No. 12-313

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The holding below rests on a legal principle that this Court has rejected repeatedly in its decisions interpreting the Federal Arbitration Act. The Indiana court acknowledged the generally-applicable, commonsense rule that successor trustees are bound by the contractual obligations of their predecessors, but refused to apply that principle to an arbitration agreement. The court candidly explained that it had not been presented with cases specifically applying this "proposition to the arbitration context." Pet. App. 22a. By insisting on an arbitration-specific precedent before applying a legal rule that governs all other contracts, the Indiana court plainly violated the FAA's "substantive command that arbitration agreements be treated like all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 447 (2006); Pet. 13-18.

The brief in opposition does not dispute the settled legal principle that successor trustees are bound by their predecessor trustee's contracts. Respondents instead assert that because the rule stems from "trust" law, not "contract" law, the FAA's protections do not apply, and the Indiana court therefore could single out arbitration contracts for differential treatment. Opp. 17-18 & n.3. According to respondents, the FAA's equal-footing guarantee is implicated only when a court applies *contract* law in a discriminatory fashion.

That crabbed reading of Section 2 cannot be squared with this Court's precedents, which hold that the FAA preempts imposition of *any* state-law "prerequisites to enforcement of an arbitration agreement"—regardless of doctrinal basis—"that are

not applicable to contracts generally." *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008). If respondents were correct, moreover, States would be free to avoid Section 2 of the FAA simply by characterizing any legal rule invalidating arbitration agreements as arising from a "non-contract law" standard.

Apart from this bold and completely erroneous claim, the brief in opposition relies chiefly on misdirection. Respondents falsely characterize the Indiana court's decision and assert that the arbitration provision is unenforceable for other reasons—entirely lacking in merit—that the Indiana court expressly disavowed as the basis for its judgment. This Court has repeatedly rejected identical contentions in past cases, holding that the assertion of "an alternative ground for denying arbitration" that "was not decided below" does not warrant denying review. *Perry* v. *Thomas*, 482 U.S. 483, 492 & n.9 (1987).

Because the decision below conflicts with the FAA on its face, this Court should grant review and summarily reverse or grant certiorari, vacate, and remand the decision below in light of *Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201 (2012).

A. The Decision Below Violates The FAA Because It Rests On A State-Law Rule Applicable Only To Arbitration Agreements.

The brief in opposition confirms that the decision below is directly contrary to this Court's precedents. Settled law—which respondents do not dispute—holds that a successor trustee steps into the shoes of its predecessors and takes on the predecessors' contractual duties relating to the trust. When a successor trustee asserts claims on behalf of the trust, it is

therefore subject to the same defenses that could have been raised against the original trustee. Pet. 16 & n.8; see also, *e.g.*, Restatement (Second) of Trusts § 280 cmt. j. Respondents do not dispute our explanation (Pet. 17-19) that application of this generally-applicable principle would have required the Indiana court to enforce the arbitration provision against Independence Trust.

Respondents instead insist that, because the rule governing successor trustees supposedly has its roots in "trust law," not "contract law," Opp. 14, 17, the FAA does not prohibit the Indiana court from refusing to follow that otherwise-applicable legal rule. According to respondents, only an "accepted theory of contract law" may be invoked to bind a nonsignatory in the arbitration context—not a trust-law principle. *Id.* at 17. They are wrong.

To begin with, the notion that there is some rigid separation between trust law and contract law is simply mistaken; the common law is not divided up into distinct categories defined by law school course catalogs or treatise titles.[1] In any event, respondents' theory cannot save the Indiana court's analysis from FAA preemption, because the question "is one of statutory construction, not of common law distinctions." Cf. *Milanovich* v. *United States*, 365 U.S. 551, 554 (1961).

Respondents' distinction has no basis in the plain text of the FAA, which unqualifiedly provides that

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[1] See *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 610 (7th Cir. 2000) (Easterbrook, J.) ("[P]artnership and fiduciary rules are a part of contract law[.]") (citing John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995)).

arbitration agreements are "valid, irrevocable, and enforceable" as a matter of federal law *except* "upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). Under Section 2, if the state-law "ground[]" for refusal to enforce an arbitration agreement does not apply to "any contract"—whether it is based on common law, statute, public policy, or any other source—it cannot be applied in the arbitration context. See *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 n.5 (2011) (rejecting "limitation [that] appears nowhere in the text of the FAA").

Moreover, this Court has held repeatedly that it would run "directly contrary to the Act's language and Congress's intent" in enacting Section 2 for States to "place[] arbitration clauses on an unequal 'footing'" from other contracts. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686 (1996) (quoting *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995)). Section 2's broad nondiscrimination mandate means, at minimum, that if a *non*-arbitration contract would be enforceable under the generally-applicable state-law rules, a similarly-situated arbitration agreement *also* must be enforceable. Pet. 13-15.

In the very context presented here—determining a nonsignatory's rights and obligations under an arbitration contract—this Court has explicitly held that the "'traditional principles' of state law [that] allow a contract to be enforced * * * against nonparties" in general are available to enforce arbitration agreements against nonsignatories, because arbitration agreements stand "'upon the same footing as other contracts.'" *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009). The Court in *Arthur An-*

dersen did *not* say that only traditional *contract-law* principles are relevant.

The touchstone issue therefore is whether a State has conditioned the enforceability of an arbitration agreement on compliance with a requirement that does not apply to "contracts generally," *Doctor's Assocs.*, 517 U.S. at 687—whether, in other words, the "uniqueness of an agreement to arbitrate" has been relied upon as a basis to deny arbitration. *Perry*, 482 U.S. at 492 n.9; accord *Concepcion*, 131 S. Ct. at 1746. If a court employing generally applicable legal rules in the usual manner would determine that a contract is enforceable, then Section 2 forbids the court from reaching the contrary result simply because the contract is an agreement to arbitrate.[2] Respondents' contention that the FAA's equal-footing guarantee applies only to contract-law principles—and does not prohibit the discriminatory application of other legal principles—is untenable given this Court's precedents.

Respondents try shore up their "contract-law only" principle by contending that the grounds recited in *Arthur Andersen* for enforcing arbitration against nonsignatories—"assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel"—are the exclusive legal bases for requiring a nonparty to arbitrate. Opp. 20. But *Arthur Andersen* did not "declare that these are the *only* state-law principles allowing enforcement of a contract * * * against a nonparty." 1 Larry E. Edmonson, *Domke on Commercial*

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[2] Whether contract law "trumps" trust law in a generic sense is a red herring. Cf. Opp 23. The FAA requires courts to apply *both* sources of law in a nondiscriminatory fashion.

Arbitration § 13:1, at 13-6 (3d ed. 2008) (emphasis added). The point, rather, was that the FAA calls for application of generally-applicable "traditional principles" of state law in *whatever* form they take. See, *e.g.*, *id.* ch. 13 (cataloguing doctrines); 1 Thomas Oehmke, *Oehmke Commercial Arbitration* ch. 9 (3d ed. 2011) (same).

Certainly subsequent decisions applying *Arthur Andersen* have not recognized any such limitation. *E.g.*, *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (recognizing that the direct versus derivative distinction under Delaware corporate law would control nonsignatory enforcement). That is not surprising: A limitation would be nonsensical because the enforceability of most every contract depends on many other interconnected bodies of state law. See, *e.g.*, *Norfolk & W. Ry. Co.* v. *Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) ("A contract depends on a regime of common and statutory law for its effectiveness and enforcement.").

The illegitimacy of respondents' argument is driven home by their acknowledgment that not only "contract law" but also "agency law" is relevant to whether an arbitration clause can be enforced against nonsignatories. Opp. 1, 16, 19, 23. There is no reasoned basis for including agency law but excluding other legal principles relevant to contract enforcement.[3]

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[3] Respondents nevertheless insist that no court has applied trust-law principles in this context. Opp. 20-21. But that is untrue. In *Thomas* v. *Westlake*, 139 Cal. Rptr. 3d 114 (Ct. App. 2012), for example, the California court stated that "a new trustee succeed[s] to all the rights, duties, and responsibilities of his predecessors" and "*[t]hus*, a successor trustee is bound by a va-

None of this Court's cases has endorsed the distinction that respondents have conjured up. To the contrary, they confirm the breadth and sweep of the FAA. State-law principles that disfavor arbitration, "whether of legislative or judicial origin," are preempted. *Perry*, 482 U.S. at 492 n.9; see also *Marmet*, 132 S. Ct. at 1204 (mandating application of "state common law principles that are not specific to arbitration"); *Allied-Bruce*, 513 U.S. at 281 ("any such state policy" that allows a court to "enforce all [a contract's] basic terms," but *not* "its arbitration clause," is preempted).

The patent inconsistency between the Indiana court's decision and this Court's precedents—and the ease with which the FAA's equal-footing guarantee could be evaded if courts were emboldened to single out arbitration agreements for suspect status merely by labeling a legal standard as "*non*-contract law"—makes the decision below an appropriate candidate for summary treatment.

B. The Asserted Vehicle Problems Are Completely Illusory.

Perhaps because the Indiana court's failure to adhere to this Court's precedents is so clear, most of the brief in opposition is devoted to changing the subject. Specifically, respondents contend that the question presented is not properly before the Court because, in their view, there are alternative bases for invalidating the arbitration agreement.

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lid arbitration agreement executed by a predecessor." *Id.* at 120 n.5 (emphasis added).

1. The Indiana court's final decision did not rely on a purported distinction between "successor trustees" and "successors in interest."

Respondents contend that the decision below falls outside this Court's jurisdiction because it rests on an independent-and-adequate state-law ground—namely, that Independence Trust, while undisputedly a "successor trustee," is not a "successor in interest" of the predecessor trustees that signed the Client Agreement. Opp. 15-16, 24-26. This argument blatantly misstates what the Indiana court actually held.

The Indiana court's order on rehearing expressly did *not* rest on this ground: the lower court stated that the arbitration provision was not enforceable against Independence Trust "*[r]egardless* of whether a 'successor trustee' [can] be considered a 'successor in interest' for purposes of the Client Agreements." Pet. App. 23a (emphasis added). Thus, although the Indiana court purported to "affirm[] [its] original opinion" (*ibid.*), the court expressly refused to rest its judgment on the distinction urged by respondents.

Nor could it; in an earlier part of its order on rehearing, the Indiana court accepted without challenge the proposition that a successor trustee is, as a matter of law, the successor in interest to the trust property—and that property includes the legal claims that may be asserted on behalf of the trust. *Id.* at 20a-21a; see also *Oak Hill Cemetery of Hammond, Inc.* v. *First Nat'l Bank of Kokomo*, 553 N.E.2d 1249, 1251 (Ind. Ct. App. 1990); Pet. 16 & n.8.

The decision below thus unambiguously held that it *did not matter* whether Independence Trust

was the "successor in interest" to the predecessor trustee that had entered into the arbitration agreement. And the sole reason it did not matter, in the Indiana court's view, was that this case arose in the "arbitration context"—a justification that violates the FAA's equal-footing guarantee. Pet. App. 22a.[4]

2. Respondents' waiver argument was not reached by the court below.

Respondents admit that the Indiana court "never reached the issue of waiver." Opp. 31. They raise the possibility that there might be further litigation on remand to resolve the waiver issue if this Court were to decide that the FAA preempts the Indiana court's arbitration-specific ruling. That possibility is no obstacle to this Court's review of the issue that the Indiana court *did* decide.

Indeed, this Court so held in *Perry*, explaining that "an alternative ground for denying arbitration" that was not decided below "does not prevent [the Court] from reviewing the ground exclusively relied upon by the courts below." 482 U.S.at 492; see also *id*. at 492 n.9 (refusing to address the plaintiff's unconscionability argument because that issue "was not decided below" and could "be considered on remand").

In *Doctor's Associates*, the Court reversed the Montana court's decision, holding that a notice requirement applying only to arbitration provisions was preempted by the FAA. 517 U.S. at 688. The

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[4] Whether a state-law rule used to invalidate an arbitration provision is one of general applicability is *itself* a federal question. See, *e.g.*, *Concepcion*, 131 S. Ct. at 1747; *Perry*, 482 U.S. at 492 n.9. A decision is not insulated from review when it rests on a state-law ground that is preempted by federal law.

Court did so despite the respondent's contention that one of the petitioners was not entitled to enforce the arbitration provision because he was a nonsignatory. See Opp. 1 n.1, 14, *Doctor's Assocs.*, 517 U.S. 681 (1996) (No. 95-559), 1995 WL 17047945.

This Court has consistently rejected the argument that review and/or summary action is inappropriate because of supposed alternative grounds for refusing to enforce arbitration agreements that were not relied upon by the decision below. *E.g.*. Opp. 1, 16-33, *Marmet*, 132 S. Ct. 1201 (2012) (No. 11-391), 2011 WL 6094899; Opp. 8-14, *KPMG LLP*, 132 S. Ct. 23 (2011) (No. 10-1521), 2011 WL 4073065. Here too, respondents' waiver argument does not prevent the Court from deciding the question presented.[5]

3. The StoneMor entities' supposed "direct" claims are irrelevant to the arbitrability of Independence Trust's claims.

Respondents further assert that even if Independence Trust were compelled to arbitrate, the claims

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[5] Moreover, here there is no basis for an implied-waiver finding. Within a week after the filing of respondents' complaint, Smith Barney moved to compel arbitration under the FAA. Pet. 6-7. Smith Barney's defense of litigation that *other* parties commenced against it *before* respondents were joined as plaintiffs cannot possibly support a finding of waiver as to *respondents*. That is particularly so because the FAA requires that any doubts about arbitrability, including "allegation[s] of waiver [or] delay," be "resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Respondents' "third-party waiver" theory—which is novel and not adopted by any of the cases they cite—is meritless. Cf. *Brock* v. *Allen*, 568 S.E.2d 536, 540 (Ga. Ct. App. 2002) ("[A] waiver as to one party does not necessarily amount to a waiver as to all parties.").

of the StoneMor entities would nevertheless proceed in court. Opp. 21. Again, this contention was not addressed by the court below, and therefore no reason to deny review. See pages 9-10, *supra*.

Even if respondents were correct, moreover, that could not justify the Indiana court's refusal to enforce the arbitration provision against Independence Trust. Just last Term, this Court summarily reversed a state-court decision that committed exactly the same error. It held in *KPMG LLP* that the FAA requires the rigorous enforcement of arbitration provisions—party-by-party and claim-by-claim—even "where the result would be the possibly inefficient maintenance of separate proceedings in different forums." 132 S. Ct. at 265 (quotation marks omitted).

C. Allowing The Decision Below To Stand Would Undermine The Non-Discrimination Principle Embodied In The FAA.

The petition explains (Pet. 20-22) why the question presented is of great importance. Allowing States to impose additional, arbitration-specific restrictions on the enforcement of arbitration agreements against nonsignatories is a paradigmatic violation of the FAA's equal-footing guarantee and would introduce uncertainty in many commercial contexts, where contractual rights and obligations frequently change hands.

Respondents deny none of this. Instead, they say that the Indiana court merely "declined to enforce" the arbitration provision based on the "facts and circumstances of this particular case." Opp. 27. But that is no response—the *reason* that these "facts and circumstances" were deemed insufficient to bind In-

dependence Trust to the arbitration agreement was because of the perceived lack of a legal rule expressly mandating this result in the "arbitration context." Pet. App. 22a. If an arbitration-specific rule can be required here, it can be required in any other legal context as well, completely vitiating the FAA's anti-discrimination principle.

Respondents also claim that this case involved "unique circumstances" surrounding Independence Trust's appointment as successor trustee. Opp. 28. This, too, is a red herring: Nothing in the order appointing Independence Trust as successor trustee purported to relieve it of the contractual obligations that its predecessors made on behalf of the trusts. The order states only that Independence Trust would have authority to pursue "claims relating to missing trust funds * * * as permitted by law." (Opp. App. 21 ¶ 53). Generally-applicable legal principles required that those claims be pursued in arbitration.

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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