No. 21-1188

IN THE
Supreme Court of the United States

PORTFOLIO RECOVERY ASSOCIATES, LLC,
Petitioner,

v.

IRIS POUNDS, CARLTON MILLER, VILAYUAN SAYAPHET-TYLER, and RHONDA HALL, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

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REPLY BRIEF

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INTRODUCTION

In denying PRA's motion to compel arbitration, the court of appeals fashioned a new rule of contract law that does not apply to the assignment of other contract rights: to enforce an arbitration agreement, an assignee now must submit evidence of "additional intent" to transfer the right to arbitrate. As PRA's petition showed, the court of appeals thus violated the equal-footing principle that arbitration rights must be enforced just like any other contract rights.

In response, Respondents concede that the court of appeals imposed an additional-intent requirement on arbitration. But they contend that this requirement applies to *any* right in an assignment. This argument misstates the court of appeals' opinion as well as applicable law. The court of appeals did not apply the additional-intent requirement to other contractual rights, such as the choice-of-law provisions from the underlying credit-card agreements. And the generally accepted law of assignments (including in the states implicated here) requires no specific intent to transfer incidental contract rights, like the right to arbitrate.

Even Respondents cannot maintain that position, since they then concede that *some* rights transfer upon assignment of a debt regardless of additional intent, but insist that the right to arbitrate does not. Respondents provide no authority for this backup position. Nor do they explain why a choice-of-law right passes the test but the right to arbitrate fails it. The lack of any such explanation confirms that discrimination against arbitration is doing the work here.

The court of appeals' discrimination against arbitration is confirmed by the court's refusal to

enforce arbitration agreements that are expressly enforceable by assigns, absent "additional intent" to assign the right to arbitrate. Requiring additional intent to let assigns enforce an arbitration right that is already enforceable on its face by assigns is compelling proof that the court of appeals tilted the playing field against arbitration.

Respondents ask this Court to turn a blind eye to that discrimination based on lip-service citation only to *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). But deferring to such a fig leaf would only encourage the continued circumvention of the equal-footing principle that *Arthur Andersen* sought to defend. Certiorari thus remains necessary to enforce the ban on discrimination against arbitration enshrined in this Court's precedents.

ARGUMENT

Respondents seek to rescue the court of appeals' opinion using four main arguments. First, they contend that specific intent is required to transfer *any* right in an assignment and therefore the court of appeals did not violate the FAA in requiring additional intent to transfer the arbitration right. *See* Respondents' Brief in Opposition ("BIO") 1, 17. Second, in an apparent about-face, Respondents concede that some rights and remedies transfer implicitly along with a debt, but contend that the right to compel arbitration of disputes related to the debt is not one of them. *Id.* at 15-16. Third, Respondents argue—directed at PRA's express right to arbitrate as an assign of two of the debts here—that the arbitration clauses' express statements that assigns are entitled to arbitrate are not enough to render these arbitration agreements enforceable by assigns,

without, again, additional intent to transfer the arbitration right. Fourth, Respondents contend that a bare citation of *Arthur Andersen*, 556 U.S. 624 (2009), shows that the court of appeals discharged its duty to apply the FAA and this Court's FAA jurisprudence. None of these arguments dispels the compelling need for this Court's review.

A. Respondents fail to show that the court of appeals did not impose an impermissible barrier on arbitration.

Respondents' first argument—that specific intent is required to transfer *any* right in an assignment—mischaracterizes the court's opinion and misstates the applicable law.

Respondents' specific intent argument mischaracterizes the opinion because the court required "additional intent" for the enforcement of arbitration rights by assignees. Pet. App. 24. As shown below with the discussion of the choice-of-law clauses, the court's use of "additional intent" betrays what the court intended to and did do: impose an "additional" hurdle on arbitration that does not apply to an assignee's enforcement of other rights or remedies.

Respondents' specific intent argument also misstates the law. Assignees are not limited to enforcing only those rights specifically included in the assignment. *See, e.g.*, *Finch v. Enke*, 54 S.D. 164, 222 N.W. 657, 659 (S.D. 1929) (applying the rule that "in the absence of any provision to the contrary, the unqualified assignment of a chose in action vests in the assignee an equitable title to all such securities and rights as are incidental to the subject-matter of

the assignment"). As summarized by the Utah Supreme Court, "the common law puts the assignee in the assignor's shoes, *whatever* the shoe size." *Sunridge Dev. Corp. v. RB & G Eng'g, Inc.*, 2010 UT 6, ¶ 13, 230 P.3d 1000, 1003 (Utah 2010) (emphasis added). If the rule manufactured here by the court of appeals applied, then it would not be accurate to say that the assignee steps into the shoes of the assignor, which is a short-hand way of saying that although the identity of the counterparty changes, the rights and remedies attached to the thing assigned—*i.e.*, the size of the shoes—remain the same.

The court's new rule, as well as Respondents' specific intent formulation, also violates the principle that the "assignee is subject to any defenses that would have been good against [the assignor]; the assignee cannot recover more than the assignor could recover; and the assignee never stands in a better position than the assignor." *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 16, 28 P.3d 669, 676 (Utah 2001); *see also Kroeplin Farms General P'ship v. Heartland Crop Ins., Inc.*, 430 F.3d 906, 911 (8th Cir. 2005) (Under South Dakota law, "[a]n assignee can obtain no greater rights than the assignor had at the time of assignment.").

The specific characteristics of the debts assigned to PRA—including the amount owed and the means available for collection—are functions of and determined by provisions in the underlying agreements such as choice-of-law clauses, penalty and interest provisions, and forum-selection clauses selecting arbitration. *See* Pet. App. 70-248. According to the court's new rule, as characterized by Respondents, unless there is specific intent to

transfer, these provisions are no longer enforceable post-assignment. Thus, under the court's new rule, the assignment of the debts converted the debts from debts subject to choice-of-law clauses and a forum-selection clause selecting arbitration, among other provisions, to debts that are no longer subject to those provisions.[1] This is another reason why the assignee steps into the assignor's shoes: to preserve the character of the assigned debt, including the debtor's own protections.

The courts' enforcement of the choice-of-law provisions here proves that assignments do not operate in the manner described by Respondents. Respondents argue that "the court of appeals applied Utah and South Dakota law solely on the basis that neither party disagreed with the trial court's conclusion that those state laws governed the issue." BIO 24-25. This argument ignores why the courts below, as well as the parties, agreed that South Dakota and Utah law applied. As Respondents admit, the reason was that the choice-of-law clauses in the credit-card agreements *remained enforceable* following the assignment. BIO 6 ("The trial court then determined that '[t]he question of whether PRA was assigned the right to enforce the agreements is governed by the choice of law provisions in each agreement.'" (quoting Pet. App. 53)). This was the case notwithstanding that the bills of sale do not

[1] Respondents assume that these changes work in their favor, but that is not necessarily the case. A debtor might wish to arbitrate disputes related to the debt, or for Utah or South Dakota law to apply. Moreover, applying the rule Respondents advocate, banks and other entities could collaborate to remove consumer protections by changing the applicable state law and other provisions incidental to the debt through cleverly structured assignments.

evidence any more intent to transfer the choice-of-law provisions than they do arbitration rights. Pet. App. 16-17. That Respondents and each court below understood that the choice-of-law clauses from the credit-card agreements applied to the debts after assignment shows that the so-called specific-intent rule does not apply generally. Moreover, that the court applied its additional-intent rule to the arbitration right but not to the choice-of-law clause proves that the court discriminated against arbitration.

Respondents point to no Utah or South Dakota cases supporting or applying the additional-intent rule manufactured and applied by the court of appeals—nor the specific intent formulation proposed by Respondents. *See* BIO 6-7, 17. Respondents' cases (at 6-7 & 17) discuss the test for determining whether an assignment has occurred in the first place—not whether any particular incidental right transfers upon assignment. Because the assignment of the debts here is undisputed, Respondents' cases are inapposite.

Finally, Respondents concede (at 16) that an "assignment of a contract carries with it any right to compel arbitration contained within the contract." But Respondents do not explain why the assignment of a debt sheds the right to compel arbitration of disputes about that debt. Nor do they explain why the assignment of an account to PRA would not transfer the contract contained within that account, along with the associated arbitration rights. *See* BIO 4 (discussing the assignment of the Citibank account); *see Koch v. Compucredit Corp.*, 543 F.3d 460, 462, 465-66 (8th Cir. 2008) (holding that assignee of credit-card account "assumed all of [credit card company's] rights

and obligations" under credit-card agreement, including arbitration rights).

B. Respondents have not shown that the right to arbitrate disputes related to a debt is not incidental to the debt.

Respondents' second attempt to save the court of appeals' opinion fares no better. Respondents cite a Virginia and a Massachusetts case for the proposition that an "'incident' to an assigned debt includes only an interest that serves as 'security' for the debt or that 'usually or naturally and inseparably depends upon, appertains to, or follows its principal.'" BIO at 16 (discussing *Commonwealth v. Wampler*, 104 Va. 337 (1905), and *A.J. Properties, LLC v. Stanley Black & Decker, Inc.*, 469 Mass. 581 (2014)). These two cases do not address arbitration rights and do not establish that arbitration rights do not transfer. *See A.J. Properties*, 469 Mass. at 591-92 (analyzing whether the assignment of a claim carries with it a collateral cause of action against a third party); *Wampler*, 104 Va. at 340 (same).

On the contrary, arbitration rights do usually, naturally and inseparably depend upon, appertain to, and follow the debt, just like other contract rights pertaining to the debt. *See* Pet. 11-12. For example, according to the Uniform Commercial Code as adopted by both Utah and South Dakota, absent an agreement to the contrary, the right to arbitrate disputes about a credit-card debt, along with the other terms of the agreement that gave rise to the debt, transfer along with the debt's assignment. *See* Utah Code § 70A-9a-404 and S.D. Cod. Laws § 57A-9-404 (specifying that debt assignees take the debt "subject to all terms of the agreement between account debtor

and assignor"); Utah Code § 70A-9a-102(2)(a)(vii) and S.D. Cod. Laws § 57A-9-102(a)(2)(vii) (specifying that the UCC provisions apply to assignments of credit-card debt). Thus, according to the principles applied by Respondents' own cases, PRA received the right to compel arbitration.

C. The court of appeals' failure to enforce arbitration clauses that were expressly enforceable by assigns confirms the discrimination.

Rather than seek to justify the court of appeals' discriminatory treatment of the arbitration right expressly enforceable by assigns, Respondents first contend that this argument is fact-bound and improper for this Court's review. BIO 19. Next, Respondents contend that PRA did not sufficiently make the argument and that it was not decided below. BIO 19. These attempts to dodge PRA's argument are inaccurate and unpersuasive.

First, courts cannot insulate discrimination against arbitration from FAA scrutiny by hiding behind fact-bound inquiries. This Court has rejected attempts to avoid application of the FAA on this basis. *See, e.g.*, *Arthur Andersen*, 556 U.S. at 629 (rejecting attempt to avoid appellate review of interlocutory order denying arbitration to non-signatory, where opposing party contended review would enmesh courts in fact-intensive inquiries).

Moreover, whether a party can enforce rights expressly granted to it under a contract is a key legal question. The courts below successfully answered the relevant fact question by concluding that PRA is an assign of the debt. Pet. App. 16, 57-59. The violation

of the FAA arose when the courts confronted the legal implications of that factual finding: whether PRA, as an assign, is entitled to enforce the arbitration right expressly granted to assigns by two of the credit-card agreements. Pet. App. 33-34.

Mey v. DIRECTV, LLC illustrates the folly of Respondents' argument. 971 F.3d 284 (4th Cir. 2020). There, the Fourth Circuit correctly enforced the plain language of an arbitration agreement granting the right to arbitrate to "affiliates" who were not contracting parties. *Id.* at 289-92. The presence of a factual issue—whether the party seeking to arbitrate qualified as an "affiliate"—did not hinder the application of the FAA to vacate the trial court's refusal to compel arbitration. *Id.* at 289-90. *Mey*, notably, enforced the arbitration right without even discussing third-party beneficiary doctrine. It was sufficient that an affiliate sought to enforce an arbitration clause that was expressly enforceable by "affiliates." *Id.* at 290-92.

Respondents' efforts to cabin *Mey* are not persuasive. Respondents argue that *Mey* "involved a different issue—whether DirecTV, as an 'affiliate' of one of the signatories to an arbitration provision, could enforce the [arbitration] agreement that by its terms applied to 'affiliates.'" BIO 28 (citing *Mey*, 971 F.3d at 289-91). In fact, if we substitute "assign" for "affiliate," Respondents' formulation precisely describes the issue presented by PRA's motion to compel: whether PRA, as an "assign" of one of the signatories to an arbitration provision, can enforce the arbitration agreement that by its terms applies to

"assigns."[2] That the court of appeals and the Fourth Circuit reached diametrically opposite conclusions to this same question confirms the court of appeals' discrimination against arbitration and the need for certiorari.

Moreover, contrary to Respondents' contentions, PRA's argument that it is entitled, as an assign, to enforce the right to arbitrate expressly granted to assigns was both raised and adversely decided below. *See* Pet. App. 17-18, 58-59.

D. The court of appeals' single citation to *Arthur Andersen* does not allow it to circumvent the FAA.

Finally, in response to PRA's argument that the court of appeals sought to circumvent the FAA in violation of *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), respondents rely heavily on the court of appeals' single citation to *Arthur Andersen*, contending no fewer than twelve times that the lone reference shows the court of appeals' faithful adherence to this Court's FAA jurisprudence. BIO 7, 8, 12, 13, 14, 15, 21, 23, 26, 27, 29, 30. There are two problems with this argument.

First, the lone citation does not show that the court of appeals applied the FAA principles set forth in *Arthur Andersen*, *Kindred Nursing*, and other

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[2] Thus, with respect to the debts subject to arbitration clauses expressly enforceable by assigns, there was no need for the court of appeals to consider whether any arbitration right was assigned or transferred to PRA—PRA already had its own arbitration right when it became an assign.

precedent. Respondents do not attempt to show that the court of appeals actually addressed PRA's arguments under the FAA, including that the trial court's ruling violated the equal-treatment principle and impermissibly construed doubts *against* arbitration. *See* BIO 6-7, 13-14. Any attempt to show that the court of appeals addressed these FAA arguments would be futile, as it is plain on the face of the court's opinion that it did not do so. *See* Pet. App. 15-25 (addressing neither the equal-treatment principle nor the construction of doubts in favor of arbitration).

Second, the court of appeals' opinion does not remotely address the substance of *Arthur Andersen*. *Arthur Andersen* involved a non-signatory's attempt to enforce an arbitration agreement by estoppel, and held that, in determining whether the non-signatory could compel arbitration, the court was to look to ordinary principles of state contract law. 556 U.S. at 626, 630-32. Here, rather than apply ordinary principles of contract law under which incidental rights like arbitration transfer with assignment of a contract right, the court of appeals created a *new rule* barring the transfer of arbitration rights absent evidence of additional intent to transfer them. Pet. App. 24-25. The creation of a whole new rule to deny arbitration is a straightforward violation of *Arthur Andersen* and of this Court's FAA jurisprudence. That alone merits this Court's review and reversal.[3]

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[3] Respondents' other arguments likewise fail. They assert that PRA could have avoided the question presented by using different language in the bills of sale, *see* BIO 18, 27-28, 30, but this fails to show that the court of appeals did not discriminate against arbitration here, and, in any event, (allegedly) defeasible discrimination against arbitration finds no shelter in this Court's

CONCLUSION

The court of appeals' refusal to let PRA enforce the right to compel arbitration violated this Court's precedent protecting the equal footing of arbitration agreements. This Court should grant certiorari and reverse. Under the circumstances, summary reversal would be appropriate.

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precedents. Similarly, the fact that a class has not yet been certified here does not undercut the importance of this appeal. *See* BIO 32. For one, Respondents do not disavow their goal of certifying a class. Moreover, if uncorrected, the court of appeals' erroneous holding could deny PRA the right to arbitrate with tens of thousands of potential class members, whether a class is certified or not, and could invite other courts throughout the country to craft similar opinions undermining this Court's cases. That result would flout the federal policy favoring arbitration.

Respectfully submitted,

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