No. 21-111

IN THE
Supreme Court of the United States

NC FINANCIAL SOLUTIONS OF UTAH, LLC,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA *EX REL.*
MARK R. HERRING, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF AMICUS CURIAE PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He has been a faculty member at Columbia Law School since 1975, and teaches and writes extensively on transnational dispute resolution, European Union law, administrative law, and comparative law. He is an affiliated faculty member of both the MIDS Master's Program in International Dispute Settlement in Geneva and the International Dispute Resolution LLM Program at the School of Law of Sciences Po in Paris.

For more than four decades, Professor Bermann has been an active international arbitrator in commercial and investment disputes. He is the Chief Reporter of the American Law Institute's *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst. Proposed Final Draft 2019), a project that began in 2007 and was completed in 2019. He is also the co-author of the *UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; chair of the Global Advisory Board of the New York International Arbitration Center; co-editor-in-chief of the *American Review of International Arbitration*; and founding member of the International

[1] All parties were notified of amicus curiae's intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief. Pursuant to Rule 37.6, counsel for amicus authored this brief. No counsel for a party in this case authored this brief in whole or in part. Only amicus and his counsel contributed monetarily to the preparation and submission of this brief.

Chamber of Commerce International Court of Arbitration's Governing Body.

Professor Bermann is interested in this case because it raises important questions concerning the relationship between federal and state law in the field of commercial arbitration. While there is a role for state law in this field, the decisions of this Court have established that States may not enact or implement legislation that compromises the substantial federal interest in the enforcement of agreements to arbitrate. There is considerable case law, including from this Court, on the preemptive effect of the Federal Arbitration Act ("FAA") vis-à-vis state law. Those decisions have been unfailingly sensitive to the importance of the FAA and its priority over state policies that weaken the enforceability of arbitration agreements and arbitral awards. The decision below directly undermines the federal policy in favor of enforcing arbitration agreements and requires this Court's review.

SUMMARY OF ARGUMENT

This Court has repeatedly rejected attempts by state legislatures and state courts to undermine the effectiveness of agreements to arbitrate. The decision of the Virginia Supreme Court below allows the Virginia Attorney General to sidestep and effectively nullify an arbitration agreement between a business and a consumer. The decision does so by allowing the Attorney General to bring a claim for restitution on behalf of the consumer and against the business in state court proceedings, while ignoring the dispute resolution forum to which the consumer and the business agreed. This decision violates the FAA and the federal policy protecting arbitration agreements, and requires this Court's review.

I. Protecting agreements to arbitrate was a key purpose prompting the FAA's enactment in 1925. Frequently since then, however, States have created private causes of action and attempted to make their courts the sole arbiters of those claims—effectively denying effect to freely entered agreements to arbitrate those claims between private parties. In all such cases this Court has affirmed the right to arbitrate and rejected state laws that seek to constrain it. According to this Court, the FAA embodies a substantive federal policy favoring arbitration that States must respect. For States to declare state-law claims nonarbitrable is to create "an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA"—a result that flouts the Constitution's Supremacy Clause. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)). This Court has reiterated its disapproval of these state-law measures, first voiced in *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984), in numerous cases, *see, e.g.*, *id.*; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 75 n.4 (2010); *Perry v. Thomas*, 482 U.S. 483, 491 (1987), and this trend has not abated with time. As recently as 2018, this Court warned that "we must be alert to new devices and formulas" that undercut the federal policy in favor of arbitration. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

II. This Court should reinforce that admonition in this case. Here, the attack on agreements to arbitrate takes a form this Court has not previously considered. The Virginia Consumer Protection Act ("VCPA") authorizes the Virginia Attorney General to bring a state court action for restitution against a business on behalf of a consumer. The Virginia Supreme Court ruled below that the VCPA permits the

Attorney General to pursue this action for restitution even though the consumer agreed to submit any claim "arising directly or indirectly" out of their agreement with the business exclusively to arbitration, including claims "asserted on [the consumer's] behalf by another person." In other words, although the claim holder and putative beneficiary of the suit has waived its right to prosecute its claim in court, the Attorney General was permitted to sidestep the contract and bring such a claim on the consumer's behalf.

III. The Virginia Supreme Court's ruling is at odds with this Court's precedent on the preemptive nature of the FAA. U.S. Courts of Appeals have reached the same conclusion in similar cases. In *United States v. Bankers Insurance Co.*, the Fourth Circuit rejected an attempt by the U.S. Attorney General to avoid arbitration by bringing suit on behalf of federal agencies bound by an arbitration agreement. 245 F.3d 315 (4th Cir 2001). And in *Olde Discount Corp. v. Tupman*, the Third Circuit ruled that the Delaware Deputy Attorney General could not sue for recission of a contract on behalf of a party bound by an arbitration clause, because allowing a state official to use a "substitute" proceeding to pursue claims that the parties had agreed to arbitrate would "render [the parties'] right to arbitration meaningless," and "must fall before the conflicting right to an arbitral forum granted by the FAA." 1 F.3d 202, 209 (3d Cir. 1993).

There is likewise no doubt that the VCPA, as interpreted by the Virginia Supreme Court, is preempted by the FAA. If, as this Court has held, States may not proscribe arbitration when a consumer claim is governed by a valid arbitration agreement, *Southland*, 465 U.S. at 15–16, States should not be permitted to authorize their Attorneys General to

bring those claims to court on the consumer's behalf. To allow the Attorney General to sidestep the arbitration agreements here would undermine Congress' purpose in passing the FAA: to prevent parties to an arbitration agreement from avoiding their agreement to arbitrate by invoking state law.

IV. Unfortunately, the decision below is not an isolated error. Other state courts of appeals have issued similar decisions, often mistakenly relying on this Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)—a case involving interpretation of the Americans with Disabilities Act, where federal preemption was not applicable. The Virginia Supreme Court's decision conflicts with this Court's precedent and has exacerbated the split between state courts of appeals, on the one hand, and the decisions of the Third and Fourth Circuits, on the other. This Court should grant the Petition for Certiorari to address the errors below.

ARGUMENT

I. This Court has Consistently Barred States from Undermining the Policy Underlying Enactment of the Federal Arbitration Act

When Congress enacted the FAA in 1925, it had one fundamental purpose in mind: ensuring that agreements to arbitrate commercial disputes arising out of interstate or international transactions would be fully respected by state courts and legislatures. Before the FAA was enacted, agreements to arbitrate disputes were largely denied enforcement on the ground that they tended to "oust" courts of their jurisdiction. *See generally* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393 (2004). Congress' primary purpose in enacting the

FAA was to override that case law,[2] and that has been the touchstone of this Court's interpretation of the FAA ever since.

This Court has repeatedly rejected attempts by state legislatures and state courts to undermine the effectiveness of agreements to arbitrate. For decades, this Court has stressed that FAA § 2—which, generally speaking, makes arbitration agreements "valid, irrevocable, and enforceable," 9 U.S.C. § 2—represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This Court has thus consistently had "a healthy regard" for this federal policy in answering "questions of arbitrability." *Id.*

In the leading case of *Southland Corp. v. Keating*, for instance, this Court observed that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. 1, 15–16 (1984). *Southland* established a standard to which this Court has since consistently adhered. This Court has thus reiterated that the FAA preempts not only state law measures that directly conflict with the FAA, but also those that single out or discriminate against arbitration or that otherwise "stand as an obstacle to the accomplishment of the

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[2] Senator Walsh, explaining the purpose of the FAA at the 1923 Senate Hearings on the Act, reported that the Act "sought to overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 6 (1923).

FAA's objectives." *Concepcion*, 563 U.S. at 343. Thus, courts may decline to enforce arbitration agreements on grounds generally applicable to the enforcement of contracts, but may not place arbitration agreements on less favorable footing than other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006). Following *Southland*, this Court has repeatedly rejected attempts by state legislatures and courts to undermine agreements to arbitrate. *See id.*; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (The FAA was designed to "place[] arbitration agreements on an equal footing with other contracts" (citing *Buckeye*, 546 U.S. at 443)); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (states cannot force state-court litigation of claims subject to arbitration); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) ("[S]tate law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." (citing *Concepcion*, 563 U.S. at 352)).

The Court has looked no more favorably on decisions by state courts restricting access to arbitration by consenting parties. In *Kindred Nursing Centers Ltd. Partnership v. Clark*, this Court rejected a Kentucky rule that disfavored arbitration agreements by invalidating such agreements signed on another person's behalf under a power of attorney. 137 S. Ct. 1421, 1424–25 (2017). And in *Concepcion*, this Court rejected a California common-law doctrine that invalidated as unconscionable class arbitration waivers. 563 U.S. at 352.

The Court has also struck down state statutes that give state administrative bodies the exclusive authority to adjudicate claims between private parties. For example, in *Preston v. Ferrer*, this Court held that

a state cannot force parties that have agreed to arbitrate to instead litigate a claim before an administrative tribunal. 552 U.S. 346, 349–50 (2008).

II. The VCPA and the Decision Below Expressly Allow the State Attorney General to Bring Suit on Behalf of Parties Whose Claims are Subject to Arbitration

The VCPA provides several avenues of recourse against a business that violates it. First, an injunction provision, Section 59.1-203(A), provides that "the Attorney General . . . may cause an action to be brought in the appropriate circuit court in the name of the Commonwealth . . . to enjoin any violation of [the VCPA]."[3] Second, under a restitution provision, § 59.1-205, the court may, in connection with the Attorney General's suit, also award restitution to consumers. More specifically, the court may "restore to any identifiable person any money or property, real, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice declared to be unlawful." *Id.* § 59.1-205. At the same time, an individual damages provision, § 59.1-204(A), affords individuals a cause of action for damages against a business that violates the VCPA. The VCPA thus both grants consumers a damages claim for losses suffered as a result of a violation of its provisions, and empowers the Attorney General to simultaneously enjoin such violations and pursue restitution for consumers.

The individual damages claim and the restitution claim are effectively the same. Both rights of action

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[3] The court is likewise "authorized to issue temporary or permanent injunctions to restrain and prevent violations of [the VCPA]." VCPA § 59.1-203(C).

arise directly from the harm suffered by the consumer. *See First Va. Bank-Colonial v. Baker*, 225 Va. 72, 81 (1983) ("[T]wo separate rights of action may arise from a single cause of action."). The Virginia Supreme Court has defined restitution as "a *restoration* of something to its rightful owner: the making good of or giving an equivalent for some injury (as a loss of or damage to property)." Pet. App. 11a (emphasis in original) (citing *Howell v. Commonwealth*, 274 Va. 737, 740 (2007)). In other words, restitution under the VCPA effectively compensates for injury suffered by a consumer as a consequence of the actions of a business. A restitution claim brought by the Virginia Attorney General under § 59.1-205 of the VCPA is thus functionally the same claim as one brought by a consumer himself or herself for damages.

In this case the Virginia Attorney General sued Petitioner NC Financial Solutions of Utah for violations of the VCPA, seeking injunctive relief, civil penalties, and a judgment awarding restitution for any money or property lost by consumers. NC Financial moved to dismiss or, alternatively, to compel arbitration of individual claims for damages pursuant to the agreements between NC Financial and its customers to arbitrate "any dispute arising out of" their loan agreements, specifically including "all claims asserted on [the borrower's] behalf by another person." Pet. App. 24a. NC Financial correctly pointed out that the parties had agreed to arbitrate *all* claims arising from their relationship, including all derivative claims brought by a third party on the consumer's behalf.

The lower courts rejected NC Financial's arguments and the Virginia Supreme Court affirmed. The Virginia Supreme Court acknowledged the FAA's strong federal policy in favor of arbitration, but held

that the Attorney General's action, and the statute authorizing it, did not offend that policy because "the Commonwealth was not a party to the loan agreements" and so "is not bound by the arbitration provisions. . . . Neither the FAA nor general principles of contract law preclude the Commonwealth from seeking restitution." Pet. App. 5a.

III. Allowing a State Attorney General to Sue on Behalf of Parties Who Agreed to Assert their Claims Exclusively in Arbitration Runs Afoul of the FAA's Underlying Purposes

The Virginia Supreme Court erred. The Attorney General's claim for restitution under the VCPA asserts a claim on behalf of consumers who, because of their arbitration agreement, are obliged to pursue those claims in an arbitral forum. This is the first case with this posture brought before this Court, to amicus' knowledge, but this case cannot be distinguished from the Court's numerous prior cases rejecting state attempts to undermine arbitration agreements. As in several of those cases, the decision below effectively declares claims under state law to be nonarbitrable and consequently allows the claims to proceed in court notwithstanding an agreement between the parties to submit all claims exclusively to arbitration. Although some state courts have found similar measures to be compatible with the FAA, the U.S. Courts of Appeals that have considered this issue have consistently held to the contrary. This Court should do so as well.

I. Federal courts have consistently found similar suits by Attorneys General to be incompatible with the FAA. The Virginia Supreme Court's interpretation of the VCPA allows the Virginia Attorney General, by espousing a consumer's claims, to essentially

sidestep the consumer's agreement to arbitrate its disputes with its counterparty. The notion that an Attorney General may bring claims in court on behalf of a party that agreed to arbitrate those claims was squarely rejected by the Fourth Circuit in *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir 2001). There, the U.S. Attorney General sued on behalf of federal agencies, bringing claims that the agencies had agreed to arbitrate. The Fourth Circuit rejected this attempt to avoid an arbitration agreement, noting that "when a third party sues on a contract, any arbitration provision . . . remains in force," and it would be unjust to allow the Attorney General to bring a claim arising out of the contract "while . . . avoid[ing] the terms of an arbitration provision contained therein." *Id.* at 323.

To the same effect is the Third Circuit's decision in *Olde Discount Corp. v. Tupman*, 1 F.3d 202 (3d Cir. 1993). There, the Delaware Deputy Attorney General sued for recission of securities transactions between a securities broker and one of its customers. The broker and its customer had agreed to arbitrate any dispute arising from the securities transaction, and the broker resisted the state action, as NC Financial has done here. The Third Circuit honored the parties' agreement, observing that "[State] proceedings, to the extent they concern claims and liabilities between the [contractual parties], are nothing other than a substitute for the arbitration." *Id.* at 209. The court found that the fact that the Delaware Deputy Attorney General was not a party to the arbitration agreement "does not alter [the] result" because allowing a state official to use such a "substitute" proceeding to pursue claims that the parties had agreed to arbitrate would "render [the parties'] right to arbitration meaningless," and "must fall before the conflicting right to an

arbitral forum granted by the FAA." *Id.* The situation here is indistinguishable from that in *Olde Discount* and *Bankers Insurance*: here too, the Attorney General seeks to circumvent the parties' arbitration agreement.

Bankers Insurance and *Olde Discount* also echo other decisions by Courts of Appeals requiring arbitration of claims covered by an arbitration agreement, even when such claims are brought by a third party. *See Jock v. Sterling Jewelers Inc.*, 942 F.3d 617, 625 (2d Cir. 2019) (arbitration agreements signed by absent class members are binding on representative bringing actions on their behalf), *cert. denied*, 141 S. Ct. 255 (2020); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1989) (debtor's claims brought by court-appointed bankruptcy trustee are subject to the debtor's arbitration agreement); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993) ("[A]rbitration agreements may be upheld against non-parties where the interests of such parties are directly related to, if not congruent with, those of a signatory."); *see also Mandviwala v. Five Star Quality Care, Inc.*, 723 F. App'x 415, 417 (9th Cir. 2018) (forcing arbitration of claims brought in state court because they "could be pursued individually" by a plaintiff).

The above cases signal that there is nothing unusual about extending arbitration agreements to nonparties. Indeed, this Court very recently held that the FAA "authorize[s] enforcement of an [arbitration agreement] by a nonsignatory." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643–44 (2020). *See also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624,

631 (2009) (nonsignatory to a contract may be bound by it). The Restatement of the U.S. Law of International Commercial and Investment Arbitration takes the same view:

> [N]onsignatories may be bound by or entitled to invoke an arbitration agreement to the extent that they may be deemed to have assented to the arbitration agreement under ordinary principles of contract law, as well as other legal doctrines that operate legally to bind parties. In addition to principles of contract law, a range of theories and doctrines exist under which a nonsignatory may be bound by or entitled to invoke an arbitration agreement, including doctrines under equity and that apply to related corporate entities.

Restatement of the U.S. Law of Int'l Comm. Arb. § 2.3 cmt. c (Proposed Final Draft 2019). Here the Attorney General is bringing a claim belonging to individual consumers, and so must be bound by the arbitration agreement to which the consumers agreed.

Finally, the Virginia Attorney General's attempt to bring these claims in a state forum also contravenes the teachings of another of this Court's precedents, *Preston v. Ferrer*, 552 U.S. 346 (2008). Under the decision below, the Attorney General can, by obtaining a settlement with the company under the restitution provision, eliminate a consumer's access to arbitration by creating claim preclusion applicable to the consumer's individual claims under the VCPA.[4] In fact, if

[4] The Attorney General admitted that his action would have this effect in the briefing below. *See* Brief of Appellee at 34 n.12,

the Attorney General were to settle a restitution claim against a business that violated the VCPA, it could in one fell swoop preclude all claims held by every consumer affected by that business—potentially divesting thousands or millions of consumers of their right of action. This situation is similar to *Preston*, where this Court struck down a California law that forced disputes subject to an arbitration agreement into a state administrative body for resolution. 552 U.S. at 349. There is no meaningful difference between redirecting a claim to the California Labor Commissioner, as in that case, and allowing the Virginia Attorney General to preclusively litigate a consumer's claim to judgment in a state court, as here. In both situations a state law impermissibly diverts claims subject to arbitration into a state forum.

II. The situation here must not be confused with *EEOC v. Waffle House*, Inc., 534 U.S. 279 (2002)—a mistake made by the Virginia Supreme Court. In *Waffle House*, the EEOC brought a court action against an employer for violations of the Americans with Disabilities Act ("ADA"), seeking backpay, reinstatement, and damages. This Court ruled that the EEOC's suit was compatible with the FAA, despite an arbitration agreement between the employer and its employee, because the EEOC was not asserting the same claim that the employee was required by contract to bring in an arbitral forum. *Id.* at 297–298. This Court expressly stated that the claim before the EEOC was not "merely derivative" of the employee's, *id.* at 297, because once a charge is filed with the EEOC, the EEOC is "in command of the process" and has "exclusive jurisdiction": the employee may not bring her own suit

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without the EEOC's permission, *id.* at 291-92. Here, by contrast, the Virginia Attorney General is acting entirely on behalf of the consumer, who may be engaged in a parallel arbitration. While this Court ruled in *Waffle House* that the EEOC was "not merely a proxy" for the employee, *id.* at 288 (citing *General Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 326 (1980)), the Attorney General is indeed a proxy in this case.

More importantly, the claim before the EEOC in *Waffle House* was brought under the ADA, a federal statute. In this respect NC Financial's case is fundamentally different. *See* Petition at 18–21. Here, the Virginia Attorney General is a state official bringing an action under a state, not a federal, statute. Congress is free to modify the FAA's scope or establish exceptions, but state legislatures do not have that privilege. While in *Waffle House* this Court had to harmonize two federal statutes, here Virginia is preempted from curtailing the reach of the FAA.

III. Finally, protecting Virginia consumers' access to arbitration does not impair the policies underlying the VCPA. NC Financial has never suggested that the arbitration agreements here affect the Attorney General's demands for non-individualized remedies under the VCPA (such as injunctive relief, civil penalties, and an award of attorney's fees, costs, and reasonable expenses)—*see* Petition at 10, 14—and so permitting the consumer actions to proceed in arbitration leaves the Attorney General's authority to pursue non-individualized remedies fully intact.

Moreover, consumer claims under the VCPA "continue to serve both [their] remedial and deterrent function" when consumers pursue those claims in an arbitral forum. *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 27-28 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (also finding that arbitration of Age Discrimination in Employment Act ("ADEA") claims was consistent with "further[ing] [the] important social policies" of the ADEA and that the arbitration dispute resolution mechanism "can further broader social purposes."); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 237, 242 (1987) (Securities Exchange Act and civil RICO claims are arbitrable). Enforcing the arbitration agreements at issue here would thus fully accord with the VCPA's consumer-protection aim. Because consumers are entitled to the same relief in arbitration as they would have in court, and because the Attorney General's authority to act in the public interest is unimpaired, enforcement of the consumer's arbitration agreement does not undermine the purposes behind the VCPA.

IV. Decisions in other State Courts have Likewise Undermined Arbitration Agreements in Cases Brought by State Attorneys General, Underscoring the Prejudice to the FAA

Unfortunately, appellate courts in several other States, like the Virginia Supreme Court, have issued decisions permitting state agencies to sidestep agreements to arbitrate. Those States have likewise empowered public officials to bring state actions to prosecute claims that are derivative of those encompassed by an arbitration agreement.

In one such case, *People ex rel. Cuomo v. Coventry First LLC*, the New York Attorney General sued a buyer of life insurance policies, alleging that the defendant engaged in bid-rigging that harmed insurance policy owners. 13 N.Y.3d 108, 112 (N.Y. 2009). The At-

torney General sought recission of the insurance policy purchase agreements, which contained arbitration agreements, and restitution on behalf of the policy sellers. The New York Court of Appeals rejected the defendant's attempt to compel arbitration of the recission and restitution claims brought on behalf of the sellers, holding that "the arbitration agreement . . . does not bar the Attorney General from pursuing victim-specific judicial relief in his enforcement action" because the Attorney General was not a party to the arbitration agreement. *Id.* at 114.

A similar decision was reached by the Massachusetts Supreme Judicial Court in *Joulé, Inc. v. Simmons*, 944 N.E.2d 143 (Mass. 2011). There, an employee filed a claim with a state agency alleging discrimination. *Id.* at 89. The employer sought to compel arbitration of the claim under the employment agreement's arbitration provision, but the Massachusetts court held that the state agency's "authority to conduct an investigation and adjudication of [the employee's] claim of discrimination was not affected by the [employee's] agreement to arbitrate." *Id.* at 92. The court further noted that "there is no legal bar to having an arbitration and the [state administrative] proceeding continue concurrently, on parallel tracks," *id.* at 99, and that the employee was free to testify or otherwise participate in the state administrative proceeding, *id.* at 98.

And in *State ex rel. Hatch v. Cross Country Bank, Inc.*, the Minnesota Attorney General sued credit card companies under various state-law causes of action, alleging unfair or deceptive practices and seeking restitution on behalf of consumers who had signed arbitration agreements with the defendants. 703 N.W.2d 562, 566 (Minn. Ct. App. 2005). The defendants sought

to compel arbitration of the restitution claims, but the Court of Appeals of Minnesota disagreed, finding that "a party that has not agreed to arbitrate a dispute cannot be required to arbitrate," *id.* at 569, and "[t]he FAA only applies when there is an agreement to arbitrate," *id.* at 571.

Absent this Court's intervention, there will doubtless be many more examples in the future of state legislatures and courts seeking to undermine the policies underlying the FAA. This Court should make clear that, just as states may not, consistent with the FAA, shield state law claims from arbitration, so too they may not empower public officials to bring damages actions in court on behalf of parties who have agreed to resolve their disputes exclusively through arbitration.

CONCLUSION

The Virginia Supreme Court's decision should not be allowed to stand. This Court's consistent case law under the FAA requires States to place arbitration agreements on the same footing as other contractual provisions and refrain from adopting measures that directly conflict with the FAA, discriminate against arbitration or otherwise "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. If, as this Court has held, parties may not avoid their obligation to honor their arbitration agreement, the Virginia Attorney General should not be allowed to do so on their behalf.

For the foregoing reasons, this Court should grant the Petition and invalidate the decision of the Virginia Supreme Court, which harms the policy underlying the FAA and contravenes this Court's jurisprudence under that statute.

Respectfully submitted,

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