No. 21-111

IN THE

Supreme Court of the United States

NC FINANCIAL SOLUTIONS OF UTAH, LLC,
Petitioner,

v.

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

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

REPLY BRIEF FOR PETITIONER

CHARLES K. SEYFARTH
ELIZABETH TURNER
O'HAGAN MEYER
411 East Franklin
Street, Suite 500
Richmond, VA 23219
(804) 403-7137

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
DAVID M. LEHN
AMY LISHINSKI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

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INTRODUCTION

Nothing in respondent's opposition changes the critical fact: The Virginia Supreme Court held here that attorneys general can circumvent binding arbitration provisions by seeking individualized relief in court for people who committed that they themselves would seek that relief only in arbitration. That holding contravenes traditional contract principles, under which an arbitration clause precludes a third party from stepping into the shoes of a signatory and litigating claims on her behalf. The Virginia Supreme Court's departure from these traditional principles—principles the court has applied outside the arbitration context—disfavors arbi-

tration agreements. That reprises the very judicial hostility that Congress sought to overcome by commanding in the Federal Arbitration Act (FAA) that arbitration agreements be treated like other contracts. Pet. 1-2, 7. And respondent's effort to circumvent the arbitration provision underscores this Court's recognition that such hostility persists, and hence that the Court "must be alert to new devices and formulas" employed by states to undermine arbitration agreements, *Epic Systems Corporation* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018).

Respondent argues that he could not be bound by the arbitration clause because he was not a signatory. But he concedes that, as this Court has recognized, nonsignatories *can* be bound by arbitration clauses in certain circumstances, and he fails to explain why this is not one of those circumstances. Respondent also contends that *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), exempts public enforcers from traditional contract principles in the arbitration context. To the contrary, *Waffle House* reasoned that the EEOC was not bound *under* those principles, because of specific features of the statutory scheme at issue. Those features are not present here.

As for respondent's attempt to erase or downplay the lower-court division over the question presented, it rests on misreading of the relevant cases (including, again, *Waffle House*).

Finally, respondent does not dispute the petition's argument that whether and under what circumstances attorneys general are bound by arbitration clauses when they seek individualized relief for parties to those clauses is an important—in fact, increasingly important—issue. Respondent's failure to disagree is un-

surprising, as this case epitomizes the trend of attorneys general engaging more and more aggressively in civil enforcement, seeking significant monetary recoveries for sizeable numbers of individuals who would otherwise be required to arbitrate. Whatever the virtues generally of that trend, such enforcement cannot run roughshod over the mandates Congress imposed in the FAA. Because the decision below allows precisely that, this Court's review is warranted.

ARGUMENT

I. RESPONDENT'S DEFENSE OF THE DECISION BELOW IS MERITLESS

A. Respondent Offers No Persuasive Reason Why He Should Be Able To Sue For Individualized Relief Notwithstanding The Arbitration Provision

Respondent's opposition rests largely on the simplistic—and incorrect—view that the FAA never requires enforcement of an arbitration clause against a non-signatory. *E.g.*, Opp.6, 13-14. Respondent even claims (Opp.19) that NCFS "asks this Court … to elevate its contracts *above* traditional principles of contract law by forcing a non-party … into arbitrations" (emphasis added). Respondent grudgingly concedes in a footnote, however, that "[i]n 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." Opp.14 n.6. As the petition made clear, the Virginia Supreme Court's approval of an arbitration-specific carve-out from those ordinary principles is precisely what warrants this Court's review.

In particular, the petition explained (at 13) both that traditional principles allow contracts to be enforced against non-signatories in various circumstances (such as a signatory's alter ego or proxy) and that the Virginia courts have adhered to these principles outside the arbitration context. Even-handed application of the same principles should have led the court below to hold that the arbitration provision at issue precluded respondent from pursuing individualized relief for signatories in court. Pet. 14-15. By instead brushing these principles aside—with only the unexplained conclusory claim that the principles "do not apply in th[is] case," Pet. App. 8a n.4—the decision below violates the FAA, which prohibits states from disfavoring arbitration clauses relative to other types of contracts, Pet. 14, 16-17.

Respondent's attempts to address this chain of reasoning lack merit. First, he protests (Opp.12) that "the interpretation of private contracts is ordinarily a question of state law." That is true, but again, the Virginia Supreme Court's departure from traditional contract principles to avoid enforcing the arbitration provision here violates, and therefore is preempted by, the FAA. Pet. 1-2, 8, 16-17. That conclusion is mandated by this Court's repeated holdings that the FAA requires arbitration agreements to be placed "on an equal footing with other contracts," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011), and that "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 Inc.* v. *Varela*, 139 S. Ct. 1407, 1415 (2019). Accordingly, notwithstanding that contract interpretation is ordinarily a question of state law, the decision below raises a reviewable federal issue. That conclusion is similarly

clear from this Court's cases, including *Southland Corporation* v. *Keating*, 465 U.S. 1 (1984), and *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). *See* Pet. 5-6.

Respondent asserts, however, that "this Court has been clear that '[i]mplied preemption analysis does not justify' [a] 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" Opp.13 (first alteration in original) (quoting *Chamber of Commerce* v. *Whiting*, 563 U.S. 582, 607 (2011) (plurality)). To begin with, a plurality opinion (which relied on a single-Justice concurrence) hardly qualifies as this Court being "clear." More fundamentally, NCFS nowhere urged a "freewheeling" inquiry. NCFS simply argues that the decision below violates the FAA's settled prohibition on states departing from traditional contract law to negate an arbitration clause. Accepting that argument requires no wide-ranging inquiry, but only (1) a reaffirmation that the FAA does not permit the disfavoring of arbitration agreements and (2) a recognition that the decision below does disfavor arbitration agreements, by ignoring contract principles that Virginia courts have (properly) applied outside the arbitration context.

Second, respondent repeatedly asserts (Opp.3-4 n.4, 20 n.8) that NCFS seeks to require *him* to arbitrate. That is wrong; NCFS never sought to compel arbitration with respondent. It moved the trial court to dismiss, under the arbitration agreement, his claims for individualized relief. Pet'r's Va. S. Ct. Br. 43. Indeed, respondent admits this, refuting his own claims by correctly stating that NCFS "conceded that the Attorney General himself would not be required to submit to arbitration." Opp.14 n.6. Respondent cannot prevail by

making incorrect claims and then setting the record straight only in footnotes. (The fact that NCFS does not seek to force respondent to arbitrate also refutes his invocation (Opp.13-14) of the principle that arbitration is a matter of consent rather than coercion.)

Third, respondent asserts that NCFS "never argued that the Commonwealth is a third-party beneficiary to the loan agreements." Opp.14 n.6. That is true but irrelevant, because being a third-party beneficiary is only one of several established bases for holding a non-signatory to a contract. Pet. 13. And NCFS *has* invoked another established basis, namely, that respondent has stepped into the shoes of the signatories, i.e., is a proxy for them. *See* Pet. 13-16.

As to that basis, respondent quotes the Virginia Supreme Court's conclusion that he is not "the borrowers' proxy" because he "'filed [the] complaint … to enforce the VCPA *on behalf of the public*.'" Opp.16 (quoting Pet. App. 9a) (emphasis added by respondent); *see* Opp.15-16. That formalistic *ipse dixit* disregards the fact that respondent seeks individualized monetary relief, 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." Pet. App. 2a. Respondent never denies that he seeks to restore to each borrower the amount each allegedly lost due to NCFS's conduct, i.e., "seeks the amount of loss that each individual borrower allegedly suffered—money he asks the court to restore … in exactly the amount that each allegedly lost," Pet. 15. In asking for such direct, individual-specific awards, respondent is indeed a proxy for the individuals. That he *also* seeks non-individualized relief on behalf of the public—relief that NCFS has never contended is precluded by its arbitra-

tion provision—does not render the individual-specific relief immune to the arbitration clause that the individuals for whom that relief is sought voluntarily signed.*

Respondent charges, however (Opp.17), that NCFS "ignores the difference between a restitution remedy and individual damages." That difference, according to respondent, is that "[w]hereas individual damages seek to compensate victims for their injury, restitution charges the defendant for the defendant's gain." That "difference" is meaningless. Both damages and restitution are amounts of money that individuals seek to be paid by an alleged wrongdoer because of losses purportedly suffered by the former because of the latter's charged conduct. And there is no doubt that restitution is an individualized remedy. The Virginia Supreme Court noted here that "the Commonwealth sought restitution for individual consumers," Pet. App. 9a, and the VCPA provides that a "court may … restore to any identifiable person any money … which may have been acquired from such person by means of any act or practice declared to be unlawful," Va. Code §59.1-205. The label that respondent put on that money is immaterial; he seeks to litigate claims reserved for arbitration.

Finally, respondent argues (Opp.20) that NCFS "should not be able to handcuff a sovereign state to arbitration provisions in the very contracts the Commonwealth has concluded are illegal." But this case is not about whether "contracts … are illegal." In fact, notwithstanding respondent's assertion that he "challenges the legality of [those] contracts" (*id.*), his claims

* In addressing this issue, respondent relies (Opp.16) on Virginia Code §59.1-517(A)—a provision of the Virginia Telephone Privacy Protection Act. That statute has no application or relevance here.

impugn neither the contracts as a whole nor their arbitration provisions. In any event, NCFS's position would not "handcuff" respondent. He would remain free to pursue all the *non*-individualized remedies that his complaint seeks to recover. *See* Pet. 10, 14. But even if an even-handed application of traditional contract principles meant that respondent is bound by the arbitration provision, that would be because federal law (which is the supreme law of the land) required it.

B. Respondent Misreads *Waffle House*

Respondent contends (Opp.14) that *Waffle House* supports the decision below because there this Court supposedly "reaffirmed the longstanding principle that a non-party is not bound by arbitration agreements to which it did not agree." The petition already explained why that claim is doubly wrong—and respondent ignores both reasons. First, *Waffle House* held that the EEOC was not bound by the arbitration provision not simply because the EEOC was a non-signatory, but because the bases for binding a non-signatory were absent: The EEOC's claim was not "merely derivative" of the signatory's claim and the EEOC did "not stand in the [signatory's] shoes" or function as "a proxy for" the signatory. 534 U.S. at 297-298; *see* Pet. 11, 14, 19. Second, as the petition also explained (at 3, 7-8, 14), this Court has repeatedly recognized (including since *Waffle House*) that "traditional principles of state law allow a contract to be enforced … against nonparties to the contract." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009)); *see also GE Energy Power Conversion France SAS, Corporation* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643-1644 (2020).

Likewise infirm is respondent's contention (Opp.18) that *Waffle House* controls here because he "is in a

functionally identical position under the Virginia Consumer Protection Act as the EEOC was under federal law in *Waffle House*." In actuality, his situation is quite different. The VCPA merely authorizes respondent to sue. *See* Va. Code §59.1-203. It does not preclude individuals from suing separately for the same conduct if respondent brings an action, nor does it require anyone to bring potential claims to respondent before suing. In contrast, individuals seeking to bring a federal employment-discrimination lawsuit must: (1) first file a claim with the EEOC; (2) wait while the EEOC investigates, conciliates, and determines whether a lawsuit should be brought; and (3) sit on the sidelines (forbidden from suing) if the EEOC does sue. *See* Pet. 19-20. *That* is why *Waffle House* said that an EEOC claim is not derivative of or a proxy for the employee's claim. *See* 534 U.S. at 285-288, 297-298. And none of that is true for respondent under the VCPA. Again, the petition explained all this; respondent offers no direct answer.

Nor does respondent address the additional important reasons that the petition cited (at 20-21) for why this case differs markedly from *Waffle House*. First, whereas allowing the EEOC's suit would have negligible effect on the federal policy favoring arbitration, the adverse effect on that policy of allowing attorneys general to sue—unilaterally overriding private arbitration agreements—would be significant. Second, whereas *Waffle House* had to harmonize the FAA with another federal statute, there is no such duty with respect to the VCPA here. Respondent's complete silence on all of these myriad points (like that of the Virginia Supreme Court) is revealing, and it confirms that *Waffle House* provides no support for the decision below.

II. RESPONDENT'S ATTEMPT TO ERASE THE DIVISION AMONG THE LOWER COURTS FAILS

As the petition explains (at 21-25), there is division among the lower courts over the question presented: Other state high courts have reached the same conclusion as the Virginia Supreme Court, while 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. Respondent's answer (Opp.6) is that "[t]here is no split and any tension arising from these cases has been stale since *Waffle House*." He is wrong on both points.

A. Respondent's treatment of the Third and Fourth Circuit decisions is mistaken. For starters, he falsely states (Opp.7) that the petition "attribute[d]" Judge Greenberg's opinion in *Olde Discount Corporation* v. *Tupman*, 1 F.3d 202 (3d Cir. 1993), "to the Third Circuit itself." In reality, the petition accurately explained (at 22-23) that Judges Greenberg and Rosenn agreed that a state official could not pursue recission (the remedy at issue) on investors' behalf because of the arbitration agreement the investors signed, but they reached that conclusion for slightly different reasons. *See Olde Discount*, 1 F.3d at 207-209 (op. of Greenberg, J.); *id.* at 215 (Rosenn, J., concurring). Contrary to respondent's assertion, therefore (Opp.7), the Third Circuit did hold that public officials who sued on behalf of a party to an arbitration agreement were bound by that agreement.

Equally flawed is respondent's attempt (Opp.8) to distinguish *Olde Discount* on the ground that he "does not seek individualized damages … but instead acts in the public interest by seeking injunctive relief and restitution." Again, respondent engages in semantics, try-

ing to prevail based on labels rather than substance. What matters is that respondent seeks individualized restitutionary relief for allegedly injured borrowers, which they agreed to seek for themselves in arbitration. *See supra* pp.6-8. Moreover, while respondent also contends (Opp.8) that this case "presents precisely the kind of widespread violations of uniform character that Judge Greenberg contemplated in *Olde Discount*," the "conceivable … theory" (*id.*) that Judge Greenberg floated—but did not conclude was sound—would not apply here. That is because the violations alleged here and the damages sought *do* "arise from the particular relationship between the customer" and NCFS, 1 F.3d at 210 n.5: the specific interest rates and other terms stated in each borrower's NCFS contract, *see* Opp.3 & n.3.

In response to Judge Rosenn's concern that states would (as respondent does) make "'end run[s]' around the terms of [an] arbitration agreement," 1 F.3d at 215, respondent simply repeats his mantra (Opp.9) that he "is not acting as a proxy for the individual consumers or seeking individualized damages on their behalf." As discussed, *see supra* pp.6-8, he plainly is.

Next, respondent tries to distinguish *United States* v. *Bankers Insurance*, 245 F.3d 315 (4th Cir. 2001), on the ground that "the United States through FEMA was actually a party to the arbitration agreement," Opp.9. That misses the point: The Fourth Circuit held that the attorney general—who "was *not* a party" to the contract—was nonetheless bound by the arbitration clause because his claim was "derivative" of FEMA's. 245 F.3d at 323 (emphasis added).

B. Contrary to respondent's assertions (Opp.9), the lower-court conflict was not "resolved in *Waffle*

House," because *Waffle House* did not categorically "reject[] the notion that a government agency acts as a proxy for the individuals involved when it sues a defendant or files a charge." As explained, this Court's analysis turned on the specific features of the EEOC's powers under federal law—features that are absent here. *See supra* pp.8-9; Pet. 18-20. Similarly, the post-*Waffle House* Ninth Circuit decision that respondent cites (Opp.11) turned on specific features of the relevant federal statute that placed the government actor "in command of" the enforcement process. *Walsh* v. *Arizona Logistics, Inc.*, 998 F.3d 393, 396-397 (9th Cir. 2021). And in the post-*Waffle House* First Circuit case that he cites, *Labor Relations Division of Construction Industries* v. *Healey*, 844 F.3d 318 (1st Cir. 2016), the court dismissed for lack of jurisdiction, *id.* at 322. Its statement (based on no analysis) that in a hypothetical suit, the state attorney general "would not appear herself to be bound by" an arbitration provision to which she was not a party, *id.* at 329 n.6, is thus unquestionably dicta. In any event, if respondent's reading of *Walsh* and *Labor Relations* were correct, that would only deepen the conflict, reinforcing the need for this Court's review of the question presented—the importance of which, as noted at the outset, respondent never disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES K. SEYFARTH
ELIZABETH TURNER
O'HAGAN MEYER
411 East Franklin
Street, Suite 500
Richmond, VA 23219
(804) 403-7137

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
DAVID M. LEHN
AMY LISHINSKI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
daniel.volchok@wilmerhale.com

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