No.

In the Supreme Court of the United States

CITIGROUP GLOBAL MARKETS INC.
D/B/A SMITH BARNEY,

Petitioner,

v.

STONEMOR OPERATING LLC et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist * * * for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Petitioner was sued by the successor trustee of a trust for alleged violations of duty arising from a brokerage contract entered into between petitioner and the trustee's predecessor. The Indiana Court of Appeals denied petitioner's motion to enforce the arbitration agreement contained in the very same brokerage contract solely because petitioner had not cited a case "support[ing] the application * * * to the arbitration context" of the general principle that successor trustees are bound by their predecessor's contractual obligations. App., *infra*, 22a. The question presented is:

> Whether Section 2 of the FAA preempts Indiana's special legal rule barring the enforcement of arbitration agreements against successor trustees.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

Petitioner: Citigroup Global Markets Inc. d/b/a Smith Barney.

Respondents: StoneMor Operating LLC, StoneMor Indiana LLC, StoneMor Indiana Subsidiary LLC, Ohio Cemetery Holdings, Inc., Chapel Hill Funeral Home, Inc., Chapel Hill Associates, Inc., Covington Memorial Funeral Home, Inc., Covington Memorial Gardens, Inc., Forest Lawn Memorial Chapel Inc., Forest Lawn Memory Gardens, Inc., and Independence Trust Company.

RULE 29.6 STATEMENT

Citigroup Global Markets Inc. is a wholly-owned subsidiary of Citigroup Financial Products Inc., which is a wholly-owned subsidiary of Citigroup Global Markets Holdings Inc., a wholly-owned subsidiary of Citigroup Inc., which is publicly traded. Citigroup Inc. has no parents and no publicly-held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Citigroup Global Markets Inc. d/b/a Smith Barney respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Indiana in this case.

OPINIONS BELOW

The summary order of the Supreme Court of Indiana denying transfer (App., *infra*, 24a) is reported at 967 N.E.2d 1036. The opinion of the Court of Appeals of Indiana on rehearing (App., *infra*, 12a-23a) is reported at 959 N.E.2d 309. The initial opinion of the Court of Appeals of Indiana (App., *infra*, 1a-11a) is reported at 953 N.E.2d 554.

JURISDICTION

The Supreme Court of Indiana's order denying transfer (and declining to exercise jurisdiction) was entered on May 15, 2012. App., *infra*, 24a. On August 6, 2012, Justice Kagan entered an order extending the time to file a petition for a writ of certiorari until September 12, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, Cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such 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.

STATEMENT

The decision below flouts the FAA's plain text and this Court's precedents. Section 2 of the FAA provides that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2; emphasis added by the Court). This Court repeatedly has emphasized that Section 2 of the FAA means, at minimum, that States may not discriminate against arbitration agreements or single them out for suspect status.[1]

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[1] See, *e.g.*, *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2776 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687-88 & n.3 (1996); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270-71 (1995); *Volt Info. Scis., Inc.* v. *Bd.*

The Indiana Court of Appeals expressly stated that it was declining to apply an otherwise-applicable legal rule solely because this case involves the enforceability of an arbitration agreement. The court acknowledged the black-letter legal principle that "'a successor trustee is bound by contractual obligations entered into by its predecessor trustees relating to the trust.'" Pet. App. 22a (quoting Smith Barney's petition on rehearing, in turn citing George G. Bogert et al., *The Law of Trusts & Estates* § 722). But it refused to hold that the successor trustee here was bound by the arbitration agreement entered into by its predecessor on the ground that "Smith Barney does not cite a single case * * * to support the application of this proposition to *the arbitration context*." *Ibid.* (emphasis added).

By thus singling out arbitration agreements for suspect status, the Indiana court's decision violated the FAA. Specifically, the Indiana court failed to "permit[] arbitration * * * against nonparties to the written arbitration agreement" in accordance with the generally applicable "background principles" of 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 & n.5 (2009) (emphasis omitted). A clearer violation of the FAA's "equal-footing guarantee," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 447 (2006), is hard to imagine.

Moreover, because the Indiana court's failure to comply with the FAA and this Court's precedents is so plain—and because its decision threatens to un-

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of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 & n.11 (1984).

dermine the stable and predictable enforcement of arbitration agreements—this Court should grant certiorari and summarily reverse the decision. Alternatively, the Court should vacate and remand the case for further consideration in light of last Term's *Marmet* decision—handed down after the Court of Appeals of Indiana issued its decision here—in which this Court unanimously confirmed that a State may refuse to enforce an arbitration agreement only if that result is required by "state common law principles that are *not* specific to arbitration." *Marmet Health Care Ctr., Inc.* v. *Brown,* 132 S. Ct. 1201, 1204 (2012) (emphasis added). *Marmet*'s affirmation of that principle provides the lower court with additional guidance regarding the appropriate outcome of this case.

A. The Arbitration Agreement Between Smith Barney And The Predecessor Trustee

Indiana law requires mortuary businesses to establish cemetery trusts in order to provide for the perpetual upkeep of burial plots and other related services. App., *infra*, 1a. In April 2005, Community Trust & Investment Co., Inc. (Community Trust), the trustee of various cemetery trusts—the so-called "Ansure trusts"—opened an account with petitioner Smith Barney and deposited some of the Ansure trust funds into that account. *Id.* at 3a, 41a-42a.[2]

Community Trust agreed to arbitrate any future disputes with Smith Barney. The following state-

[2] The Ansure trusts were established by a number of mortuary businesses: Memory Gardens Management, Ansure Mortuaries of Indiana, and affiliated entities (collectively, the "Ansure companies"). App., *infra*, 27a.

ment appears in bold-face type immediately above the signature line in the Account Application executed by Community Trust: "I acknowledge that I have received the Client Agreement which contains a pre-dispute arbitration clause on page 4, section 6." App., *infra*, 3a, 52a.[3] The arbitration provision itself, which also is in bold type, states:

> I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and [Smith Barney] * * * concerning or arising from (i) any account maintained by me with [Smith Barney] individually or jointly with others in any capacity; (ii) any transaction involving [Smith Barney] * * * and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of [Smith Barney] or otherwise, shall be determined by arbitration.

Id. at 3a, 54a (bold emphasis removed). The Client Agreement further states:

> The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with [Smith Barney] * * * and shall be binding upon my heirs, executors, administrators, assigns or *successors in interest*.

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[3] Relevant portions of the Account Application and Client Agreement are reproduced in the Appendix. See App., *infra*, 51a-56a.

Id. at 55a (emphasis added).

Eight months later, in December 2005, Security Financial Management Company (Security Financial) succeeded Community Trust as trustee of the Ansure trusts. App., *infra*, 5a. Security Financial likewise established an account for the Ansure trusts with Smith Barney and executed an Account Application and Client Agreement containing virtually identical language, including a similarly-worded arbitration provision. *Ibid.*; see Appendix filed in Indiana Court of Appeals (Ind. Ct. App. App'x) pp. 776 ¶ 41, 800 ¶¶ 141-14, 900-907.

B. The Successor Trustee's Assertion Of Claims Against Smith Barney

In 2008, an Indiana court placed the Ansure companies into receivership after their owners allegedly stole millions of dollars from the Ansure trusts. App., *infra*, 5a.

In early 2010, respondent StoneMor Operating LLC (StoneMor) purchased the Ansure companies. App., *infra*, 6a. Concurrently, respondent Independence Trust Company (Independence Trust) was appointed successor trustee of the Ansure trusts. *Ibid.*

In November 2010, Independence Trust and StoneMor sued Smith Barney, alleging that Smith Barney participated in the misappropriation of the Ansure trusts' assets. *Id.* at 2a, 6a, 20a. As the Indiana court recognized, "[i]t is undisputed that Independence Trust is asserting its claims against Smith Barney as a successor trustee to the Ansure trusts." *Id.* at 20a.[4] In other words, Independence Trust

[4] Independence Trust's complaint specifically alleges that Independence Trust has "full legal standing and authority" to assert

seeks to advance claims against Smith Barney based on an alleged breach of the duties flowing from the relationship established by the Client Agreement. *E.g.*, Amended Complaint ¶¶ 190-191, 215, 233-235 (reprinted at Ind. Ct. App. App'x pp. 809, 814, 817).

Within a week after Independence Trust filed its complaint, Smith Barney moved to compel arbitration "pursuant to Sections 3 and 4 of the Federal Arbitration Act" and the Indiana Arbitration Act. App., *infra*, 2a; Mot. to Compel Arbitration (reprinted at Ind. Ct. App. App'x p. 826); see also *id.* at 838-839. Smith Barney argued that Independence Trust was required to arbitrate its claims under the terms of the arbitration agreements executed by its predecessor trustees. App., *infra*, 2a. It further contended that StoneMor was obligated to arbitrate its claims because they were derivative of Independence Trust's claims. *Ibid.*

C. The Trial Court's Ruling

The trial court denied Smith Barney's motion to compel arbitration. It recognized that there was a binding arbitration agreement between Smith Barney and Community Trust, a predecessor trustee of the very same trusts on behalf of which Independence Trust was asserting claims as successor trustee. App., *infra*, 41a-42a ¶¶ 16, 18. But the trial court concluded that Smith Barney had waived its right to compel arbitration. *Id.* at 48a ¶ 46. It did not address respondents' contention that they were not

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the claims of the "Ansure Trusts[] or * * * predecessor Trustees." Amended Complaint ¶ 35 (reprinted at Ind. Ct. App. App'x p. 783); see also *id.* ¶ 29 ("The term 'Independence Trust,' as used in this Complaint, refers to Independence Trust Company *and its predecessors-in-interest*[,] * * * including[] the Ansure Trusts * * * .") (reprinted at Ind. Ct. App. App'x p. 782).

bound by the arbitration agreement because they were not parties to that agreement. *Id.* at 42a-43a ¶ 22.

D. The Appellate Court's Decisions

Smith Barney appealed to the Court of Appeals of Indiana, asserting that the FAA required arbitration of the dispute. See, *e.g.*, Ind. Ct. App. Opening Br. 10, 2011 WL 2616693; Ind. Ct. App. Reply Br. 5, 2011 WL 2616695. Smith Barney argued that, "consistent with the strong public policy favoring arbitration embodied in the FAA," there is a powerful presumption against the waiver of arbitration rights. Ind. Ct. App. Opening Br. 10. Smith Barney pointed that the trial court's waiver finding was not supported by the record because Smith Barney had promptly filed its motion to compel arbitration just *seven days* after Independence Trust and StoneMor initially asserted claims against it. *Id.* at 12-13.

The Court of Appeals of Indiana affirmed, but it did not rest its holding on the supposed waiver that was the trial court's sole basis for denying arbitration. App., *infra*, 11a n.6.

Instead, the Court of Appeals held initially that the arbitration agreement signed by the predecessor trustee (Community Trust) did not bind the successor trustee (Independence Trust) because the agreement referred to "successors *in interest*," which (according to the court) meant "something entirely different from a mere 'successor trustee.'" App., *infra*, 8a (emphasis added). The Indiana court reasoned that "Independence Trust is not a 'successor in interest' to * * * Community Trust * * * and therefore is not bound by the arbitration clause in the Client

Agreement[]" that Community Trust signed with Smith Barney. *Id.* at 10a.

On rehearing, the Court of Appeals of Indiana adhered to its affirmance of the trial court's refusal to compel arbitration, but adopted a different justification for that result. The court acknowledged that Community Trust, as predecessor trustee of the Ansure trusts, agreed to arbitrate its claims against Smith Barney, App., *infra*, 16a, and that "Independence Trust is asserting its claims against Smith Barney as a successor trustee to the Ansure trusts," *id.* at 20a.

The court also acknowledged two fundamental legal principles governing successor trustees:

- A successor trustee succeeds by operation of law to the predecessor trustee's interest in trust property. App., *infra*, 20a (citing *Oak Hill Cemetery of Hammond, Inc.* v. *First Nat'l Bank of Kokomo*, 553 N.E.2d 1249, 1251 (Ind. Ct. App. 1990)).
- A successor trustee is bound by contractual obligations entered into by its predecessor relating to the trust, and therefore a "'successor trustee as trustee [may be sued] on contracts that the predecessor trustee made.'" *Id.* at 22a (quoting Bogert, *supra*, *The Law of Trusts and Trustees* § 722).

Nonetheless, the Indiana court refused to apply these principles to compel Independence Trust to arbitrate under its predecessor's agreement. It rested that holding on Smith Barney's failure to "cite a single case * * * to support the application * * * to the *arbitration context*" of these principles governing the

obligations of successor trustees. App., *infra*, 22a (emphasis added).[5]

Smith Barney petitioned to transfer the case to the Supreme Court of Indiana, arguing that the Court of Appeal's decision was in direct conflict with the FAA and this Court's precedents, which establish that "'courts must place arbitration agreements on an equal footing with other contracts.'" Pet. to Transfer 1 (quoting *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011)).

The Indiana Supreme Court denied review by a 3-2 vote. App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

The Indiana court invoked a novel legal rule—expressly applicable only to arbitration agreements, and not to other contracts—governing the circumstances in which arbitration provisions bind nonsignatories. That ruling violates the FAA because it rests on the Indiana court's refusal to apply acknowledged, generally applicable legal principles in the context of arbitration. As this Court has recognized time and time again, the failure to subject arbitration provisions to the same legal standards as other contract terms is flatly forbidden by Section 2 of the FAA.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer* v. *Inter-*

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[5] Because the Indiana court did not compel arbitration of Independence Trust's claims, it concluded that there was no "basis for compelling StoneMor to arbitrate its claims," App., *infra*, 18a, which are wholly derivative of Independence Trust's.

state/Johnson Lane Corp., 500 U.S. 20, 24 (1991). To that end, Section 2 prohibits courts from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008).

That is precisely what the state court did here, and unabashedly so: The application of an arbitration-specific rule is explicit on the very face of the decision below. Indeed, the court was forthright in refusing to apply the generally applicable legal principle that successor trustees are bound by contractual obligations entered into by their predecessor trustees because of the lack of authority "support[ing] the application" of this "proposition to the *arbitration context*." App., *infra*, 22a (emphasis added). The Indiana court thus explicitly imposed an additional obstacle to enforcement of arbitration provisions that does not apply to the enforcement of other contract terms against nonsignatory successor trustees.

The decision below not only violates the plain terms of the FAA and this Court's precedents, but also is likely to lead to grave consequences if it is permitted to stand. To begin with, this issue will recur time and time again. There are literally tens of millions of brokerage contracts containing arbitration agreements that similarly bind not only customers, but their successors and successors in interest. The inability to enforce those agreements will cast a dark shadow of doubt over the stability and predictability that the FAA was specifically intended to provide.

Moreover, allowing the decision to stand would encourage state courts to apply other discriminatory rules that target only arbitration contracts for invalidation. That opens the door to the widespread judi-

cial hostility to arbitration that Congress enacted the FAA to eliminate.

Because the decision below is contrary to the settled precedents of this Court and will have significant practical consequences, this Court's review is essential. Indeed, just last Term, this Court emphasized that Section 2 of the FAA permits states to refuse enforcement of arbitration provisions *only* on the basis of "state common law principles that *are not specific to arbitration*." *Marmet*, 132 S. Ct. at 1204 (emphasis added). In view of that holding, which was issued after the Court of Appeals' decision on rehearing in this case, this Court may wish to vacate the decision below and remand for reconsideration in light of *Marmet* or summarily reverse on the basis of *Marmet*. Alternatively, the Court should grant plenary review.[6]

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[6] The judgment of the court below is final within the meaning of 28 U.S.C. § 1257(a). This Court has frequently granted certiorari petitions seeking review of state-court judgments finally denying efforts to compel arbitration. See, *e.g.*, *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam); *Perry*, 482 U.S. at 489 n.7; *Southland,* 465 U.S. at 6-8; see also *Marmet*, 132 S. Ct. 1201 (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration agreement); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam); *Doctor's Assocs.*, 517 U.S. 681; *Allied-Bruce Terminix*, 513 U.S. 265.

There similarly is no doubt that petitioner properly raised the FAA claim at the first opportunity it had after the issue arose—when the Indiana court, in its opinion on rehearing, applied the novel, arbitration-specific rule concerning the enforceability of contracts with nonsignatory successor trustees. See, *e.g., PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 85 n.9 (1980); *Herndon* v. *Georgia*, 295 U.S. 441, 443-44 (1935).

A. The FAA Preempts State-Law Limitations On Enforceability That Apply Only To Arbitration Agreements Or That Discriminate Against Arbitration.

Section 2 of the FAA requires enforcement of arbitration provisions notwithstanding contrary state law, subject only to a narrow exception for generally applicable "grounds * * * for the revocation of *any* contract. 9 U.S.C. § 2 (emphasis added). The statute "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing*, 546 U.S. at 443.

"[T]he judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 131 S. Ct. at 1747 (quoting *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Congress enacted the FAA to "overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995). As the Court "ha[s] several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the 'same footing as other contracts.'" *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

That principle means that the FAA, at minimum, absolutely bars States from imposing obstacles to enforcing arbitration agreements that are inapplicable to other kinds of contracts. Thus, a state-law rule limiting the enforceability of arbitration provisions is preempted by the FAA unless "that law arose to govern issues concerning the validity, revocability, and

enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9. In other words, a state-law impediment to arbitration that "conditions the enforceability of arbitration agreements on compliance with a special * * * requirement not applicable to contracts generally," *Doctor's Assocs.*, 517 U.S. at 687, is preempted by the FAA and "must give way." *Perry*, 482 U.S. at 490-491.

This principle is not limited to state laws declaring certain claims non-arbitrable. For example, in *Doctor's Associates*, this Court held that a law imposing a special disclosure requirement on arbitration contracts fell outside Section 2's savings clause "because the State's law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement *not applicable to contracts generally*." 517 U.S. at 687 (emphasis added). An "arbitration-specific limitation" on enforceability, which "sing[les] out arbitration provisions for suspect status," cannot stand. *Id.* at 687 & n.3. And in *Preston*, the Court reiterated that the FAA preempts any state law—there a provision of the California Talent Agency Act—that "imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." 552 U.S. at 356.

More recently, this Court in *Concepcion* confirmed that "courts must place arbitration agreements on an equal footing with other contracts." 131 S. Ct. at 1745. They may not invalidate arbitration agreements on the basis of "defenses that apply only to arbitration," "that derive their meaning from the fact that an agreement to arbitrate is at issue," or that are "premised on the uniqueness of an agreement to arbitrate." *Id.* at 1746-47 (quotation marks omitted). Moreover, courts may not apply a "doctrine

normally thought to be generally applicable" in "a fashion that disfavors arbitration." *Id.* at 1747. And—although disagreeing on other issues—the dissenting Justices in *Concepcion* likewise recognized that the FAA's "basic objective [is] assuring that courts treat arbitration agreements 'like all other contracts.'" *Id.* at 1761 (Breyer, J., dissenting) (quoting *Buckeye Check Cashing*, 546 U.S. at 447; collecting cases).

In sum, the FAA's "substantive command" is that state and federal courts must "treat[]" arbitration agreements "like all other contracts." *Buckeye Check Cashing*, 546 U.S. at 447; see also, *e.g.*, *Marmet*, 132 S. Ct. at 1204 (summary reversal); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (summary reversal).[7]

B. The Indiana Court Refused To Enforce The Arbitration Agreement On The Basis Of A Legal Rule That Is Applicable Only To Arbitration Contracts.

The Indiana court did precisely what the FAA forbids—it deviated from the standard that applies generally to determine the enforceability of contracts against successor trustees, in refusing to enforce the arbitration agreement. Indeed, the lower court's departure from the FAA's equal-footing guarantee is plain from the face of its decision.

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[7] Of course, even a generally applicable contract defense might be preempted if it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1747-48. But application of that broader rule is not necessary to resolve this case, given the FAA's plain text and this Court's clear precedent that arbitration agreements must be treated, at minimum, just like any other contract.

The Court of Appeals acknowledged the black-letter proposition "'that a successor trustee is bound by contractual obligations entered into by its predecessor trustees relating to the trust.'" App., *infra*, 22a (citation omitted). That rule is compelled by the general principle that a successor trustee automatically "succeeds to the title of the trust property" and all duties and obligations "with reference" to that property. *Oak Hill Cemetery*, 553 N.E.2d at 1251 (internal quotation marks omitted). Under Indiana law, legal claims—like any other sort of property, tangible or intangible—constitute a species of trust property. See *In re Trusteeship of Creech*, 159 N.E.2d 291, 295 (Ind. Ct. App. 1959). When a successor trustee brings suit to vindicate some alleged injury to the trust, therefore, it has no more right or ability to assert claims on behalf of the trust than its predecessors would have had—and is subject to all defenses that could have been asserted against the predecessor. See Restatement (Second) of Trusts § 280 cmt. j ("[T]he successor trustee can maintain the same actions or suits as could be maintained by the original trustee.").[8]

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[8] "Although the Client Agreements state that they are governed by New York law," the Indiana court decided the case on the assumption, shared by the parties, that New York law did not "differ[] substantively from Indiana law on any relevant point." App., *infra*, 15a n.1. Indeed, the principle that successor trustees are bound by their predecessor's agreements is commonplace: A creditor may sue "a successor trustee as trustee on contracts that the predecessor trustee made." Bogert, *supra, The Law of Trusts & Estates* § 722*;* see also 76 Am. Jur. 2d Trusts § 237 ("The * * * successor trustee assumes the trust estate subject to all liabilities binding the trust estate in the hands of his or her predecessor"; the "successor trustee * * * steps into the place of the former trustee."); 3A H. Clay Horner et al., *Probate*

The court acknowledged that it was "undisputed" that "Independence Trust is * * * the [successor] trustee of the Ansure trusts" whose accounts were maintained with Smith Barney. App., *infra*, 19a. It also recognized that "Independence Trust is asserting its claims against Smith Barney as a successor trustee to the Ansure trusts." *Id.* at 20a.

But the lower court nonetheless held that Independence Trust was not bound by the arbitration agreement between Smith Barney and the predecessor trustee. The reason for that determination: Smith Barney had cited no case that specifically "support[ed] the application * * * to the *arbitration context*" of the general rule that a successor trustee is bound by its predecessor's agreements. App., *infra*, at 22a (quotation marks omitted; emphasis added).

That holding violates the FAA in two separate, but related, respects. First, the refusal to apply to an arbitration agreement what the court itself acknowledged was a generally applicable principle of law is squarely forbidden by the FAA. Indeed, it is telling that the lower court did not even try to explain how the successor trustee could sue Smith Barney for

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Practice & Estates § 68:12 ("A successor trustee has all the * * * duties that are * * * imposed on the predecessor."); C.J.S. Trusts § 346 ("A new trustee succeeds to all the duties and obligations of his or her predecessors."); *Drummy* v. *Wall Co., Inc.,* 2003 WL 328084, at *2 (Mich. Ct. App. Feb. 11, 2003) ("[A] successor trustee steps into the shoes of his predecessor trustees and is bound by their actions."); *Glover* v. *Wachovia Equity Servicing LLC*, 2011 WL 3794828, at *6 (D. Or. July 18, 2011) ("'NWTS, as successor trustee * * * , stand[s] in the shoes of the original * * * trustee[.]"); *In re Res. Tech. Corp.*, 2006 WL 463344, at *3 (N.D. Ill. Feb. 22, 2006) ("[A]s a successor trustee, he steps into the previous trustee's shoes and is bound by that trustee's conduct.").

breaches of duties created by the contractual relationship between petitioner and its predecessor—*i.e.*, presumably because it stood in the shoes of its predecessor, see Restatement (Second) of Trusts § 280 cmt. j—yet not be bound by the arbitration agreement contained in the very same contract.

Second, and relatedly, by conditioning application of a general principle of law on the existence of a precedent applying the rule specifically in the arbitration context, the Indiana court did precisely the opposite of what the FAA requires. Subjecting arbitration agreements to heightened standards of enforceability—such as requiring the party seeking to enforce an arbitration provision to identify an arbitration-related precedent directly on point—is exactly what federal law prohibits.

The Indiana court's deviation from generally applicable principles of law is confirmed by the decisions of other courts holding that successor trustees are bound by their predecessor's arbitration agreements. For example, the California Court of Appeal has unequivocally declared that "a successor trustee is bound by a valid arbitration agreement executed by a predecessor." *Thomas* v. *Westlake*, 139 Cal. Rptr. 3d 114, 120 n.5 (Ct. App. 2012). The court explained that a successor trustee "'succeed[s] to *all* the rights, duties, and responsibilities of his predecessors,'" which includes the obligation to arbitrate. *Ibid.* (emphasis in original) (quoting *Moeller* v. *Sup. Ct.*, 947 P.2d 279, 283 (Cal. 1997)); accord *In re Amended Watson Trust*, 2011 WL 1631941, at *6 (Ariz. Ct. App. Apr. 28, 2011) (holding that arbitration agreement bound "all other successor trustees"); see also *In re Mercurio*, 402 F.3d 62, 66 (1st Cir. 2005) ("The Trustee stands in the debtor's shoes and

is not entitled to avoid the [arbitral] forum selected by [the debtor]."); *Javitch* v. *First Union Secs., Inc.*, 315 F.3d 619, 625 (6th Cir. 2003) ("[A]rbitration agreements, like other * * * contractual commitments, [are] binding on the bankruptcy trustee to the same extent that they would bind the debtor."); *Hays & Co.* v. *Merrill Lynch*, 885 F.2d 1149, 1153-54 & n.7 (3d Cir. 1989) (similar). To our knowledge, no court has reached a contrary conclusion.

In light of the Indiana court's admission that it was applying different legal standards because an arbitration provision was at issue—and the stark contrast between the result below and those reached by other courts to consider the question—there can be no doubt that the decision below flatly violates the FAA by failing to apply "common law principles that are not specific to arbitration." *Marmet*, 132 S. Ct. at 1204.[9]

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[9] In passing, the Indiana court stated that "the Client Agreements do not indicate that they were signed by the predecessor trustees [*e.g.*, Community Trust] in their representative capacity or that the accounts were opened on behalf of a trust." App., *infra*, 22a. But the trial court found as a fact—a finding never challenged by respondents on appeal—that "Community Trust, by and through David Becher," the individual who signed the Account Application, "act[ed] as Trustees for the Ansure Trusts" in entering into the Client Agreement with Smith Barney. App., *infra*, 41a-42a ¶¶ 16-18; see Amended Complaint ¶¶ 40-41, 134(d) (reprinted at Ind. Ct. App. App'x pp. 787, 799). In any event, Indiana law does not require that contracts entered into by a trustee specify that they were signed on behalf of the trust. Cf. *Kiefer* v. *Klinsick*, 42 N.E. 447, 449-50 (Ind. 1895) ("[I]f the agent transact[s] the business * * * actually for an undisclosed principal, the person with whom the contract is made may * * * elect to hold the principal for the contract[.]"). Holding the arbitration agreement unenforceable on the arbitration-

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The Court should grant review to reaffirm the FAA's equal-footing guarantee. Given the clear inconsistency between the decision below and this Court's precedents, the Court may wish to consider summary reversal.

Alternatively, the Court should grant certiorari, vacate the decision below, and remand the case for reconsideration in light of *Marmet*, which was decided after the Court of Appeals issued its opinion on rehearing and emphasizes that, under the FAA, a state court may refuse enforcement of an arbitration provision only on the basis of "state common law principles that are not specific to arbitration." 132 S. Ct. at 1204. In *Marmet*, as here, a state appellate court "disregard[ed] the precedents of this Court interpreting the FAA" and thus "did not follow controlling federal law implementing that basic principle." *Id.* at 1202. Accordingly, just as in *Marmet*, the state court's decision should "be vacated," because "[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Ibid.* (citing U.S. Const., Art. VI, Cl. 2).

C. If Permitted To Stand, The Decision Below Could Broadly Restrict The Enforceability Of Arbitration Agreements.

The issue presented here has importance far beyond this case. Transfers of contractual rights, and reorganizations producing successors in interest, occur frequently in the commercial sphere.

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specific ground that the predecessor trustees did not explicitly agree to the agreements in their representative capacity would therefore constitute yet another violation of the FAA.

If States were permitted to impose an especially stringent legal standard for binding such successors to arbitration agreements—as the Indiana court did here—that would upset the settled expectations of many entities that the general legal rules determining when a contract is enforceable against a successor also apply in determining whether an arbitration agreement contained in that contract will be enforceable against the successor. Review by the Court is necessary to ensure that the FAA's national policy favoring arbitration is vindicated and not subject to vagaries of state laws and policies that place arbitration provisions on unequal footing.

Indeed, the arbitration agreement in this case was part of a standard form contract commonly used by Smith Barney and its affiliates. See Ind. Ct. App. App'x 886-889. And securities customer agreements that both contain arbitration provisions and bind successors and successors in interest are commonplace. See, *e.g.*, JPMorgan Chase & Co., *Agreement and Disclosures*, available at https://www.chase.com/cm/crb/rfs/file/document/agreements.pdf (binding the "Customer's heirs, executors, administrators, *successors* and assigns") (emphasis added); TD Ameritrade, Inc., *Client Agreement*, available at https://www.tdameritrade.com/forms/AMTD182.pdf (binding the account holder's "heirs, executors, administrators, *successors*, and assigns") (emphasis added); Vanguard Group, *Brokerage Account Agreement*, available at http://goo.gl/vBik8 (binding "heirs, executors, administrators, *successors*, and assigns") (emphasis added); E*TRADE Securities, *Client Agreement*, available at https://us.etrade.com/e/t/prospectestation/help?id=1209031000 (binding "heirs, administrators, representatives, executors, *successors*, [and] assigns, * * * together with all other persons

claiming a legal or beneficial interest") (emphasis added); Scotttrade, Inc., available at http://www.scottrade.com/documents/alt/111_BrokAccAgreement.pdf (binding "heirs, executors, administrators, *successors*, and personal representatives") (emphasis added). The Indiana court's legal ruling could be cited to prevent enforcement of the arbitration agreement contained in these contracts against every successor to an accountholder, potentially numbering in the millions.[10]

More generally, allowing the decision below to stand would embolden state courts to frustrate the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), by manufacturing new legal requirements specific to the arbitration context. As the Court has recognized, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 131 S. Ct. at 1747. The nondiscrimination principle that lies at the core of Section 2 of the FAA provides strong protection against the proliferation of such "devices and formulas." Even state courts that are

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[10] Because the Indiana court arguably applied both New York law and Indiana law on the assumption that they are essentially the same on this issue, see note 8, *supra*, the ruling could provide grounds for refusing to enforce arbitration agreements against successors in a variety of commercial contexts, because New York law is frequently selected in brokerage customer arbitration agreements as well as other financial services agreements. See, *e.g.*, *Kurke* v. *Oscar Gruss & Son, Inc.*, 454 F.3d 350, 357 n.6 (D.C. Cir. 2006); *Coutee* v. *Barington Capital Group, L.P.*, 336 F.3d 1128, 1131-32 (9th Cir. 2003).

hostile to arbitration will be reluctant to announce legal doctrines that undermine the enforceability of arbitration agreements if such doctrines would have to be imposed generally and thereby impair the enforceability of all agreements. Uniform, rigorous application of the FAA's nondiscrimination principle is therefore critical—particularly when, as here, the state court *expressly admits* that it is applying an arbitration-specific rule disfavoring enforcement.

This case is an especially attractive candidate for review—and summary disposition—because it is exceedingly rare for a state court to admit that it has done exactly what Section 2 of the FAA prohibits—*i.e.*, refuse to enforce an arbitration agreement on the basis of an arbitration-specific, state-law principle. The decision below indulges the very "'ancient' judicial hostility to arbitration" that the FAA was enacted to end, *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995), and cries out for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal or, in the alternative, vacatur and remand in light of *Marmet*, 132 S. Ct. 1201.

Respectfully submitted.

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