No. 21-111

In the Supreme Court of the United States

NC FINANCIAL SOLUTIONS OF UTAH, LLC, PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a non-consenting sovereign state that was not a signatory to an arbitration agreement is precluded from seeking victim-specific judicial relief in a government-enforcement action that raises claims on behalf of the state.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Statutes:

TABLE OF AUTHORITIES – Continued

Page

Other Authorities:

In the Supreme Court of the United States

No. 21-111

NC Financial Solutions of Utah, LLC, petitioner

v.

Commonwealth of Virginia, *ex rel.*
Mark R. Herring, Attorney General

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 854 S.E.2d 642 (Pet. App. 1a–12a). The circuit court's letter opinion (Pet. App. 13a–21a) is unreported.

JURISDICTION

The Supreme Court of Virginia issued its decision on February 25, 2021. The petition for a writ of certiorari was filed on July 23, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

The decision below is unremarkable. It holds that, under the Federal Arbitration Act (FAA) and general principles of contract law, the Commonwealth is not

bound by arbitration provisions contained in loan agreements to which the Commonwealth is not a party. This unextraordinary conclusion does not warrant this Court's review.

1. "Predatory lending is an umbrella term that is generally used to describe cases in which a broker or originating lender takes unfair advantage of a borrower," including by charging "[e]xcessive interest rates." U.S. Gov't Accountability Off., GAO-04-280, Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending 18 (2004). Because of the harm predatory lending causes to communities across the nation, many states have enacted usury or consumer protection laws to restrict the interest rates lenders can charge. Carolyn Grose, Of Victims, Villains and Fairy Godmothers: Regnant Tales of Predatory Lending, 2 Ne. U. L.J. 71, 82 (2010).

The Virginia Consumer Protection Act (VCPA) is one such remedial state statute that seeks to "promote fair and ethical standards of dealings between suppliers and the consuming public." Va. Code Ann. § 59.1-197. The VCPA empowers Virginia's Attorney General to "cause an action to be brought in the appropriate circuit court in the name of the Commonwealth . . . to enjoin any violation of [the VCPA]." Va. Code Ann. § 59.1-203(A).

Despite states' efforts to address predatory lending practices through legislation like the VCPA, lenders have attempted "various work-arounds and loopholes to continue offering triple-digit interest rate loans," including "by moving to an unregulated state to escape the reach of state laws." Nathalie Martin, Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap, 34 N. Ill. U. L. Rev. 259, 261 (2014). These lenders frequently "then rely on broad anti-class action and arbitration clauses in contracts in order to escape liability." *Id.*

Petitioner NC Financial Solutions of Utah, LLC (Net Credit) is an unlicensed internet lender headquartered in Chicago, Illinois. Va. S. Ct. J.A. 3.[1] To evade Virginia usury laws that prohibit interest rates above 12%, Va. Code Ann. § 6.2-303, Net Credit's loan agreements included a choice-of-law provision that relied on Utah's more lenient usury laws to charge Virginians interest rates of up to 155% on loans ranging from $1,000 to $10,000 (more than ten times the interest rate limit permitted by Virginia law). Va. S. Ct. J.A. 1, 3, 6–7.[2]

2. The Commonwealth filed suit against Net Credit for violating the Virginia Consumer Protection Act and sought restitution for the excess interest payments that tens of thousands of Virginians made, injunctive relief, civil penalties, and attorney's fees and costs. Va. S. Ct. J.A. 10–13.[3] Net Credit attempted to use the mandatory arbitration clauses in its loan agreements with the individual consumers to preclude the Commonwealth from seeking victim-specific judicial relief in court.[4]

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[1] Citations to the record before the Supreme Court of Virginia are abbreviated as "Va. S. Ct. J.A." and citations to briefing before the Supreme Court of Virginia are abbreviated as "Va. S. Ct. Br."

[2] Net Credit was initially incorporated in Delaware. After facing litigation alleging that Net Credit lacked a sufficient relationship with Utah to justify its choice-of-law provision, Net Credit switched its state of incorporation from Delaware to Utah. Va. S. Ct. J.A. 7.

[3] Specifically, the Commonwealth alleged that Net Credit: (a) charged interest rates in excess of Virginia's usury rates without qualifying for an exception; (b) misrepresented its relationship to Utah to utilize a choice-of-law provision and avoid Virginia's statutory usury cap; (c) misrepresented that a Utah regulatory body "licensed and regulated" its business when that body did not license and regulate it or similar consumer lenders; and (d) unlawfully continued seeking payments from customers even after they filed for bankruptcy. Va. S. Ct. J.A. 8, 12.

[4] Although Net Credit frames the question presented as whether the arbitration agreements preclude the Commonwealth

Va. S. Ct. J.A. 41–42; Pet. 2–4. It is undisputed that the Commonwealth was never a party to these loan agreements.

The trial court denied Net Credit's motion to compel arbitration, reasoning that the Commonwealth had the authority to seek restitution under the Virginia Consumer Protection Act and that Net Credit's arbitration agreements did not preclude the Commonwealth from exercising this statutory authority. Pet. App. 13a–21a.

The Virginia Supreme Court unanimously affirmed. The court rejected Net Credit's broad argument that an award of restitution would conflict with the FAA and general principles of contract law. Pet. App. 5a. In concluding that the FAA did not preclude the Commonwealth from seeking restitution in a judicial forum, the court emphasized that the Commonwealth was not a party to any of the loan agreements between Net Credit and the individual consumers. Pet. App. 5a, 9a. The court explained that both Virginia and federal public policy favored arbitration and that the FAA did not purport "to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Pet. App. 6a (quoting *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009)). After thoroughly considering this Court's decision in *EEOC* v. *Waffle House*, *Inc.*, 534 U.S. 279 (2002), the state supreme court concluded that *Waffle House*'s underlying principles applied in this case, even though the enforcement scheme in *Waffle House* arose

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from seeking victim-specific judicial relief, its contention that "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" makes clear that Net Credit seeks to force the Commonwealth into arbitration in each of the tens of thousands of contracts at issue individually. See Pet. 14.

under federal law. Pet. App. 7a–9a. As further support for its conclusion, the court highlighted the similarities between this case and *Waffle House*, including that, like the EEOC, the Commonwealth (1) was not a party to the arbitration agreements, (2) acted in the public interest, and (3) sought victim-specific relief. Pet. App. 9a.

The Virginia Supreme Court next considered and rejected Net Credit's argument that the Virginia Consumer Protection Act does not authorize the Commonwealth to collect restitution for individual consumers.[5] Pet. App. 9a. The court explained that Net Credit's theory "conflict[ed] with the plain language . . . of the VCPA and the remedial purpose of the legislation." Pet. App. 9a. The court interpreted the Virginia Consumer Protection Act, a state statute, as authorizing the Attorney General to request restitution when pursuing a VCPA enforcement action on the Commonwealth's behalf. Pet. App. 11a–12a.

Net Credit timely filed a petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Nothing about this case makes it appropriate for certiorari. Not only does this Court's decision in *EEOC* v. *Waffle House*, *Inc.*, 534 U.S. 279 (2002), answer the question presented, but *Waffle House* also fused any primeval split that may have existed.

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[5] Net Credit does not—and indeed, cannot—challenge the Virginia Supreme Court's interpretation of Virginia state law. Given that the Virginia high court resoundingly rejected its state-law argument, Net Credit no longer contends that the trial court "impermissibly expanded the Attorney General's authority under the VCPA by allowing him to pursue . . . individualized damages." Net Credit Va. S. Ct. Br. 33 (May 22, 2020). It now rests instead on its argument that the Commonwealth must "tak[e] on the obligations that th[e] agreements impose on the borrowers, including the obligation to arbitrate." Pet. 15.

In *Waffle House*, this Court addressed "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief." 534 U.S. at 282. In concluding that the EEOC was not bound by the private contractual arbitration provision, this Court made clear that the FAA "does not purport to place any restriction on a nonparty's choice of a judicial forum." *Id.* at 289. In other words, even though there is a "liberal federal policy favoring arbitration agreements," *id.* (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991)), the FAA "does not require parties to arbitrate when they have not agreed to do so," *id.* at 293 (quoting *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 478 (1989)). "Arbitration under the [FAA] is a matter of consent, not coercion," *id.* at 294 (quoting *Volt*, 489 U.S. at 479), and "a contract cannot bind a nonparty." *Id.*

I. There is no split: courts agree that governments are not bound by private arbitration agreements they did not sign

It is notable that the Petition for Certiorari does not begin with the circuit split it purports to identify. In the Petition's second argument, Net Credit attempts to manufacture a split between the decision below and two pre-*Waffle House* cases out of the Third and Fourth Circuits. There is no split and any tension arising from these cases has been stale since *Waffle House*. First, neither of the two pre-*Waffle House* cases on which Net Credit relies actually held that non-consenting government entities who are non-parties to an arbitration agreement are bound by that agreement. Second, in the two decades since *Waffle House*, no federal appellate court or state high court has concluded that a non-

consenting state government or agency is bound by a private arbitration agreement it never signed.

1. In its rush to craft a split, Net Credit attributes the concurrence of a single judge in *Olde Discount Corp.* v. *Tupman*, 1 F.3d 202 (3d Cir. 1993), to the Third Circuit itself. It is simply not true, however, that the Third Circuit has "held that public officials who sue on behalf of a party to an arbitration agreement are bound by that agreement." Pet. 21.

a. In *Olde Discount*, a divided panel affirmed the district court's order enjoining state securities regulators from seeking rescission on behalf of two investors who had entered into an arbitration agreement. 1 F.3d at 203. The two judges who formed the majority, however, voted to affirm for different reasons. *Id.* at 203–04.

The authoring judge, Judge Greenberg, spoke only for himself and not for the court when he reasoned that allowing the state agency to seek rescission on the investors' behalf would hinder the FAA's purpose of favoring arbitration—a point Judge Greenberg himself acknowledged. *Id.* at 206 n.3 (Greenberg, J., op.) ("While as a matter of convenience this section of the opinion . . . is written as if for the court, it in fact is the opinion only of Judge Greenberg."); see also *id.* at 207–09 (Greenberg, J., op.). The concurring judge, Judge Rosenn, agreed that the state agency could not seek rescission, but his reasoning relied on contract law, not preemption. *Id.* at 215 (Rosenn, J., concurring). The opening paragraph of the opinion emphasizes this divide. *Id.* at 203–04 ("Judge Greenberg votes to affirm on the grounds that the FAA preempts Delaware's rescission remedy in these circumstances and this opinion reflects the reasons why he has reached this conclusion. Judge Rosenn votes to affirm on the ground that the rescission remedy is barred by reason of contract law as set forth in his separate

concurring opinion."). A single judge's concurrence does not create a splinter, let alone a split.

b. In any event, neither judge's theory helps Net Credit here. The state agency in *Olde Discount* sought equitable relief for a single set of investors under a single arbitration agreement and could have duplicated the relief available to the investors through arbitration. 1 F.3d at 203–05. In contrast, the Commonwealth does not seek "individualized damages" for the individual consumers as Net Credit claims, see, *e.g.*, Pet. 10, 11, 14, 15, 17, but instead acts in the public interest by seeking injunctive relief and restitution consistent with the "remedial purpose of the VCPA." Compare Pet. App. 12a, with *Olde Discount*, 1 F.3d at 205 ("The Notice, however, did not suggest that either Olde Discount or Donohoe had violated any duty to customers other than the Engelhardts; the Notice thus proposed individual relief for the Engelhardts only.").

Judge Greenberg himself emphasized the "distinction between private remedies available in arbitration for one [affected person], versus remedies available through an action of the [agency] for a group of [affected persons]." 1 F.3d at 210 (Greenberg, J., op.). He further noted that "[i]t is conceivable that in the case of widespread violations of uniform character, . . . individualized relief for members of a victimized class of customers might be possible notwithstanding the presence of arbitration agreements, on a theory that the violations did not arise from the particular relationship between the customer and the broker." *Id.* at 210 n.5 (Greenberg, J., op.). Judge Greenberg explained that he "state[s] no opinion on that possibility as it is not before" the court. *Id.*

This case presents precisely the kind of widespread violations of uniform character that Judge Greenberg contemplated in *Olde Discount*. Net Credit's violations of the Virginia Consumer Protection Act do not "arise

from the particular relationship" between Net Credit and individual Virginia consumers, 1 F.3d at 210 n.5 (Greenberg, J., op.), but instead arise from Net Credit's general practices and misrepresentations. See note 3, *supra*. This case, therefore, falls outside of the ambits of Judge Greenberg's opinion.

Lastly, to the extent Judge Rosenn was concerned about the investors attempting an "end run" around their arbitration agreement, that concern is not apparent here for the same reason that Judge Greenberg's opinion is inapplicable: the Commonwealth seeks restitution and is not acting as a proxy for the individual consumers or seeking individualized damages on their behalf. See 1 F.3d at 215 (Rosenn, J., concurring).

c. Even if the Third Circuit had adopted Judge Greenberg's reasoning, any potential split would have been resolved in *Waffle House*. This Court in *Waffle House* reiterated the longstanding principle that arbitration "is a matter of consent, not coercion." 534 U.S. at 294 (quoting *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989)). In concluding that the EEOC was not bound by a private arbitration agreement, this Court rejected the notion that a government agency acts as a proxy for the individuals involved when it sues a defendant or files a charge—a key part of Judge Greenberg's opinion. See *id.* at 291.

2. As to the Fourth Circuit's pre-*Waffle House* case, Net Credit overlooks material distinctions between this case and *United States* v. *Bankers Insurance*, 245 F.3d 315 (4th Cir. 2001). In *Bankers Insurance*, the United States sued Bankers for, *inter alia*, breach of contract on behalf of the Federal Emergency Management Agency (FEMA), which had entered into a contract with Bankers that provided for arbitration. 245 F.3d at 317–18. Unlike the Commonwealth here, the United States through FEMA was actually a party to the arbitration agreement

with Bankers. *Id.* at 319–20. The United States in fact drafted the contract's provisions, including the arbitration provision at issue. *Id.*

The Fourth Circuit concluded that the arbitration clause was enforceable, reasoning that the United States could not sue for breach of contract and simultaneously attempt to evade the same contract's arbitration provision. 245 F.3d at 323. Although the court noted that the Attorney General himself was not a party to the arbitration agreement, his "presence as counsel" did not render the arbitration agreement unenforceable as to the Federal Government because the Attorney General was "serv[ing] as counsel for the Government" and suing on the Federal Government's contract. *Id.* The Fourth Circuit's decision in *Bankers Insurance* stands for the unremarkable proposition that the Government is bound by the contracts that it signs.

In contrast to the Attorney General in *Bankers Insurance*, the Attorney General of Virginia is not serving as counsel for the individual consumers. Instead, the Attorney General represents the Commonwealth itself, a non-party to Net Credit's loan agreements. The Fourth Circuit was silent on the issue here: whether governments are bound (or limited in the victim-specific relief they may seek) by arbitration agreements to which they are not parties. See also *United States ex rel. Roby* v. *Boeing Co.*, 302 F.3d 637, 645 (6th Cir. 2002) (considering *Bankers Insurance* and noting that "[t]hat the Government is bound by the contracts that its authorized officials sign is incontrovertible"); see also *United States* v. *My Left Foot Child.'s Therapy, LLC*, No. 2:14-cv-1786, 2016 WL 3381220, at *4 (D. Nev. June 13, 2016) ("While *Bankers Insurance Co.* suggests that the FCA does not, on its own, foreclose arbitration of *qui tam* claims, the case is silent as to arbitration agreements to which the government is not a party.").

3. The decisions of every federal appellate and state high court to consider this issue post-*Waffle House* confirm that no split exists. Indeed, the First and Ninth Circuits relied on *Waffle House* to explain that state and federal governments, respectively, are not bound by private arbitration agreements to which they are not parties. *Walsh* v. *Arizona Logistics*, *Inc.*, 998 F.3d 393, 394–96 (9th Cir. 2021) (concluding that, because of *Waffle House*, the Secretary of Labor was not bound by a private arbitration agreement to which he was not a signatory when bringing an enforcement action on behalf of the employee against the employer); *Labor Rels. Div. of Constr. Indus.* v. *Healey*, 844 F.3d 318, 329 n.6 (1st Cir. 2016) (noting that "the Attorney General [of Massachusetts] is not alleged in the employers' complaint to be a party to any [collective bargaining agreement] and thus would not appear herself to be bound by any [of the agreement's] terms, including those mandating arbitration of disputes over its meaning"); see also *Cohen* v. *Viray*, 622 F.3d 188, 195 (2d Cir. 2010) (citing *Waffle House* for the proposition that "agreements of private parties cannot frustrate the power of a federal agency to pursue the public's interests in litigation").

Similarly, every state court to consider this issue after *Waffle House* was decided has relied upon *Waffle House* to reach conclusions consistent with the Supreme Court of Virginia's decision. See, *e.g.*, *Rent-A-Ctr.*, *Inc.* v. *Iowa C.R. Comm'n*, 843 N.W.2d 727, 728 (Iowa 2014) ("Because the [state agency] was not a party to the agreement and its interest is not derivative of the employee's, we find the [arbitration] agreement does not limit its ability to bring claims against the employer."); *id.* at 736 ("[I]t should not matter whether a federal or a state civil rights enforcement regime is at issue. Nonparties don't have to arbitrate."); *Joule*, *Inc.* v. *Simmons*, 944 N.E.2d 143, 149 (Mass. 2011) ("The [state agency] is not a party to

the employment agreement at issue here, has not agreed to arbitration of [the] complaint, and cannot be bound by the agreement's arbitration provision."); *State ex rel. Hatch* v. *Cross Country Bank, Inc.*, 703 N.W.2d 562, 569–71 (Minn. Ct. App. 2005) (relying on *Waffle House* to conclude that the non-signatory state was not bound by the arbitration agreement in individual card holders' contracts); *People ex rel. Cuomo* v. *Coventry First LLC*, 915 N.E.2d 616, 619–20 (N.Y. 2009) ("We therefore hold that the arbitration agreement between defendants and their alleged victims does not bar the Attorney General from pursuing victim-specific judicial relief in his enforcement action.").

This Court's decision in *Waffle House* and the ever-growing number of courts to reach the same conclusion confirm that any tension between the opinion below and the pre-*Waffle House* decisions on which Net Credit relies is stale. There is no split for this Court to resolve and no reason for this Court to hear this case.

II. *Waffle House* answers the question presented and supports the decision below

The Petition begins with Net Credit's contention that the Supreme Court of Virginia was wrong. Certiorari predicated on error correction is unwarranted because this Court's decision in *Waffle House* answers the question presented and the Supreme Court of Virginia's decision was consistent with *Waffle House*.

1. Net Credit insists that the Supreme Court of Virginia's decision "depart[ed] from traditional contract principles." Pet. 20. As an initial matter, "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 474 (1989). Interpreting the Net Credit contracts

under Virginia law, the Supreme Court of Virginia—the highest authority on Virginia law—concluded that because the Commonwealth was not a signatory to Net Credit's contracts, the Commonwealth was not bound by them. Pet. App. 9a. The Supreme Court of Virginia likewise applied state law to conclude that: (i) Virginia's Attorney General can seek restitution under the Virginia Consumer Protection Act, and (ii) the Attorney General is "pursuing a VCPA enforcement action *on behalf of the Commonwealth*" and not representing the individual consumers in disguise. Pet. App. 11a, 12a (emphasis added).

It is certainly true that state law may be "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, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415 (2019) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 352 (2011)). But this Court has been clear that "[i]mplied preemption analysis does not justify" the "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that Net Credit demands. *Chamber of Com.* v. *Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion) (quoting *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)); see also *id.* (explaining that courts impose a "high threshold" for a "state law . . . to be preempted for conflicting with the purposes of a federal Act" (quoting *Gade*, 505 U.S. at 110 (Kennedy, J., concurring in part and concurring in judgment))).

2. *Waffle House* itself confirms that the Supreme Court of Virginia properly applied traditional contract principles. Time and again, this Court has emphasized "the consensual nature of private dispute resolution." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010); *Volt*, 489 U.S. at 479 ("Arbitration under

the [FAA] is a matter of consent, not coercion[.]"). Indeed, "[t]he first principle that underscores all of [this Court's] arbitration decisions is that [a]rbitration is strictly a matter of consent," and this Court "refus[es] to infer consent when it comes to [various] fundamental arbitration questions." *Lamps Plus*, 139 S. Ct. at 1415–16 (quoting *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 299 (2010)) (internal quotation marks omitted); *id.* at 1416 ("Consent is essential under the FAA because arbitrators wield only the authority they are given.").

In *Waffle House*, this Court reaffirmed the longstanding principle that a non-party is not bound by arbitration agreements to which it did not agree. 534 U.S. at 289 ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."); see also *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985) ("The [FAA] . . . does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements."); *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").[6]

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[6] In some circumstances, a party that did not sign an arbitration agreement may be bound by that agreement under ordinary third-party principles of contract law. See *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 632 (2009) ("[A] litigant who was not a party to the relevant arbitration agreement may invoke § 3 [of the FAA] if the relevant state contract law allows him to enforce the agreement."). Net Credit, however, has never argued that the Commonwealth is a third-party beneficiary to the loan agreements and has explicitly conceded that the Attorney General himself would not be required to submit to arbitration. Net Credit Va. S. Ct. Br. 43 (May 22, 2020).

Traditional contract principles under Virginia law reinforce the conclusion that the Commonwealth is not bound by an arbitration provision in a contract it never signed. Like the federal policy, "the public policy of Virginia favors arbitration." *TM Delmarva Power, L.L.C.* v. *NCP of Va., L.L.C.*, 557 S.E.2d 199, 202 (Va. 2002). Virginia state courts consider the "law of contracts" when determining whether there is a "valid and enforceable agreement to arbitrate." *Mission Residential, LLC* v. *Triple Net Props., LLC*, 654 S.E.2d 888, 890 (Va. 2008). Under Virginia law, parties generally "cannot be compelled to submit to arbitration unless [they] ha[ve] first agreed to arbitrate." *Id.* (quoting *Doyle & Russell, Inc.* v. *Roanoke Hosp. Ass'n*, 193 S.E.2d 662, 666 (Va. 1973)).

It is undisputed that the Commonwealth is not—and never has been—a party to Net Credit's loan agreements. The Virginia Consumer Protection Act, in fact, forbids the Commonwealth from agreeing to arbitrate VCPA claims. Va. Code Ann. § 59.1-202(B) ("[N]othing 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."). Because the Commonwealth never consented to arbitration, the arbitrability analysis should end here.

a. Net Credit's suggestion that the Commonwealth seeks to merely vindicate private interests or coerce a settlement from Net Credit, see Pet. 4, is entirely unfounded.

Virginia's Attorney General is not a mere puppet whose name consumers can simply "attach[]" to their claim to "circumvent" arbitration provisions. Pet. 26; see also Pet. 4, 13, 15, 16, 27. The Attorney General is an elected constitutional officer who exercises his professional and independent judgment to serve the

public interest in performing his statutory role under the Virginia Consumer Protection Act. Individual consumers may file complaints with the Attorney General, but the Attorney General reviews those complaints and decides himself whether to use government resources to sue the lender on behalf of the Commonwealth, not on behalf of the consumer. See Va. Code Ann. § 59.1-517(A) ("The Attorney General . . . may cause an action to be brought in the name of the Commonwealth or of the locality, as applicable, to enjoin any violation of this chapter by any responsible person and to recover from any responsible person damages for aggrieved persons . . . .").

Interpreting Virginia law, the Supreme Court of Virginia specifically rejected Net Credit's theory that Virginia's Attorney General was simply the borrowers' proxy, explaining that "the Commonwealth filed its complaint against [Net Credit] in order to enforce the VCPA *on behalf of the public*." Pet. App. 9a (emphasis added); accord Net Credit Va. S. Ct. Br. 17–18 (May 22, 2020) (Net Credit arguing to the Supreme Court of Virginia that "the Attorney General, using its public interest enforcement authority as pretense" seeks to "pursue the private remedy of individual-specific damages on behalf of, and for the direct benefit of, individual borrowers"). This reasoning was not restricted to injunctive relief. The Supreme Court of Virginia held that in pursuing restitution under the Virginia Consumer Protection Act, the Attorney General sought "to vindicate *the public interest* and enforce the laws of the Commonwealth that are intended to protect consumers." Pet. App. 9a (emphasis added).

Net Credit nevertheless repeatedly insists to this Court that the Commonwealth is merely a proxy for the individual consumers. See Pet. 2, 13, 15, 16, 20. The Virginia Consumer Protection Act does not support this position, and the Supreme Court of Virginia's

interpretation of the Attorney General's role under Virginia state law is not something "this Court . . . sit[s] to review." *Volt*, 489 U.S. at 474.

b. Net Credit also ignores the difference between a restitution remedy and individual damages. Whereas individual damages seek to compensate victims for their injury, restitution charges the defendant for the defendant's gain. See *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946) (noting that restitution "asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the" injured party); *Restitution*, Black's Law Dictionary (11th ed. 2019) (defining "restitution" as the "[r]eturn or restoration of some specific thing to its rightful owner or status" or as "[t]he set of remedies associated with that body of law, in which the measure of recovery is usu[ally] based not on the plaintiff's loss, but on the defendant's gain"). Individual damages and restitution both arise from the defendant's bad acts, but they may differ in amount. And, to the extent individual consumers conclude that the individual damages they faced exceed the restitution remedy, they can assert those claims in their own actions and would be bound by the arbitration provision in the agreements they signed.[7] Any potential overlap in remedy does not make the Attorney General a mere proxy for the consumers. Cf. *Waffle House*, 534 U.S. at 298 ("The fact that ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims . . . does [not] render the EEOC a proxy for the employee.").

The Commonwealth below recognized that because restitution and individual damages may overlap, an

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[7] Individual consumers pursuing their own claims are limited to restitution only when the defendant establishes that the violation was unintentional. Va. Code Ann. § 59.1-207.

individual customer's settlement of individual damages might trigger traditional principles of res judicata, mootness, or mitigation. Commonwealth Va. S. Ct. Br. 34 n.12 (Jul. 16, 2020) ("That is not to say that individual restitution eligibility or awards would be unaffected by a prior settlement or litigation by a consumer in a private case. . . . But the fact that principles such as res judicata continue to apply has no effect on the arbitration analysis here." (citations omitted)). Net Credit seeks to paint the Commonwealth's recognition of this unremarkable principle as some sort of concession that the Commonwealth "*would* be bound by an individual borrower's agreement to settle claims" against Net Credit and that, therefore, the Commonwealth must also be bound by the arbitration agreement in the borrower's contract. Pet. 15. But the impact of downstream legal principles like mootness, res judicata, or mitigation that may follow from a settlement says nothing of who is bound by that settlement (and certainly says nothing about who is bound by an arbitration provision in the agreement from which the settlement arises).

b. To the extent Net Credit suggests that *Waffle House* does not govern because the Commonwealth asserted claims under a state, not federal, statutory scheme, Pet. 3–4, 18, this distinction weighs *against* certiorari.

As a practical matter, the Commonwealth is in a functionally identical position under the Virginia Consumer Protection Act as the EEOC was under federal law in *Waffle House*. Under the process at issue in *Waffle House*, the EEOC had sole control over the claims it filed and was the "master of its own case." 534 U.S. at 291. When the EEOC filed a charge, it could "seek[] to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursue[d] entirely victim-specific relief." *Id.* at 296. The EEOC

therefore did not merely "stand in the employee's shoes." *Id.* at 297 (noting, *inter alia*, that the EEOC does not have to comply with state statutes of limitations).

As with the EEOC in *Waffle House*, when the Commonwealth investigates claims and chooses to bring suit in a specific case under the Virginia Consumer Protection Act, it too acts in the public's interest; the Commonwealth is not a mere proxy for individual consumers or beholden to their individual desires. See Va. Code Ann. §§ 2.2-517, 59.1-201.1; *Waffle House*, 534 U.S. at 296–97. Like the EEOC, the Commonwealth is not subject to the statute of limitations that applies to private individual actions. See Va. Code Ann. § 8.01-231 ("No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same."). And once the Commonwealth brings an action against a lender under the Virginia Consumer Protection Act, the Commonwealth "is in command of the process" and is "the master of its own case . . . [with] the authority to evaluate the strength of the public interest at stake." See *Waffle House*, 534 U.S. at 291; see also Va. Code Ann. § 59.1-203.

c. Net Credit does not simply ask this Court to place its arbitration agreements "on an equal footing with other contracts." Pet. 14. It asks this Court instead to elevate its contracts above traditional principles of contract law by forcing a non-party—not just any non-party, but a sovereign State—into arbitrations to which the sovereign never agreed, all through arbitration provisions found in contracts that the sovereign has concluded violate state law. Virginia, like all states, is an "independent sovereign[] in our federal system." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). There is therefore an "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless

that was the clear and manifest purpose of Congress." *Id.* (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In keeping with this presumption, the FAA 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).[8]

The Commonwealth here challenges the legality of the contracts of which the arbitration provision is a part. An entity accused of violating state law should not be able to handcuff a sovereign state to arbitration provisions in the very contracts the Commonwealth has concluded are illegal. Net Credit's endeavor to stretch the "liberal federal policy favoring arbitration" so far as to coerce a non-consenting sovereign into arbitration (or to compel the sovereign to abandon its claims) cannot be squared with *Waffle House*. See Pet. 17 (quoting *Concepcion*, 563 U.S. at 339).

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478. Consistent with *Waffle House*, the Supreme Court of Virginia properly rejected Net Credit's attempt to expand its arbitration agreements beyond their terms to bind an entity—here, a sovereign state—that was not a signatory to Net Credit's contracts.

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[8] Net Credit does not seek to hale the Commonwealth into a single arbitration of the Virginia Consumer Protection Act violation issue, but to force the Commonwealth to arbitrate each of the tens of thousands of claims individually. See Pet. 4 ("[B]usinesses and others can reduce the risk of being subjected to such coercion [into settlement] by agreeing in advance to arbitrate disputes individually. *That is what [Net Credit] attempted to do here.*" (emphasis added)); Pet. 10 (explaining that Net Credit sought "to compel individual arbitration").

There is no split in authority to merit this Court's review, nor is error-correction review appropriate. Use of the word "arbitration" alone should not serve as a new third basis to trigger this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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