No. 15-719

IN THE
Supreme Court of the United States

DICKEY'S BARBECUE RESTAURANTS, INC., *et al.*,
Petitioners,

v.

CHORLEY ENTERPRISES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF ATLANTIC LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE ATLANTIC LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL[1]

Amici timely notified counsel of record for both parties that they intended to submit the attached brief more than 10 days prior to filing. Counsel for petitioner consented to the filing of this brief, and that letter of consent has been lodged with the Clerk of the Court. Counsel for respondent declined to grant such consent. Therefore, pursuant to Supreme Court Rule 37.2(b), *amici* respectfully move this Court for leave to file the

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[1] Pursuant to this Court's Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. A shareholder and Co-Chair, Global Litigation Practice of Greenberg Traurig, LLP, counsel for Petitioner in this case, is a member of the board of directors of *amicus* Atlantic Legal Foundation, but he did not participate in the decision of the executive committee of the board to file this brief. Greenberg Traurig, LLP did not make any monetary or other contribution to the preparation or submission of the brief.

Counsel of record for all parties were timely notified more than 10 days prior to filing, and while Petitioners consented to the filing of this brief, Respondents declined to grant such consent. Accordingly, *amici* are also submitting a motion for leave to file this brief.

accompanying brief of *amici curiae* in support of petitioner.

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an

association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration and their concern regarding repeated attempts to frustrate the purposes of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. ("FAA") is exemplified by their participation as *amicus* and as counsel for *amici* in several cases concerning Federal arbitration law, including, *inter alia*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *MHN Government Services, Inc. v. Zaborowski*, No. 14-1458, currently before the Court, and *DIRECTV, Inc. v. Imburgia*, No. 14-462, 577 U. S. ___ (2015).

Amici believe that the decision of the Court of Appeals for the Fourth Circuit in this case is inconsistent with the Federal Arbitration Act, *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 131 S. Ct. 1740 (2011), and *DIRECTV, Inc. v. Imburgia*, in which this Court held that the FAA preempts state laws that disfavor arbitration agreements. The FAA also preempts "generally applicable contract defenses," which purport to apply to all contracts, but which in practice apply "only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue," *(id.* at 1746) or which "have a disproportionate impact on arbitration agreements." *Concepcion*, 563 U. S. 333, 131 S. Ct. at 1747.

This case presents an issue of considerable practical and constitutional importance, and *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel are particularly well-suited to provide additional insight into the broad implications of the decision below for businesses and their counsel throughout the country.

Amici seek leave to file the attached brief *amici curiae* urging the Court to grant the petition.

January 4, 2016

Respectfully submitted,

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QUESTION PRESENTED

The question presented in the petition is:

Is an otherwise preempted state law, rule or regulation that is required by a state regulator to be included in a contract, as a condition and prerequisite for doing business in the state, not preempted on the ground that it was "*voluntarily*" included in the contract because the party (i) could have simply declined to do business in the state, or (ii) could have filed a declaratory action challenging the state regulator's position before including the otherwise preempted contract clause in its agreements?

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers.

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[1] Pursuant to this Court's Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. A shareholder and Co-Chair, Global Litigation Practice of Greenberg Traurig, LLP, counsel for Petitioner in this case, is a member of the Board of Directors of *amicus* Atlantic Legal Foundation, but he is not a member of, nor did he participate in the decision of, the Executive Committee of the Board to file this brief. Greenberg Traurig, LLP did not make any monetary or other contribution to the preparation or submission of the brief.

Counsel of record for all parties were timely notified more than 10 days prior to filing, and while Petitioners consented to the filing of this brief, Respondents declined to grant such consent. Accordingly, *amici* are also submitting a motion for leave to file this brief.

Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration is exemplified by their participation as *amicus* and as counsel for *amici* in several cases concerning Federal arbitration law, including,

inter alia, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *MHN Government Services, Inc. v. Zaborowski*, No. 14-1458, currently before the Court, and *DIRECTV, Inc. v. Imburgia*, No. 14-462, 577 U. S. ____ (2015).

Amici believe that the decision of the Court of Appeals for the Fourth Circuit in this case is inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. ("FAA"), *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 131 S. Ct. 1740 (2011), and *DIRECTV, Inc. v. Imburgia*, No. 14-462, 577 U. S. ____ (2015) in which this Court held that the FAA preempts state laws that expressly disfavor arbitration agreements. The FAA also preempts "generally applicable contract defenses," which purport to apply to all contracts, but which in practice apply "only to arbitration" or that "derive their meaning from the fact that an agreement to arbitrate is at issue," *(id*. at 1746) or which "have a disproportionate impact on arbitration agreements." (*Concepcion*, 563 U. S. 333, 131 S. Ct. at 1747).

PRELIMINARY STATEMENT

The Fourth Circuit's opinion refusing to enforce federal preemption opens a new and dangerous chapter in attempts to unconstitutionally undermine federal statutes and regulations. Now, the question of constitutionality of state laws inconsistent with federal laws is rendered wholly irrelevant due to the behind-the-scenes

involvement of state regulators. So long as state regulators mandate that a provision contradicting federal law appears in a company's contract as a condition of doing business in the state, federal preemption is no longer an issue. The Supremacy clause no longer reigns supreme – at least when state regulators are involved.

Petitioner Dickey's is a barbecue restaurant franchisor with restaurants across the United States. Respondents Chorley and Trouard entered into separate franchise agreements with Dickey's to open Dickey's Barbecue Pit locations in Maryland. The franchise agreements contained arbitration clauses applying to "all disputes."

After the Trouard respondents unilaterally closed their restaurant, Dickey's filed for arbitration in Texas, asserting breaches of the franchise agreements based on poor and non-conforming operations, substandard food quality, and numerous health and cleanliness violations. Dickey's also alleged claims for fraud, alleging that Trouard submitted false sales reports to Dickey's.

Dickey's filed for arbitration against the Chorley respondents in Texas, asserting breaches of the franchise agreement based upon poor and nonconforming operations, poor and substandard food quality, numerous health and cleanliness violations, and other claims.

After Dickey's filed for arbitration, the Trouard respondents filed a complaint in the United States

District Court for the District of Maryland, making claims under the Maryland Franchise Law.[2] A week later, the Chorley respondents filed a separate action in the same federal district court, alleging similar violations of the Maryland Franchise Law. The Trouard and Chorley respondents sought damages and rescission of their franchise agreements.

Simultaneous with the filing of their district court complaints, respondents filed separate motions to preliminarily enjoin the pending arbitrations, seeking to avoid arbitration of their Maryland Franchise Law claims and Dickey's common law claims. Dickey's filed a cross-motion to compel arbitration of all causes of action arising out of the franchise agreements, including respondents' Maryland Franchise Law claims; Dickey's also sought a stay of all proceedings in court. The two cases were consolidated in the District of Maryland.

The Maryland Regulations.

The State of Maryland prohibits franchisors from requiring a franchisee to "[w]aive the franchisee's right to file a lawsuit alleging a cause of action arising under the Maryland Franchise Law in any court of competent jurisdiction in this State." Code of Maryland Regulations ("COMAR")

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[2] Maryland Franchise Registration and Disclosure Law ("Maryland Franchise Law"), MD. CODE, Bus. REG. § 14-201, *et seq*.

02.02.08.16(L)(3) (hereafter the "Prohibition of Arbitration Regulation").[3] *See* App. 14a.

The Maryland Commissioner of Securities is the state official authorized to regulate franchises and the Commissioner implements the Prohibition of Arbitration Regulation by requiring franchisors such as petitioner to include a clause in its franchise agreements with franchisees in Maryland that incorporate the Prohibition of Arbitration Regulation almost verbatim. App. 93-95a. The clause provides:

> Notwithstanding any provisions in this Agreement to the contrary, subject to Article 29 pursuant to Title 14, Sections 14-201 - 14-233 of the Annotated Code of Maryland (the "Maryland Franchise Registration and Disclosure Law") and Title 02, Subtitle 02, Chapter 8, Sections 02.02.08.01 – 02.02.08.18 of the Code of Maryland Regulations (the "Maryland Franchise Regulations"):
>
> * * *
>
> 4. The provisions of this Agreement shall not require you to waive your right to file a lawsuit alleging a cause of action arising under Maryland

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[3] COMAR is available online at http://www.dsd.state.md.us/COMAR/searchall.aspx

> Franchise Law in any court of competent jurisdiction in the State of Maryland.

App. 104-105a.

The Fourth Circuit's Interpretation

The Fourth Circuit read the Maryland Prohibition of Arbitration Regulation as prohibiting arbitration of claims made under Maryland's franchise law.

But the Fourth Circuit also found that

> [a]lthough some of the language in the Clause tracks the Regulation, they are not identical. Both the Regulation and the Clause consist of a single sentence, but they differ in one fundamental respect: they contain different subjects. In the Regulation, the subject is the franchisor: it is the franchisor who may not require the franchisee to waive their litigation rights. But in the Clause, the subject is the agreement itself: the "provisions of the agreement" cannot be read to require that franchisees waive their litigation rights.
>
> This distinction matters. As the district court held, when the subject is the "franchisor" as in the Regulation, the Franchisees remain free to agree to arbitrate Maryland Franchise Law

> claims – the Regulation only prohibits forced or involuntary waivers.[20] But when the subject is the "provisions of the agreement" as in the Maryland Clause, the parties have already reached an agreement as to arbitration. And here, that agreement consists of both the Maryland and Arbitration Clauses, which demonstrate that the parties intended to arbitrate all claims except for Maryland Franchise Law claims.
>
> Put differently, under the district court's interpretation of the Regulation, the Franchisees were free to waive their right to file suit in Maryland, as long as that waiver were voluntary. But the Maryland Clause demonstrates that the Franchisees did not agree to waive that right in the first instance, at least as to their Franchise Law claims. Rather, both parties agreed to litigate those claims in Maryland. Accordingly, we will not compel arbitration of the Franchisees' Maryland Franchise Law claims.

App. 34a-35a.

SUMMARY OF ARGUMENT

The petition should be granted because this case raises an issue of exceptional importance because the Fourth Circuit's reasoning provides a roadmap for states to evade FAA preemption of arbitration-hostile state enactments and attempts by states to evade, frustrate or minimize the FAA's encouragement of arbitration as an efficient method of dispute resolution recur frequently.

The decision below is not faithful to the Supremacy Clause, the Federal Arbitration Act's encouragement and protection of a federal right to arbitration and this Court's recent precedents striking down various iterations and variations of statutes and lower court decisions that interfere with the FAA's central purpose.

The Maryland franchise regulation at issue overtly applies to arbitration because it requires franchisors to incorporate in their franchise agreements the "Maryland Clause" that eschews arbitration for a whole class of issues that arise under the franchise agreement, effectively depriving franchisors of the benefits of arbitration. When state law or regulation prohibits outright the arbitration of a particular type of claim that rule is displaced by the FAA.

The Maryland franchise regulation that mandates inclusion of the "Maryland Clause" and that requires the franchisor to surrender his right to incorporate a generally applicable arbitration clause, does not place arbitration contracts on

equal footing with all other contracts and is is an obstacle to the accomplishment of the purposes of the FAA. The Maryland regulation at issue here – which requires franchisors to incorporate the "Maryland Clause" that eschews arbitration for a whole class of issues that arise under the franchise agreement, effectively deprives franchisors of the benefits of arbitration.

The Maryland regulation and the "Maryland Clause" that state regulators impose on franchisors who wish to do business in Maryland evince hostility towards arbitration and to parties' rights to contract for arbitration that the FAA was intended to foreclose.

A franchisor's inclusion of the "Maryland Clause" is not voluntary because it is a condition to a franchisor's right to do business in Maryland imposed by law and regulation.

ARGUMENT

THE FOURTH CIRCUIT FAILED TO GIVE EFFECT TO THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT AND THE SUPREMACY CLAUSE, AND INVOLVES AN ISSUE OF GREAT AND RECURRING IMPORTANCE

The Fourth Circuit's tortured reading of the Maryland Prohibition of Arbitration Regulation and the Maryland Clause creates a "state regulation exception" to FAA preemption. This is an issue of exceptional importance because the

Fourth Circuit's rationale provides a roadmap for other states to evade FAA preemption of arbitration-hostile state enactments. Attempts by states to evade, frustrate or minimize the FAA's encouragement of arbitration as an efficient method of dispute resolution recur frequently, as this Court's dockets for recent terms show.

The decision below is not faithful to this Court's recent precedents striking down various iterations and variations of statutes and lower court decisions that interfere with the FAA's encouragement and protection of a federal right to arbitration and fails to honor the Supremacy Clause.[4]

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[4] As this Court recently said in *DIRECTV, Inc.*:

> [L]ower courts must follow this Court's holding in *Concepcion*. . . . Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U. S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

Slip. Op. at 5.

The Federal Arbitration Act provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."(9 U.S.C. § 2; *Concepcion*, 563 U. S. 333, 352, 131 S.Ct. 1740 (2011), quoting 9 U.S.C. § 2). The FAA preempts state laws that expressly disfavor arbitration agreements. Preemption applies when a "generally applicable contract defense" in practice applies "only to arbitration" or "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 1746; *see also, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1203-04 (2012); *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 67-68 (2010); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 & n.3 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984).

The Maryland regulation at issue here overtly applies to arbitration – it requires franchisors to incorporate the "Maryland Clause" that eschews arbitration for a whole class of issues that arise under the franchise agreement, effectively depriving franchisors of the benefits of arbitration. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is

straightforward: The conflicting rule is displaced by the FAA." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012) (citing *Concepcion,* 563 U.S. 333 (2011)).[5]

Maryland's regulatory requirement that franchise agreements contain the "Maryland Clause" – which purports to exclude from arbitration a broad category of disputes that might arise between a franchisor and its franchisees – is an obstacle "to the accomplishment and execution of the full purposes" of the FAA. The Maryland Regulation is specifically applicable to arbitration clauses in franchise agreements, and cannot be said to be applicable to "any contract." It "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" embodied in the FAA. *Concepcion*, 563 U. S. 333, 352 (2011)(citation omitted).

As a condition of selling franchises in Maryland, the Maryland regulations required franchisors such as Dickey's to include in their franchise agreements with Maryland franchisees a contract clause prohibiting arbitration of disputes arising under the Maryland Franchise Law. App. 93-95a. The mandatory contract clause is virtually identical to the regulation prohibiting arbitration: "[the] provisions of this Agreement

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[5] In *Southland Corp. v. Keating,* 465 U.S. 1 (1984), this Court found that the provision of the California Franchise Investment Law which was similar to Maryland's regulations at issue here was preempted.

shall not require [franchisee] to waive your right to file a lawsuit alleging a cause of action arising under Maryland Franchise Law in any court of competent jurisdiction in the State of Maryland." App. 105a. The Fourth Circuit found that the "plain language" of the Maryland regulation (and its inclusion in Dickey's franchise agreements with respondents) prohibits Dickey's from arbitrating respondents' Maryland Franchise Law claims. App. 26a.

The Fourth Circuit's opinion is internally inconsistent. While the Fourth Circuit recognized that "[i]t is well established that the FAA 'preempts application of state laws which render arbitration agreements unenforceable.'" App. 36a (quoting *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 472 (1989)), the circuit court used sophistic reasoning to try to avoid federal preemption:

> [T]he [Prohibition of Arbitration] Clause is not a state law prohibiting arbitration. Rather, it is a contractual provision prohibiting arbitration. And it is generally well-settled that when a "party to a contract *voluntarily assumes* an obligation to proceed under certain state laws, traditional preemption doctrine does not apply to shield a party from liability for breach of that agreement." *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315, 326 (4th Cir. 2012) (citing *Am.*

> *Airlines v. Wolens*, 513 U.S. 219, 228, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995))

App. 37a (emphasis added).

The key phrase in the Fourth Circuit's rationale is "voluntarily assumes," but the adverb "voluntarily" is completely inapposite. "Voluntary" (the adjectival form of the "voluntarily") means "proceeding from the will or from one's own choice or consent, . . . unconstrained by interference, . . . having power of free choice, . . .acting or done of one's own free will without valuable consideration or legal obligation." *See Merriam-Webster Dictionary*, available at http://www.merriam-webster.com/dictionary/voluntary. Dickey's did not insert the Maryland Prohibition of Arbitration Clause in its franchise agreements with respondents of its own volition – it was constrained to do so by the force of the State of Maryland's laws and regulations.

The Circuit Court then held, however, that preemption did not apply because

> "Dickey's was not forced to do anything. If Dickey's did not want to include the [Prohibition of Arbitration] Clause, it had several options. It could have simply declined to do business in Maryland. Or, ... it could have filed a declaratory action challenging the Maryland Commissioner of Securities' position *before* including the

> [Prohibition of Arbitration] Clause in its agreements."

App. 39a (emphasis in original).

The Fourth Circuit's reading of the interplay between the Maryland regulation and the Maryland Prohibition of Arbitration Clause is disingenuous, because it forces franchisors to make an untenable choice of either not doing business in Maryland, suing the Commissioner of Securities, and thus preventing the franchisor from doing business in Maryland during the pendency of the declaratory judgment action, or including the Maryland Clause in their franchise agreements.

The "choice" made by franchisors wishing to do business in Maryland, such as Dickey's, can hardly be said to be "voluntary." It was no more voluntary than the driver who applies for a driver's license, or a lawyer who takes the bar examination and submits to the character committee's examination, or the property owner who needs a building permit and certificate of occupancy to make improvements to her property, or any number of other state or local licensees who are required to apply (and pay) for permits in order to do business or otherwise to conduct one's affairs. This Court in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), held that federal preemption "bars *state-imposed*" contractual provisions that contravene federal law, as opposed to "enforcement of contract terms *set by the parties themselves*." *Id.* at 222 (emphasis added). The Court explained that

preemption applies to "state-imposed obligations," as opposed to "self-imposed undertakings," because "privately ordered obligations . . . do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard or other provision having the force and effect of law.'" *Id*. at *228-229* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) (preemption applies to contract provisions "imposed" by state law)).

The Fourth Circuit's attempt to substitute the Maryland state-imposed clause for the regulation itself as the focus of its analysis is merely a semantic exercise, with no real-world meaning. The semantics of trying to rationalize an exception to FAA preemption of judicial decisions, state laws or state regulations that impair the right to arbitrate disputes are akin to forcing "a camel to go through the eye of a needle." (Matthew 19:23-26).

The Fourth Circuit characterized the Maryland Clause exclusions as a "narrow carve-out for Maryland Franchise Law claims," App. 26a, but that court's use of the adjective "narrow" does not save the Maryland Regulation.[6] The FAA and this Court's cases do not distinguish between state laws

[6] *Amici* submit that the use of the word "narrow" is misleading. The Maryland Clause purports to exclude from arbitration a broad category of legal disputes – all franchisor-franchisee claims arising under the Maryland Franchise Law.

which "narrowly" or "broadly" render arbitration agreements unenforceable.

The Fourth Circuit's decision, enforcing a contract clause in franchise agreements that was mandated by a Maryland regulation, to negate the parties' agreed arbitration clause in the same agreements is contrary to binding precedent of this Court construing the FAA to reflect "a 'liberal federal policy favoring arbitration'" *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and precluding state law that is inimical to arbitration. The Maryland regulation at issue here – which requires franchisors to incorporate the "Maryland Clause" that eschews arbitration for a whole class of issues that arise under the franchise agreement, effectively deprives franchisors of the benefits of arbitration.

The Maryland franchise regulation that mandates inclusion of the "Maryland Clause" and that requires the franchisor to surrender his right to incorporate a generally applicable arbitration clause simply does not place arbitration contracts "on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443 (2006); *see also DIRECTV*, slip op. at 10, and does not give "due regard . . . to the federal policy favoring arbitration." *Volt Information Sciences*, 489 U. S., at 476; *DIRECTV*, Slip. Op. at 10. The Maryland regulation and the "Maryland Clause" that state regulators impose on franchisors who wish to do business in Maryland evince hostility

towards arbitration and to parties' rights to contract for arbitration that the FAA was intended to foreclose. *See Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Maryland thus treats arbitration clauses in franchise agreements quite differently from other types of commercial contracts, and exhibits the very suspicion of and hostility towards arbitration this Court has denounced.

CONCLUSION

The Fourth Circuit's state mandated contract clause exception to FAA preemption presents an issue of exceptional importance and broad application, and therefor this Court should grant the petition.

Respectfully submitted,

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