No. 20-481

IN THE
Supreme Court of the United States

IN RE: NYREE BELTON, *Debtor*.

GE CAPITAL RETAIL BANK,

Petitioner,

v.

NYREE BELTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case presents an important and recurring question at the intersection of bankruptcy and arbitration law: is there an irreconcilable conflict between § 524(a)(2) of the Bankruptcy Code and the FAA such that the FAA's command of arbitrability is impliedly repealed? If that question were asked of a provision in any other area of federal law, the answer would be an unequivocal "no." As Respondent concedes, this Court has consistently refused to find conflicts sufficient to override the FAA in cases going back decades.

When it comes to bankruptcy law, however, the answer is increasingly "yes." Rather than look to the text of the Bankruptcy Code to determine if there is a conflict with the FAA, courts are routinely finding implied conflicts with the FAA based on an intuited sense of the Code's purposes. Respondent tries to justify this atextual, purposive mode of interpretation on the ground that this Court has noted that another statute may impliedly displace the FAA. But as this Court has repeatedly explained, an implied statutory conflict nullifies the FAA only when arbitration is *incapable* of effectively vindicating a federal claim—a test this Court has never found to be satisfied. This Court's precedents afford no license simply to decide that policy goals underlying other federal statutes outweigh the FAA's express command of arbitration.

The decision below represents an extreme and consequential example of this mistaken trend, and it is worthy of this Court's review. At issue is a straightforward question of statutory interpretation

that the parties agreed to arbitrate, namely, what constitutes an attempt to collect a debt under § 524(a)(2). There is no doubt that question is not exclusively within the ken of bankruptcy courts. Congress expressly granted state courts concurrent jurisdiction to resolve such issues.

The parties' dispute thus plainly falls within the ambit of the FAA, but the court below held that the FAA was impliedly repealed because of the Code's policy goal of providing a "fresh start" and Respondent's styling her request for relief as seeking a contempt finding. The Second Circuit reached this conclusion notwithstanding that the dispute turns on an issue of statutory interpretation that is eminently resolvable in an arbitral forum, and notwithstanding the fact that Respondent seeks to have the bankruptcy court adjudicate a nationwide class action consisting of other debtors in other jurisdictions.

No one doubts that the policy goals underlying the Code are important. But as this Court has explained time and again, policy considerations do not give a court license to decide which federal enactments to enforce and which to ignore. That is a recipe for a Swiss cheese FAA in which different purposive arguments deprive the FAA of the scope that Congress expressly articulated. This Court should grant review to address this issue and reaffirm that the FAA's command of arbitrability is curtailed only when another federal law irreconcilably conflicts with that mandate.

I. The Decision Below Violates This Court's Precedents.

A. The decision below violates this Court's arbitration jurisprudence, which holds that conflicts between the FAA and another statute must be "irreconcilable" and "clear and manifest" for the other statute to displace the FAA. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (internal quotation marks omitted). Respondent's opposition is based upon a misstatement of Petitioner's position and her failure to acknowledge the actual holding of Respondent's lead case, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

As this Court has repeatedly held, the FAA expressly eliminates judicial discretion in determining whether a claim is arbitrable and instead requires arbitration to be compelled unless Congress has directed otherwise with regard to a specific claim. *See, e.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233-34 (2013); *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Nothing in the Bankruptcy Code or its legislative history in any way indicates that Congress intended for only bankruptcy courts to resolve the scope of a discharge under § 524(a)(2). On the contrary, Congress expressly provided state courts with concurrent jurisdiction to resolve such issues. *See* 28 U.S.C. § 1334(b); *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1803 (2019). Nor is there any argument that an arbitrator cannot award the same relief as a court. Thus, a dispute as to the scope of the discharge is arbitrable.

McMahon is not to the contrary and Respondent's strawman argument that reversing the Second Circuit

requires an overruling of *McMahon* is baseless. In *McMahon* this Court held that both Exchange Act and RICO claims were arbitrable. Because those statutes were "silen[t]" on arbitration, the McMahons argued that the remedial and deterrent purposes of RICO would not be fulfilled in arbitration and that this was an irreconcilable conflict. *McMahon*, 482 U.S. at 238-39. Applying its prior decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), this Court reasoned that there is no "inherent conflict between arbitration and the purposes underlying [another statute]" "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *McMahon*, 482 U.S. at 240, 242 (second quotation quoting *Mitsubishi Motors*, 473 U.S. at 637). In short, the FAA was not displaced because "[t]he McMahons may effectively vindicate their RICO claim in an arbitral forum," and "nothing in RICO's text or legislative history otherwise demonstrates congressional intent to make an exception to the Arbitration Act for RICO claims." *McMahon*, 482 U.S. at 242.

The real rule that Respondent is pressing, and that the Second Circuit adopted, is that even where another federal law is silent on arbitration and an arbitral forum can provide the relief sought, courts may still find the FAA nullified based on the Bankruptcy Code's perceived purposes. That mode of statutory interpretation has been rejected by this Court time and again in literally every case where it has been presented. Although important policy concerns may underlie the Bankruptcy Code (just as they underlay the NLRA,

RICO, the Sherman Act, and all the other federal laws where this Court has refused to imply a conflict with the FAA), *see* Pet. at 14-16, those concerns do not justify ignoring the FAA's plain text. In particular, as *Epic* explained, and Respondent and the Second Circuit ignored, "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has *not* displaced the Arbitration Act," not an invitation to search for policy underpinnings that impliedly conflict with the FAA. *Epic Sys. Corp.*, 138 S. Ct. at 1627 (emphasis added); *cf. Meza Morales v. Barr*, 973 F.3d 656, 666 (7th Cir. 2020) (A "general policy of expeditiousness . . . doesn't justify departure from the plain text . . . . [A]ll laws and regulations[] are the product of compromise over competing policy goals." (Barrett, J.)).

One measure of just how far the Second Circuit went astray from statutory text was its conclusion that a bankruptcy court has *discretion* to permit (or not permit) arbitration of a § 524(a)(2) dispute. *See* Pet. App. 10a; *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 387 (2d Cir. 2018) (if bankruptcy court finds a conflict between the purpose of the Bankruptcy Code and the FAA, it has discretion to decline to enforce the arbitration agreement). The aim of statutory interpretation is to determine what Congress intended. The Second Circuit ascribed to Congress an intent not to decide whether a discharge dispute is arbitrable and instead to leave it to judges' discretion to make that policy determination. It was of no consequence to the Second Circuit that the FAA explicitly provides that judges "shall" compel

arbitration and have no discretion. The Second Circuit's interpretation is, thus, implausible on its face, and it rests on the kind of malleable mode of interpretation that privileges a court's weighing of policy goals over what Congress actually enacted.

B. Respondent is also wrong to assert that the arbitrability of the § 524(a)(2) issue turns on her decision to style her request for relief as one for contempt. Indeed, Respondent's account of her claims barely resembles what is actually at issue. Although Respondent never mentions it in her opposition, she is seeking to bring a nationwide class action in a newly filed adversary proceeding in bankruptcy court in which the operative question is what constitutes an attempt to collect a discharged debt within the meaning of § 524(a)(2). *See* Pet. 6; JA122-41.[1] Because § 524(a)(2) does not provide a cause of action, Respondent sought relief by purporting to invoke a bankruptcy judge's equitable power, and further sought to hold GE in contempt on behalf of a nationwide class of debtors. Respondent's mantra is that by using the word "contempt" she transforms her dispute from a statutory determination about § 524(a)(2)'s scope into an inquiry that can *only* be adjudicated by a bankruptcy court (albeit on behalf of a nationwide class of debtors).

That argument defies law and logic. What constitutes an attempt to collect a discharged debt under

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[1] "JA_" refers to the Joint Appendix filed in *Belton v. GE Capital Retail Bank (In re Belton)*, 961 F.3d 612 (2d Cir. 2020) (No. 19-0648), ECF No. 28-29.

§ 524(a)(2) is not a question exclusively in the purview of the bankruptcy court. It is a question of statutory interpretation, and more than that it is a question that Congress has expressly provided can be heard by state courts, as Respondent is forced to concede.[2] Belton Opp. 29-30; *see* 28 U.S.C. § 1334(b). Indeed, just two Terms ago, this Court explained that it is not only possible *but desirable* for state courts to resolve these questions in collection proceedings, lest bankruptcy courts be inundated with "additional federal litigation, additional costs, and additional delays." *Taggart*, 139 S. Ct. at 1803.

Respondent should not be allowed to dress up a straightforward § 524(a)(2) statutory dispute in a cloak of equitable concerns by characterizing it as contempt. The parties agreed to arbitrate this dispute; Congress mandated in the FAA that their agreement be enforced; and, for good measure, Congress even decided that federal jurisdiction over this kind of dispute is not exclusive. The result is that creditors and debtors litigate discharge disputes in a variety of postures every day in courts around the country. *See, e.g.*, *Scoggins v. Scoggins*, 2015 IL App (4th) 140473-U, ¶ 27, 2015 WL 754521, at *5 (Ill. App. Ct. Feb. 20, 2015) (affirming state court's denial of relief in counterclaim for violation of discharge injunction); *see also* Br. of Citi Respondents 17-19 & n.6 (collecting cases in which allegations of statutory discharge injunction violations have been

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[2] For example, a threshold issue is whether in passing § 524(a) Congress intended to impose credit reporting duties upon former creditors of a debtor that sold the debt prior to the bankruptcy filing, thereby increasing credit reporting obligations beyond those imposed by the Fair Credit Reporting Act.

adjudicated in multiple postures outside bankruptcy court). Congress cannot have intended that whether an otherwise valid arbitration agreement will be enforced would depend on the procedural vehicle used—that the same statutory question impliedly repeals the FAA when a debtor seeks a finding of contempt, but not as a defense to a claim by a creditor.

II. The Decision Below Is The Latest In The Line Of Confused Decisions Treating Arbitrability In Bankruptcy Different From All Other Contexts.

Respondent contends that the decision below is not worthy of review because it is not part of a circuit split. Belton Opp. 16-17. But GE never claimed a circuit split. What GE demonstrated—and Respondent has not rebutted—is that the decision is the latest in a confused line of bankruptcy decisions that have undermined the FAA and largely failed to acknowledge this Court's arbitration decisions since issuing *McMahon* in 1987. This Court's review is warranted to make clear that bankruptcy law is not an outlier in this Court's arbitration jurisprudence, and where the Code's perceived purposes impliedly repeal the FAA for an ever-growing body of bankruptcy-related disputes.

As Respondent tells it, all of the bankruptcy decisions holding that the FAA is impliedly repealed for a dispute apply the same purposive analysis to their particular facts. Belton Opp. 20-24. Each case asks whether arbitration would "seriously jeopardize the objectives of the Bankruptcy Code." Belton Opp. 17 (quoting *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631,

640 (2d Cir. 1999)). That is an accurate account of the case law, but it states the problem rather than resolves it. In the absence of this Court's guidance (or in spite of its decisions such as *Epic*), what has emerged is a patchwork of decisions in which lower courts invoke policies underlying the Code to override the FAA's express command.

As the petition explained, the malady is multi-dimensional. For one thing, the Courts of Appeals employ this purposive approach for different kinds of bankruptcy disputes, with some reserving it for "core" claims and others applying to a broader range of claims depending on their facts. *See* Pet. 21-23; *compare Anderson*, 884 F.3d at 387 (noting that a non-core claim generally may be arbitrated under the FAA, while a core claim may not) *and Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1021 (9th Cir. 2012) (same), *with Mintze v. Am. Gen. Fin. Servs., Inc. (In re Mintze)*, 434 F.3d 222, 229 (3d Cir. 2006) ("The core/non-core distinction does not, however, affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement."). The FAA's text should not be ignored for any class of bankruptcy claims, whether core or not.

Equally concerning is the sheer range of issues where bankruptcy courts have found arbitration to be inconsistent with various perceived goals of the Code. Just looking at the cases canvassed in the petition and Respondent's opposition tells the tale. There are of course the discharge injunction disputes in this case and others where courts have held that policy goals of the Code impliedly repeal the FAA. *E.g.*, *Henry v. Educ.*

Fin. Serv. (Matter of Henry), 944 F.3d 587, 590-92 (5th Cir. 2019); *Bauer v. Credit Cent., LLC (In re Bauer)*, No. AP 20-80012-DD, 2020 WL 3637902, at *6-8 (Bankr. D.S.C. June 8, 2020); *Roth v. Butler Univ. (In re Roth)*, 594 B.R. 672, 675-77 (Bankr. S.D. Ind. 2018); *In re Jorge*, 568 B.R. 25, 27, 35-37 (Bankr. N.D. Ohio 2017). But courts have also held that the Code policies of "efficiency," "centralization," and other "pragmatic concerns" impliedly repeal the FAA's command of arbitration over a host of disputes that all could have been resolved—and the parties had agreed to resolve—via arbitration. *See, e.g.*, *Ackerman v. Eber (In re Eber)*, 687 F.3d 1123, 1130-32 (9th Cir. 2012) (policy goal of avoiding "piecemeal ligation" impliedly repeals FAA over claims of contract, fraud, and breach of fiduciary duty); *In re Thorpe Insulation Co.*, 671 F.3d at 1016, 1023 ("[p]ragmatic concerns" of efficiency impliedly repeal FAA over contract disputes); *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 634, 641 (2d Cir. 1999) (same); *Phillips v. Congelton* (*In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 169 (4th Cir. 2005) (Code's interest in "centralized decision-making" impliedly repeals FAA in dispute about amount of indebtedness); *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 498-99 (5th Cir. 2002) (Code policy of "expedition" impliedly repeals FAA where a party sought to avoid transfers); *Phelan v. Highland Capital Mgmt., L.P. (In re Acis Capital Mgmt., L.P.)*, 600 B.R. 541, 557-60 (Bankr. N.D. Tex. 2019) (policy goal of "expeditious and equitable distribution of the assets of a debtor's estate" nullified FAA in action involving fraudulent transfer claims, turnover request, and defenses to proofs of claim).

In each of these cases, like this one, the lower courts have shunted the actual text of the FAA aside and been guided instead by their sense of the Code's policy goals. Those policy goals may well be important, but that is precisely the undertaking this Court warned of in *Epic* and elsewhere. *Epic Sys. Corp.*, 138 S. Ct. at 1624 ("Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them."). If labor law looked like bankruptcy law in this regard, *Epic* would have come out the other way, and disputes about, say, protecting workers' concerted activities, *see id.* at 1627, would have been deemed to be impliedly outside the scope of the FAA. Only this Court can prevent bankruptcy law from poking purposive holes in the FAA provisions that Congress enacted.

III. This Case Is A Proper Vehicle.

Respondent's vehicle arguments are meritless. She argues that this case is a poor vehicle because the Second Circuit merely applied its earlier decision in *Anderson*. Belton Opp. 30-31. Yet, as Respondent also acknowledges, in *Anderson*, "the parties had waived any arguments concerning the Bankruptcy Code's text or legislative history." Belton Opp. 14-15. Thus, when this Court denied certiorari in *Anderson*, it did so when the Second Circuit had addressed neither the textual arguments, nor the effect of *Epic*.

Now, the Second Circuit has conclusively spoken on these issues and declared that the purposive analysis in *Anderson* is good law. Moreover, that Second Circuit reached this conclusion after *Epic* establishes that

bankruptcy remains an island unto itself, outside of this Court's arbitration jurisprudence. The case is ripe for adjudication.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 17, 2021

Respectfully submitted,

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