No. 21-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Virginia's attorney general brought this case against petitioner under state law, seeking individualized relief on behalf of people who borrowed money from petitioner pursuant to a loan agreement. That agreement contains a provision requiring individual arbitration of any claim "arising from or relating directly or indirectly to this Agreement," including "claims asserted on [the borrower's] behalf by another person." Although the attorney general's claims for individualized relief would indisputably be covered by the agreement to arbitrate if asserted by the borrowers themselves, the Virginia Supreme Court held that the attorney general could assert those claims on the borrowers' behalf in litigation because he was not a signatory to, and therefore not bound by, the arbitration agreement. The question presented is:

Whether a state attorney general who is not a signatory to an arbitration agreement may bring claims that are covered by the agreement and seek individualized relief on those claims on behalf of persons who are signatories to the agreement and thus would be required to arbitrate if they brought those claims themselves.

CORPORATE DISCLOSURE STATEMENT

NC Financial Solutions of Utah, LLC, is an indirect wholly owned subsidiary of Enova International, Inc., a publicly traded company.

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NC Financial Solutions of Utah, LLC (NCFS) respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Virginia in this case.

INTRODUCTION

For decades, this Court has repeatedly explained that Congress enacted the Federal Arbitration Act, or FAA, "to reverse … longstanding judicial hostility to arbitration agreements …, and to place arbitration agreements upon the same footing as other contracts." *Gilmer* v. *Interstate/Johnson Lane Corporation*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-220 & n.6 (1985), and *Scherk* v. *Alberto-Culver Company*, 417 U.S. 506, 510 n.4 (1974)). Judicial

hostility to arbitration agreements, however, has persisted, requiring the Court time and again to grant review and reverse lower-court decisions that employed "a great variety of devices and formulas" in order to avoid honoring Congress's mandates in the FAA. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011) (quotation marks omitted); *see also*, *e.g.*, *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1419 (2019); *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421, 1426 (2017); *Nitro-Lift Technologies, LLC* v. *Howard*, 568 U.S. 17, 22 (2012) (per curiam). The Court's intervention is again needed, as the Virginia Supreme Court's decision in this case—a decision that deepens a division of authority among lower state and federal courts—impermissibly disfavors arbitration agreements and has far-reaching deleterious implications.

NCFS makes small loans to individuals over the Internet. Like many other businesses, NCFS includes a broad arbitration provision in its loan agreement, a provision that requires borrowers to pursue claims arising from or relating to the agreement through individual arbitration. Virginia's attorney general brought this action against NCFS in 2018, alleging that NCFS's lending practices violated Virginia law. Among other relief, the attorney general asked the court to award restitution to individual NCFS borrowers. NCFS asserted that the FAA barred the attorney general from circumventing those arbitration provisions by suing as a proxy for NCFS borrowers, i.e., by advancing damages claims that in every meaningful sense belong to the borrowers and seeking on borrowers' behalf individualized relief that they had agreed to pursue in individual arbitration. The Virginia Supreme Court rejected NCFS's argument, holding that the attorney general could not be bound by

the arbitration provision because he was not a signatory to the loan agreement.

That ruling, in addition to departing from decisions of two federal circuits, cannot be reconciled with the FAA itself or with this Court's precedent interpreting that statute. The FAA commands that arbitration agreements be treated like other contracts. *See, e.g.*, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989). And this Court has explained—including in the arbitration context—there *are* circumstances in which a non-signatory to a contract can be bound by it. *See GE Energy Power Conversion France SAS, Corporation* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643-1644 (2020) (citing *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009)). One such circumstance is where a party seeks restitution in court for individuals who could not seek it in court for themselves because of an arbitration provision. The Virginia Supreme Court's contrary conclusion improperly nullified the arbitration provision to which NCFS and its borrowers agreed, allowing that provision to be circumvented simply by having the attorney general attach his name to what are in every meaningful sense the borrowers' claims.

The court justified its ruling by citing *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), which held that the FAA did not preclude the EEOC from pursuing federal claims under the Americans with Disabilities Act (ADA) on behalf of employees who had signed agreements with their employers to arbitrate such claims. But contrary to the Virginia Supreme Court's suggestion, *Waffle House* did not broadly exempt public officials from the FAA and traditional contract principles when they sue for the benefit of a signatory to an arbitration agreement. In any event, *Waffle House* involved the interplay

of two federal statutes rather than (as here) the interplay of state and federal law. And this Court's reconciliation of the two statutes at issue in *Waffle House* flowed from features of the ADA (and the EEOC) that are not present here. *Waffle House* thus does not support the decision below.

Review of the Virginia Supreme Court's decision is warranted not only because of the conflict it deepens among lower courts over the question presented, but also because of its far-reaching implications. In recent years, state attorneys general have become increasingly aggressive in bringing lawsuits against businesses, often on behalf of thousands of state residents. Because of this aggregation of claims, such lawsuits resemble class actions—and hence lawsuits like this one raise the possibility of attorneys general obtaining what this Court has called "'in terrorem' settlements," unrelated to a claim's merit, *Concepcion*, 563 U.S. at 350. This Court's precedent makes clear that businesses and others can reduce the risk of being subjected to such coercion by agreeing in advance to arbitrate disputes individually. That is what NCFS attempted to do here. Yet the decision below leaves NCFS defending itself against what is in effect a class action: an aggregation of claims belonging to borrowers who agreed to arbitrate individually yet pursued collectively in court by the attorney general. Attorneys general should not be able to circumvent valid arbitration agreements (or the FAA's command that they be rigorously enforced) and coerce potentially large settlements of questionable claims in this way, i.e., by seeking individualized relief in court on behalf of borrowers when the borrowers agreed that such relief could be sought only via individual arbitration.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App. 1a-12a) is published at 854 S.E.2d 642. The opinion of the Circuit Court for Fairfax County, Virginia (App. 13a-21a) is reported at 102 Va. Cir. 114.

JURISDICTION

The Virginia Supreme Court issued its decision on February 25, 2021. This Court has jurisdiction under 28 U.S.C. §1257(a), which authorizes review of "[f]inal judgments or decrees rendered by the highest court of a State."

The Virginia Supreme Court's decision is final under §1257 even though there will be further proceedings in the state courts. In *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469 (1975), this Court held that review under §1257 is available despite the fact that there will be further state-court proceedings if (as relevant here):

- "the federal issue has been finally decided in the state courts" and the party seeking review "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court";
- "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and
- "a refusal immediately to review the state-court decision might seriously erode federal policy."

Id. at 482-483. This Court has repeatedly held these requirements to be met where a state high court refuses to enforce an arbitration agreement and the petitioner contends that the state court's decision violated the FAA. *See Southland Corporation* v. *Keating*, 465 U.S. 1, 6-8

(1984); *Volt*, 489 U.S. at 473 & n.4. The same conclusion is warranted here.

First, the Virginia Supreme Court's ruling—that the arbitration agreement between NCFS and its borrowers does not preclude the attorney general from seeking individualized damages in court on behalf of those borrowers, App. 5a-9a—is the state courts' final word on that question. And "[w]ithout immediate review of the [Virginia Supreme Court's] holding by this Court there may be no opportunity to pass on the federal issue," because NCFS might prevail in subsequent proceedings on state-law grounds. *Southland*, 465 U.S. at 6.

Second, reversal of the decision below on the question presented will preclude further litigation on the attorney general's claims for individualized relief; any such claims would instead be subject to individual arbitration. *See Southland*, 465 U.S. at 7.

Third, a failure to review the decision below would seriously erode the "liberal federal policy favoring arbitration," *Concepcion*, 563 U.S. at 339, because the decision's effect is "to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration," *Southland*, 465 U.S. at 7. And postponing review until after the state courts' final resolution of the case would "lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate," and thus "would defeat the core purpose of a contract to arbitrate." *Id.* at 7-8.

STATUTORY PROVISION INVOLVED

Section 2 of the FAA provides in relevant part that:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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.

STATEMENT

A. Statutory Framework

The FAA—which, as noted, was enacted "in response to widespread judicial hostility to arbitration agreements"—"reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (quotation marks and citation omitted). To implement these principles, section 2 of the act states that a "written provision in … a contract … to settle by arbitration a controversy thereafter arising out of such contract … 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. In other words, "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339 (citing *Volt*, 489 U.S. at 478, and *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006)). That equality extends to "principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *GE Energy*, 140 S. Ct.

at 1643. Hence, the "traditional principles of state law [that] allow a contract to be enforced by or against nonparties to the contract" apply equally in the arbitration context, *Arthur Andersen*, 556 U.S. at 631 (quotation marks omitted); *see also GE Energy*, 140 S. Ct. at 1643 (citing *Arthur Andersen*).

Under the FAA, moreover, "state 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." *Lamps Plus*, 139 S. Ct. at 1415 (quotation marks omitted); *see also, e.g.*, *Kindred Nursing*, 137 S. Ct. at 1426; *Epic Systems Corporation* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018). For example, in *AT&T Mobility LLC* v. *Concepcion*, the Court held that the FAA preempted a state-court rule conditioning enforcement of arbitration provisions on whether they allowed class arbitration. 563 U.S. at 336, 352. Even though the rule was purportedly grounded in the generally applicable "unconscionability doctrine and [the state's] policy against exculpation," the rule was preempted because the state "applied [those principles] in a fashion that disfavors arbitration." *Id.* at 341, 344. Similarly, in *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam), the Court held that the FAA preempted a state-court rule deeming a certain category of arbitration clauses void "as a matter of public policy," *id.* at 532-533; *see also, e.g.*, *Kindred Nursing*, 137 S. Ct. at 1426-1427; *Preston* v. *Ferrer*, 552 U.S. 346, 356-359 (2008). Moreover, this Court has observed that it "must be alert to new devices and formulas" adopted or employed by states to undermine arbitration agreements. *Epic Systems*, 138 S. Ct. at 1623 (citing *Concepcion*, 563 U.S. at 342).

B. Factual And Procedural History

1. NCFS provides online lending services. App. 2a. Between 2012 and 2018, it lent money to more than 47,000 Virginians. *Id.* The loan terms are laid out in written agreements between NCFS and its borrowers. *See* Va. S. Ct. J.A. 16-40.

These loan agreements each include a "broad arbitration provision[]." App. 2a n.1. Under that provision (which is reproduced in full at pages 23a-29a of the appendix), "all claims 'arising from or relating directly or indirectly' to the loan agreements were subject to arbitration, including any claims 'based upon a violation of any state … statute or regulation' and any claims 'asserted on [the borrower's] behalf by another person.'" App. 2a-3a n.1. (quoting App. 24a). "The loan agreements also stated that the arbitration provisions were 'governed by the [FAA].'" App. 3a n.1 (alteration in original) (quoting App. 28a).

To ensure understanding among the contracting parties, the arbitration provision further stated that borrowers "acknowledge[d] and agree[d]" that they "waiv[ed] [their] right to have a court … resolve any dispute alleged against" NCFS. App. 24a-25a. The provision also required that any arbitration "be resolved … only on an individual basis," i.e., with no "class arbitration." App. 25a (capitalization altered). The loan agreements recognized only one exception to mandatory arbitration, for disputes that could be brought in small-claims court. *See* App. 28a. And even that exception was only partial, because the arbitration provision specified that any appeal from a judgment by such a court "shall be resolved by binding arbitration." *Id.*

The NCFS loan agreement gave each borrower 60 days to "opt out of th[e] Arbitration Provision." App.

29a. Exercising that option, the agreement stated, would not "affect" a borrower's "other rights or responsibilities" thereunder. *Id.*

2. In 2018, Virginia's attorney general brought this action, nominally on behalf of the commonwealth, in state court, alleging that certain terms of the loan agreements between NCFS and its borrowers violated the Virginia Consumer Protection Act, or VCPA. App. 1a-2a. The complaint requests injunctive relief, civil penalties, and awards of attorney's fees, costs, and reasonable expenses. App. 2a; *see also* Va. S. Ct. J.A. 13. Of particular relevance here, it also asks that damages be awarded for individual borrowers—specifically, "'all sums necessary to restore to any consumers the money or property which may have been acquired from them by [NCFS] in connection with its [alleged] violations … of the VCPA.'" App. 2a (quoting Va. S. Ct. J.A. 13).

Invoking the FAA, NCFS sought to enforce its arbitration agreement by moving to dismiss respondent's request for individualized damages or, alternatively, to compel individual arbitration of such claims by the borrowers. App. 2a-3a; *see also* Va. S. Ct. J.A. 41-42. NCFS argued that because it had agreed with each borrower to arbitrate all claims relating to the borrower's loan, including claims asserted on the borrower's behalf, allowing the attorney general to sue for individualized damages—relief each borrower could seek only in individual arbitration—would circumvent the arbitration provision in violation of the FAA. App. 2a-3a; *see also* Va. S. Ct. J.A. 41-42. NCFS did not contend that the attorney general's requests for non-individualized remedies (including injunctive relief and civil penalties) were affected by the arbitration agreement.

The trial court denied NCFS's motion, concluding that because "the Commonwealth was not a party to any of the arbitration agreements made between individual borrowers and [NCFS], … the Commonwealth is free to pursue [its] claims through litigation." App. 21a (citing *Waffle House*).

3. NCFS appealed, again arguing that the attorney general's claims for individualized damages contravene the FAA, *see* Va. S. Ct. J.A. 57, but the Virginia Supreme Court affirmed.

Echoing the trial court, the state high court reasoned that because "the Commonwealth was not a party to the loan agreements between NCFS[] and the Virginia consumers …, the Commonwealth is not bound by the arbitration provisions contained in the loan agreements, and it could therefore pursue its claim for restitution in a judicial forum." App. 5a.

Like the trial court, the Virginia Supreme Court relied heavily on this Court's decision in *Waffle House*. There, the Court held that "an agreement between an employer and an employee to arbitrate employment-related disputes" did not "bar[] the Equal Employment Opportunity Commission … from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action" under the ADA. 534 U.S. at 282. Based on the EEOC's role and authority under that statute (including specific statutory authorization to pursue victim-specific relief), this Court determined that the agency was not bound by the arbitration provision because the agency's claim was not "merely derivative" of the employee's and because the EEOC did "not stand in the employee's shoes" or function as "a proxy for the employee." *Id.* at 297-298; *see also id.* at 285-288.

Here, the Virginia Supreme Court concluded that "[u]nder *Waffle House* and general principles of contract law, the Commonwealth is not bound by the arbitration agreements at issue." App. 9a. The court recognized that this "Court has explained that traditional principles of contract law [do] allow contracts to be enforced against third parties in certain circumstances." App. 7a-8a n.4 (citing *Arthur Andersen*, 556 U.S. at 631). The state court asserted in a footnote, however—without authority or analysis—that those "traditional principles of contract law … do not apply in the present case." App. 8a n.4. Moreover, the court stated, *Waffle House* held that "the FAA does not address enforcement actions that are brought by public agencies." App. 8a. And the court claimed—again without citing any supporting authority—that *Waffle House* was "based on the scope of the FAA and the limitations of the underlying arbitration agreement rather than the specific provisions of the ADA." *Id.* The dispositive facts for the court, therefore, were that "the Commonwealth was not a party to the underlying arbitration agreements" and that (in the court's view) the attorney general's request for restitution for individual borrowers "is similar to the 'victim-specific' relief pursued by the EEOC in *Waffle House*." App. 9a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG

A. Traditional State-Law Contract Principles Bar Third Parties—Including Attorneys General—From Suing For Individualized Relief For People Who Could Seek That Relief For Themselves Only In Individual Arbitration

The Virginia Supreme Court held here that because the attorney general is not a party to an arbitration agreement with NCFS, he is free to circumvent the arbitration agreements between NCFS and its borrowers by suing in court as the borrowers' proxy, seeking individualized relief for them even though they agreed to seek it for themselves in individual arbitration. That holding cannot be reconciled with the FAA or established principles of contract law.

1. As this Court has explained, "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through" various doctrines, including "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Arthur Andersen*, 556 U.S. at 631 (quotation marks omitted). The Virginia Supreme Court itself has long recognized this. In one case, for example, the court held that a non-signatory to a contract was "bound" by it because he "simply stepped into the shoes of the" signatory. *Jones* v. *Nelson County*, 120 S.E. 140, 140 (Va. 1923). And as noted, it similarly recognized here that this "Court has explained that traditional principles of contract law allow contracts to be enforced against third parties in certain circumstances." App. 7a n.4. Yet it brushed past those principles, dismissing them with only the unexplained

and unsupported claim that they "do not apply in this case." App. 8a n.4.

That conclusory assertion disregards this Court's precedent—including precedent the decision below itself cited. Consistent with the FAA's mandate that arbitration agreements be placed on an equal footing with other contracts, *see supra* pp.7-8, this Court has made clear that courts' authority to bind non-signatories applies equally in the arbitration context. *See Arthur Andersen*, 556 U.S. at 631; *GE Energy*, 140 S. Ct. at 1643-1644. Indeed, "hundreds of years of common law" teach that "contract and agency principles [may] bind nonsignatories to arbitration agreements." *Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006); *accord, e.g.*, *Thomson-CSF, S.A.* v. *American Arbitration Association*, 64 F.3d 773, 776-777 (2d Cir. 1995) ("[N]onsignatories may be bound to the arbitration agreements of others" under "common law principles of contract and agency law."). Conversely, an arbitration agreement does not bind a non-signatory who brings a claim that is not "derivative" of a signatory's claim, such that the nonsignatory does "not stand in the [signatory's] shoes" or is not "a proxy for the" signatory. *Waffle House*, 534 U.S. at 297-298.

Under this case law, the attorney general is bound by the arbitration provision in the loan agreements to the extent he seeks individualized damages for borrowers who have themselves agreed to the provision. (As noted, NCFS has never argued that the attorney general's claims for *non*-individualized relief—i.e., relief available only to the attorney general—are subject to arbitration.) It is undisputed that the provision would require arbitration of the claims here for individualized relief if those same claims were brought by the borrowers themselves. *See supra* p.9. Neither the borrowers nor

the attorney general should be permitted to circumvent the borrowers' arbitration agreements by having the attorney general simply attach his name to what are in every meaningful sense the borrowers' claims: Those claims relate to the loan agreements between the borrowers and NCFS, and the attorney general seeks the amount of loss that each individual borrower allegedly suffered—money he asks the court to restore to each borrower in exactly the amount that each allegedly lost. *See supra* p.10. The attorney general is thus (as the Virginia Supreme Court said in a prior case) "simply step[ping] into the shoes of" individual borrowers, *Jones*, 120 S.E. at 140, serving as the borrowers' proxy by seeking to obtain damages for them relating to their loan agreements. The attorney general cannot do so without also taking on the obligations that those agreements impose on the borrowers, including the obligation to arbitrate. Indeed, the attorney general rightly conceded below that he *would* be bound by an individual borrower's agreement to settle claims against NCFS. *See* Respondent's Va. S. Ct. Br. 34 n.12 (July 16, 2020). That concession was well-founded, and the attorney general has never explained—nor did the court below—why the FAA's mandate that arbitration agreements be treated the same as other contracts does not require that he likewise be bound by the arbitration agreements entered into by those for whom he seeks damages.

To the extent that the attorney general's (or the Virginia Supreme Court's) explanation is that traditional principles of contract law are categorically inapplicable to a state attorney general, neither the attorney general nor the court cited any authority supporting that proposition. (*Waffle House*, which the attorney general and the court below relied on, does not constitute such authority, for reasons discussed in the next subsection.)

Contracts are regularly enforced by and against state attorneys general, as well as other public officials. *See, e.g.*, *California* v. *IntelliGender, LLC*, 771 F.3d 1169, 1178-1182 (9th Cir. 2014). And even if there were a carve-out from longstanding contract principles for state attorneys general when they sue on behalf of the public—and again, no authority for such a carve-out has been cited throughout this litigation—that carve-out certainly would not extend to circumstances in which an attorney general (as here) sues as a mere proxy for certain private individuals.

2. As just explained, traditional contract principles require that the attorney general adhere to the arbitration provision in borrowers' loan agreements to the extent he attempts to litigate as their proxy by advancing claims that relate to those agreements and seeking individualized relief on their behalf. By instead allowing the attorney general to circumvent the arbitration provision, the decision below violates the FAA's mandate that arbitration agreements be placed "on an equal footing with other contracts," *Concepcion*, 563 U.S. at 339. The decision, in other words, does "exactly what [the FAA] bar[s]: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court." *Kindred Nursing*, 137 S. Ct. at 1427. Because it "disfavor[s]" arbitration clauses relative to other contracts in this way, *id.* at 1426, the rule the Virginia Supreme Court adopted in this case (precisely the kind of "new" anti-arbitration rule that this Court has said it must "be alert to," *see supra* p.8) is preempted by the FAA.

That preemption is confirmed by the fact that the decision below will "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA," *Lamps Plus*, 139 S. Ct. at 1415

(quoting *Concepcion*, 563 U.S. at 352), namely, the "liberal federal policy favoring arbitration," *Concepcion*, 563 U.S. at 339. Under the Virginia Supreme Court's ruling, businesses and others will be discouraged from using arbitration agreements, because they will be unable to obtain the cost savings and other "real benefits" that flow from arbitrating rather than litigating disputes with their customers, employees, and others, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122 (2001); *see also Allied-Bruce Terminix Companies* v. *Dobson*, 513 U.S. 265, 280 (1995); *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corporation*, 559 U.S. 662, 685 (2010); *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009); *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); H.R. Rep. No. 97-542, at 13 (1982); H.R. No. 68-96, at 2 (1924); S. Rep. No. 68-536, at 3 (1924). Those benefits will be unavailable even when businesses and others have specifically agreed to them. That is because under the decision below, individuals who wish to litigate a claim covered by an arbitration provision to which they agreed can turn to their state attorney general (or anyone else authorized to sue under state law) to bring their claim for them and recover the very damages they could recover for themselves only through arbitration. That outcome is impossible to reconcile with the FAA. As this Court has explained, that act proscribes conduct that targets "arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Epic Systems*, 138 S. Ct. at 1622 (quotation marks and alterations omitted); *see also id.* at 1623.

B. *Waffle House* Does Not Support The Decision Below

As noted, the Virginia Supreme Court's ruling—that the attorney general can seek restitution in court for borrowers who agreed in writing to seek such relief only in arbitration—rested largely on this Court's decision in *Waffle House*. In particular, the court below read *Waffle House* to hold that the FAA does not require enforcement of arbitration agreements against non-signatory "public agencies" that would otherwise be bound under traditional contract principles. App. 8a. The court below also concluded that because the attorney general "filed [his] complaint" assertedly "to enforce the VCPA on behalf of the public," the attorney general's restitution request "is similar to the 'victim-specific' relief pursued by the EEOC in *Waffle House*" and therefore "[t]he principles underlying the *Waffle House* decision apply with equal weight in the present case." App. 9a. None of this reasoning withstands scrutiny.

The issue in *Waffle House* was whether a *federal* statute—rather than, as here, a state-law rule—permitted the EEOC to assert claims in court seeking relief for individuals who had signed arbitration agreements. That difference is crucial because whereas the FAA preempts any state law (common-law or otherwise) that hinders the liberal federal policy favoring arbitration, *see supra* pp.7-8, courts have a duty to "harmonize[]" two federal statutes absent "a clearly expressed congressional intention" that "one displaces the other," *Epic Systems*, 138 S. Ct. at 1624 (quotation marks omitted); *see also Mitsubishi*, 473 U.S. at 628 (Congress, but not states, can "preclude a waiver of judicial remedies"). And the *Waffle House* Court's conclusion that the EEOC's claims for individual relief did not have to be arbitrated rested not on any categorical exemption for

public officials—as the court below appeared to conclude—but on specific features of the EEOC's powers under the ADA that are absent here.

First, the EEOC has sole control over all claims of employment discrimination. Under the ADA, *Waffle House* explained, an individual employee cannot sue for employment discrimination without first filing a "charge" with the EEOC. 534 U.S. at 288, 296. And when a charge is filed, the EEOC gains "exclusive jurisdiction over the claim" to "investigate," try to "conciliate," "evaluate the strength of the public interest at stake," and determine whether to "file[] suit on its own" or issue a "right-to-sue letter" to the employee. *Id.* at 286, 288, 291. "If … the EEOC files suit," moreover, the ADA "unambiguously authorizes [the agency] to proceed in a judicial forum" and "the employee has no independent cause of action." *Id.* at 291-292. In short, under the ADA, the EEOC does "not stand in the employee's shoes" or function as "a proxy for the employee," *id.* at 297-298; rather "the EEOC is in command of the process," including having the ability to decide to sue on behalf of an individual employee or to permit the employee to sue instead, *id.* at 291.

By contrast, no federal law places the attorney general in control of individuals' claims. Nor, if it would matter, does the VCPA. That law has no administrative-exhaustion requirements, leaving individuals free to sue for damages for any injury they allegedly incur from prohibited conduct, even if the attorney general also sues for the same individualized relief. Unlike with the ADA, therefore, the right to receive individualized relief in court for a VCPA violation belongs to the individual—and accordingly can be waived by the individual even when the relief is sought by someone else. Moreover, because the attorney general has no "exclusive

jurisdiction over [a borrower's] claim," he *is* "merely a proxy for" borrowers, *Waffle House*, 534 U.S. at 288, i.e., his claim for individual relief is purely derivative of theirs, and thus he must abide by their arbitration agreements to the extent he pursues such relief on their behalf.

Second, whereas *Waffle House* concluded that permitting the EEOC to sue despite an arbitration clause would "have a negligible effect on the federal policy favoring arbitration," 534 U.S. at 291 n.7, the same cannot be said of actions by state attorneys general. *Waffle House* anticipated such a negligible effect partly because "some of the benefits of arbitration are already built into the EEOC's statutory duties," *id.* at 290 n.7, including an "independent statutory responsibility to investigate and conciliate claims" before suing, *id.* at 288. The VCPA requires no such process, instead requiring only that the attorney general provide "notice" in writing "before initiating any legal proceedings." Va. Code §59.1-203(B). The *Waffle House* Court also expected a negligible effect on arbitration because the EEOC brings few cases and almost always sues on behalf of a single employee rather than a class of employees. *See* 534 U.S. at 290 n.7. State attorneys general, in stark contrast, have become "national policymaker[s] and feared enforcer[s]," Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 B.Y.U. L. Rev. 421, 447 (2019). Indeed, state attorneys general routinely file lawsuits under state consumer protection laws, often on behalf of large groups of individuals. *See infra* pp.26-27.

These differences between this case and *Waffle House*—none of which the Virginia Supreme Court acknowledged, let alone addressed—leave no doubt that *Waffle House* does not justify the state court's decision to depart from traditional contract principles by

allowing the attorney general to pursue individualized relief in court for borrowers who would be required by their arbitration agreements to seek such relief for themselves only in arbitration.

II. THE DECISION BELOW DEEPENS DIVISION AMONG LOWER COURTS

State high courts and federal courts of appeals have divided on the question presented. In particular, two federal circuits have held that non-signatory attorneys general (or other government officials) must adhere to an arbitration agreement when they sue for individualized relief on behalf of signatories to that agreement, whereas state high courts (including here) have reached the opposite conclusion. This established conflict, which is unlikely to be resolved without this Court's intervention, confirms the need for the Court's review.

A. Two Federal Circuits Have Held That Non-Signatory Attorneys General Are Bound By Arbitration Agreements When Suing On Behalf Of A Signatory

The Third and Fourth Circuits have held that public officials who sue on behalf of a party to an arbitration agreement are bound by that agreement.

In *United States* v. *Bankers Insurance Company*, 245 F.3d 315 (4th Cir. 2001), the attorney general of the United States sued Bankers for damages under the False Claims Act on behalf of the Federal Emergency Management Agency, *see id.* at 317-318 & n.2. The claims related to a contract between FEMA and Bankers that contained an arbitration clause. *Id.* at 318. The Fourth Circuit held that the attorney general was bound by that clause even though he "was not a party" to the

contract. *Id.* at 323. The court declined to make an exception to the traditional rule that "when a third party sues on a contract, any arbitration provision contained therein remains in force …, simply because the Attorney General" had sued. *Id.* The court explained that "the Attorney General's rights and responsibilities under the [contract] are derivative of [FEMA's], and [therefore] he possesses no right to ignore the arbitration agreement." *Id.*

The Third Circuit reached a similar conclusion in *Olde Discount Corporation* v. *Tupman*, 1 F.3d 202 (3d Cir. 1993). There, state securities regulators initiated administrative proceedings to rescind stock transactions on behalf of investors who had agreed to arbitrate disputes with their broker-dealer. *See id.* at 203-205. Although the state officials' claim "certainly would be subject to arbitration if pursued by the [investors] themselves," the state "argue[d] that for preemption purposes [courts] must distinguish between the advancement of essentially identical claims on the basis of whether their proponent is a state agency or a private litigant." *Id.* at 208-209 (op. of Greenberg, J.). The court rejected that argument, holding that the state was bound by the arbitration clause, though the panel members diverged slightly as to the reason. *See id.* at 204.

Judge Greenberg concluded that allowing "an agreement to arbitrate … [to] be abrogated by a state agency's pursuit of an administrative remedy that would duplicate the remedy sought in an arbitration," 1 F.3d at 207, would "create[] an obstacle to the accomplishment" of the FAA's purpose of "favoring" arbitration, *id.* at 209 (quotation marks omitted). He pointed to several circumstances supporting that conclusion, including "[t]he very community of interest between the state" and the individual investors; the fact that having to participate

in the administrative process would "deprive[the broker-dealer] of its right to the presumed simplicity and efficiency of the arbitral forum"; and the fact that the administrative proceeding and the arbitration (which the investors could pursue concurrently) could reach "irreconcilable" results. *Id.* at 209-210. In his view, therefore, the state's attempt to proceed administratively would "render [the] right to arbitration meaningless." *Id.* at 209.

Judge Rosenn agreed that allowing the administrative proceeding "would interfere with the contractually created arbitration agreement." 1 F.3d at 215. And similar to Judge Greenberg, he regarded the administrative proceeding as an "attempted … 'end run' around the terms of the arbitration agreement." *Id.* Judge Rosenn's disagreement with Judge Greenberg was only that Judge Rosenn believed this conclusion followed from contract law, without the need to consider preemption under the FAA. *Id.* at 216; *see also Garrett* v. *Circuit City Stores, Inc.*, 449 F.3d 672, 680-681 (5th Cir. 2006).

B. State Appellate Courts Have Taken A Different Approach

In contrast to the Third and Fourth Circuit decisions just discussed, the highest courts of New York and Massachusetts, as well as the Minnesota Court of Appeals, have issued rulings aligned with the Virginia Supreme Court's decision in this case.

In *People ex rel. Cuomo* v. *Coventry First LLC*, 915 N.E.2d 616 (N.Y. 2009), New York's attorney general sued a buyer of life insurance policies seeking rescission and restitution "on behalf of the [policy] owners … who have been damaged by the [buyer's alleged] schemes,"

id. at 618 (quotation marks omitted). Invoking the arbitration agreements between itself and the policy owners, the buyer moved to compel arbitration of "all claims for victim-specific relief," arguing that "the Attorney General, by suing on behalf of policy sellers …, ha[d] become the agent or alter ego of the … sellers." *Id.* at 618-619 (quotation marks omitted). On appeal, the New York Court of Appeals held that this argument "fail[ed] in light of" *Waffle House*. *Id.* at 619. The court reasoned that the attorney general's "statutory authority to serve the public interest by seeking both injunctive and victim-specific relief[was] comparable to that of the EEOC in the federal arena." *Id.* Thus, the court concluded, "[l]ike the EEOC, the Attorney General should not be limited, in his duty to protect the public interest, by an arbitration agreement he did not join." *Id.*

The Massachusetts Supreme Judicial Court reached a similar conclusion in *Joule, Inc.* v. *Simmons*, 944 N.E.2d 143 (Mass. 2011). There, an individual filed a complaint with a state agency alleging employment discretion. *Id.* at 145. Under state law, the agency had the authority to "conduct its own, independent proceeding based on [the] complaint." *Id.*; *see also id.* at 148. The employer moved in state court to compel arbitration under the terms of the employment contract. *Id.* at 145. Citing *Waffle House*, the court held that, because the state agency was "not a party to the employment agreement at issue here," it "cannot be bound by the agreement's arbitration provision." *Id.* at 149; *see also id.* at 150.

And in *State ex rel. Hatch* v. *Cross Country Bank, Inc.*, 703 N.W.2d 562 (Minn. Ct. App. 2005), the Minnesota attorney general sued a bank over its practices for collecting credit card debt, seeking restitution for all injured persons, *see id.* at 566. Because the bank's

cardholders had agreed to arbitrate disputes involving their cards, the bank moved to compel arbitration of the restitution claim, arguing that "the state … has stepped into the shoes of [the] card holders and is therefore subject to the arbitration agreement contained in [the bank's] contracts with card holders." *Id.* at 567 & n.2, 569. Relying heavily on *Waffle House*, the Minnesota Court of Appeals disagreed, holding that "a party that has not agreed to arbitrate a dispute cannot be required to arbitrate" and that "the state is in a position similar to the EEOC's position in *Waffle House*." *Id.* at 569-570. "It is not dispositive," the court added, "that the attorney general seeks victim-specific relief or that the claim is based on the facts that could permit an individual to obtain relief through a private tort claim. That was the situation in *Waffle House* as well." *Id.* at 570.

In short, there is entrenched division among federal courts of appeals and state appellate courts over the question presented—and hence inconsistency in the application of the FAA, with the enforcement of arbitration agreements in these circumstances dependent on where litigation is brought.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

As the cases cited in Part II show, the question presented is a recurring one. And this Court's review is warranted because "[i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the" FAA. *Nitro-Lift*, 568 U.S. at 17-18. The Virginia Supreme Court failed to do so here, and its decision will have far-reaching implications.

As explained, the decision below ignores the settled rule that the FAA requires enforcement of arbitration

agreements against non-signatories who would be bound by the agreement under traditional contract principles. Its decision will thus upend settled expectations, allowing non-signatories to benefit from contracts (by bringing claims relating to those contracts) without assuming the contracts' obligations. And the disruption will be particularly severe for the many businesses that—like NCFS—operate in multiple states.

Additionally, in exempting public officials from binding arbitration agreements, the decision below (like the similar rulings by other state appellate courts) allows both public officials and individuals who have signed arbitration agreements to circumvent those agreements simply by attaching an attorney general's or other public official's name to what are in every important sense claims by the individuals—claims that the individuals themselves could not press in court because of the agreements they signed. Such circumvention will severely undermine the FAA's pro-arbitration policy because (as also explained) state attorneys general have become "prominen[t] … enforcer[s]," routinely bringing claims for individualized relief on behalf of state residents. Dishman, 2019 B.Y.U. L. Rev. at 447.

Some such lawsuits—i.e., "state suits seeking financial recoveries for identifiable citizens"—are often "multimillion-dollar, multistate treble-damages … suits." Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 498 (2012). And even when such suits involve claims of only "a few hundred dollars" per individual, *id.*, attorneys general still possess "enormous bargaining leverage" through their ability to "amalgamat[e] … claims of … hundreds of thousands or even millions of residents," Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C.

L. Rev. 913, 930-931 (2008); Ratliff, Parens Patriae: *An Overview*, 74 Tul. L. Rev. 1847, 1854 (2000). Indeed, because lawsuits brought by state attorneys general often "involve the rights of a large number of people, they bear some resemblance to class actions, even if the only plaintiff is the state." Lemann, Note, *Sheep in Wolves' Clothing: Removing* Parens Patriae *Suits Under the Class Action Fairness Act*, 111 Colum. L. Rev. 121, 122 (2011); *see also id.* at 129-133. Such actions therefore present the same risk this Court has identified with class actions, namely, that "defendants will be pressured into settling questionable claims" because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *Concepcion*, 563 U.S. at 350. This Court has rightly declined to require businesses or others to assume that risk in class arbitration unless they have agreed to do so. *See Stolt-Nielsen*, 559 U.S. at 684-685. For the same reasons, a business should not have to do so via the aggregation in court of disputes with individuals who have all agreed with the business that such disputes would be resolved only through individual arbitration.

Finally, the circumvention of arbitration agreements that is accomplished through lawsuits like this one is not accidental. To the contrary, some have argued explicitly that state attorneys general *should* use representative suits to evade the prohibition on class-wide arbitration found in many arbitration agreements (and approved by this Court in *Concepcion*). *See* Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 629-631 (2012). However, such evasion—and the circumvention of arbitration agreements more generally—is contrary to the FAA's pro-arbitration policy, which

requires courts to "rigorously enforce" arbitration agreements. *Dean Witter*, 470 U.S. at 221. This Court's intervention is needed to reaffirm that principle and ensure that businesses and others can enjoy the benefits of arbitration for which they have specifically bargained.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2021

APPENDICES

APPENDIX A

SUPREME COURT OF VIRGINIA

Record No. 190840

NC FINANCIAL SOLUTIONS OF UTAH, LLC,

v.

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

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY,
Daniel E. Ortiz, Judge
Filed: February 25, 2021

OPINION

PRESENT: All the Justices

OPINION BY JUSTICE TERESA M. CHAFIN:

The Attorney General, acting on behalf of the Commonwealth, filed the present action against NC Financial Solutions of Utah, LLC ("NCFS-Utah"), to enforce the provisions of the Virginia Consumer Protection Act (the "VCPA"), Code §§ 59.1-196–59.1-207.

On appeal, NCFS-Utah argues that the Circuit Court of Fairfax County erred when it refused to enforce arbitration agreements between NCFS-Utah and the individual consumers who were affected by the alleged VCPA violations. Additionally, NCFS-Utah maintains that the VCPA does not permit the Commonwealth to pursue restitution for individual consumers. For the following reasons, we affirm the circuit court's judgment.

I. BACKGROUND

NCFS-Utah is an online lender. Between 2012 and 2018, NCFS-Utah provided loans to over 47,000 Virginia consumers, at interest rates that ranged from 34 to 155 percent. On April 23, 2018, the Attorney General filed a complaint against NCFS-Utah on behalf of the Commonwealth. The complaint alleged that NCFS-Utah's lending practices violated certain provisions of the VCPA.

The complaint requested injunctive relief, civil penalties, and awards of attorney's fees, costs, and reasonable expenses. The complaint also requested that the circuit court "[g]rant judgment against [NCFS-Utah] and award to the Commonwealth all sums necessary to restore to any consumers the money or property which may have been acquired from them by [NCFS-Utah] in connection with its violations … of the VCPA." Furthermore, the complaint requested that the circuit court "[e]nter any additional orders or decrees as may be necessary to restore to any consumers the money or property" that NCFS-Utah acquired through its unlawful conduct.

On July 17, 2018, NCFS-Utah filed a "Motion to Dismiss, or Alternatively, to Compel Arbitration of Individual Damages." Based on arbitration provisions in the loan agreements between NCFS-Utah and the individual Virginia consumers, NCFS-Utah argued that the consumers had agreed to arbitrate any disputes arising from the loans at issue.[1] NCFS-Utah maintained that an

[1] The loan agreements between NCFS-Utah and the Virginia consumers contained broad arbitration provisions. The arbitration provisions stated that all claims "arising from or relating directly or indirectly" to the loan agreements were subject to arbitration, including any claims "based upon a violation of any state … statute or regulation" and any claims "asserted on [the consumer's] behalf by

award of restitution would circumvent these arbitration agreements. Moreover, NCFS-Utah asserted that an award of restitution would be inconsistent with the provisions of the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16. Thus, NCFS-Utah argued that an award of restitution was preempted by federal law. NCFS-Utah requested that the circuit court either dismiss the restitution component of the complaint or compel the Virginia consumers to arbitrate any individual claims for damages.

The Commonwealth filed a memorandum opposing NCFS-Utah's motion on August 10, 2018. Citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2005), the Commonwealth argued that it was not bound by the arbitration provisions at issue. The Commonwealth noted that it was not a party to the loan agreements that contained the arbitration provisions. The Commonwealth also emphasized that it was attempting to enforce the VCPA on behalf of the public in general rather than the individual consumers.

The circuit court held a hearing regarding NCFS-Utah's motion on December 7, 2018. At the hearing, NCFS-Utah argued that *Waffle House* only applies to employment claims pursued by the Equal Employment Opportunity Commission (the "EEOC"). NCFS-Utah maintained that an award of restitution would nullify the arbitration agreements between NCFS-Utah and the Virginia consumers and conflict with the provisions of the FAA. NCFS-Utah also argued that the VCPA did not allow the Commonwealth to collect restitution for individual consumers.

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another person." The loan agreements also stated that the arbitration provisions were "governed by the [FAA]."

In response, the Commonwealth argued that *Waffle House* was dispositive of the pending motion. The Commonwealth maintained that the FAA was not implicated in the present case because the Commonwealth was not bound by the arbitration agreements between NCFS-Utah and the Virginia consumers. The Commonwealth argued that its ability to enforce the VCPA was not limited by the arbitration agreements at issue, and that it had statutory authority to pursue restitution when enforcing the VCPA on behalf of the public.

The circuit court denied NCFS-Utah's motion on February 25, 2019. Relying on *Waffle House*, the circuit court concluded that the Commonwealth was not bound by the arbitration agreements between NCFS-Utah and the Virginia consumers. The circuit court determined that the Commonwealth had statutory authority to pursue litigation to enforce the VCPA. Additionally, the circuit court determined that Code §§ 59.1-203 and 59.1-205 authorize the Commonwealth to seek restitution for individual consumers in VCPA enforcement actions. This appeal followed.[2]

II. ANALYSIS

NCFS-Utah presents two primary arguments on appeal. First, NCFS-Utah contends that an award of restitution in this case would conflict with the provisions of the FAA and general principles of contract law. Second, NCFS-Utah argues that the VCPA does not authorize the Commonwealth to collect restitution for individual consumers. These arguments present issues of statutory interpretation and other issues of law that are subject to de novo review. *See Virginia Marine Res.*

[2] NCFS-Utah filed an interlocutory appeal pursuant to Section 16 of the FAA, 9 U.S.C. § 16, and Code § 8.01-581.016, a similar provision of the Virginia Uniform Arbitration Act (the "VUAA").

Comm'n v. Chincoteague Inn, 287 Va. 371, 380 (2014); *Anthony v. Verizon Va., Inc.*, 288 Va. 20, 29 (2014).

A.

NCFS-Utah argues that the FAA and general principles of contract law bar an award of restitution in this case. This argument fails for a fundamental reason. As noted by the circuit court, the Commonwealth was not a party to the loan agreements between NCFS-Utah and the Virginia consumers. Accordingly, the Commonwealth is not bound by the arbitration provisions contained in the loan agreements, and it could therefore pursue its claim for restitution in a judicial forum. Neither the FAA nor general principles of contract law preclude the Commonwealth from seeking restitution under the circumstances of the present case.

The FAA was enacted to "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In pertinent part, Section 2 of the FAA states:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … 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.

In general, the provisions of the FAA reflect the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The FAA ensures that arbitration agreements are consistently enforced, "notwithstanding any state

substantive or procedural policies to the contrary." *Perry v. Thomas*, 482 U.S. 483, 489 (1987). Nevertheless, the FAA is simply "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

Like the federal policy, the public policy of Virginia also favors arbitration.[3] *See TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C.*, 263 Va. 116, 122 (2002). Pursuant to the FAA, this Court applies "federal substantive law to determine whether the parties must submit to binding arbitration as required by [a] contract." *Amchem Products, Inc. v. Newport News Cir. Ct. Asbestos Cases Plaintiffs*, 264 Va. 89, 96 (2002). The FAA, however, does not purport "to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Therefore, we rely on the general "law of contracts" in order to determine whether a "valid and enforceable agreement to arbitrate" exists between the parties in any given case. *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 160 (2008).

As a general principle, "[a] party cannot be compelled to submit to arbitration unless [it] has first agreed

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[3] The VUAA contains a provision that is nearly identical to Section 2 of the FAA. Code § 8.01-581.01 states that:

> [a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract.

to arbitrate." *Id.* at 161 (quoting *Doyle & Russell, Inc. v. Roanoke Hosp. Ass'n*, 213 Va. 489, 494 (1973)). "Arbitration under the [FAA] is a matter of consent, not coercion." *Waffle House*, 534 U.S. at 294 (quoting *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (alteration in original). "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *Id.* at 293 (quoting *Volt Info. Scis., Inc.*, 489 U.S. at 478). While the FAA "ensures the enforceability of private agreements to arbitrate, [it] does not purport to place any restriction on a nonparty's choice of a judicial forum." *Id.* at 289.

In *Waffle House*, the Supreme Court of the United States determined that an arbitration agreement between an employer and an employee did not preclude the EEOC from pursuing an enforcement action against the employer to obtain "victim-specific" relief for the employee (i.e., backpay, reinstatement, and other damages). *See id.* at 282.

The Supreme Court noted that the EEOC was not a party to the arbitration agreement between the employer and the employee. *Id.* at 294. Additionally, the Supreme Court observed that the EEOC never agreed to arbitrate the employment dispute at issue. *Id.* Consequently, the Supreme Court concluded that the EEOC was not bound by the arbitration agreement. *See id.* ("It goes without saying that a contract cannot bind a nonparty.").[4]

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[4] We note that this is a general statement. The Supreme Court has explained that traditional principles of contract law allow contracts to be enforced against third parties in certain circumstances, through "assumption, piercing the corporate veil, alter ego,

Moreover, the Supreme Court noted that the FAA does not address enforcement actions that are brought by public agencies. *See id.* at 289. The Supreme Court concluded that the EEOC was pursuing the enforcement action on behalf of the public, despite its request for individual-specific remedies. *See id.* at 296 ("[W]henever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.").

Additionally, the Supreme Court noted that the EEOC's claim was not merely "derivative" of the employee's claim. *See id.* at 297. While the Supreme Court acknowledged that the employee's conduct may have limited the relief available to the EEOC, the Court explained that the EEOC was not proceeding as a "proxy for the employee." *See id.* at 297-98.

We recognize that *Waffle House* was decided within the context of a "detailed enforcement scheme created by Congress." *See id.* at 296. Specifically, *Waffle House* involved an alleged violation of the Americans with Disabilities Act of 1990 (the "ADA") that was challenged by the EEOC through the procedures set forth in Title VII of the Civil Rights Act of 1964 ("Title VII"). *See id.* at 285. The holding in *Waffle House*, however, was primarily based on the scope of the FAA and the limitations of the underlying arbitration agreement rather than the specific provisions of the ADA or Title VII.

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incorporation by reference, third-party beneficiary theories, waiver and estoppel." *See Arthur Andersen LLP*, 556 U.S. at 631 (quoting 21 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 57:19, at 183 (4th ed. 2001)). These theories of third-party liability do not apply in the present case.

The principles underlying the *Waffle House* decision apply with equal weight in the present case. Like the EEOC in *Waffle House*, the Commonwealth was not a party to the underlying arbitration agreements. Furthermore, the Commonwealth filed its complaint against NCFS-Utah in order to enforce the VCPA on behalf of the public. Although the Commonwealth sought restitution for individual consumers, restitution in this context is similar to the "victim-specific" relief pursued by the EEOC in *Waffle House*. *See Waffle House*, 534 U.S. at 296. The Commonwealth pursued restitution, along with other forms of relief, to vindicate the public interest and enforce the laws of the Commonwealth that are intended to protect consumers. *See generally* Code § 59.1-197 (explaining that the VCPA is intended to "promote fair and ethical standards of dealings between suppliers and the consuming public").

Under *Waffle House* and general principles of contract law, the Commonwealth is not bound by the arbitration agreements at issue. Accordingly, the FAA does not preclude the Commonwealth from pursuing its VCPA enforcement action in a judicial forum. Moreover, the Commonwealth is not precluded from seeking "victim-specific" relief, including restitution for individual consumers, when enforcing the VCPA on behalf of the public. *See Waffle House*, 534 U.S. at 296.

B.

NCFS-Utah also contends that the VCPA did not authorize the Commonwealth to collect restitution for individual consumers. This argument conflicts with the plain language of the pertinent provisions of the VCPA and the remedial purpose of the legislation.

"When the language of a statute is unambiguous, we are bound by the plain meaning of that language."

Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104 (2007). "[I]t is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." *REVI, LLC v. Chicago Title Ins. Co.*, 290 Va. 203, 208 (2015) (quoting *VEPCO v. Board of Cty. Supervisors*, 226 Va. 382, 387-88 (1983)). "[S]tatutes are not to be considered as isolated fragments of law, but as a whole, or as parts of … a single and complete statutory arrangement." *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 384 (2016) (quoting *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957)).

The General Assembly has indicated that the VCPA is to "be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public." *See* Code § 59.1-197. "The legislature seldom chooses to expressly direct the courts how to apply a statute. When it does so we must pay special attention to that choice and ensure that it is given full effect." *Ballagh v. Fauber Enters., Inc.*, 290 Va. 120, 125 (2015). "We construe remedial legislation liberally in favor of the injured party." *Id.*

Pursuant to Code § 59.1-203, "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]." Code § 59.1-203(A). Thereafter, the "circuit court having jurisdiction may enjoin such violations notwithstanding the existence of an adequate remedy at law." *Id.* The circuit court is "authorized to issue temporary or permanent injunctions to restrain and prevent violations of [the VCPA]." Code § 59.1-203(C).

Code § 59.1-205 allows a circuit court to award restitution when it permanently enjoins a practice that violates the VCPA. Pursuant to Code § 59.1-205,

> [t]he circuit court may make such additional orders or decrees as may be necessary to restore to any identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice declared to be unlawful in [Code] § 59.1-200 … , provided, that such person shall be identified by order of the court within 180 days from the date of the order permanently enjoining the unlawful act or practice.

We conclude that Code § 59.1-205 refers to the remedy of restitution, even though it fails to expressly use that particular term.[5] Code § 59.1-205 permits money or property to be "restored" to the victim of a VCPA violation. "'Restitution' is defined, in pertinent part, 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).'" *Howell v. Commonwealth*, 274 Va. 737, 740 (2007) (emphasis added) (quoting Webster's Third New International Dictionary 1936 (1993)).

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[5] Numerous jurisdictions have interpreted identical or similar statutory language to encompass the remedy of restitution. *See California v. IntelliGender, LLC*, 771 F.3d 1169, 1174 (9th Cir. 2014); *People v. Pacific Land Research Co.*, 569 P.2d 125, 127 n.4 (Cal. 1977); *Commonwealth v. ABAC Pest Control, Inc.*, 621 S.W.2d 705, 706 (Ky. Ct. App. 1981); *State v. Master Distribs., Inc.*, 615 P.2d 116, 123 (Idaho 1980); *Kugler v. Romain*, 279 A.2d 640, 642 (N.J. 1971); *Thomas v. State*, 226 S.W.3d 697, 706 (Tex. App. 2007); *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 510 P.2d 233, 241 (Wash. 1973) (en banc).

The plain language of Code § 59.1-203 allows the Attorney General to file an action on behalf of the Commonwealth to enjoin practices that violate the VCPA. In turn, Code § 59.1-205 permits a circuit court to award restitution after it enters an order permanently enjoining an unlawful practice. When Code §§ 59.1-203 and 59.1-205 are read together, the statutes implicitly authorize the Attorney General to request an award of restitution when pursuing a VCPA enforcement action on behalf of the Commonwealth. This construction is consistent with the plain language of the statutory provisions at issue and the remedial purpose of the VCPA. *See* Code § 59.1-197; *Ballagh*, 290 Va. at 125.

III. CONCLUSION

For the reasons stated, we affirm the judgment of the circuit court.

Affirmed.

APPENDIX B

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

[OPINION LETTER]

[letterhead]

May 1, 2019

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Office of the Attorney General
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Richmond, VA 23219
Counsel for Plaintiff

Charles K. Seyfarth, Esquire
O'Hagan Meyer
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Richmond, VA 23219
Counsel for Defendant

Re: *Commonwealth of Virginia, ex. Rel. Mark R. Herring, Attorney General v. Net Credit Financial Solutions of Utah, LLC*, Case No. CL-2018-6258

Dear Counsel:

This matter is before the Court on Net Credit Financial Solutions of Utah's ("Net Credit") Motion to Dismiss or to Compel Arbitration. Net Credit contends that certain portions of this litigation should be dismissed or stayed since the individual borrowers signed arbitration agreements with Net Credit, which would preclude the Commonwealth of Virginia's ("Commonwealth") ability to obtain relief in this matter. The Court is called upon to decide one central issue:

Whether the Commonwealth may pursue litigation against Net Credit on behalf of individuals to enforce the Virginia Consumer Protection Act, Virginia Code §§ 59.1-196 et seq., notwithstanding that the individual borrowers signed binding arbitration agreements with Net Credit?

After considering the pleadings and oral arguments presented by Counsel, the Court finds that the existence of arbitration agreements between Net Credit and individual borrowers does not preclude the Commonwealth from filing this action. Although the borrowers made agreements to pursue their claims with Net Credit through arbitration, the Commonwealth is not a party to those agreements, and has statutory authority to proceed with this action.

I. BACKGROUND

The present Motion to Dismiss stems from loan agreements entered into between Net Credit and private borrowers. The Commonwealth's Complaint alleges several claims, including an allegation that Net Credit violated the Virginia Consumer Protection Act ("VCPA") by misrepresenting the legality of charging more than twelve percent annual interest, among other misrepresentations. *See* Compl. ¶76 (a)-(g). Net Credit is a Chicago-based internet lender that has allegedly provided closed-end installment loans to over 47,000 Virginia consumers at annual interest rates ranging from 35% to 155% between 2012 and 2018. *Id.* Net Credit's contracts with those consumers included mandatory arbitration provisions. In its Complaint, the Commonwealth is seeking restitution, civil penalties, attorneys' fees, and injunctive relief. This Court is called upon to decide whether the Commonwealth may pursue litigation against Net Credit to enforce the VCPA, Virginia Code §§ 59.1-196 et seq.,

although the borrowers signed binding arbitration agreements with Net Credit.

II. STANDARD OF REVIEW

This Court has jurisdiction to determine whether parties are bound to arbitration. "[I]t is the province of the courts to determine the threshold question of arbitrability, given the terms of the contract between the parties. This is so because the extent of the duty to arbitrate, just as the initial duty to arbitrate at all, arises from contractual undertakings. *Doyle & Russell, Inc. v. Roanoke Hospital Assoc.*, 213 Va. 489, 494 (1973). However, a "party cannot be compelled to submit to arbitration unless he has first agreed to arbitrate." *Id.* Whether there has been an agreement to arbitrate on a given issue is a matter of contract interpretation subject to the determination of the courts. *Id.*

III. ARGUMENTS

A. Defendant's Argument

Net Credit contends that the Commonwealth is bound by the arbitration agreements made by the individual borrowers, and thus should be compelled to arbitrate the issues raised in its Complaint. Each loan agreement in question contains an arbitration provision requiring that any disputes between Net Credit and the individual borrowers be resolved by binding arbitration. The Commonwealth cannot assert these claims on behalf of the individual borrowers and then ignore the arbitration agreement between Net Credit and the individual borrowers. Net Credit argues that the relevant case law contradicts the Commonwealth's position. In *Olde Discount Corp. v. Tupman*, the Third Circuit addressed whether the securities commissioner could pursue remedies on behalf of individuals who had contractually

agreed that such claims would be subject to mandatory arbitration. 1 F.3d 202 (3d Cir. 1993). Since the matter would be subject to arbitration if brought by the individuals themselves, the commissioner could not be granted the ability to circumvent arbitration. *Id* at 210. That court decided that to allow the commissioner to pursue litigation would be to render the arbitration agreement a nullity. *Id.* This logic has been subsequently relied upon in the Federal District Court in Delaware. *Ropp v. 1717 Capital Mgmt. Co.*, 2004 WL 93945, at *2 (D. Del. Jan. 14, 2004).

Net Credit argues that *EEOC v. Waffle House*, 534 U.S. 279 (2002) is not dispositive of the matter at hand. *Waffle House* held that the EEOC could not be bound by arbitration provisions between employers and employees, but its value does not extend beyond the area of employment disputes. The VCPA places individuals in control of their own cases, expressly providing for a private right of action by individuals. Va. Code § 59.1-204. Unlike in EEOC actions, both individuals and the Commonwealth may bring separate actions under the VCPA, and it contains no statutory mechanism to prevent duplicative litigation.

B. The Commonwealth's Response

The Commonwealth argues that it is not subject to the arbitration requirement because it was not a party to the arbitration agreements. "It goes without saying that a contract cannot bind a non-party." *EEOC v. Waffle House, Inc.* 534 U.S. 279, 294 (2002). Although *Waffle House* involved a dispute with the EEOC, the VCPA bears many resemblances to the EEOC-enforced Title VII. The Attorney General bears the primary burden of litigation for VCPA claims, like the EEOC does for employment-related claims. Just like in the EEOC process,

when a government agency files a suit under the VCPA, the statute of limitations applicable to private actions is tolled, permitting consumers to defer pursuing individual claims. Va. Code § 59.1-204.1(B). The Commonwealth is not merely a proxy for individuals' claims, and it maintains control over its own cases. The contradictory cases cited by Net Credit are either not binding or precede the Supreme Court's *Waffle House* decision.

IV. ANALYSIS

A. The Commonwealth Possesses Statutory Authority to Pursue Litigation

The General Assembly has set forth plain language supporting the Commonwealth's position. The foundation for the support begins with the "intent" of the VCPA:

> It is the intent of the General Assembly that this chapter shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public.

Va. Code § 59.1-197.

When the General Assembly provides language in "clear and unmistakable terms," it must be followed. *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 657, 604 S.E.2d 403,410 (2004). "When a statute's language is plain and unambiguous, we are bound by the plain meaning of that language." *Mozley v. Prestwould Bd. of Directors*, 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002) (citing *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002); *Earley v. Landsidle*, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999). "Therefore, when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that would be tantamount to holding that the General Assembly

intended something other than that which it actually expressed." *Id.* (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); see *Advanced Marine Enters., Inc. v. PRC Inc.*, 256 Va. 106, 125, 501 S.E.2d 148, 159 (1998). Here, the plain language of Va. Code § 59.1-197 illustrates the General Assembly's intent that the statute be applied to remedy unfair and unethical dealings between suppliers and consumers.

The Commonwealth has statutory authority to pursue the claims through litigation. Virginia Code § 59.1-205 permits a circuit court in a VCPA case to:

> Make additional orders or decrees as may be necessary to restore to any identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice declared to be unlawful in §59.1-200 or 59.1-200.1, provided, that such person shall be identified by order of the court within 180 days from the date of the order permanently enjoining the unlawful act or practice.

Thus, Va. Code § 59.1-205 gives this Court the authority to issue injunctions as individual remedies. Va. Code § 59.1-203 provides that only the Commonwealth or an agent of the Commonwealth may bring an action for an injunction in the framework of the VCPA. The fact that only the Commonwealth may obtain injunctive relief and that the Court is authorized to grant it for individuals insinuates that the Commonwealth may pursue such relief on the part of individual borrowers. If the Commonwealth is authorized to seek injunctive relief under the VCPA on behalf of citizens, then it follows that it may pursue other remedies on behalf of individual borrowers as well.

Finally, the only statute in the VCPA that references arbitration, Va. Code § 59.1-202, prohibits any requirement that the Attorney General submit to arbitration to resolve disputes over its settlements. "Nothing in this chapter shall be construed to authorize or require the Commonwealth, the Attorney General, an attorney for the Commonwealth or the attorney for any county, city or town to participate in arbitration of violations under this section." §59.1-202.

Net Credit's arguments that the Commonwealth is seeking to obtain damages for individuals and might subject it to "double litigation" are incorrect. Instead, the Commonwealth is seeking the following relief as a result of a violation of the VCPA:

"A. That the Court permanently enjoin Defendant and its officers, directors, members, managers, employees, agents, successors and assigns from violating (section) 59.1-200 of the VCPA pursuant to Virginia Code §59.1-203;

B. That the Court grant judgment against the Defendant and award to the Commonwealth all sums necessary to restore to any consumers the money or property which may have been acquired from them by Defendant in connection with its violation of §59.1-200 of the VCPA pursuant to Virginia Code §59.1-205;

C. That the Court enter any additional orders or decrees as may be necessary to restore to any consumers the money or property which may have been acquired from them in connection with its violation of § 59.1-200 of the VCPA pursuant to Virginia Code § 59.1-205;

D. That the Court grant judgment against the Defendant and award to the Commonwealth civil penalties of up to $2,500.00 per violation for each

willful violation of § 59.1-200 of the VCPA pursuant to Virginia Code § 59.1-206(A), the exact number of violations to be proven at trial;

E. That the Court grant judgment against the Defendant and award to the Commonwealth its costs, reasonable expenses incurred in investigating and preparing the case up to $1,000.00 per violation of § 59.1-200 of the VCPA, and attorney's fees pursuant to Virginia Code § 59.1-206 (C); and

F. Grant such other and further relief as this Court deems equitable and proper."

(*See* Compl., at 13).

Net Credit's concern regarding duplicitous recovery is also rebutted by the Court's ability to prevent such an outcome. "Courts can and should preclude double recovery." *Waffle House*, 534 U.S. at 297. Should Net Credit become aware of both the individual borrowers and the Commonwealth seeking the same recovery, it may then petition the Court for relief. Since such duplicitous recovery has not yet occurred or been threatened, the issue is not ripe for the Court to consider at this time. Although the VCPA does not statutorily prohibit consumers from pursuing individual claims while the Commonwealth's lawsuit is pending, Net Credit could obtain the same result through other means. It could follow the actions of the litigants in *In re: Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 2013 U.S. Dist. LEXIS 96449, who successfully moved the court to preclude double recovery.

B. The Binding Case Law Supports the Commonwealth's Ability to Pursue Litigation

The United States Supreme Court has provided guidance on the ability of a government entity to pursue litigation to enforce its laws, even when affected individuals agreed to arbitrate the same disputes. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), the Court allowed the EEOC to pursue employment discrimination claims through litigation, even though the individual employees had agreed to arbitration. In making this decision, the Court did not focus specifically on the structure of the EEOC, but rather on the fact that the Commission was not privy to the agreements that had been made: "[i]t goes without saying that a contract cannot bind a non-party." *Id.* at 294. Here, the Commonwealth was not a party to any of the arbitration agreements made between individual borrowers and Net Credit. Pursuant to the Court's rationale and holding in *Waffle House*, the Commonwealth may not be bound by provisions in contracts it did not agree to. Thus, the Commonwealth is free to pursue these claims through litigation.

V. CONCLUSION

For the foregoing reasons, the Court denies Net Credit's Motion to Dismiss or to Compel Arbitration.

Sincerely,

[handwritten signature]

Daniel E. Ortiz
Circuit Court Judge

APPENDIX C

ARBITRATION PROVISION

GOVERNING LAW, ASSIGNMENT and EXECUTION.

The laws of the State of Utah will govern this Agreement.· However, any dispute arising out of this Agreement will be subject to the ARBITRATION PROVISION (http://portal.netcredit.com/account/7834492/loans/2015VA120578593/contract#arbitration_provision), which is governed by the Federal Arbitration Act ("FAA"). We may assign or transfer this Agreement or any of our rights hereunder. If we approve this Agreement, then you agree that this Agreement will be binding and enforceable as to both parties.

ARBITRATION PROVISION

Arbitration is a process in which persons with a dispute(s): (a) agree to submit their dispute(s) to a neutral third person (an "arbitrator") for a decision; and (b) waive their rights to file a lawsuit in court to resolve their dispute(s). Each party to the dispute(s) has an opportunity to present some evidence to the arbitrator. Pre-arbitration discovery may be limited. Arbitration proceedings are private and less formal than court trials. The arbitrator will issue a final and binding decision resolving the dispute(s), which may be enforced as a court judgment. A court rarely overturns an arbitrator's decision. THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:

Scope.

For purposes of this Arbitration Provision the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all claims, disputes, or controversies arising from or relating

directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Agreement (including the Arbitration Provision), the information you gave us before entering into this Agreement, including your application, and/or any past agreement or agreements between you and us; (c) all counterclaims, cross-claims and third-party claims; (d) all common law claims, based upon contract, tort, fraud, or other intentional torts; (e) all claims based upon a violation of any state or federal constitution, statute or regulation; (f) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us; (g) all claims asserted by you individually against us and/or any of our employees, agents, directors, officers, shareholders, governors, managers, members, parent company or affiliated entitles (hereinafter collectively referred to as "related third parties"), including claims for money damages and/or equitable or injunctive relief; (h) all claims asserted on your behalf by another person; (i) all claims asserted by you as a private attorney general, as a representative and member of a class of persons, or in any other representative capacity, against us and/or related third parties (hereinafter referred to as "Representative Claims"); and/or (j) all data breach or privacy claims arising from or relating directly or indirectly to the disclosure by us or related third parties of any non-pubic personal information about you.

Court and Class Action Waivers.

You acknowledge and agree that by entering into this Arbitration Provision:

a. **YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A COURT OF LIMITED JURISDICTION (e.g., small claims court), RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and**

b. **YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.**

No Class Arbitration.

Except as provided in the Small Claim Disputes paragraph below, all disputes, including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION. THE ARBITRATOR SHALL ALSO NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.

Process.

Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, you shall have the right to select either of the following arbitration

organizations to administer the arbitration: the American Arbitration Association (1-800-778-7879) http://www.adr.org (http://www.adr.org/) or JAMS (1-800-352-5267) http://www.jamsadr.com (http://www.jamsadr.com/). However, the parties may agree to select a local arbitrator who is an attorney, retired judge, or arbitrator registered and in good standing with an arbitration association and arbitrate pursuant to the arbitrator's rules. If you demand arbitration, you must inform us in your demand of the arbitration organization you have selected or whether you desire to select a local arbitrator. If related third parties or we demand arbitration, you must notify us within 20 days in writing by certified mail return receipt requested of your decision to select an arbitration organization or your desire to select a local arbitrator. If you fail to notify us, then we have the right to select an arbitration organization. The parties to the dispute will be governed by the rules and procedures of the arbitration organization applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this Agreement, including the Arbitration Provision. You may get a copy of the rules and procedures by contacting the arbitration organization listed above.

Fees/Awards/Appeals.

Regardless of who demands arbitration, we will advance your portion of the expenses associated with the arbitration, including the filing, administrative, hearing and arbitrator's fees ("Arbitration Fees"). Throughout the arbitration, each party shall bear his or her own attorneys' fees and expenses, such as witness and expert witness fees. The arbitrator shall apply applicable substantive law consistent with the FAA, and applicable statutes of limitation, and shall honor claims of privilege recognized at law. The arbitration hearing will be conducted in the

county of your residence, in the county where this Agreement was signed, or in such other place as ordered by the arbitrator or required by law. The arbitrator may decide, with or without a hearing, any motion that is substantially similar to a motion to dismiss for failure to state a claim or a motion for summary judgment. In conducting the arbitration proceeding, the arbitrator shall not apply any federal or state rules of civil procedure or evidence. If allowed by statute or applicable law, the arbitrator may award statutory damages and/or reasonable attorneys' fees and expenses. If the arbitrator renders a decision in your favor awarding monetary damages and the award is less than the maximum amount allowed to be awarded in the state's court of limited jurisdiction, then your award will be automatically increased to $100 more than that maximum amount. Regardless of whether the arbitrator renders a decision or an award in your favor resolving the dispute, you will not be responsible for reimbursing us for your portion of the Arbitration Fees. At the timely request of any party, the arbitrator shall provide a written explanation for the award. The arbitrator's award may be filed with any court having jurisdiction. Either party may appeal the arbitrator's decision within 30 days to a single arbitrator or a three-arbitrator panel from the same arbitration organization originally chosen, which shall review the award de novo (without regard to the original decision). If you decide to appeal the decision to a single arbitrator, then we will pay your portion of the Arbitration Fees associated with the appeal. If you decide to appeal the decision to a three-arbitrator panel, then you will be responsible for paying the difference in Arbitration Fees between a single arbitrator and a three-arbitrator panel.

Small Claim Disputes.

All parties, including related third parties, shaft retain the right to seek adjudication in the state's court of limited jurisdiction for disputes within the scope of that court's jurisdiction. Any dispute which cannot be adjudicated in that court shall be resolved by binding arbitration. Any appeal of a judgment from that court shall be resolved by binding arbitration.

Interstate Commerce.

This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA. If a final non-appealable judgment of a court having jurisdiction over this transaction finds, for any reason, that the FAA does not apply to this transaction, then our agreement to arbitrate shall be governed by the arbitration law of the State of Utah.

Binding Effect.

This Arbitration Provision is binding upon and benefits you, your respective heirs, successors and assigns. The Arbitration Provision is binding upon and benefits us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and affect, even if your obligations have been prepaid, paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing.

Severability.

If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Provision, unless the

provision precluding the arbitrator from conducting a class arbitration as set forth in the No Class Arbitration paragraph is deemed invalid or unenforceable, in which case this entire Arbitration Provision shall be deemed void.

OPT-OUT PROCESS.

You may choose to opt out of this Arbitration Provision but only by following the process set forth below. If you do not wish to be subject to this Arbitration Provision, then you must notify us in writing postmarked within sixty (60) calendar days of the date of this Agreement at the following address: NC Financial Solutions of Utah, LLC, Attn: General Counsel, 200 W Jackson, Suite 500, Chicago, IL 60606. Your written notice must include your name, address, social security number, the date of this Agreement, a statement that you wish to opt out of the Arbitration Provision and must not be sent with any other correspondence, indicating your desire to opt-out at this Arbitration Provision in any manner other than as provided above is insufficient notice. Your decision to opt out of this Arbitration Provision will not affect your other rights or responsibilities under this Agreement, and applies only to this Arbitration Provision and no prior or subsequent Arbitration Provision to which you and we have agreed.