when a drafter can unilaterally change the terms of arbitration without prior notice, even when the other party has already sought to invoke arbitration.

That's this case. Even on Amex's own reading of its arbitration provision, it can make unilateral changes without prior notice and apply those changes even after a merchant has already sought to invoke Amex's promise to arbitrate. Not only that, but in practice Amex has actually made exactly such changes: After receiving notice that merchants were planning to file arbitration claims against Amex, the company dramatically changed the terms of its arbitration provision to favor the company. Amex has not cited a single case that has sanctioned such unilateral, retroactive changes, without prior notice or a chance to opt out. In contrast, courts across the country have held that the power to make such changes renders an arbitration provision illusory. Below, both Judge Kelley and Magistrate Judge Boal correctly joined that consensus.

Amex offers little to disturb this result. Shifting gears on appeal, Amex urges

several new arguments that it did not properly present below. Some Amex did not raise to the magistrate judge, then tried to raise before the district court. But this Court has “categorically” held that an “unsuccessful party” may not press “an argument never seasonably raised before the magistrate.” *Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988). Applying this precedent, Judge Kelley held that these issues were waived. That ruling is reviewable only for abuse of discretion, a standard Amex does not even try to meet.

As to Amex’s lead argument on appeal that courts lack the authority to even address the merits of illusoriness, Amex not only failed to inform the magistrate judge of its view that she lacked this authority, Amex also identified the merchants’ challenges as questions for a court and asked the court to decide illusoriness on the merits. And before the district court, Amex again spent virtually its entire brief asking the court to rule in its favor on the merits of illusoriness. A party cannot “ask[] the [lower] court to decide” a challenge to arbitration, then “[o]nly when the matter was illuminated by the light of an unfavorable decision from the [lower] court ... suddenly see that the court ought not have answered the question after all.” *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1213 (11th Cir. 2011). That is precisely what Amex is attempting here. Amex cannot claim that the court below committed reversible error by deciding an issue Amex itself asked it to decide.

Amex’s efforts to inject new issues on appeal is understandable given the

weakness of the arguments that it actually preserved. Amex claims that its arbitration provision doesn't allow retroactive changes. Yet on Amex's own reading, it can modify the arbitration provision even after it has notice that a merchant will invoke arbitration to resolve a dispute. Amex also asserts that it gives notice, but its "notice" occurs after the changes are already effective and the merchants cannot avoid them.

The illusoriness of Amex's arbitration provision is neither a technicality nor an accident. For decades, courts have warned that these kinds of unilateral-modification powers render arbitration provisions illusory. And for decades, other companies have included provisions preventing them from making such modifications. Amex is a highly sophisticated party. If it didn't impose such limits here, it's because Amex wanted to make the kind of changes that courts have prohibited. Nor is this hypothetical; it's exactly what Amex did. As both judges below held, Amex cannot now avoid the consequences of its decisions.

Even if this Court were to disagree, however, Amex's arbitration provision is unenforceable for other reasons as well. Thanks to its unilateral changes, the arbitration provision is now replete with one-sided, unenforceable terms to stack the deck in Amex's favor. In such cases, courts across the country have held that the arbitration provision should be invalidated.

The decision below should be affirmed.

STATEMENT OF THE ISSUES

I. A. Did Amex waive its argument that the judges below lacked authority to decide illusoriness by expressly asking them to decide illusoriness?

B. Waiver aside, did the court below properly reach illusoriness, a question of contract formation that must be addressed before any purported contractual right to arbitration can be enforced?

II. Is Amex's arbitration provision illusory because Amex can make (and has made) unilateral, retroactive changes without prior notice?

III. In the alternative, is Amex's arbitration provision unenforceable because it is procedurally unconscionable and replete with one-sided, unconscionable terms?

STATEMENT OF THE CASE

A. Factual background

1. Pizza Hazel is a small restaurant that has served the local community in Lowell, Massachusetts, for decades. It accepts all major credit and debit cards, including Amex. JA-11. So do the other named plaintiffs, Nunan Florist and Greenhouses, a florist and garden center in Georgetown, Massachusetts, and Skin Rejuvenation Center and Spa in Danvers, Massachusetts. *Id.* They have little choice, as 99% of credit-card-accepting merchants in the United States accept Amex. JA-16-17. And a failure to accept Amex would mean a loss of business they can ill afford.

Accepting Amex cards isn't cheap. Amex charges an expensive "swipe fee" of around 3% or more of each credit-card sale. JA-12.¹ That is a heavy toll for small businesses—like family restaurants and local retailers—that operate on tight margins. Yet Amex's rules bar merchants from offering a discount to customers for using a cheaper credit card, from assessing a small fee (or surcharge) for using Amex specifically, or even from simply asking customers to please use a cheaper credit card. JA-14-15. Amex is alone in this. After successful antitrust litigation, Visa, Mastercard, and Discover now permit merchants to engage in these kinds of practices. JA-16-17. But as a practical matter, Amex's rules apply across the board because practices that other credit-card companies now allow would violate Amex's rules. *Id.*

2. Amex has been able to maintain this situation by using mandatory arbitration provisions to prevent merchants from vindicating their rights under antitrust law. Amex requires each merchant to arbitrate individually, with no ability to aggregate claims through a class action. When small merchants argued that the cost of individually arbitrating a complex antitrust case against Amex would be far more expensive than they could ever recover in damages, Amex fought—all the way to the Supreme Court—and won. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 250 (2013).

¹ Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

A key part of Amex’s strategy for getting courts to uphold its arbitration provision was to limit the merchants’ share of arbitration-specific fees—like filing fees and the fees arbitrators charge to adjudicate the cases—such as by capping those fees at what a merchant would have to pay in court, with Amex covering the rest. JA-231-32; *see* Pet. Br., No. 12-133, *Italian Colors Rest.*, 2012 WL 6755152, at *41-42 & n.12 (U.S. 2012). This strategy worked. The Court rejected challenges based on general litigation costs like expert witnesses, accepting Amex’s distinction between such costs and a challenge that “filing and administrative fees attached to arbitration ... are so high as to make access to the forum impracticable.” *Italian Colors*, 570 U.S. at 236. For years, *Italian Colors* meant that, in practice, no small merchant could hope to bring antitrust claims against Amex.

3. A decade later, thousands of merchants were finally able to pool their resources to pursue arbitrations. They did so in the forum that Amex chose, under the rules that Amex selected.² But as small businesses had warned for years, large numbers of individual arbitrations are expensive and unwieldy. There are per-case

² Amex’s amici in *Italian Colors* advocated this as an alternative to class actions. *See* Chamber of Com. Amicus Brief, *Italian Colors*, 2012 WL 6759408, at *27-30 (U.S. 2012) (12-133). Amex argued that merchants could make individual arbitration practicable by pooling resources. Transcript of Oral Argument at 20-22, *Italian Colors*, 570 U.S. 228 (2013) (12-133). And courts across the country have criticized the “hypocrisy” of imposing mandatory arbitration on others, only to balk when they seek to invoke arbitration in large numbers. *See, e.g., Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1067 (N.D. Cal. 2020).

filing fees, and arbitrators can charge hundreds of thousands of dollars to adjudicate a single complex antitrust claim. JA-239-44. Now, however, Amex balked at high arbitral costs. JA-235-36. And the reason behind Amex’s long-term strategy was exposed: Amex didn’t impose its arbitration provision because it wanted merchants to file individual arbitrations. Amex didn’t want merchants to file claims at all.

But Amex had given itself an escape hatch. Under its contract, Amex could unilaterally change its arbitration provision at any point, without prior notice, and effective immediately. JA-280.

So that’s what Amex did. Just days after a group of merchants filed thousands of claims and other merchants informed Amex that they planned on filing similar claims, Amex rushed to change its arbitration provision. JA-233. On August 18, 2023, “Amex posted a new [Merchant Operating Guide] version on its website under a legend that stated ... ‘Effective Immediately.’” *Id.*; *see also* JA-262. Amex provided no prior notice. Indeed, it was in such a hurry that it dispensed with the contract’s default ten-day notice period for unscheduled changes. JA-232-34. And Amex’s contract provides that the arbitration provision “survives termination of the Agreement,” such that the merchants had no ability to reject these changes. JA-268, 285-86.

The updates dramatically changed Amex’s arbitration provision. A small merchant’s arbitral fees were no longer capped at what it would pay in court. Instead,

it must pay half of the arbitration-specific fees, which will be tens if not hundreds of thousands of dollars more than it could possibly seek in damages. JA-233-34, 237-44. The result was a return to the status quo: Arbitration was prohibitively expensive for small merchants again. JA-233, 237.

In subsequent unilateral updates, Amex made still more changes to further disadvantage the merchants. Previously, either side could appeal an arbitral decision in any case where an injunction was sought. JA-251. Now an appeal is possible only if the arbitrator *grants* an injunction—meaning that in practice merchants won’t be able to appeal adverse decisions, while Amex is ensured a *de novo* appeal. JA-284. And in cases seeking smaller amounts of damages, “no discovery” will be allowed. *Id.* These changes govern under the operative arbitration agreement in this case, which is contained in the April 2024 Merchant Operating Guide. JA-279-86.

4. These changes have had the desired effect. The arbitration fees assessed against claimants under the recent versions of Amex’s contract are far higher than the awards that merchants could possibly recover in damages. JA-238-44. For example, given their small size, Pizza Hazel could plausibly recover around \$323 in damages and Rejuvenation Spa around \$841. JA-239. On the other side of the ledger, as extensive evidence compiled by the merchants shows, arbitral filing fees will be in the thousands, while arbitrators’ high hourly rates mean that a full merits arbitration will cost tens if not hundreds of thousands of dollars. JA-240-44.

B. Procedural background

1. The merchants bring suit under federal antitrust laws.

Pizza Hazel and the other merchants filed an antitrust suit on behalf of a putative class of merchants who participate in the OptBlue program, an Amex program for smaller businesses.³ JA-27-29.

In their complaint, the merchants also laid out defenses to arbitration. These included that the arbitration provision was illusory because Amex could unilaterally and retroactively change it without prior notice, even after merchants give notice they will seek to arbitrate. JA-8. Because of this, they alleged, “no valid agreement to arbitrate was formed.” *Id.* The merchants also raised additional challenges to a number of one-sided provisions that Amex had added. JA-5-10.

2. Amex moves to compel arbitration, requesting that the court rule in its favor on the merits of illusoriness.

Amex moved to compel arbitration and filed a barebones 13-page brief. JA-39-51. Amex did not argue that the merchants’ illusoriness challenge must go to an arbitrator—to the contrary, it expressly asked the court to resolve the merits of this issue in Amex’s favor: “[A] court must determine whether there is a valid and

³ *Merchant Services & Credit Card Processing For Small Businesses*, Am. Express, <https://perma.cc/NU5Z-Z9FN>.

enforceable agreement to arbitrate between the parties” JA-44 (emphasis added). Judge Kelley then referred the motion to Magistrate Judge Boal. JA-369.

The merchants opposed arbitration, again arguing that Amex’s arbitration provision was illusory because Amex “has the power to make changes to its arbitration policy that have retroactive effect” and that “no agreement to arbitrate was formed.” JA-222. They also argued that the arbitration provision was unconscionable. JA-223-28.

Amex then sought and received permission to file an overlength reply brief. JA-363-64, 371. This brief was accompanied by a 20-page declaration, JA-394-413, and forty-two exhibits, JA-414-1221. Amex again asked the court to decide the merits of the merchants’ challenges: the “question before this Court,” it maintained, was whether the “terms of the parties’ arbitration agreement ... are enforceable.” JA-378. And “if *the Court* did find some of the provisions unenforceable,” it should sever them from the rest of the contract. JA-40 (emphasis added). Amex also responded to the merchants’ retroactive-change argument, arguing that “changes apply *prospectively*, not retroactively.” JA-386-87. Amex then filed a supplemental letter brief with additional exhibits. JA-1222, 1226-37.

The merchants sought leave to file a surreply, pointing to Amex’s extensive new evidence on reply and explaining that courts either “permit a surreply or refrain from relying on any new material contained in the reply brief.” JA-1238-40.

Magistrate Judge Boal permitted the surreply, meaning she would consider Amex's new evidence, then ordered that "[n]o further briefing shall be allowed." JA-11257.

Amex then had another chance to address the merchants' arguments at a hearing that lasted over an hour. JA-1290-1337. Amex again did not argue that Magistrate Judge Boal lacked the authority to decide illusoriness and continued to seek a ruling in its favor on the merits.

3. The magistrate judge concludes that Amex's arbitration provision is illusory and was never formed.

Magistrate Judge Boal then issued a report recommending that Amex's motion be denied. JA-1273-89.⁴ The magistrate judge explained that *before* arbitration may be compelled, "the existence of a valid and enforceable agreement to arbitrate between the parties must be identified." JA-1280 (citing cases).

As to illusoriness, Magistrate Judge Boal recognized that "[u]nder both New York and Massachusetts law," the mere existence of "the unilateral right to modify that agreement" does not render a contract illusory. JA-1286. But "by its own account," Amex could make changes to the arbitration provision without advance notice that were "effective immediately." JA-1286 (citing JA-1124). And "[t]here is also nothing in the [contract] preventing a modification from applying to disputes

⁴ While this was styled as a Report and Recommendation, it was technically a decision because a motion to compel arbitration is non-dispositive. *Op.*, JA-2060.

arising before the modification.” JA-1286-87 (citing cases). Given this, “the arbitration agreement was illusory from the outset and no agreement to arbitrate was formed between the parties.” JA-1287. However, she rejected the merchants’ other challenges to arbitration. JA-1281-85, 87-88.

4. Amex files objections, again asking the district court to rule in the company’s favor on the merits.

Amex filed objections, again seeking for the district court to decide the illusoriness question on the merits. JA-1367-1384.

For the first time, Amex argued that the implied covenant of good faith and fair dealing prevented retroactive modifications. JA-1382. Amex admitted that “[t]he duty of good faith and fair dealing was not addressed in prior briefing,” but claimed this was because the merchants hadn’t raised retroactivity. JA-1382 n.5. Amex raised other new arguments about why its arbitration provision isn’t illusory, which it has since abandoned on appeal. Op., JA-2065-66. And Amex argued that, based on a severability clause, even if “the modification provision were illusory, the R&R failed to include any discussion of severing that provision and upholding the rest of the MOG.” JA-1376.⁵

⁵ Judge Kelley also denied Amex’s request to file an untimely (and, by rule, unauthorized) reply brief expanding on its new merits arguments, explaining that “[p]arties must take before the magistrate, not only their best shot but all of their shots.” JA-2056-57.

5. The district court holds that Amex’s arbitration provision is illusory and was never formed.

Judge Kelley then issued an opinion and order overruling the objections.

The court explained that “[u]nder both Massachusetts and New York law, an arbitration agreement is illusory if one party can change it unilaterally without providing notice to the other party”—exactly what Amex could do and had done. Op., JA-2063-64 (citing cases). “Delaying notice until after changes take effect defeats the very purpose of notice and is functionally equivalent to providing none.” Op., JA-2065. While Amex argued that merchants could avoid such changes by terminating acceptance of Amex cards, Amex did “not point[] to ... any provision that permits the merchants to terminate the Agreement or reject the changes.” *Id.* Additionally, under the contract, “the arbitration agreement ‘survives termination of the Agreement,’” such that “the merchants would still be bound by the Agreement that included the unilateral changes the merchants oppose.” *Id.* (quoting JA-181-82).

The court also rejected Amex’s retroactivity arguments. Under the operative version of Amex’s contract, merchants must “‘send a written notice’” to Amex before they can “initiate a mediation or arbitration.” Op., JA-2066 (quoting JA-178). Even on Amex’s reading, it can then change the terms of arbitration—precisely the kind of retroactive change that illusoriness doctrine exists to prevent. Op., JA-2066-67 (citing JA-179). And indeed, in this case, Amex had “alter[ed] the rules after learning of numerous pending claims.” Op., JA-2067.

As to Amex’s new good-faith-and-fair-dealing argument, the court held that this was “waived” because—as Amex had admitted—it “was not presented to the Magistrate Judge.” Op., JA-2067. The court rejected “Amex’s suggestion that it may raise this argument now because [the merchants] never alleged retroactive change,” as the merchants had plainly raised such arguments. *Id.*

The court also addressed Amex’s argument that even if the court were to conclude that the unilateral modification provision was unenforceable, it should sever “the unilateral modification clause” pursuant to the contract’s “severability clause.” Op., JA-2068. The court explained that “severing provisions in an illusory agreement would be an ‘absurd process’ because the court would be ‘reviving a contract [that] was never formed.’” Op., JA-2068-69 (quoting *Nat’l Fed’n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 87 (1st Cir. 2018)).

Out of an abundance of caution, the merchants had filed partial cross-objections as to their alternative challenges besides illusoriness. Op., JA-1340-1359. The district court held that the merchants’ challenge based on prohibitive fees was premature, though noting that it had “reservations” about this outcome. Op., JA-2076. The court also held that while the arbitration provision’s one-sided appeal rule was unconscionable, that was not sufficient on its own to invalidate the arbitration provision. Op., JA-2083.

STANDARDS OF REVIEW

On a motion to compel arbitration, a “court must construe the record in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” *Air-Con, Inc. v. Daikin Applied Latin Am., LLC*, 21 F.4th 168, 175 (1st Cir. 2021). In this analysis, the Supreme Court has made clear that any “federal policy” about arbitration “is about treating arbitration contracts like all others, not about fostering arbitration” and “a court may not devise novel rules to favor arbitration over litigation.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

In reviewing the denial of a motion to compel arbitration, this Court is “not wedded to the lower court’s rationale, but, rather, may affirm its order on any independent ground made manifest by the record.” *Nat’l Fed’n*, 904 F.3d at 78. This Court “review[s] legal issues de novo and factual determinations for clear error.” *Canales v. CK Sales Co., LLC*, 67 F.4th 38, 43 (1st Cir. 2023).

This Court also “review[s] for abuse of discretion a district court’s conclusion that a party has waived an issue by failing to adequately assert it before the magistrate judge.” *Curet-Velazquez v. ACEMLA de Puerto Rico, Inc.*, 656 F.3d 47, 54 (1st Cir. 2011). If a party did not “fairly raise[]” its arguments in its “objections to the magistrate’s report,” they are “precluded on appeal.” *Keating v. Sec’y of Health & Human Servs.*, 848 F.2d 271, 275 (1st Cir. 1988).

Forfeited arguments can sometimes be reviewed for “plain error”—though when “no ‘excusatory circumstances’ were present,” this Court has “declined to review [the] new arguments under *any* standard on appeal.” *Triantos v. Guaetta & Benson, LLC*, 91 F.4th 556, 563 & n.3 (1st Cir. 2024). Plain error is “extremely demanding, and in this circuit, it is rare indeed for a panel to find plain error in a civil case.” *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 30 (1st Cir. 2015). It requires a showing that “(1) an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant’s] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceedings.” *Id.*

SUMMARY OF ARGUMENT

I.A. On appeal, Amex’s lead argument is that the judges below lacked the authority to decide illusoriness. Below, however, Amex never raised this to the magistrate judge, instead repeatedly asking her to decide the merits of illusoriness in Amex’s favor. But Amex cannot “ask[] the [lower] court to decide” the illusoriness challenge, then after receiving “an unfavorable decision from the [lower] court ... suddenly see that the court ought not have answered the question after all.” *Princess Cruise*, 657 F.3d at 1213; *see also infra* 21. Then before the district judge, Amex again repeatedly asked her to decide the merits. Amex never clearly and distinctly raised its (entirely inconsistent) assertion that the court lacks the power to do so, with the result that the district court didn’t address this novel argument. Amex can’t claim on

appeal that the judges below committed reversible error by deciding a question Amex repeatedly asked them to decide.

B. Waiver aside, Amex’s new argument is foreclosed by Supreme Court precedent. “Where a party contests” the “formation of the parties’ arbitration agreement,” “the court,” rather than an arbitrator, “must resolve the disagreement.” *Granite Rock v. Int’l Broth. of Teamsters*, 561 U.S. 287, 299-30 (2010). The merchants argued from the outset that illusoriness went to formation, the magistrate judge held this, and Amex never objected on this point. *See infra* 24. So Amex is doubly “precluded” from raising it “on appeal.” *Keating*, 848 F.2d at 275. In any event, under both Massachusetts and New York law, illusoriness is a formation problem. *See infra* 26-27 (compiling cases). Finally, even if illusoriness went only to validity (rather than formation), Amex’s assertion that a challenge must be unique to the arbitration provision is foreclosed by recent Supreme Court precedent: Even “where a challenge applies ‘equally’ to the whole contract and to an arbitration ... provision, a court must address that challenge.” *Coinbase, Inc. v. Suski*, 602 U.S. 143, 151 (2024).

II. The issues that Amex did actually raise below fare no better.

A. “Under both Massachusetts and New York law, an arbitration agreement is illusory if one party can change it unilaterally without providing notice to the other party.” *Op.*, JA-2063 (citing cases). Yet on Amex’s own reading of its contract, it can unilaterally modify its arbitration provision without prior notice and effective

immediately—and indeed, it did so in practice. *See supra* 7-8. Amex claims that the merchants still could have rejected the changes by terminating the contract, but as below, doesn't identify any provision to that effect. Op., JA-2065. And its contract states that the arbitration provision “survives termination of the Agreement.” JA-285-86 (quoting JA-181-82). So “even if the merchants could terminate the Agreement ‘at any time’ as Amex contends, the merchants would still be bound by the Agreement that included the unilateral changes the merchants oppose.” Op., JA-2065.

B. The judges below both correctly held that Amex's arbitration provision is illusory because it permits retroactive changes, meaning changes even after “it had previously received notice of an existing arbitration dispute.” *McNamara v. S.I. Logistics, Inc.*, 2018 WL 6573125, *3-4 (D. Mass. 2018) (compiling cases). As below, Amex can't really contest that retroactive changes create an illusoriness problem, and instead claims that it doesn't have the power to make such changes. But as the district court explained, Amex's contract contains no such limitation, and Amex *has* made (and defends its contractual power to make) changes to the terms of arbitration after receiving notice of disputes. Op., JA-2067. And Amex's operative arbitration provision requires merchants to provide such advance notice, ensuring Amex's chance to make such changes. Op., JA-2066.

C. It was not a “manifestly erroneous” abuse of the district court's “wide discretion” to hold that Amex waived the issue of the implied covenant of good faith

and fair dealing. *Matter of G&J Fisheries, Inc.*, 67 F.4th 20, 27 (1st Cir. 2023). Amex itself admitted below that it didn't raise this issue before the magistrate judge, and on appeal, Amex has abandoned the only justification it gave for this failure below. Op. JA-2067. Amex's new tack is that it was enough that some of the cases cited in its brief discuss the doctrine, Amex Br. 49-51, but that's insufficient, *Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31, 36-37 (1st Cir. 2007). Finally, there's no "excusatory circumstances justifying plain error review," *Triantos*, 91 F.4th at 563 n.3, and Amex doesn't come close to showing not just "clear or obvious" error but impairment of "the fairness, integrity, or public reputation of the judicial proceedings," *Sparkle Hill*, 788 F.3d at 30.

III. In the alternative, Amex's arbitration provision is independently unenforceable because it is highly procedurally unconscionable and replete with substantive terms that are baldly one-sided in favor of the drafting party. Procedurally, this was a contract of adhesion, with a massive disparity in bargaining power, with terms imposed through unilateral, retroactive changes. *See infra* 47. As to substance, there are numerous one-sided terms favoring Amex: (1) prohibitive arbitration-specific costs; (2) terms guaranteeing Amex's power to unilaterally change the arbitration provision retroactively without notice; and (3) a term ensuring in practice that Amex can appeal if it loses but not merchants. *See infra* 48-52. These warrant invalidating Amex's arbitration provision in full, as its terms are "so one-

sided that their only possible purpose” is to stack the deck in the arbitration. *Machado v. System4 LLC* (“*Machado IP*”), 471 Mass. 204, 218, 28 N.E.3d 401, 415 (2015).

ARGUMENT

I. The judges below properly addressed the merits of the merchants’ illusoriness challenge, as Amex asked them to do.

On appeal, Amex’s lead argument is that the court below lacked the authority to decide the merits of the merchants’ illusoriness challenge. This is waived and forfeited multiple times over, not least because Amex expressly asked both the magistrate judge and the district judge to resolve the merits. Amex cannot claim that a court committed reversible error by deciding an issue that Amex asked it to decide. And in any event, Amex’s new argument is foreclosed by precedent.

A. Amex waived any challenge to the authority of the judges below to address illusoriness.

This Court has been particularly rigorous in policing waiver when parties don’t present their arguments before magistrate judges, holding “categorically” that an “unsuccessful party” may not press “an argument never seasonably raised before the magistrate.” *Paterson-Leitch*, 840 F.2d at 990-91. “The role played by magistrates within the federal judicial framework is an important one.” *Id.* But “[s]ystemic efficiencies would be frustrated and the magistrate’s role reduced to that of a mere dress rehearsal” if a party could press new arguments in objections. *Id.* Accordingly, “[p]arties must take before the magistrate, not only their best shot but all of their

shots.” *Borden v. Sec’y of Health & Hum. Servs.*, 836 F.2d 4, 6 (1st Cir. 1987). Further, under the doctrines of invited error and waiver, a party may not “ask[] the [lower] court to decide” a challenge to arbitration, then “[o]nly when the matter was illuminated by the light of an unfavorable decision from the [lower] court ... suddenly see that the court ought not have answered the question after all.” *Princess Cruise*, 657 F.3d at 1213; *see also, e.g., Emmanuel v. Handy Techs., Inc.*, 992 F.3d 1, 11 & n.9 (1st Cir. 2021) (declining to “consider” contention that an issue is “for the arbitrator” when not presented below); *United States ex rel Dorsa v. Miraca Life Scis., Inc.*, 33 F.4th 352, 357 (6th Cir. 2022) (compiling cases).⁶

That describes this case. Over the course of multiple briefs and a lengthy hearing, Amex repeatedly asked Magistrate Judge Boal to decide the merits of illusoriness in its favor. It argued that “a court must determine whether there is a valid and enforceable agreement to arbitrate between the parties,” JA-44, and identified the “question before this Court” as “whether the express, written terms of the parties’ arbitration agreement ... are enforceable,” JA-378. Amex never informed Magistrate Judge Boal of its view that she lacked authority to even reach the merits of illusoriness. Given this, Amex could not “present new initiatives to the district judge.” *Paterson-Leitch*, 840 F.2d at 990.

⁶ Certain older cases discussing waiver involved an additional prejudice requirement that the Supreme Court has since rejected. *See Morgan*, 596 U.S. at 417.

But even if it could, Amex failed to do so, as an issue must be “squarely and distinctly” raised. *Guillemard-Ginorio*, 490 F.3d at 37. Virtually every page of Amex’s objections asked the district court to decide illusoriness in Amex’s favor on the merits. JA-1367-1384. Before this Court, Amex attempts to retrofit its prior briefing, presenting itself as raising the argument that courts may not decide illusoriness at the end of its objections. Amex Br. 21. But in doing so, Amex conflates two fundamentally different issues, both of which happen to refer to “severing.” One is a *merits* question about whether a provision that a court has held is unenforceable should be severed under a severability clause, based on garden-variety contract law. *Rent-A-Ctr. West, Inc., v. Jackson*, 561 U.S. 63, 75 & n.4 (2010). The other is the *forum* question of whether a court even has the authority to decide enforceability in the first place, based on special “substantive federal arbitration law” that treats arbitration contracts as “severable” from the broader contract. *Id.* at 71, 75 n.4.

National Federation illustrates the difference: The defendant forfeited the “forum” argument that “the arbitrator should have decided [illusoriness] since this claim is directed at the entire agreement” by instead “simply discuss[ing] the merits of the illusoriness issue” below. 904 F.3d at 85-86. Then in its “merits” analysis, this Court addressed the distinct “argument that any illusory provision of the contract could simply be severed and the remainder of the contract stand.” *Id.* at 86-87.

Amex only clearly raised the latter argument. It argued that that “[e]ven if some aspect of the unilateral modification provision of the April 2024 MOG did render the arbitration agreement invalid or unenforceable,” it should be severed because of a “severability clause.” JA-1384; *see also* JA-1369 (“[I]f the modification provision did create an illusoriness issue, the contract specifies how it must be resolved: by severing that modification provision.”). Buried on the second-to-last page, presented as further support for this main argument, Amex confusingly invoked the notion that “where a plaintiff challenges the contract as a whole or a provision of the contract outside the arbitration provision, the arbitration provision should be severed and upheld, and the plaintiff’s challenge should be sent to arbitration.” JA-1385 (citing cases). Then in the next sentence, Amex stated “Magistrate Judge Boal therefore erred in refusing to even consider severing Section 1.4,” the unilateral modification provision, “and upholding the remainder of the contract.” JA-1386.

If a sophisticated party like Amex wanted to clearly and distinctly alert the court that it lacked the authority to even address illusoriness on the merits, it wouldn’t spend its whole brief asking the court to address the merits—then on the second-to-last page gesture obliquely to a never-before-raised and entirely inconsistent notion in a muddled paragraph. *See, e.g., Guillemard-Ginorio*, 490 F.3d at 37 (a few sentences and a citation to case law did not raise “arguments squarely and distinctly”). The

merchants, for their part, noted that to the extent Amex was gesturing to any such “new argument,” it was waived. JA-2003.

It’s little wonder, then, that the district court only addressed Amex’s merits argument that the magistrate judge “fail[ed] to consider severance of the unilateral modification clause” after finding the contract to be “illusory.” Op., JA-2068-69. When a party fails to raise an issue before the magistrate and it was not “addressed by the district court,” it is waived. *United States v. Mendoza-Maisonet*, 962 F.3d 1, 16 (1st Cir. 2020).

On top of waiving the whole question of the right forum, Amex also never presented its main argument as to why courts are the wrong forum, which is that illusoriness is supposedly not about contract formation. Amex Br. 34-35. But the merchants argued that illusoriness went to formation at every stage. JA-8, 222, 1309. Even after Magistrate Judge Boal concluded that “no agreement to arbitrate was formed,” JA-1287, Amex’s objections didn’t dispute that illusoriness is a formation issue. JA-1373; JA-1367. Amex is thus “precluded” from raising it “on appeal.” *Keating*, 848 F.2d at 275; Fed. Rule Civ. Proc. 72(a) (“A party may not assign as error a defect in the order not timely objected to.”).

Perhaps Amex asked the judges below to decide illusoriness because Amex had faced many individual arbitrations where its arbitration clause was challenged and wanted a favorable decision by a federal court that it could use in arbitrations.

Whatever the reason, Amex had ample opportunities below to raise its new argument, *see supra* 9-12, but it cannot do so now.⁷

B. Waiver aside, under Supreme Court precedent, courts must decide illusoriness challenges to arbitration contracts.

Even if this Court were to reach Amex’s waived argument, it is foreclosed by precedent.

1. Courts must decide whether an arbitration contract was formed.

To begin, the judges below properly decided illusoriness because it is a question of contract formation. “[A]rbitration is a matter of contract.” *Nat’l Fed’n*, 904 F.3d at 80. Thus, a court may “not compel arbitration unless and until it determines that the parties entered into a validly formed and legally enforceable agreement.” *Id.* “To satisfy itself that such agreement exists, the court must resolve any issue that calls into question *the formation* ... of the specific arbitration clause.” *Granite Rock*, 561 U.S. at 297 (emphasis added). So “[w]here a party contests” the “formation of the parties’ arbitration agreement,” “the court,” rather than an arbitrator, “must resolve the disagreement.” *Id.* at 299-30. Even Amex does not

⁷ Amex doesn’t even request plain-error review of this issue, ignoring its waiver and not attempting to meet this “extremely demanding” standard. *Sparkle Hill*, 788 F.3d at 30.

appear to really dispute this, citing case law for the principle that challenges other than to “formation” should be “sent to arbitration.” Amex Br. 30.⁸

Instead, Amex contends the district court “erred in saying that an illusoriness challenge goes to contract formation instead of validity.” Amex Br. 34-35. Even putting aside Amex’s repeated failure to press this below, Amex is wrong. While the outcome would be the same under either state’s law, if there were any relevant difference, Massachusetts substantive law would govern. *Op.*, JA-2062-63. But it is a fundamental principle that illusoriness “results in no contract being formed.” *Nat’l Fed’n*, 904 F.3d at 86 (quoting 3 Williston on Contracts § 7:11 (4th ed.)). That’s true under Massachusetts law. *See, e.g., McNamara*, 2018 WL 6573125, at *3-4 (compiling Massachusetts cases for this principle); *Pearson v. John Hancock Mut. Life Ins. Co.*, 979 F.2d 254, 259 (1st Cir. 1992) (illusory contract “lack[s] the mutuality required to constitute a binding contract”); *A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transportation Auth.*, 479 Mass. 419, 429-30, 95 N.E. 3d 547, 557 (Mass. 2018). Even the (unpublished) case on which Amex relies describes illusoriness as going to “formation.” *Pazol v. Tough Mudder Inc.*, 93 Mass. App. Ct. 1109, 103 N.E.3d 1237 (2018). And New York law is no different. *See, e.g., Dorman v. Cohen*, 66 A.D.2d 411, 414-16, 413

⁸ Amex contends in passing that *National Federation* did not resolve this question, but that was only because, like here, it was waived below. 904 F.3d at 85-86.

N.Y.S.2d 377, 380-81 (N.Y. App. Div. 1979); *Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co.*, 28 N.Y.3d 675, 684-85, 71 N.E.3d 556, 561-62 (N.Y. 2017).

Finally, Amex contends that the court below erred in treating this as a formation question because it failed to account for other “consideration” in unspecified provisions elsewhere in the 126-page Merchant Operating Guide. Amex Br. 35. But the court below didn’t address this argument because Amex never raised it. This also appears to be (another) merits argument that Amex’s arbitration provision isn’t illusory because there is other consideration. The merchants therefore address it below. *See infra* 40-41.

2. Even if illusoriness were a question of validity, rather than formation, it would still be for the court to decide.

Even if illusoriness were a matter of validity, rather than formation, Amex would still be wrong that the judges below couldn’t decide illusoriness. It is true that a party challenging the validity of an arbitration contract must “directly challenge” the arbitration provision itself. *Coinbase*, 602 U.S. at 150-51. But that’s exactly what the merchants did. Starting with their complaint and continuing through all their briefing, they argued that the “arbitration provision of the MOG is illusory.” JA-8; *see also, e.g.*, JA-222 (“The arbitration provision is illusory”). The merchants also expressly identified specific parts in the arbitration provision that sharpen the illusoriness problem—such as the clause’s survival post-termination and a provision

expressly permitting changes after a party has filed notice that it seeks to invoke arbitration. *See infra* 34, 37-38. And so long as “a party challenges the validity of the precise agreement to arbitrate at issue, the federal court *must* consider the challenge before ordering compliance with that arbitration agreement.” *Coinbase*, 602 U.S. at 150-51 (emphasis in original) (quoting *Rent-A-Center*, 561 U.S. at 71).

Amex, however, contends that this challenge wasn’t specific to the arbitration provision because it was not *unique* to the arbitration provision. According to Amex (at 28), its unilateral-modification provision “has no more (or less) to do with the arbitration provision than it does to the other 126 pages of the MOG.” But the Supreme Court recently rejected this exact argument in a case that Amex fails to cite: A party is “not required” to “challenge *only* the arbitration ... provision.” *Coinbase*, 602 U.S. at 151. Even “where a challenge applies ‘equally’ to the whole contract and to an arbitration ... provision, a court must address that challenge.” *Id.* (quoting *Rent-A-Center*, 561 U.S. at 71). Under “basic principles of contract and consent,” “if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute.” *Id.* That includes challenges based on provisions elsewhere in the contract when raised “as applied” to the arbitration provision. *Rent-A-Center*, 561 U.S. at 71. Anything else would make the analysis “artificially limited to the words that happen to appear under the ‘arbitration provision’ heading.” *Johnson v. Cont’l Fin. Co., LLC*, 131 F.4th 169, 179 (4th Cir. 2025).

Amex also cites this Court’s decision in *Toth*, but it points in precisely the opposite direction—likely why Amex never cited it below. *Toth v. Everly Well, Inc.*, 118 F.4th 403 (1st Cir. 2024). *Toth* addressed an illusoriness challenge as an argument that the unilateral modification provisions in that case were unconscionable—rather than a challenge to the arbitration clause—because it was “unclear whether the unilateral-modification provisions even apply to the arbitration clause,” and the plaintiff did “not assert that [the defendant] modified the arbitration clause, nor that the modification clauses would rewrite the bargained-for exchange.” *Id.* at 415. None of that applies here. Amex’s unilateral modification power indisputably applies to its arbitration provision, Amex has used that power to make unilateral changes that apply to preexisting disputes without prior notice, and Amex has done so in ways that fundamentally rewrote the parties’ respective arbitration obligations in Amex’s favor. *See supra* 7-8.

Amex also cites a grab-bag of out-of-circuit cases. Amex Br. 29-30. As an initial matter, these decisions are inapplicable for the reason above that they are about validity, rather than formation challenges. *See supra* 25-27. In any event, most predate *Coinbase*. *See, e.g., In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195 (10th Cir. 2016). Many relied on a party’s failure to directly challenge the specific arbitration contract at issue—unlike here. *See, e.g., Arnold v. Homeaway, Inc.*, 890 F.3d 546, 554 (5th Cir. 2018). In others, the court decided the merits of illusoriness.

See Gonzalez v. Cheesecake Factory Restaurants, Inc., 2024 WL 989881, at *5 (E.D.N.Y. 2024).

None of this warrants departing from Supreme Court precedent.

II. Both judges below correctly held that Amex's arbitration provision is illusory.

Turning to arguments Amex actually raised below, both judges below correctly concluded that Amex's arbitration provision is illusory. What makes this conclusion particularly straightforward is that—on Amex's own reading of its contract—it can unilaterally change its arbitration provision even if Amex already has notice that merchants are invoking their right to arbitrate. Similarly, on Amex's own reading, it has the power to make those changes without any advance notice, effective immediately. And if that were not enough, Amex has actually exercised this power in exactly this way in order to stack the deck in its favor in the arbitrations.

Simply put, Amex did not make an actual binding promise to arbitrate if it can avoid that promise at will—even when it already has notice that the other party seeks to invoke Amex's obligation to fulfill its promise. As court after court has held, that is illusory under fundamental principles of contract law, no matter which law applies. *See, e.g., Nat'l Fed'n*, 904 F.3d at 86 (citing Williston on Contracts § 7:11); *Domenichetti v. Salter Sch., LLC*, 2013 WL 1748402, at *7 (D. Mass. 2013); *McNamara*, 2018 WL 6573125, at *3 & n.3; *Douglas v. Johnson Real Estate Invs., LLC*, 470 F. App'x 823, 826 (11th Cir. 2012); *Jackson v. Action for Bos. Cmty. Dev., Inc.*, 403 Mass. 8, 15, 525 N.E.2d 411, 415 (Mass. 1988); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 207 (5th Cir. 2012);

Dumais v. Am. Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002); *Floss v. Ryan's Fam. Steak Houses, Inc.*, 211 F.3d 306, 316 (6th Cir. 2000). For its part, Amex has cited no case that approved an arbitration provision where a party can make (or has made) retroactive changes effective immediately, without prior notice. And its attempt to salvage these defects with novel arguments is unavailing.

A. Amex can make (and has made) unilateral changes to its arbitration provision without any advance notice or the opportunity to opt out.

The district court correctly concluded that Amex's arbitration provision is illusory because Amex can make unilateral changes without prior notice, effective immediately. Amex's primary response is that it's sufficient to give notice *after* the unilateral changes become effective. This conflates the kind of notice that courts have required (advance notice) with notice after the changes are a done deal. And while Amex tries to escape this problem by arguing that merchants can opt out of any such changes, its contract says the opposite.

1. "Under both Massachusetts and New York law, an arbitration agreement is illusory if one party can change it unilaterally without providing notice to the other party." Op., JA-2063 (citing cases). And as the district court explained, "[d]elaying notice until after changes take effect defeats the very purpose of notice and is functionally equivalent to providing none." Op., JA-2065. Other courts have drawn a clear line. Modifications without prior notice or the chance to reject the changes

are illusory. *See, e.g., McNamara*, 2018 WL 6573125, at *4 (unilateral changes made “without providing any notice ... beyond displaying the amended version of the agreement on [the defendant’s] website”); *Nat’l Federation*, 904 F.3d at 87 (“[a]ny changes or modifications will be effective immediately upon posting” on website); *Domenichetti*, 2013 WL 1748402, at *7 (“defendants retained the ability to modify the terms ... at their discretion, without notice to plaintiff”); *Douglas*, 470 F. App’x at 824 (unilateral changes “at any time” and “without prior notice”).

Modifications made with prior notice and that the other party can reject, however, are different. *See, e.g., Vaiano v. United Nat’l Corp.*, 733 F. Supp. 3d 32, 38, 42 (D. Mass. 2024) (post-modification notice *and* “a forty-five day opt-out window”); *Byrne v. Charter Commc’ns*, 581 F. Supp. 3d 409, 418 (D. Conn. 2022) (“notice of intended changes to the terms” and opportunity of “rejecting the changes”); *Lebowitz v. Dow Jones & Co.*, 847 F. Supp. 2d 599, 603 (S.D.N.Y. 2012) (notice in December for a change in January), *aff’d*, 508 F. App’x 83 (2d Cir. 2013); *In re Celsius Network LLC*, 647 B.R. 631, 650, 654-55 (Bankr. S.D.N.Y. 2023) (citing *Byrne* and requiring acceptance prior to changes taking effect).⁹ The lead case on which Amex relies drew this very line, accepting a notice that gave a 30-day opt-out window. *Bassett v. Electronic Arts, Inc.*, 93 F. Supp. 3d 95, 107 (E.D.N.Y. 2015). And it distinguished a case where “users had no

⁹ Another case wasn’t addressing an illusoriness challenge, merely what constitutes “inquiry notice.” *Wu v. Uber Techs., Inc.*, 186 N.Y.S.3d 500, 596 (N.Y. Sup. Ct. 2022), *aff’d*, 260 N.E.3d 1060 (N.Y. 2024).

power to accept or reject any such changes,” as “[a] notice requirement becomes significant when it is coupled with the right to accept or reject the change.” *Id.* at 108 (quoting *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021, 1034 (D. Colo. 2012)).

This line makes sense. Subsequent notice doesn’t render Amex’s ability to unilaterally escape its promise to arbitrate less problematic when, at the time of the notice, the change is set in stone. Even Amex cites a case as properly “enforcing [a] contract as not illusory when notice was provided prior to a change,” Amex Br. 44 (citing *Lebowitz*, 847 F. Supp. 2d 599), and recognizes (at 38) that notice matters when the other party can “avoid the change.”

The problem for Amex is that its contract falls on the wrong side of this line. Amex can make “unscheduled” changes “at any time, which shall take effect ten (10) days after the release is posted to www.americanexpress.com/merchantopguide unless another effective date is specified in the notice.” JA-280 (emphasis added). Under that plain text, Amex isn’t required to give any notice beforehand. Nor did it do so when it changed its arbitration provision in August 2023, which by its terms was “effective immediately.” JA-262. Yet Amex has consistently maintained that this “effective immediately notice” was allowed by its contract and entirely proper. Amex Br. 22. The court below therefore understandably looked to this change in evaluating Amex’s ability to make changes without prior notice. *Op.*, JA-2063. And as Judge Kelley explained, “[e]ffective immediately’ means precisely that—changes take

effect immediately”—no prior notice, no chance to reject them before they go into effect. *Id.* Amex thus “unilaterally retained the right to alter the terms of the contract at any time.” Op., JA-2063-64 (quoting *McNamara*, 2018 WL 6573125, at *3).

2. Recognizing the problem, Amex asserts that “merchants are free to reject changes to the MOG by ceasing acceptance of Amex cards.” Amex Br. 40. But as Judge Kelley held, Amex’s contract permits no such thing. As below, “Amex has not pointed to ... any provision that permits the merchants to terminate the Agreement or reject the changes.” Op., JA-2065. That’s unsurprising, because its arbitration provision says the exact opposite: “This section 13.1,” which governs arbitration, “survives termination of the Agreement.” JA-285-86. So “even if the merchants could terminate the Agreement ‘at any time’ as Amex contends, the merchants would still be bound by the [arbitration provision] that included the unilateral changes the merchants oppose.” Op., JA-2065. Indeed, the whole point of Amex’s unilateral modifications was to alter the terms of arbitration preemptively. And this Court has already rejected as “unconvincing” the argument “that [a] contract cannot be found to be illusory because Plaintiffs can terminate the agreement at any time.” *Nat’l Fed’n*, 904 F.3d at 87.

Even though the district court expressly relied on the post-termination survival provision, Amex doesn’t address it. Instead, Amex (at 40) cites a different contract. But that contract, too, provides that its arbitration provision survives termination.

JA-256-57 (section 7 of contract, which governs arbitration, survives termination). For the first time, Amex invokes (at 41) general implied contract principles regarding termination. But even if this Court were to reach this and those principles applied, the merchants couldn't immediately terminate. *See, e.g., Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 14 (1999). More importantly, this again conflates the ability to terminate the commercial relationship with the ability to reject terms that already became “effective immediately” and will “survive[] termination.” Op. JA-2065 (quoting JA-285-86)).¹⁰

3. Finally, Amex makes a strained attempt to argue that the district court invented a new “fair notice” standard, Amex Br. 44-45. But the district court drew the same line as other courts in requiring notice before changes are set in stone, the court pointed to Amex's August 2023 changes to show that Amex had “unilaterally retained the right to alter the terms of the contract at any time,” and the court analyzed Amex's contract to explain why its reliance on cases involving “opt-out windows is misplaced.” Op., JA-2062-66. There's nothing novel about any of this.

¹⁰ In an argument Amex has now abandoned on appeal, in its objections, Amex attempted to argue for the first time that the merchants' continued acceptance of Amex cards constituted “ratification.” Op., JA-2065-66. The district court held that issue was waived because Amex did not raise it before the magistrate judge, as well as wrong on the merits. *Id.*

B. Amex can make (and has made) unilateral modifications that apply retroactively after a merchant has sought to invoke arbitration.

1. Courts have repeatedly held that an arbitration provision is illusory if a party “has the power to make changes to its arbitration policy that have retroactive effect, meaning changes to the policy that would strip the right of arbitration from a party who has already attempted to invoke it.” *Nat’l Fed’n*, 904 F.3d at 86. While Amex asks this Court to ignore its prior decision because it was applying Texas law, this Court explained that its conclusion would have been the same under Massachusetts law because “the principles governing our decision are so fundamental and basic.” *Id.* at 80 n.13. As Judge Burroughs has explained, “[c]ourts have applied similar reasoning” to *National Federation* “to find arbitration agreements illusory under Massachusetts law” where a defendant could “amend or terminate ... the arbitration provision, even if it had previously received notice of an existing arbitration dispute.” *McNamara*, 2018 WL 6573125, at *3-4 (compiling cases). Amex’s lead case only upheld an arbitration provision where modifications “become prospectively effective.” *Bassett*, 93 F. Supp. 3d at 107.

Even Amex acknowledged below that “[c]ourts have held that contractual provisions allowing one party to unilaterally modify the contract are not illusory where the changes apply *prospectively*, rather than retroactively, *and* where notice of

the changes is provided.” JA-1375 (emphases added); JA-1333. And Amex now mostly argues that its contract does not give it the power to make retroactive changes.

But because Amex can change its arbitration provision at *any* time, effective immediately, it can do so even after the other party has given Amex notice that it seeks to invoke arbitration. JA-280. Indeed, Amex has actually made retroactive changes to its arbitration provision, modifying it after having notice that merchants were planning to file arbitration demands. JA-233-34. In other words, it “change[d] the terms of the agreement” after learning that the merchants were “seek[ing] to invoke arbitration to settle a dispute.” *Nat’l Fed’n*, 904 F.3d at 86. This is exactly the kind of power that courts have held renders an arbitration provision illusory. *See, e.g., McNamara*, 2018 WL 6573125, at *4; *Carey*, 669 F.3d at 205.

2. Amex tries to evade this result by claiming that a different provision of its contract precludes retroactive changes. This provision, section 13.1(c)(i), states that: “Claims will be resolved pursuant to this Arbitration provision and the selected organization’s rules in effect when the Claim is filed.” JA-283. This argument fails for multiple reasons.

First, even on Amex’s view, it can apply unilateral changes at any point before “the Claim is filed.” *Id.* And as Amex has admitted, a claim is not deemed filed until it is formally submitted to the arbitration organization selected and the claimant pays their filing fees. JA-284 (setting out conditions); *see also* JA-1381 (acknowledging this).

In other words, Amex’s contract expressly provides that it can modify its arbitration provision even after having notice that merchants seek to invoke arbitration. And that’s not hypothetical; it’s exactly what Amex did—and what it defends its right to do. Op., JA-2066. That is a textbook “retroactive effect.” *McNamara*, 2018 WL 6573125, at *4; see also, e.g., *Nat’l Fed’n*, 904 F.3d at 86.

Not only that, but Amex requires merchants to give it “written notice” that they are planning to invoke arbitration *before* they can “initiate a mediation or arbitration.” JA-282. As Judge Kelley explained, “[u]nder this framework, a merchant can send a written notice initiating the arbitration process yet be subject to a different agreement if Amex amends the terms before the formal filing of the claim.” Op., JA-2066. This guarantees Amex the opportunity to unilaterally “change the terms of the agreement” before the merchant files its claim. *Nat’l Fed’n*, 904 F.3d at 86. And that is by design—it’s no coincidence that Amex imposed this buffer period through its August 2023 unilateral changes. JA-265.

Second, even once a merchant formally submits a dispute with an arbitral organization, it can take months to determine its filing fees such that it will not be deemed “filed.” JA-235. Indeed, in thousands of cases, Amex disputed the amount of filing fees merchants owed—disputes that took the arbitration provider months to resolve. JA-1167 n.5; JA-1180. On Amex’s reading of the contract, during this whole time, Amex could still unilaterally change the arbitration provisions in its favor (or

remove them completely).

Third, nothing in section 13.1(c)(i) expressly limits Amex’s ability to exercise its unilateral-modification power, and nothing prevents Amex from unilaterally modifying section 13.1(c)(i) itself. JA-283. In other words, Amex could simply unilaterally remove that provision. *See Day v. Fortune Hi-Tech Mktg., Inc.*, 536 F. App’x 600, 605 (6th Cir. 2013) (clause could not save arbitration provision from illusoriness when “that provision itself could have been altered or removed at any time”).

Finally, if there were any ambiguity about this—and there isn’t—this Court should apply the “*contra proferentem* rule and h[old] that any ambiguities in the agreements must be construed against” the drafter, based on the position it has taken in the litigation before the court. *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, 226 F.3d 15, 24 (1st Cir. 2000).

3. Unable to meaningfully challenge that the power to make retroactive changes creates an illusoriness problem, Amex raises arguments that are irrelevant, novel, or both.

Amex first asserts that the district court reviewed the “wrong version” of its contract. Amex Br. 24. But Amex’s contract has consistently given it “*the power* to make changes to its arbitration policy that have retroactive effect,” which the court below noted was the “crux” of retroactivity. Op., JA-2067 (emphasis added); *see, e.g.*, JA-248 (prior April 2023 version). Further, in analyzing Amex’s powers under the

contract, the court properly looked to the operative April 2024 version that contains the required written notice before filing an arbitration claim. Op., JA-2066.

The court also correctly explained Amex had used its unilateral modifications power to make retroactive changes in August 2023, when Amex changed arbitration terms in its favor after merchants gave notice they intended to seek arbitration. Op., JA-2066. It is true that, prior to the change, the operative arbitration provision didn't include the subsequent process for formal, written notice of intent to pursue claims in arbitration. JA-248. But the merchants *did* provide such notice and Amex *did* still make retroactive changes because its contract gave it “the power” to do so. Op., JA-2067. So no matter how you slice it, the result remains the same.

Finally, Amex asserts that the district court erred because it “ignored” other consideration in unspecified provisions in the 126-page Merchant Operating Guide. Amex Br. 48. But the court didn't “ignore[]” this argument, Amex didn't raise it—before either judge below—despite the fact that the merchants (and judges below) consistently presented illusoriness as a question of formation. *See supra* 24. Amex is “precluded” from doing so now. *Keating*, 848 F.2d at 275.

Even on appeal, Amex barely explains its argument. For example, the company makes no attempt to explain how other obligations could provide consideration, when all of its terms are subject to its power to make unilateral, retroactive changes without prior notice. Amex Br. 3 (unilateral modification power

applies “to every single term” of the contract). Amex ensured it had an escape hatch to unilaterally avoid any obligation, and even Amex appears to recognize that a contract “consist[ing] entirely of illusory promises” would be a problem. Amex Br. 31 n.7 (quoting *Johnson*, 131 F.4th at 181); *see also, e.g., Day*, 536 F. App’x at 605 (“provision [that] itself could have been altered or removed at any time” can’t prevent illusoriness).¹¹ Nor does Amex try to square this argument with its other new claim that the arbitration provision must be treated as a separate contract. This Court should not overturn the district court’s decision based on an argument Amex never presented to either judge below and doesn’t even fully articulate on appeal.

C. Amex’s argument about the duty of good faith and fair dealing is clearly waived—and also incorrect.

The district court did not abuse its discretion in holding that Amex waived the implied covenant of good faith and fair dealing.¹² Amex doesn’t even try to meet the high bar for showing abuse of discretion. And in any event, Amex cannot show any

¹¹ Given the issues that were presented by the parties, the judges below focused on the illusoriness of the arbitration provision. *See* JA-1287 (magistrate judge concluding that “that the arbitration agreement was illusory from the outset”); Op., JA-2069 (adopting magistrate judge’s recommendation); *see also* JA-8, 221 (arguing that arbitration provision is illusory). In affirming, this Court need not go beyond this based on issues Amex didn’t properly raise.

¹² In passing, Amex confusingly claims that because “the district court rejected Amex’s implied covenant argument on the merits, this court may review it,” Amex Br. 49, but the district court expressly held this issue was waived and moved on, Op., JA-2067. Even beyond that, Amex cites no authority that this Court can ignore a lower court’s express finding of waiver because of a holding in the alternative.

error, plain or otherwise.

1. This Court “review[s] for abuse of discretion a district court’s conclusion that a party has waived an issue by failing to adequately assert it before the magistrate judge.” *Curet-Velazquez*, 656 F.3d at 54. Under this standard “[a]n appellate court must defer to the lower court’s sound judgment, so long as its decision falls within its wide discretion, and is not manifestly erroneous.” *G&J Fisheries*, 67 F.4th at 27. Amex has a “heavy burden of showing an abuse of discretion,” which “is found in only the rarest of instances.” *Id.*

Amex never even attempts to satisfy this standard, instead simply arguing that it sufficiently raised the issue below. Amex Br. 49-52. Even if this Court were to overlook this failure, Amex’s arguments are unavailing. The district court’s waiver ruling was based on Amex’s *own admission* that “[t]he duty of good faith and fair dealing was not addressed in prior briefing” before the magistrate judge. JA-1382 n.5. While Amex claimed that it didn’t do so “because Plaintiffs never argued that Amex had the power to make retroactive changes,” *id.*, the court pointed out that was obviously incorrect, Op. JA-2067; *see also* JA-7-8 ¶ 16 (making retroactive argument in complaint); JA-222 (same in briefing); JA-1309-10 (same at hearing).

Before this Court, Amex doesn’t renew its assertion that the merchants hadn’t raised retroactivity. And Amex’s new tack (at 49-51) fares no better. It asserts that its citation to a few cases applying New York law, which in turn discussed good faith

and fair dealing, sufficed. Amex Br. 51. This is, of course, inconsistent with Amex's own admission that it failed to "address[]" this issue in its "briefing." JA-1382 n.5. And anyways, merely citing case law discussing an issue fails to satisfy a party's "duty to spell out their arguments squarely and distinctly." *Guillemard-Ginorio*, 490 F.3d at 36-37. "The magistrate judge should not have been expected to make the argument for" Amex, and "[t]he argument is waived." *Curet-Velazquez*, 656 F.3d at 54. Particularly given this Court's insistence that "[p]arties must take before the magistrate, not only their best shot but all of their shots," *Borden*, 836 F.2d at 6, it wasn't "manifestly erroneous" for the district court to conclude that Amex waived this issue. *G&F Fisheries*, 67 F.4th at 27; *see also, e.g., AES-Apex Emp. Servs., Inc. v. Rotondo*, 924 F.3d 857, 867 (6th Cir. 2019) ("[A] district court never abuses its discretion when it holds that an issue not actually presented to a magistrate judge is forfeited.").

2. Falling back, Amex invokes plain-error review. Amex Br. 52-53. But there are no "excusatory circumstances justifying plain error review." *Triantos*, 91 F.4th at 563 n.3. Unlike the cases Amex cites, it was not proceeding pro se, *id.* at 562, nor was there an intervening Supreme Court decision, *Davila-Feliciano v. Puerto Rico State Ins. Fund*, 683 F.3d 405, 406 (1st Cir. 2012). And even if Amex were entitled to plain-error review, it cannot come close to satisfying this "extremely demanding" standard by showing that "(1) an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant's] substantial rights, but also (4) seriously impaired the

fairness, integrity, or public reputation of the judicial proceedings.” *Sparkle Hill*, 788 F.3d at 30.

The fourth factor alone is enough: Amex is a sophisticated litigant with sophisticated counsel, not a pro se party facing sanctions who wasn’t informed of Rule 11’s safe harbor protections. *See Triantos*, 91 F.4th at 562. The fact Amex was already citing cases involving this doctrine only makes Amex’s failure more glaring. Amex may have done so strategically, because it preferred to argue that any notice at all was sufficient. JA-386. Or perhaps Amex wished to avoid drawing attention to the fact that its own conduct would undermine any attempt to invoke this doctrine. *See infra* 45. Whatever the reason, “it would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge.” *Paterson-Leitch*, 840 F.2d at 991.

In any event, there was no error here, much less a clear one. Even on Amex’s own reading, the plain text of its contract expressly allows it to make unilateral modifications with any effective date it pleases, even after a party has provided notice that it intends to invoke its right to arbitrate. *See supra* 37-38. And the implied “duty of good faith cannot add to, detract from, or alter the terms of the contract itself.” *Warner Theatre Assocs. Ltd. P’ship v. Metro. Life Ins. Co.*, 1997 WL 685334, at *6 (S.D.N.Y. 1997) (Sotomayor, J.), *aff’d*, 149 F.3d 134 (2d Cir. 1998); *see also Chokel v. Genzyme Corp.*,

449 Mass. 272, 276, 867 N.E.2d 325, 329 (Mass. 2007) (“The covenant does not supply terms that the parties were free to negotiate, but did not, nor does it create rights and duties not otherwise provided for in the contract.”). Plus, Amex’s own conduct precludes the company from relying on good faith and fair dealing. *See Bassett*, 93 F. Supp. 3d 95, 107 (looking to whether party “behaved consistently in accordance with its duty of good faith and fair dealing”); *Lebowitz*, 508 F. App’x at 84-85 (same).

For Amex’s part, its plain error argument turns on the idea that the court below applied Texas law by relying on this Court’s decision in *National Federation*. Amex Br. 53. But the main principle for which the district court cited *National Federation* was that changes with “retroactive effect” are impermissible. Op., JA-2067. That is widely accepted by courts applying Massachusetts and New York law—and even Amex acknowledged it below. *See supra* 36-37. And it was this ability to alter the rules of arbitration after Amex had notice that merchants were seeking to invoke arbitration—an ability that Amex exercised and defends—that the district court identified as “a textbook example of illusoriness.” Op., JA-2067. That’s true notwithstanding any implicit covenant. *See, e.g., Bassett*, 93 F. Supp. 3d at 107 (relying on fact that “terms become *prospectively* effective thirty days from the date of posting” (emphasis added)). And even if this were a close question, “[t]he lack of any clear, easily determinable answer to a legal conundrum is, in itself, enough to defeat a claim of plain error.” *Sparkle Hill*, 788 F.3d at 30.

Finally, the policy concerns that Amex invokes cannot avoid the consequence of the contract that the company itself drafted. For decades, other companies have included limitations on unilateral modification to try to avoid exactly these kinds of problems. That includes language like “no amendment shall apply to a Dispute of which the [defendant] had actual notice on the date of amendment” or “as to Disputes which arose prior to the date” of the amendment. *Carey*, 669 F.3d at 206. Or that no modification “will alter the arbitration provisions with respect to an Injury occurring prior to the date” of the modification. *Id.* Or that no modification will be made without advance notice and an opt-out period. *See supra* 32-33. Amex is a sophisticated, well-counseled party. It could have included such limits. Indeed, a later version of Amex’s MOG provides that “unscheduled releases shall take effect ninety (90) days after the notice”—but only in Canada. JA-476. Amex didn’t include these limits for the merchants here because it wanted to be able “to hold [the merchants] to the promise to arbitrate while reserving its own escape hatch.” *Carey*, 669 F.3d at 206. That’s the definition of illusory.

III. In the alternative, Amex’s arbitration provision is unenforceable because it is replete with provisions designed to block small merchants from vindicating their rights.

Even if this Court were to conclude that Amex’s arbitration provision is not illusory, it should still affirm on the alternative grounds that the provision is unenforceable because it is replete with unenforceable, one-sided provisions.

A. Procedural unfairness. Both Massachusetts and New York unconscionability doctrines look to procedural unfairness, such as disparity of bargaining power and “unfair surprise.” *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 285, 408 N.E.2d 1370, 1376 (Mass. 1980); *see also Green v. 119 W. 138th St. LLC*, 37 N.Y.S.3d 491, 494-95 (N.Y. App. Div. 2016).¹³ To start, this is “a contract of adhesion,” so there is “a lower threshold for finding unconscionability.” *Good v. Uber Techs., Inc.*, 494 Mass. 116, 234 N.E.3d 262, 270 n.6, 288 n.41 (Mass. 2024). There’s also a clear “disparity in bargaining power”—one side is a small pizza place in Lowell, the other a multi-billion-dollar credit-card behemoth. *Green*, 37 N.Y.S.3d at 494-95. Further, given Amex’s no-notice, retroactive changes, the merchants had “no meaningful choice” to reject these terms “and w[ere] subject to unfair surprise.” *Machado II*, 28 N.E.3d at 414. The district court concluded otherwise only because it thought there was not unfair surprise “at the time of execution.” Op., JA-2079 (citing *GGNSC Chestnut Hill LLC v. Schrader*, 2018 WL 1582555, at *5 (D. Mass. 2018)). But *GGNSC* relied on “a 30-day revocation period,” which is absent here. 2018 WL 1582555, at *5. And in any event, several of the unconscionable provisions challenged here *were* added to the contract through the unilateral update. *See supra* 7-8, 38.

B. Unilateral modification and retroactive change provisions. For

¹³ New York law does not require procedural unconscionability. *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 12, 534 N.E.2d 824, 829 (N.Y. 1988).

substantive unconscionability, Massachusetts and New York law look to “one-sided” terms, *Machado II*, 28 N.E.3d at 415, that are “unreasonably favorable,” *Green*, 37 N.Y.S.3d at 494-95. Here, even if this Court were to accept Amex’s new argument that its unilateral-modification provisions are a validity problem rather than a formation problem, they’d still be substantively unconscionable. It’s hard to imagine anything more “one-sided” than the power to make unilateral, retroactive changes without prior notice. *Machado II*, 28 N.E.3d at 415; *see also Bekele v. Lyft, Inc.*, 918 F.3d 181, 190 (1st Cir. 2019) (upholding provision because it “does not allow unilateral modification; it requires that [defendant] give notice to the user and that the user accept the new terms”); *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003). That includes not just the unilateral modification power as applied to the arbitration provision, but also sections of the arbitration provision requiring advance notice to Amex so it can make retroactive changes and ensuring these changes survive termination.

C. Arbitration-specific costs. The arbitration provision is unenforceable because it requires small merchants to pay far more in arbitration-specific fees than they could ever recover in damages.

The Supreme Court has “recogniz[ed] that ‘large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum’ and h[eld] that such costs could render an arbitration agreement

unenforceable as to those federal claims.” *Bekele*, 918 F.3d at 189 (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000)). Same with Massachusetts and New York. *Id.* at 188-89 (Massachusetts law looks to whether “the arbitration fees a plaintiff would owe amount to less than the damages the plaintiff claims”); *Brady v. Williams Cap. Grp., L.P.*, 14 N.Y.3d 459, 467, 928 N.E.2d 383, 387-88 (N.Y. 2010). This “makes practical sense”: If arbitration-specific “costs ... will exceed the value of the recovery,” “the plaintiff is essentially deprived of any dispute resolution forum whatsoever.” *Kristian v. Comcast Corp.*, 446 F.3d 25, 51, 55 (1st Cir. 2006).

The district court recognized this principle. *Op.*, JA-2070. It also did not question the merchants’ detailed evidence showing inevitable arbitration-specific costs (such as filing fees and arbitrator fees) of hundreds of thousands of dollars, far more than the few hundreds of dollars small merchants like Pizza Hazel could receive in damages. JA-239-44. Instead, the district court concluded this argument was premature because the merchants could recover arbitral costs under the contract—though noting its “reservations about the ‘wait and see’ approach and its potential chilling effect on claimants.” *Op.*, JA-2076. But Amex’s contract does not permit recovery of such costs.

The “Costs of Arbitration Proceedings” provision states that: “You will be responsible for paying your legal fees (except where otherwise provided in the Agreement) ... and *your share of any arbitration fees (including filing, administrative, hearing*

and/or, all other fees.” JA-285 (emphasis added). In analyzing equivalent language, this Court held that it “unmistakably places the burden of a plaintiff’s costs” on them. *Kristian*, 446 F.3d at 52. And while merchants’ obligation to pay their “legal fees” contains the caveat “except where otherwise provided in the Agreement,” their obligation to pay “arbitration fees” has no such exception. JA-285. Under basic principles of contractual interpretation, a court cannot engraft an exception the text doesn’t provide. *See United States v. Okoye*, 731 F.3d 46, 49-50 (1st Cir. 2013).¹⁴

The court below relied on a provision stating that “[t]he arbitrator has the power and authority to award any relief that would have been available in court.” Op., JA-2072 (quoting JA-283-84)). But the next sentence states that: “However, the arbitrator has no power or authority to alter the Agreement ... nor ... make any award except as provided in [the arbitration provision].” JA-284. Requiring Amex to pay the merchant’s arbitral costs would violate this by altering language that unmistakably requires merchants to cover those costs, without exception. JA-285.¹⁵

Finally, while this Court need not reach this issue, Amex has never cited any authority that arbitration fees would have been available to the merchants in court.

¹⁴ Even if reasonable attorneys’ fees (but not arbitral costs) were recoverable, this doesn’t cure the problem of prohibitive arbitral costs when the total recovery on which attorneys’ fees will be based is far lower than those costs. *See Kristian*, 446 F.3d at 58-60 & n.21.

¹⁵ And if there were ambiguity, “[c]ontracts of adhesion are construed strictly against the drafter.” *Good*, 234 N.E.3d at 288 n.41; *see also Paul Revere*, 226 F.3d at 25.

JA-1320, 1348, 2018-19. The only potential source would be the Clayton Act, and “[t]he prevailing view is that the recovery of costs under Section 4 of the Clayton Act is limited by [28 U.S.C.] § 1920.” *Miller v. Cartel*, 627 F. Supp. 3d 1043, 1051-52 (D.N.D. 2022) (compiling cases); *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). And section 1920’s enumerated list of “costs” does not include payments to arbitrators. 28 U.S.C. § 1920; *see, e.g., Abrams v. Jamesway Corp.*, 1990 WL 69148, at *1 (E.D. Pa. 1990).

In sum, the extensive factual record demonstrates merchants will face prohibitive arbitration-specific costs they cannot recover, so there’s no need to wait and see. *See Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 13 (1st Cir. 2009); *Kristian*, 446 F.3d at 51-52; *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 517 (1st Cir. 2020) (rejecting challenge only due to lack of evidence); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 91-92 (1st Cir. 2002) (same where costs were speculative).

D. Asymmetric appeals. The district court correctly held that Amex’s one-sided appeal provision is unconscionable. Under its prior contract, in any case where injunctive relief was sought, either party could appeal. JA-251. But after being sued by thousands of merchants seeking injunctive relief, Amex changed this such that a de novo appeal is allowed “where injunctive relief is ordered,” not where it is denied. JA-284. And “for all intents and purposes, [merchants] would be the only parties pursuing any real form of injunctive relief.” *Op.*, JA-2083 (quoting *Heckman v. Live*

Nation Ent., Inc., 686 F. Supp. 3d 939, 965 (C.D. Cal. 2023), *aff'd*, 120 F.4th 670 (9th Cir. 2024)); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 133 N.M. 661, 666, 68 P.3d 901, 905-06 (N.M. 2003) (courts must scrutinize appeal provisions that appear “facially equal” but “are not truly equal in their effect on the parties”). Indeed, Amex only altered its appeal rules after receiving thousands of demands seeking injunctive relief. In contrast, Amex has not identified a single case where it has sought injunctive relief against a merchant. “This asymmetry gives Amex a meaningful second opportunity to defend itself while denying merchants the same right.” Op., JA-2083. That’s as “one-sided” as it gets. *Machado II*, 28 N.E.3d at 415. The court below only held that the unconscionability of this provision, standing alone, was insufficient. Op., JA-2083-84. But here it does not stand alone, for the reasons given elsewhere in this section.

E. Severability. When unenforceable terms “pervade[]” the arbitration provision and are “so one-sided that their only possible purpose” is to stack the deck in the arbitration, courts invalidate the arbitration provision as a whole. *Machado II*, 28 N.E.3d at 415 (quoting *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 206-08 (3d Cir. 2010) (applying Restatement (Second) of Contracts § 184(1)); *see also Am. Fam. Life Assurance Co. of New York v. Baker*, 848 F. App’x 11, 13 (2d Cir. 2021); *Narayan v. The Ritz-Carlton Dev. Co., Inc.*, 140 Haw. 343, 355-56, 400 P.3d 544, 556-57 (2017) (compiling cases). And in this analysis, a severability clause is “not dispositive.” *Machado v.*

System4 LLC (Machado I), 465 Mass. 508, 989 N.E.2d 464, 472 n.15 (2013); *see also, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003). Otherwise, drafters have no incentive against filling their contracts with unconscionable terms to deter others from litigating.

Here, the goal of Amex's eleventh-hour addition of numerous "baldly one-sided" provisions was not "a *bona fide* mechanism for dispute resolution, but rather ... a scheme that [Amex] knew ... would provide it with an impermissible advantage." *Nino*, 609 F.3d at 207. The company had designed its arbitration provision to ensure merchants could not effectively pursue their antitrust claims. But when merchants finally started availing themselves of arbitration, Amex changed the rules to stop it. And as an extensive factual record demonstrates, that's exactly what happened.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,987 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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