IN THE
SUPREME COURT OF VIRGINIA

Record No. 181678

FLINT HILL SCHOOL,

Appellant,

v.

ALESSIA McINTOSH,

Appellee.

BRIEF OF AMICI CURIAE VIRGINIA POVERTY LAW CENTER, PUBLIC CITIZEN, AND PUBLIC JUSTICE, P.C., IN SUPPORT OF APPELLEE ALESSIA McINTOSH

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INTERESTS OF AMICI

Amici are three public-interest organizations that support and defend consumers' rights and the access of consumers and other individuals to the civil justice system.

The Virginia Poverty Law Center (VPLC) serves as the state support center for all the nonprofit civil legal aid organizations in the Commonwealth of Virginia. Its mission is to break down systemic barriers that keep low-income Virginians in the cycle of poverty through advocacy, education, and litigation. VPLC leads and coordinates efforts to seek justice in civil legal matters for lower income Virginians, with a focus on consumer rights and other areas. Along with the nine legal aid organizations in the Commonwealth, VPLC also provides free legal assistance to low-income Virginians in civil matters.

Public Citizen is a national nonprofit consumer-advocacy organization founded in 1971. It advocates before courts, Congress, and administrative agencies for the enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen has long fought to protect consumers' and employees' access to the courts to enforce their legal rights. Among other things, Public Citizen works for fairness in contract provisions, including mandatory arbitration provisions, that may limit consumers' and workers' ability to vindicate their rights in court.

Public Justice, P.C., is a national public-interest law-firm dedicated to pursuing high impact lawsuits to advance consumer rights, civil rights and civil liberties, workers' rights, environmental sustainability, and the preservation and improvement of the civil justice system. A key element of Public Justice's mission is to ensure consumers and others harmed by corporate wrongdoing have access to the civil justice system.

Amici file this brief in support of appellee because the circuit court's summary judgment ruling holding the one-sided attorneys' fee clause in Flint Hill School's contract unconscionable and void as against public policy is important to the ability of consumers and employees to hold companies accountable for wrongdoing. The contract clause at issue is extreme: it seeks to saddle an individual seeking court redress with the legal fees of her opponent, the contract-drafter, regardless of who wins the case. If allowed, clauses like this one would create a significant barrier to individuals' ability to access the civil justice system to vindicate their rights.

Such clauses would pose a particularly direct threat to the work of VPLC in seeking to protect low-income Virginians from businesses that may prey on them. VPLC and the Virginia legal aid organizations use litigation to address violations that government agencies may lack the resources to address. By chilling individuals' willingness to litigate, attorneys' fee clauses like Flint Hill School's

will take away an important tool for VPLC and other organizations to stop exploitation and enforce the law.

STATEMENT OF THE CASE

Amici concur with the statement of the case made by appellee Alessia McIntosh in her brief.

STATEMENT OF FACTS

Ms. McIntosh enrolled her child at Flint Hill School under a form enrollment contract with an attorneys' fee clause. *See* J.A. 319-323, 439, 450-51. That clause provides:

> We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract.

J.A. 321 ¶ 16. This brief refers to this provision as the consumer-pay clause.

Ms. McIntosh would like to assert claims against Flint Hill School for putting her child in harm's way. The consumer-pay clause, however, has deterred her from filing suit due to the costs it threatens to impose on her. *See* J.A. 51 ¶ 7, 75-76.

STANDARD OF REVIEW

This amicus brief addresses assignments of error 6, 7, 8, and 9, concerning the circuit court's grant of summary judgment to Ms. McIntosh on the basis that the contract clause at issue is unconscionable and void as against public policy. "[I]n an appeal of a decision awarding summary judgment, the trial court's

determination that no genuinely disputed material facts exist and its application of law to the facts present issues of law subject to de novo review." *Shifflett v. Latitude Props., Inc.*, 294 Va. 476, 480, 808 S.E.2d 182, 184 (2017) (citation omitted).

ARGUMENT

Flint Hill School has inserted into its adhesion contract a one-sided consumer-pay provision, the terms of which require the parent to pay the private school's attorneys' fees and costs in "any action arising out of or relating to" the contract, including a case brought by the parent, and regardless of whether the parent wins or loses. J.A. 321 ¶ 16; *see also id.* at 315, 438. Clauses such as this one discourage individuals from asserting their rights by imposing a new price on litigating. They can double (or more) the cost of bringing suit. Even with pro bono representation, individuals would be on the hook for the adverse party's attorneys' fees and costs. Not surprisingly, because of the threat of having to pay the school's attorneys' fees and costs, Ms. McIntosh has forgone filing claims against the school related to its treatment of her child. *See* J.A. 51 ¶ 7, 75-76, 315.

For the school that drafted the contract, the clause provides an undue advantage, inviting abuse. It strengthens the school's hand in any dispute with a parent. And by chilling litigation, it insulates the school's actions from court review.

This imbalance is "so gross as to shock the conscience." *Smyth Bros.-McCleary-McClellan Co. v. Beresford*, 128 Va. 137, 170, 104 S.E. 371, 382 (1920) (holding that such inequality renders a bargain unconscionable). Further, consumer-pay clauses violate this Commonwealth's commitment to equal access to justice. This Court should affirm the decision below by holding that consumer-pay clauses, like Flint Hill School's, are per-se unconscionable, void as against public policy, and unenforceable.

A strong ruling against such clauses is especially important to ensure that they do not become common as a way for companies across the state to avoid accountability. Employment and consumer contracts are frequently ones of adhesion. Any green-light for consumer-pay clauses would send businesses a message that they can insert similar provisions in employment agreements, credit card contracts, cell phone agreements, nursing home contracts, online terms of service, and other contracts. Similar clauses could also proliferate in other contexts, such as adhesion contracts that bind franchisees and small businesses.

I. CONSUMER-PAY CLAUSES DETER INDIVIDUALS FROM FILING MERITORIOUS CLAIMS AND ENCOURAGE COMPANY ABUSES.

One-sided and extreme, consumer-pay clauses deter individuals from seeking relief in court. If allowed to proliferate, they would embolden the parties that draft adhesion contracts, giving them cover for abuses with little risk of court

review. This Court should affirm the circuit court's ruling that Flint Hill School's consumer-pay clause is unconscionable and void as against public policy, to guard against such injustice.

A. Consumer-pay clauses deter consumers, employees, and other individuals from vindicating their rights in court.

Under a consumer-pay clause, consumers who seek to enforce their rights in court are hit with an extraordinary expense: their opponents' attorneys' fees and costs. A single hour of an attorney's time can cost hundreds of dollars or more. A full defense can cost tens of thousands of dollars or more. And if a contract-drafter knows that its fees and costs in litigation are covered by a consumer-pay clause, regardless of who wins the case, it has no incentive to keep them down. For any consumers forced to pay their opponents' expenses, the result could be ruinous. And for the low-income clients served by legal aid organizations, the cost of even a few hours of an attorney's time can be devastating.

If a decision from this Court causes consumer-pay clauses to multiply, consumers and employees bound by them will reasonably forgo legal remedies, even when important rights are on the line. Victims of wage theft would be scared to pursue lost earnings, if employers use these provisions. Borrowers would be discouraged from suing over illegal lending terms, if predatory lenders insert such clauses in their contracts. And if other businesses take advantage of them, these clauses could dissuade homeowners from suing contractors for shoddy

renovations; stymie drivers seeking redress for undisclosed defects in their cars; or deter elderly individuals harmed at nursing homes from ever seeking relief in court. Weaker parties bound by adhesion contracts in other contexts, such as small businesses, could be similarly deterred.

The chilling effects of fee-shifting rules are well established. As the U.S. Supreme Court noted in the context of civil rights law, "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). Accordingly, even prevailing-party measures, which award fees to a party "on the basis of that party's having prevailed," can "stifl[e] legitimate litigation by the threat of the specter of burdensome expenses being imposed on an unsuccessful party." *Tonti v. Akbari*, 262 Va. 681, 685, 553 S.E.2d 769, 771 (2001). To avoid this effect, Virginia generally adheres to the "American Rule," in which parties bear their own expenses, rather than a prevailing-party rule. *See id.* Similarly, this Court has cautioned that the threat of attorneys' fee sanctions "should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case." *Id.* (citation omitted).

The effects of consumer-pay clauses are even more extreme. As Ms. McIntosh's brief explains, at 2, Flint Hill School's contract not only abandons the American Rule, but also goes far beyond a prevailing-party rule, by requiring

consumers to pay their own legal fees *and* the contract-drafter's, in *any* litigation, "without regard to outcome or merit," J.A. 450. Thus, even more forcefully than a prevailing-party rule, a consumer-pay clause "discourages the average [consumer] from seeking the refuge of … courts for fear that he may face the retribution of a substantial legal fee if he does so." *Dare v. Freefall Adventures, Inc*., 793 A.2d 125, 136 (N.J. Sup. Ct. App. Div. 2002).

The expense imposed by a consumer-pay clause could drain a plaintiff's pockets, and even overtake any damages award—especially for a modest consumer claim. "Common sense dictates" that consumers generally cannot bear such risk; with clauses like these, consumers will be "unwittingly … sign[ing] away all realistic relief in the event of a dispute" covered by the consumer-pay clause. *Philyaw v. Platinum Enters., Inc*., 54 Va. Cir. 364, 366-67 (2001) (holding contractual requirement for consumers who made a purchase in Virginia to arbitrate in Los Angeles "patently unconscionable" due to the "time and expense to go to Los Angeles to arbitrate").

Courts in several states have recognized these effects, explaining that clauses like Flint Hill School's effectively close the courthouse doors to individuals and, accordingly, holding the clauses unconscionable or unenforceable on other

grounds.[1] For example, a Massachusetts court equated the effect of an attorneys' fee provision analogous to Flint Hill School's with "denial … of such a 'fundamental right' as 'access to the courts.'" *Vaks v. Ryan,* 2014 Mass. App. Div. 37, 2014 WL 861455, at *3 (Mass. Dist. Ct. 2014) (citation omitted). Noting that precedent on such provisions was limited "perhaps because the issue is so obvious," the court held the clause unconscionable and unenforceable and cited public policy among other considerations. *Id.* at *2-3.

Similarly, a New York court refused to enforce a residential lease provision requiring the tenant to pay the landlord's legal fees and other costs for an action against the landlord, even when the landlord defaulted. Holding the clause unconscionable and unenforceable as a penalty, the court concluded that "[t]o enforce such a provision would produce an unjust result because it would dissuade aggrieved parties from pursuing litigation and preclude tenant-shareholders from making meaningful decisions about how to vindicate their rights." *Krodel v. Amalgamated Dwellings Inc*., 88 N.Y.S.3d 31, 34 (N.Y. App. Div. 2018) (citing similar holdings in other New York cases).

[1] Flint Hill School cites two other cases regarding attorneys' fee clauses, *see* Opening Br. of Appellant 32, but neither addresses a provision requiring that an individual plaintiff pay the contract-drafter's attorneys' fees, regardless of who prevails.

Likewise, a New Jersey court voided "as against public policy" a provision in a skydiving company's contract that required an injured customer who sued the company to pay for that company's "defense of *any and all actions*" the customer instituted, "even if the cause of plaintiff's injuries was [the company's] own negligence." *Dare*, 793 A.2d at 129, 136. Recognizing the provision's door-closing effect, the court explained that "[t]he deterrent effect of enforcing such a fee-shifting agreement offends our strong policy favoring an injured party's right to seek compensation." *Id*.

Importantly, the plain language of consumer-pay clauses produce their gross unfairness. Included in a contract of adhesion, the injustice of a one-sided, consumer-pay clause is evident on its face. Although Flint Hill School raises arguments about how a trial court might evaluate a fee request at the end of litigation, *see* Opening Br. of Appellant 37, the wording of the consumer-pay clause itself deters parents even from reaching court by telling them that they will be responsible for the school's attorneys' fees and costs in any case, whether they win or lose.

B. Allowing consumer-pay clauses would invite abuse by the companies that draft them.

Consumer-pay clauses are "unreasonably favorable" to the companies that draft them. *Vaks,* 2014 Mass. App. Div. 37, 2014 WL 861455, at *3. While weakening consumers, these clauses unjustly advantage contract-drafters in

litigation, relieving them of the standard constraints of their own litigation costs, and give them a forceful source of leverage over the individuals bound by their contracts. A strong ruling prohibiting consumer-pay clauses will prevent a multitude of abuses.

At a minimum, companies could exploit consumer-pay clauses to take a scorched-earth approach to litigation, knowing that their attorneys' fees and costs could be reimbursed. Companies would expect that they would not have to pay for their aggressive tactics and assume that, even when their claims were weak, individuals would seek to settle to avoid paying the companies' legal expenses.

Further, unscrupulous companies could hide other abuses behind consumer-pay clauses. Trusting that individuals would not sue, and that courts would therefore never have an opportunity to review their actions, companies could pad their contracts with other illegal provisions. Employers, for example, could exploit employees with overbroad non-compete clauses that unduly restrict individuals from seeking better employment. *Cf. Home Paramount Pest Control Cos., Inc. v. Shaffer*, 282 Va. 412, 419, 718 S.E.2d 762, 765 (2011) (holding that a non-compete clause in an employment contract restricting an individual's ability to work in pest control was overbroad and unenforceable). Lenders could prey on vulnerable consumers with adhesion contracts imposing illegally high interest rates. *Cf.* Va. Code Ann. § 6.2-303 (limiting legal rate of interest in loan contracts).

And at the first hint that an employee or consumer might complain, a company could wield the threat of a consumer-pay fee-award as "a weapon … to discourage litigation." *Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Coop. Ass'n, Inc*., 441 A.2d 956, 965 (D.C. 1982) (regarding an attorneys' fee provision similar to Flint Hill School's, in a deed of trust).

Moreover, consumer-pay clauses encourage contract-drafters to treat their own obligations as optional, using the provisions to immunize themselves for the legal violations the clauses cover. As one court explained regarding a similar provision, consumer-pay clauses "serve[] to foster and insulate breaches of … duty" by the clauses' beneficiaries. *Id*. Not only could a contract-drafter count on few, if any, individuals pressing their rights, but also, if sued for a violation, the clause's beneficiary could "rely on the same contract to reimburse it for expenses, such as attorney's fees, which arose out of the breach." *Id*. (citation omitted, deeming similar clause "impermissibly broad" for this reason). Companies could exploit these dynamics to ignore even basic responsibilities, such as providing employees promised benefits, paydays, or work schedules.

II. CONSUMER-PAY CLAUSES UNDERMINE EFFORTS TO MAKE JUSTICE ACCESSIBLE TO ALL.

If allowed to stand, consumer-pay clauses would upend the Commonwealth's civil justice system. By making it harder for individuals to enforce their rights and significantly advantaging companies that draft adhesion

contracts, consumer-pay clauses would undermine multiple initiatives to make justice accessible to all. For this additional reason, this Court should affirm the circuit court's ruling that consumer-pay clauses are void as against public policy.

Even without such clauses, Virginia faces a "justice gap." *See* Supreme Court of Virginia, Order Establishing the Virginia Access to Justice Commission 1 (2013), http://www.courts.state.va.us/programs/vajc/resources/order.pdf (referencing gap). Nationwide, low-income individuals do not receive adequate professional legal help for more than four-fifths of their civil legal needs. *See* Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 30 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf (regarding needs for which individuals receive no such help or inadequate help). A study across income brackets shows similar results: individuals sought legal or other third-party help for fewer than half of their civil justice problems. *See* Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* 4-5, 11 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf.

Legal costs contribute to this gap between individuals' needs and the legal assistance they receive. A Legal Services Corporation study showed that worries about cost deterred low-income individuals in 14 percent of instances in which

they did not seek legal help for their civil legal problems. *See* Legal Services Corp., *The Justice Gap,* at 33-34. Similarly, in the study across income brackets, individuals cited cost concerns in 17 percent of the cases in which they did not seek (or plan to seek) third-party assistance with civil justice situations. *See* Sandefur, *Accessing Justice in the Contemporary USA*, at 13.

Virginia has worked to keep the courthouse door open for individual litigants with a variety of measures to help them manage or limit litigation costs. The Virginia Rules of Professional Conduct not only require attorneys to charge fees that are "reasonable," as the circuit court recognized, J.A. 453, but also require attorneys to perform or support pro bono publico service; allow contingent fee arrangements that enable representation for individuals unable to afford hourly rates; and permit attorneys to pay indigent clients' court costs and litigation expenses and to advance outlays for others. *See* R. of the Sup. Ct. of Va., pt. 6, § II, Rs. 1.5(a), (c), 1.8(e), 6.1 (2019). The Canons of Judicial Conduct allow judges to inform individuals about legal aid and encourage attorneys to provide pro bono publico service. *See* R. of the Sup. Ct. of Va., pt. 6, § III, Canon 3(B)(3), commentary & Canon 4(C) (2019). By statute, indigent individuals unable to pay court costs are allowed to receive a waiver. *See* Va. Code Ann. § 17.1-606.

Moreover, the Virginia courts have identified a mission and visions that reflect a commitment to making justice accessible. The judicial system's mission is

to "provide an independent, accessible, responsive forum for the just resolution of disputes," and its visions include "provid[ing] effective access to Justice for all persons." *2009 Strategic Plan, Virginia's Courts in the 21st Century, To Benefit All, To Exclude None* 8-9 (2009), http://www.courts.state.va.us/courtadmin/aoc/judpln/reports/2009_strat_plan.pdf. Consistent with this plan, this Court established the Virginia Access to Justice Commission to "promote equal access to justice, with particular emphasis on the civil legal needs of Virginia residents," including by "[m]obiliz[ing] legal professionals in closing the justice gap." Supreme Court of Virginia, Order Establishing the Virginia Access to Justice Commission 1 (2013), http://www.courts.state.va.us/programs/vajc/resources/order.pdf.

Consumer-pay clauses fly in the face of the Commonwealth's initiatives to make justice accessible and, if permitted, would widen the justice gap. Rather than equalizing access to courts, these clauses would exacerbate the cost concerns that deter individuals from seeking legal help. Even pro bono representation could not shield individuals bound by consumer-pay clauses from the expense of their opponents' attorneys' fees and costs. Especially given the proliferation of contracts of adhesion, consumer-pay clauses would put litigation even farther out of reach for individuals who may have experienced a violation of their rights.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's grant of plaintiff's motion for summary judgment.

Dated: July 15, 2019

Respectfully submitted,

VIRGINIA POVERTY LAW CENTER,
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CERTIFICATE PURSUANT TO RULE 5:26

Pursuant to Rule 5:26, I certify that on July 15, 2019:

1) An electronic version of this brief, in Portable Document Format (PDF), has been filed with the clerk of this Court in the manner prescribed by the VACES Guidelines and User's Manual.

2) Copies of this brief were served by email on counsel for all parties, at the addresses below:

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3) Three printed copies of this brief will be hand-filed in the office of the clerk of this Court in accordance with the VACES Guidelines.

This brief does not exceed 50 pages.

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