No. 17-1652

IN THE

Supreme Court of the United States

CREDIT ONE BANK, N.A.,
Petitioner,

v.

ORRIN S. ANDERSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

NOAH A. LEVINE
ALAN E. SCHOENFELD
STEPHANIE SIMON
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8875

SETH P. WAXMAN
Counsel of Record
DAVID M. LEHN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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The court of appeals held that Anderson's claim under 11 U.S.C. §524(a) is not arbitrable based on the importance of the Bankruptcy Code's statutory discharge injunction, Anderson's claim that he continued to need its protection, and the court of appeals' own view that only the bankruptcy court could vindicate Anderson's right to that protection. *See* Pet. App. 13a-15a. This Court's decision in *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018), issued after the court of appeals' ruling in this case, forecloses that reasoning. In *Epic Systems*, this Court reaffirmed that another federal statute can displace the Federal Arbitration Act's mandate only if that statute reflects Congress's "clear and manifest" intent to preclude the waiver of judicial remedies with respect to claims under that statute. Certiorari is warranted to confirm that the rule set forth in *Epic Systems* applies with equal force to statutory claims arising under the Bankruptcy Code.

Anderson contends (Opp. 20) that this Court should not grant review simply to "[s]upervis[e] the lower courts' application" of its arbitration precedent. But this Court's intervention is necessary here—as it has been many times before—to ensure adherence to the Arbitration Act in the face of judicial hostility to arbitration. That is especially true here, given lower courts' confusion concerning how to apply this Court's arbitration precedent in the bankruptcy context. Anderson's assertion that review is not warranted due to "unique and limited procedural and factual circumstances" (Opp. 2) is also wrong: This case presents a pure question of law regarding the arbitrability of a statutory claim under the Bankruptcy Code. The litigation events Anderson cites—all of which came after the bankruptcy court denied Credit One's motion to arbitrate Anderson's claim—do not bear on the im-

portance of resolving this question or Credit One's right to have it resolved correctly.

ARGUMENT

I. THE DECISION BELOW DIRECTLY CONTRADICTS SETTLED SUPREME COURT PRECEDENT

The decision below directly contradicts *Epic Systems* and the long line of decisions preceding it, all of which make clear that federal statutory claims are presumptively arbitrable, and that the party resisting arbitration bears a heavy burden in demonstrating that Congress clearly intended otherwise with respect to the *specific claim at issue*. *See* Pet. 11-22. That evidence of congressional intent—whether in the other statute's text or legislative history, or in a claimed conflict between arbitration and that statute's purpose—may not be found lightly. *See Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018).

Certiorari is warranted to correct the court of appeals' departure from this settled law. In concluding that claims brought under 11 U.S.C. §524(a) are categorically exempt from arbitration, the court of appeals did not discern "clear and manifest" congressional intent to displace the Arbitration Act with respect to such claims. *Epic*, 138 S. Ct. at 1624. Rather, the court focused on the importance of the "fresh start" to the Bankruptcy Code, reasoning that "the discharge injunction is integral to the bankruptcy court's ability to provide debtors with the fresh start that is the very purpose of the Code." Pet. App. 13a. Only a court, not an arbitrator, accordingly could be trusted to enforce that injunction: "the bankruptcy court alone possesses the power and unique expertise to enforce" the discharge injunction. *Id.* 15a.

That reasoning reprises the very "judicial hostility to arbitration agreements" that Congress intended to "reverse" in enacting the Arbitration Act, *Shearson/American Exp., Inc.* v. *McMahon*, 482 U.S. 220, 225-226 (1987) (quotation marks and brackets omitted), and cannot be reconciled with *Epic Systems* and this Court's long line of arbitration cases. For decades, the Court has ruled that there is an inherent conflict between arbitration and another federal statute sufficient to justify a finding of implied repeal *only* where the statutory claim could not be vindicated in arbitration. Applying this principle, this Court has repeatedly and consistently rejected arguments that federal statutory claims are non-arbitrable. *See* Pet. 14-15; *see also Epic*, 138 S. Ct. at 1627 ("[i]n many cases over many years" the Court has "rejected *every* … effort" to "conjure conflicts between the Arbitration Act and other federal statutes"). The statutes this Court has previously considered all protect important federal rights, but in each case this Court found no indication that Congress intended to preclude arbitration of those claims because "even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." *Green Tree Fin. Corp.—Ala.* v. *Randolph*, 531 U.S. 79, 90 (2000).

Nothing in the text or legislative history of the Bankruptcy Code suggests an intent to preclude arbitration of a §524(a) claim. *See* Pet. 16-19.[1] To say that a

[1] Anderson suggests these arguments were waived. *See* Opp. 21-22. For the reasons explained in the Petition (*see* Pet. 10 n.4) and those set forth below, there was no waiver. Anderson's own

right is important says nothing about whom Congress trusted to enforce it. The court of appeals' recognition of the importance of the discharge injunction cannot support its conclusion that there is an inherent conflict with the Arbitration Act. The court failed to explain *why* or *how* arbitration of Anderson's claim would actually jeopardize the right to a "fresh start" secured by the Bankruptcy Code, as this Court's precedent requires. Anderson provides no reason either. That is because there is none.

Epic Systems thus confirms that the Bankruptcy Code does "not provide a congressional command sufficient to displace the Arbitration Act" with respect to statutory claims for violation of the discharge injunction. 138 S. Ct. at 1628. Section 524(a) of the Bankruptcy Code, like section 7 of the National Labor Relations Act, "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as [this Court's] precedents demand." *Id.* at 1624. Nor does the policy of ensuring debtors a fresh start, reflected in the statutory discharge injunction, "conflict with Congress's statutory directions favoring arbitration." *Id.* at 1627. And the Bankruptcy Code's provision in §105(a) for action by the "court" to enforce the rights of the Bankruptcy Code, including the §524 discharge injunction, says nothing about whether Congress intended to preclude arbitration of such claims. *See id.* at 1628-1629.

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legislative-history arguments (Opp. 26-28)—which were first presented in the Second Circuit—fare no better. The cited legislative history speaks only to the intended effect of the amendment—protecting debtors from abusive post-discharge collection actions in state courts; it sheds no light on whether Congress intended to preclude arbitration of §524 claims.

Anderson attempts to distract from the conflict with *Epic Systems* by mischaracterizing the petition, contending that the petition seeks to "wring a new rule" from *Epic Systems*' "clear and manifest" language that is somehow contrary to *McMahon*'s inherent conflict test. Opp. 21. Credit One made no such argument. Whether a contrary congressional command is to be discerned from text, legislative history, or an inherent conflict, *Epic Systems* clarifies that "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work," so courts must strive to read the Arbitration Act and other federal statutes in "harmon[y]." 138 S. Ct. at 1624. What follows from those bedrock principles is that congressional intent to carve out an exception to the Arbitration Act for a particular federal statutory claim cannot be inferred lightly and certainly cannot be inferred based simply on the importance of the statutory right sought to be vindicated.

II. THE DECISION BELOW REFLECTS THE CONFUSION AMONG THE LOWER COURTS, WARRANTING REVIEW

Anderson contends that "there is no circuit split" presented by the petition. Opp. 12 (capitalization altered). Credit One never said otherwise. Rather, Credit One explained that certiorari is warranted based on the conflict with this Court's Arbitration Act precedent, including and especially *Epic Systems*. *See* S. Ct. R. 10(c).

Anderson is also incorrect to assert that the courts of appeals are consistent in their method of resolving the question presented. Although the courts reached the same outcome concerning the arbitrability of claims for violation of the discharge injunction, the Second Circuit's approach conflicts with the Fifth Circuit's ap-

proach in *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997). In affirming the bankruptcy court's denial of the arbitration motion in that case, the Fifth Circuit distinguished between actions derived from the debtor's pre-petition legal rights and actions derived entirely from the Bankruptcy Code, and said with respect to the latter, the bankruptcy court retains almost unbridled discretion to refuse to compel arbitration. *Id.* at 1068-1069.

The Second Circuit has not adopted that approach. Although the court concluded that Anderson's discharge-injunction claim was non-arbitrable, it did not adopt *Gypsum*'s distinction premised on whether the right at issue is derived from the Bankruptcy Code. That is a distinction with a difference, as demonstrated by the court of appeals' decision in *MBNA America Bank, N.A.* v. *Hill*, 436 F.3d 104 (2d Cir. 2006). There, the court held that the bankruptcy court had *no* discretion to refuse to compel arbitration of the debtor's automatic-stay claim, which, like a claim for violation of §524, is derived solely from the Bankruptcy Code. *See id.* at 110-111.

This difference in approach confirms the confusion in the courts of appeals when it comes to applying this Court's Arbitration Act precedent in the Bankruptcy Code context. Anderson attempts to harmonize the cases by asserting that they all "applied the *McMahon* inherent conflict test." Opp. 16-20. But this assertion of uniformity at the highest level of generality—*i.e.*, agreement that the Court's inherent conflict test applies—does not establish that the cases "tell a clear and consistent story." Opp. 16. The confusion lies in the *way* courts apply the inherent conflict test to claims in the bankruptcy context, a conflict that Anderson never disputes. This Court's intervention is necessary to

"clear th[is] confusion." *Epic*, 138 S. Ct. at 1621. Contrary to Anderson's assertion (at 19-20), this is precisely the role this Court does and should embrace—indeed, routinely in the arbitration context.

None of Anderson's other attempts (at 17) to distinguish the court of appeals cases the Petition cites is persuasive: (i) for the reasons explained below, this case "did not involve the bankruptcy court's enforcement of its own orders in a contempt proceeding"; (ii) there is no greater need for "uniformity" concerning claims for violation of the discharge injunction than there is for any claim asserting federal statutory rights, and Congress accepted the risk of inconsistent results in enacting the Arbitration Act;[2] and (iii) arbitration of Anderson's §524 claim "would not have disrupted the efficient adjudication of the estate, other creditors' rights in that estate, or the protection of the fresh start" because Anderson's bankruptcy case was already closed and his estate administered.

III. THIS CASE IS A GOOD VEHICLE

Anderson argues for a variety of reasons that this case is a poor vehicle, but none is persuasive.

A. Anderson's insistent refrain—invoked more than 30 times—is that this case is unsuited for review because the Second Circuit's decision concerned only whether "a contempt proceeding for a violation of the

[2] The fact that classwide litigation would potentially result in greater uniformity than individual arbitrations is of course not itself grounds for invalidating arbitration agreements under this Court's precedent. *See American Exp. Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 235 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-351 (2011).

discharge injunction" can be compelled to arbitration and contempt proceedings are special because they involve a bankruptcy court enforcing its own order. Opp. 2.

That argument ignores the specific claim that Anderson has claimed to pursue in this litigation, that was recognized by the bankruptcy court hearing his case, and that was adjudicated by the courts below. Anderson has not purported to bring a claim invoking the bankruptcy court's inherent power to enforce the discharge *order* entered in *his* bankruptcy case through contempt of court. Rather, Anderson has said he brings a claim for violation of the *statutory* discharge injunction found in §524 of the Bankruptcy Code, which, while frequently remedied pursuant to the *standards* for civil contempt, is not itself a contempt claim. *See* Pet. App. 59a, 75a (operative complaint alleging all class members' "claims [are] based upon the same legal theory, *i.e.*, that Defendants have violated the injunction contained in § 524(a)(2)").

This distinction is important, as Anderson seeks to bring this claim on behalf of a putative nationwide class of debtors whose discharge orders were entered by other bankruptcy courts across the country. If Anderson were asking to hold Credit One in contempt for violating the discharge order entered in *his* case, he would not be able to litigate on behalf of a nationwide class. In parallel proceedings before the same bankruptcy court, Anderson's counsel has claimed that the cases are "not seeking contempt under the inherent power of the court" but instead "sanctions for contempt based on the violation of a statute and to be enforced by a statute." *Haynes* v. *Chase Bank USA, N.A.*, Adv. Proc. No. 13-08370, Dkt. 46 at 25 (Bankr. S.D.N.Y. June 9, 2014); *see also id.* at 23 ("The injunction is a statutory

provision, not a court order … . The cause of action is simply a remedy for enforcing a statutory prohibition that protects debtors.").

Importantly, the bankruptcy court hearing this case has taken that view, finding it critical to allowing the cases to continue as putative class actions. In refusing to dismiss the class action claims in the coordinated proceedings, the bankruptcy court has said that "[i]t's the statute itself that sets forth the [discharge] injunction," not a court order. *Echevarria* v. *Bank of Am. Corp.*, Adv. Proc. No. 14-08216 (RDD), Dkt. 36 at 37-38 (Bankr. S.D.N.Y. Sept. 16, 2014). Accordingly, the court noted, an adversary proceeding to enforce the injunction is an action "to enforce a statutory provision." *Id.*

For this reason—contrary to the Opposition—Anderson and his counsel have repeatedly argued before the lower courts that they are pursuing a statutory claim for violation of §524 rather than invoking the bankruptcy court's inherent power to enforce its own discharge order. Anderson cannot have it both ways.

B. Anderson also argues that Credit One "waived the argument that the text or legislative history of the Bankruptcy Code shows no conflict with arbitration." Opp. 21-22.

Anderson gets the inquiry backwards. As the party resisting arbitration, *he* had the "burden … to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227. *His* failure to prove that the text or history of the Bankruptcy Code supported his congressional-intent theory does not mean that *Credit One* waived those arguments.

Anderson is wrong on the facts, too, as Credit One explained in the Petition (at 10 n.4) and his Opposition ignores. Credit One argued to the bankruptcy court in its arbitration motion that congressional intent to preclude arbitration of Anderson's claim was not evident from the text or history of the Bankruptcy Code. *See Anderson* v. *Credit One Bank, N.A.*, Adv. Proc. No. 15-08214 (RDD), Dkt. 7 at 17 (Bankr. S.D.N.Y. Mar. 3, 2015) (arguing "there is no conflict between the FAA and the Bankruptcy Code justifying denial of a motion to compel arbitration," and "there is no indication from the statute that any dispute relating to … [the] discharge injunction … should categorically be exempt from resolution by arbitration" (internal quotation marks, brackets, and citation omitted)); *see also id.* at 17 n.11.

Credit One repeated those arguments in the district court. *See Anderson* v. *Credit One Bank, N.A.*, No. 15-4227 (NSR), Dkt. 33 at 14 (S.D.N.Y. Mar. 5, 2016) ("nothing in the Bankruptcy Code's text or legislative history support the conclusion that Congress intended to preclude arbitration of Section 524 claims" (quotation marks omitted)); *see also id.* 14 & n.17. The court of appeals (Pet. App. 10a) and the district court (*id.* 24a n.3) were simply incorrect that Credit One failed to preserve the arguments.

Moreover, these types of statutory-interpretation arguments could not be waived in the manner the court of appeals and Anderson contend. This Court's interpretation of a federal statute cannot be limited by the precise arguments made by the parties below. *See* Pet. 10-11 n.4. And Credit One's arguments based on the text and legislative history are "not separate claims, but separate arguments in support of a single claim"—that there was no evidence of congressional intent to

preclude arbitration of Anderson's claim—and thus could not have been waived. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992).

C. Finally, Anderson argues that this case is inappropriate for review because the bankruptcy court entered a default judgment against Credit One on the merits of his individual claim. *See* Opp. 29-30.

While the bankruptcy court stated that it had concluded that a default judgment was "the appropriate sanction" for certain discovery matters, the court has not actually entered a default judgment. *Anderson* v. *Credit One Bank, N.A.*, Adv. Proc. No. 15-08214 (RDD), Dkt. No. 101 at 4 (Bankr. S.D.N.Y. Nov. 10, 2016). The entry of a default judgment, moreover, would have no bearing on whether the pure legal question presented—which concerns the arbitrability of Anderson's claim—merits this Court's review. Because the parties had a valid and enforceable arbitration agreement that covered their dispute, this case should never have entered discovery. A ruling from this Court compelling arbitration can and should properly restore the *status quo ante*. *See Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1410 (9th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should grant, vacate, and remand in light of *Epic Systems*.

Respectfully submitted.

NOAH A. LEVINE
ALAN E. SCHOENFELD
STEPHANIE SIMON
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8875

SETH P. WAXMAN
Counsel of Record
DAVID M. LEHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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