No. 17-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agreement that requires a customer to resolve a dispute through arbitration is enforceable under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, notwithstanding the provisions of the Bankruptcy Code providing for a statutorily enforceable discharge of a debtor's debts.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner discloses the following. Petitioner, Credit One Bank, N.A., is a wholly owned subsidiary of Credit One Financial, a privately held corporation. No publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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Credit One Bank, N.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

In *Epic Systems Corp.* v. *Lewis*, No. 16-285 (U.S. May 21, 2018), this Court rejected a litigant's attempt to carve an exception for federal labor-law claims out of the Federal Arbitration Act's mandate to enforce arbitration agreements. The Court reaffirmed its longstanding view that another federal statute can render an arbitration agreement unenforceable notwithstanding the Arbitration Act's mandate to enforce such agreements only if that was Congress's clear and manifest intent.

The court of appeals held in this case that respondent's statutory claim under the Bankruptcy Code for violation of the discharge injunction may not be arbitrated under the parties' arbitration agreement, even though the agreement is undisputedly otherwise enforceable and covers respondent's claim. That decision cannot be reconciled with *Epic Systems*. Nothing in the Bankruptcy Code evidences a clear and manifest congressional intent to displace the Arbitration Act's command as to claims for violation of the statutory discharge injunction. Rather, emphasizing the importance of the discharge injunction to the Bankruptcy Code, the court of appeals found an inherent conflict between arbitration and the purpose of the Bankruptcy Code to provide debtors a fresh start.

That is not the kind of conflict this Court has rightly insisted on to imply repeal of the Arbitration Act, for it restores the very hostility toward arbitration that Congress intended the Act to reverse. Across decades of decisions addressing the interplay between the Arbitration Act and all sorts of federal statutes, this Court has maintained that an inherent conflict sufficient to displace the Arbitration Act's mandate may be found only where the arbitral forum would not enable the litigant resisting arbitration to effectively vindicate his substantive federal rights. The court below made no such finding about the statutory claim here (nor could it have).

Although this Court has rejected all of the many attempts to claim that arbitration conflicts irreconcilably with one federal statute or another, the lower courts have been flummoxed by the Bankruptcy Code, which this Court has never addressed for these purposes. The Second Circuit has fashioned a bespoke test to address the question whether claims arising in bank-

ruptcy are arbitrable, and that court is not alone in doing so. This Court's progressive clarification of the proper conflict analysis in cases involving other federal statutes has failed to bring uniformity to the lower courts when it comes to bankruptcy. But there is nothing special about statutory claims for violation of the discharge injunction under the Bankruptcy Code that warrants different treatment or diminished respect for Congress's command to enforce arbitration agreements.

This Court, therefore, should take this opportunity to announce that the same test used in *Epic Systems* and its predecessors applies in the bankruptcy context here, and hold that the arbitration agreement here must be enforced according to its terms. Alternatively, the Court should grant, vacate, and remand in light of its intervening decision in *Epic Systems*.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-17a) is reported at 884 F.3d 382. The opinion and order of the district court (App. 19a-40a) is reported at 553 B.R. 221. The relevant opinion of the bankruptcy court (App. 43a-50a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 7, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 9 U.S.C. §§2 and 4 and 11 U.S.C. §§105 and 524(a). They are reproduced in the Appendix.

STATEMENT

A. Factual Background

Orrin Anderson opened a credit-card account in 2002 with First National Bank of Marin, the predecessor to Credit One, N.A. Anderson's cardholder agreement contained an arbitration clause governed by the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* The agreement provides that "[y]ou and we [i.e., the bank] agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us" be "submitted to mandatory, binding arbitration." App.51a. The agreement expressly covers disputes relating to "credit reporting" and "collections matters" (App.52a), as well as claims for "injunctive or declaratory relief" (App.53a). It also expressly states that arbitration "replaces the [cardholder's] right to go to court, including … the right to participate in a class action or similar proceeding" (App.51a), and requires that claims "made as part of a class action or other representative action" be arbitrated "on an individual basis" (App.53a-54a).[1]

In 2011, Anderson defaulted on his Credit One credit-card account. As required by federal regulations, after 180 days of nonpayment, Credit One "charged off" Anderson's account, *i.e.*, reclassified the account from a receivable to a loss. *See Federal Financial Institutions Examination Council, Uniform Retail Credit Classification and Account Management*

[1] First National Bank of Marin changed its name to Credit One Bank, N.A., in February 2006, and the terms of Anderson's cardmember agreement were amended from time to time. None of the amendments materially changed the provisions of the arbitration agreement just discussed.

Policy, 65 Fed. Reg. 36,903, 36,904 (June 12, 2000) ("open-end retail loans that become past due 180 cumulative days from the contractual due date should be classified Loss and charged off"). Consistent with federal regulatory guidance and industry practice, Credit One reported to the national credit reporting agencies that Anderson's debt was charged off.

In 2012, Credit One sold Anderson's account to a third-party debt buyer. Again consistent with industry practice, Credit One reported to the credit reporting agencies that Anderson's debt was charged off and sold to another lender, and that zero dollars were owed to Credit One on the account. *See also* Consumer Data Indus. Ass'n, *2015 Credit Reporting Resource Guide* 5-14, 6-46 (2015).

Two years later, Anderson filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. On May 6, 2014, the court entered a form "Discharge of Debtor/Order of Final Decree," and closed Anderson's bankruptcy case. C.A.J.A.73. Anderson subsequently informed Credit One of his bankruptcy discharge and requested that the bank direct the credit reporting agencies to remove from his credit report the indication that Credit One had charged off his account. C.A.J.A.92-93. The fact that Credit One charged off Anderson's debt, however, remained true—irrespective of the debt's discharge in bankruptcy—and Credit One declined to make the change.[2]

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[2] As the federal regulators who oversee credit reporting have explained more generally, they "do not expect that after transferring an account to a third party a furnisher would update the current status of the account beyond providing information to a [cred-

B. Proceedings Below

In late 2014, the bankruptcy court granted Anderson's motion to reopen his bankruptcy case so that he could initiate the adversary proceeding giving rise to this appeal on behalf of himself and a putative class, challenging Credit One's credit-reporting practices with respect to charged-off, sold credit-card debt subsequently discharged in a Chapter 7 bankruptcy. The complaint alleges that Credit One's failure to report updates to the credit reporting agencies to reflect post-sale bankruptcy discharges on its former credit-card accounts was intended to coerce payment on discharged debt, in violation of the discharge injunction in bankruptcy, 11 U.S.C. §524. *See* App.59a-79a. Anderson's class allegations start from the premise that the United States Bankruptcy Court for the Southern District of New York—where his putative class action is pending—is empowered to enforce the statutory discharge injunction of §524 as to discharge orders entered by bankruptcy courts across the country in the hundreds of thousands of individual bankruptcy cases filed by putative class members.

Credit One moved the bankruptcy court to stay Anderson's adversary proceeding in favor of arbitration under Section 3 of the Arbitration Act, 9 U.S.C. §3, and to compel him to arbitrate his claim under

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it bureau] that the account has been transferred." *Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, 74 Fed. Reg. 31,484, 31,494 (July 1, 2009). Industry guidance is consistent. *See 2015 Credit Reporting Resource Guide*, 5-14 n.2 (transfer of an account is a "final status" report on the account "which does not require further updating").

§524(a)(2), under Section 4, 9 U.S.C. §4. The bankruptcy court denied the motion. The court explained that the arbitrability of claims in bankruptcy was governed in the Second Circuit by the court of appeals' decision in *MBNA America Bank, N.A.* v. *Hill*, 436 F.3d 104 (2d Cir. 2006), which held that "the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code." *Id.* at 108. Applying that standard, the court of appeals held in *Hill* that arbitrating the plaintiff's claim for violation of the automatic stay in bankruptcy, 11 U.S.C. §362, would not jeopardize the objectives of the Code, primarily because arbitration of her claim "would not interfere with or affect the distribution of the estate," 436 F.3d at 109. That was so, the court observed, in part because plaintiff's debts had been discharged and her bankruptcy case closed, and so she no longer needed the automatic stay to preserve her "fresh start" in bankruptcy. *Id.*

Applying *Hill*, the bankruptcy court concluded that arbitration of Anderson's §524 claim would undermine the objectives of the Bankruptcy Code primarily because "*Hill*[] put a premium on the debtor's fresh start," and so where, as here, the debtor's "fresh start" is implicated, Congress intended to preclude arbitration. App.49a.[3] The court further explained that it was

[3] Anderson did not challenge the scope or validity of the parties' arbitration agreement; he argued only that his §524 claim was nonarbitrable. *See* Adv. Proc. No. 15-8214, Dkt. 9 at 5-7 (Bankr. S.D.N.Y. Apr. 28, 2015).

"hard … to believe that Congress, where there was an allegation that the discharge is being violated, would so jeopardize the fresh start as to require the debtor to shell out the cost of an arbitration." *Id.* Finally, notwithstanding the parties' agreement explicitly authorizing arbitration of claims for "injunctive or declaratory relief" (App.53a), and giving the arbitrator "the power to award to a party any damages or other relief provided for under applicable law" (App.56a), and notwithstanding the bankruptcy court's recognition that it is "generally accepted" that arbitrators have the power to provide equitable and injunctive relief, *see* App.49a (citing *In re Belton*, 2014 WL 5819586, at *10 (Bankr. S.D.N.Y. Nov. 10, 2014), *rev'd*, 2015 WL 6163083 (S.D.N.Y. Oct. 14, 2015)), the court articulated its "concern[] that there's no express acknowledgement of equitable relief or injunctive relief" in the arbitration agreement because "that power is at best hazy and time consuming if one goes the arbitration route even when there is an express acknowledgment of injunctive and equitable remedies in the agreement" (App.49a). The bankruptcy court thus concluded that "arbitration was not intended by Congress when a violation of the discharge was at issue … whether that's for an individual debtor … or debtors generally." App.49a-50a.

On interlocutory appeal under 9 U.S.C. §16, the district court affirmed, holding that claims under §524 are "core" bankruptcy proceedings, and that arbitrating such claims would "necessarily jeopardize[] the objectives of the Bankruptcy Code." App.22a. Specifically, the district court, like the bankruptcy court, found that ensuring debtors' "fresh start" is the "central objective of the Bankruptcy Code," and concluded that arbitration is "inadequate" to preserve that right in view of the

"high barriers" a debtor might confront "if arbitrating on an individual basis." App.35a-36a & n.9.

The court also reasoned that because "the claims here arise from a discharge injunction, which is an affirmative order of the bankruptcy court," arbitration would necessarily interfere with the bankruptcy court's authority to enforce its own orders. App.36a. That was not a concern the bankruptcy court itself had raised. Indeed, in the course of a parallel adversary proceeding involving materially identical claims against a different financial institution, the bankruptcy court had repeatedly remarked on the absence of any consequential relationship between the statutory discharge injunction and the issuing court, observing the "fundamental difference between the normal injunction issued by a court after considering the factors required to be applied in issuing an injunction order and the injunction created by Congress in Section 524(a) to support the discharge[.]" *In re Haynes*, 2014 WL 3608891, at *8 (Bankr. S.D.N.Y. July 22, 2014). As the bankruptcy court explained, "the bankruptcy discharge order is a … national form, which is issued in every case when there is, in fact, a discharge. By statute, in [Section] 524(a)(2), it operates as an injunction," but "[i]t is not a handcrafted order." *Id.*; *see Echevarria* v. *Bank of Am. Corp.*, Tr. of Hearing re: Mot. to Dismiss Adv. Proc. 37-38, No. 14-08216, Dkt. 36 (Bankr. S.D.N.Y. Aug. 28, 2014) (Court: "It's the statute itself that sets forth the [discharge] injunction[.]").

The Second Circuit affirmed. The court explained that, in determining the arbitrability of Anderson's §524 claim, it would follow a multi-step test uniquely fashioned for bankruptcy claims. First, the court must determine "whether the issue involves a 'core' or 'non-core' proceeding." App.8a. "If the proceeding is 'non-core,' bankruptcy courts generally must stay the proceedings

in favor of arbitration." *Id.* (quotation marks omitted). "If the matter involves a core proceeding, the bankruptcy court is tasked with engaging in a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy. If the bankruptcy court determines that arbitration would create a severe conflict with the purposes of the Bankruptcy Code, it has discretion to conclude that Congress intended to override the Arbitration Act's general policy favoring the enforcement of arbitration agreements." *Id.* (citation and quotation marks omitted).

Applying this protocol to Anderson's concededly "core" claim, the court of appeals concluded that arbitration of Anderson's claim under §524(a)(2) would "seriously jeopardize" his bankruptcy proceeding because "1) 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; 2) the claim regards an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code." App.13a.[4]

[4] While recognizing that Anderson, as the party resisting arbitration, bore the "burden … to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," the court of appeals faulted Credit One for allegedly failing to raise certain textual and legislative history arguments below in support of its argument that Congress lacked that intent. App.10a. That is wrong—Credit One had made those arguments below (*e.g.*, Dkt. 7 at 17-19 & n.11, No. 15-8214 (Bankr. S.D.N.Y. Mar. 3, 2015))—and in any event immaterial: The question of congressional intent is purely a legal one.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DIRECTLY CONTRADICTS THIS COURT'S RECENT DECISION IN *EPIC SYSTEMS* AND A LONG LINE OF EARLIER PRECEDENT

The decision below cannot be squared with a long line of this Court's precedent holding that federal statutory claims are arbitrable unless Congress clearly commanded otherwise. As this Court has explained in a series of decisions dating back more than thirty years, federal statutory claims are presumptively arbitrable, and the party resisting arbitration bears a heavy burden in demonstrating that Congress clearly intended otherwise. This inquiry is so demanding that the Court has yet to recognize a single federal statutory claim that is unsuited for arbitration.

In allowing respondent to avoid the plain terms of his otherwise-enforceable arbitration agreement, however, the Second Circuit unaccountably applied a test it created specifically to evaluate the arbitrability of statutory claims arising under the Bankruptcy Code: whether there is a conflict between arbitration and the Bankruptcy Act's goals of granting debtors a fresh start and efficiently and effectively resolving bankrupt estates.

The Second Circuit's permissive standard for determining whether there is an "inherent conflict" in the bankruptcy context, if sustained, would mean that virtually no claim arising under the Bankruptcy Code—or any other federal statute, since there is no reason the test should be confined to bankruptcy—would be arbitrable, contrary to the established federal policy favoring the enforcement of arbitration agreements. That obviously contravenes this Court's many precedents on the arbitrability of federal statutory claims. Indeed,

just two weeks ago, in *Epic Systems*, this Court declared that even statutory provision for federal judicial procedures to resolve federal statutory claims, without more, does not evince the clear and manifest congressional intent needed to displace the Arbitration Act's mandate that federal courts respect arbitration agreements.

A. A plaintiff seeking to persuade a federal court to disregard an arbitration agreement faces a heavy burden. Embodying a "'liberal federal policy favoring arbitration agreements,'" *Mitsubishi Motors Corp.* v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)), the Arbitration Act "mandates enforcement of agreements to arbitrate statutory claims," *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *see* 9 U.S.C. §2. Accordingly, "courts must rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985).

This mandate "may be overridden," but *only* "by a contrary congressional command." *McMahon*, 482 U.S. at 226. For "[j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors*, 473 U.S. at 627. Accordingly, a plaintiff seeking to avoid an arbitration agreement and pursue a federal statutory claim in court must show that Congress "intend[ed] to limit or prohibit waiver of a judicial forum for a particular claim." *McMahon*, 482 U.S. at 227. Such intent may be found only in the other

Act's "text or legislative history," or in "an inherent conflict between arbitration and the [other] statute's underlying purposes." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 628).[5]

Reflecting this Court's respect for Congress's will, the "inherent conflict" test has proved exacting. "In many cases over many years," this Court declared recently, "this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date[.]" *Epic Systems*, Slip op. 16 (May 21, 2018).

For at least forty years, the Court has maintained that there is an inherent conflict between arbitration

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[5] An ancillary defect in the Second Circuit's approach is what happens if the court finds a conflict: the Arbitration Act's mandate recedes and the bankruptcy court gains *discretion* to override the otherwise-binding arbitration agreement based on its balancing of the parties' respective interests. The notion that an inherent conflict affords the court such discretion is found in no other context. It also makes no sense and contradicts this Court's precedent: The question is one of congressional intent. If there is no inherent conflict, then the Arbitration Act requires enforcement of a valid arbitration agreement. If arbitration is instead irreconcilable with the Bankruptcy Code, then the Code should be understood to reflect Congress's intent to bar enforcement of an arbitration agreement. Accordingly, as the quotations from *Mitsubishi Motors* and *McMahon* in text above show, whenever this Court has considered the interplay between the Arbitration Act and another federal statute, it has understood the question to be whether the arbitration agreement was *enforceable*, not whether enforcement was *optional*. *See also, e.g.*, *Epic Systems*, Slip op. 24 ("the Arbitration Act … speaks directly to the enforceability of arbitration agreements"); *McMahon*, 482 U.S. at 222 ("This case presents two questions regarding the enforceability of predispute arbitration agreements between brokerage firms and their customers.").

and another federal statute *only* where the litigant could not effectively vindicate the claim under that statute in arbitration. Litigants have been advancing increasingly aggressive arguments that arbitration would be at odds with the importance of the asserted federal claim, the federal judicial scheme erected to resolve such claims, or the underlying interests. But time and again, this Court has rejected those arguments, finding them insufficient to show an inherent conflict that overcomes the strong federal policy favoring enforcement of arbitration agreements.

For example:

- In *Mitsubishi Motors*, the Court rejected the notion that the "fundamental importance" of the federal antitrust laws justified departure from the Federal Arbitration Act's mandate, explaining that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function." 473 U.S. at 634, 637.

- In *McMahon*, the Court reached the same conclusion regarding claims asserted under the Racketeer Influenced and Corrupt Organizations Act and section 10(b) of the Securities Exchange Act of 1934. Dismissing the plaintiffs' insistence that arbitration would undermine "the public interest in the enforcement" of those federal laws, the Court held that there was no inherent conflict evincing congressional intent to preclude arbitration because "[t]he suitability of arbitration as a means of enforcing [the plaintiffs'] rights is evident." 482 U.S. at 231-232, 240. The Court explained that if the litigant "may effectively vindi-

cate their … claim in an arbitral forum, … there is no inherent conflict between arbitration and" the other Act that would indicate congressional intent to override the Arbitration Act's mandate, *id.* at 242; such a conflict exists "only where arbitration is inadequate to protect the substantive rights at issue," *id.* at 229; *see also id.* at 239-240, 242; *accord Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481, 483-484 (1989).

- In *Gilmer* v. *Interstate/Johnson Lane Corp.*, the Court found no "inherent inconsistency between" arbitration and the "important social policies" underlying the Age Discrimination in Employment Act ("ADEA") because arbitration "can further broader social purposes." 500 U.S. 20, 27-28 (1991).

- In *Green Tree Financial Corp.–Alabama* v. *Randolph*, the Court declined to invalidate an agreement to arbitrate claims under the Truth in Lending Act and the Equal Credit Opportunity Act because the record did not show that arbitration costs would be so great as to render the plaintiff "unable to vindicate her statutory rights in arbitration." 531 U.S. 79, 90-91 (2000). The Court again stressed that "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." *Id.* (quoting *Gilmer*, 500 U.S. at 28).

B. This was the law as it stood when the court of appeals issued its decision in this case, and it cannot be squared with that court's holding that Congress in-

tended that the Arbitration Act not apply to statutory discharge-injunction claims brought under the Bankruptcy Code.

Nothing in the text or legislative history of the Bankruptcy Code suggests an intent to preclude arbitration. Anderson's claim arises under 11 U.S.C. §524, which provides that a discharge under the Code "operates as an injunction against … an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Section 524 does not include an explicit enforcement mechanism, but rather is enforceable through Section 105 of the Bankruptcy Code, which authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* §105(a); *see, e.g.*, *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 506-507 (9th Cir. 2002) ("bankruptcy court is authorized to invoke §105 to enforce the discharge injunction"). There is no indication in either provision—or any other provisions of the Code—that Congress intended to preclude arbitration of §524 claims.[6]

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[6] The court of appeals took the view that Anderson's statutory claim for violation of the discharge injunction implicated the bankruptcy court's "unique expertise in interpreting its own injunctions and determining when they have been violated," and so could not be referred to an arbitrator. App.15a. But as the bankruptcy court acknowledged, the discharge order referenced by §524 is a form order entered in materially identical terms in every bankruptcy case and is generally not even reviewed by the issuing court. *See supra* pp.5, 9; *In re Haynes*, 2014 WL 3608891, at *8. The discharge injunction thus requires no special expertise or familiarity with the underlying bankruptcy proceedings to enforce. Indeed, the entire premise of Anderson's putative nationwide class action is that one bankruptcy court can dispose of hundreds

To the extent statutory text provides any indication of congressional intent on this question, it demonstrates that Congress did not intend for §524 claims to be litigated exclusively in the bankruptcy court and therefore excepted from the Arbitration Act. Congress has carefully parceled jurisdiction over bankruptcy-related claims among the federal district and bankruptcy courts, granting federal district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11," 28 U.S.C. §1334(b), except with respect to "claims or causes of action that involve construction of section 327 of title 11," concerning the retention and compensation of professionals in connection with bankruptcy proceedings, over which the district court has "exclusive jurisdiction," *id.* §1334(e)(2).

This arrangement strongly supports the view that §524 claims are arbitrable. In *Gilmer*, this Court found that "Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts" supported the conclusion that Congress did not intend to preclude arbitration of such claims, "because arbitration agreements, like the provision for concurrent jurisdiction, serve to advance the objective of allowing claimants a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." 500 U.S. at 29 (quotation marks, citation, and brackets omitted); *see also Rodriguez de Quijas*, 490 U. S. at 482-483 (Congress's grant of concurrent federal-state jurisdiction over claims under the Securities Act "suggest[s] that arbitration agreements, which are in effect, a specialized kind of forum-selection clause, … should not be

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of thousands of discharge-injunction claims concerning discharge orders entered by bankruptcy courts throughout the country.

prohibited under the Securities Act" (quotation marks and citation omitted)). Likewise here, far from specifying that §524 claims must have the special protection of bankruptcy courts—the kind of "contrary congressional command" that the Court has required for finding an exception to the Arbitration Act's mandate to honor arbitration agreements, *McMahon*, 482 U.S. at 226—Congress has made quite clear that bankruptcy court is not a required forum for these claims.[7]

With nothing in the text or legislative history supporting it, the court of appeals resorted to a finding of inherent conflict based on its view that certain features of the federal bankruptcy system were important to the ability of the federal courts to grant debtors a fresh start. According to the court, "discharge is the paramount tool used to effectuate the central goal of bankruptcy: providing debtors a fresh financial start." App.13a. And, the court said, judicial "enforcement" of discharge injunctions (even "after the close of [bankruptcy] proceedings") "is a crucial pillar of the powers of the bankruptcy courts and central to the statutory scheme." App.14a. "Because there is no matter more central to the purposes and policies of the Bankruptcy Code than the fresh start provided by discharge," the court concluded, "arbitration of [respondent's] claim presents an inherent conflict with the Bankruptcy

[7] This inference is bolstered by the fact that Congress provided for exclusive federal-court jurisdiction over some bankruptcy-related claims (but not §524 claims), *see* 28 U.S.C. §§1334(a) & (e), and did so in 2005, after "a string of this Court's decisions compelling arbitration" that "alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care," *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 116 & n.6 (2012) (Ginsburg, J., dissenting).

Code." App.13a (quotation marks omitted); *see also id.* ("we find that arbitration of a claim based on an alleged violation of Section 524(a)(2) would seriously jeopardize a particular core bankruptcy proceeding" (quotation marks omitted)).

Under this Court's precedent, these considerations of the importance of the discharge to the Bankruptcy Code are irrelevant. As just explained, the importance of a public interest protected by a federal judicial scheme is not a proper basis for finding an inherent conflict with arbitration. Many federal rights are important, but Congress's recognition of that importance does not indicate one way or the other whether Congress intended statutory claims implicating such rights to be nonarbitrable. At bottom, the Second Circuit's reasoning amounted to nothing more than a conclusion that the federal judicial process is important and arbitration is not the same thing. But if that is all that can be said about the difference between arbitration and the relevant judicial proceedings, the congressionally prescribed strong presumption in favor of enforcing arbitration agreements must prevail.

Moreover, the court below never considered the one question that mattered: whether Anderson could use arbitration to effectively vindicate his alleged right to compel Credit One "to update the credit reporting agencies regarding the discharged debt." App.6a. (For the record, he could. *See* App.52a-54a (defining scope of claims and relief available in arbitration); *infra*, p.4.) By thus privileging a federal forum over an arbitral forum because of the importance of the federal right, the court below exhibited the very "judicial hostility to arbitration agreements" that Congress intended to "reverse" and flouted the "federal policy favoring arbitra-

tion." *McMahon*, 482 U.S. at 225-226 (quotation marks and brackets omitted).[8]

C. This Court's subsequent decision in *Epic Systems* emphatically closes the door on the Second Circuit's conclusion that an inherent conflict renders Anderson's claim nonarbitrable.

In *Epic Systems*, the Court began by reiterating that Congress had "establish[ed] 'a liberal federal policy favoring arbitration,'" Slip op. 5 (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)), and that "the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms,'" *id.* at 5-6 (quoting *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)). Next, the Court reminded litigants that when they claim that another statute "displaces" the Arbitration Act's mandate, they "bear[] the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id.* at 10. Indeed, the Court said, out of "[r]espect for Congress as drafter" and "for the separation of powers," that "intention must be clear and manifest." *Id.* (quotation marks omitted).

Guided by these precepts, the Court held that there was no "inherent conflict" between arbitration and section 7 of the National Labor Relations Act, which "secures to employees rights to organize unions and bargain collectively." *Epic Systems*, Slip op. 2.

[8] The court of appeals' attention to the importance of the process for settling a bankrupt estate was also misplaced because respondent's claim has nothing to do with that process. His claim to enforce a discharge injunction did not arise until after the estate was settled. *See supra* pp.5-6.

Section 7, the Court said, "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." *Id.* at 11. For one thing, section 7 "says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." *Id.* at 2; *see also id.* at 11. And section 7's underlying "policy of protecting workers' concerted activities for the purpose of collective bargaining or other mutual aid or protection" did "not conflict with Congress's statutory directions favoring arbitration," even where the arbitration agreement waived class and collective action to resolve employment disputes. *Id.* at 15-16 (quotation marks omitted). There was no suggestion that the employee could not effectively vindicate his rights by having to proceed in individualized arbitration.

Similarly, the discharge injunction of §524 of the Bankruptcy Code displays no clear and manifest congressional intent to displace the Arbitration Act's mandate. The Code says nothing about the availability of arbitration or the waivability of any right to judicial procedures for enforcement of §524. And as noted above, there is no reason to conclude that respondent could not effectively vindicate his asserted right to a fresh start in arbitration. Moreover, the underlying policy of promoting efficient and effective resolution of bankrupt estates through consolidated action in federal court would not be thwarted by arbitration of respondent's claim because the estate was settled before his claim arose.

To be sure, the Bankruptcy Code provides for judicial action in bankruptcy, including enforcement of discharge injunctions. *See* 11 U.S.C. §§105, 524; *cf. Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1940

(2015); 28 U.S.C. §§157-158. But the Court in *Epic Systems* once and for all disposed of the notion that such provisions are enough on their own to create an inherent conflict. The Court explained that—as shown by "so much precedent"—"even a statute's express provision for [some type of] legal action[] does not necessarily mean that it precludes … arbitration." Slip op. 16-17. For example, the Court noted that in *Gilmer*, it "'had no qualms in enforcing a class waiver in an arbitration agreement even though' the Age Discrimination in Employment Act 'expressly permitted collective legal actions.'" *Id.* at 17 (quoting *Italian Colors*, 570 U.S. at 237). And in *CompuCredit*, the Court "refused to find a conflict even though the Credit Repair Organizations Act expressly provided a 'right to sue[]' … and even declared 'any waiver' of the rights it provided to be 'void.'" *Id.* (quoting 565 U.S. at 99-100; brackets omitted). Again, it must be so. Otherwise, the strong congressionally mandated presumption in favor of arbitration agreements would be inverted and federal judicial forums would have priority over arbitral forums, contrary to Congress's intent in enacting the Arbitration Act.

In short, *Epic Systems* confirms that the Bankruptcy Code does "not provide a congressional command sufficient to displace the Arbitration Act." Slip op. 17.

II. THIS CASE PRESENTS A TIMELY OPPORTUNITY TO CLEAR CONFUSION AMONG THE LOWER COURTS

This case is just the latest example of the confusion that is widespread among the lower courts about the interaction between the Bankruptcy Code and the Arbitration Act. As one scholar has put it, the "numerous approaches and analyses adopted by the various federal

courts of appeals" have led to substantial "uncertainty and confusion … with respect to the interplay between arbitration and bankruptcy and whether an arbitration clause should be enforced in a particular proceeding in a bankruptcy case." Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 Am. Bankr. Inst. L. Rev. 183, 185 (2007); *see also* Leventhal & Elias, *Competing Efficiencies: The Problem of Whether and When to Refer Disputes to Arbitration in Bankruptcy Cases*, 24 Am. Bankr. Inst. L. Rev. 133, 144 (2016) (in bankruptcy context, "[i]nterpretation [of *McMahon*] has not been uniform …, and the circuit courts interpreting the Supreme Court holding have emphasized the importance of different considerations and have reached different outcomes"); Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 Am. Bankr. Inst. L. Rev. 503, 517 (2009) (noting the "morass" of conflicting and inconsistent circuit decisions).

This confusion, which has persisted despite this Court's frequent efforts to clarify the inherent-conflict test, is problematic. Both the Bankruptcy Code and the Arbitration Act were intended to provide efficient resolution of disputes. *See AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011) (Arbitration Act "allow[s] for efficient, streamlined procedures tailored to the type of dispute"); *Dean Witter*, 470 U.S. at 219 (noting Arbitration Act's "goal of speedy and efficient decisionmaking"). The vexatious question of how to harmonize these two laws, however, generates a significant volume of unpredictable litigation, which undermines that shared goal. *See* Resnick, 15 Am. Bankr. Inst. L. Rev. at 212-213. On the heels of *Epic Systems*'s decisive embrace of the proposition that only a clear and manifest congressional intent to displace the Arbitration Act's mandate will suffice, and its recognition

that this requirement has been applied in "many cases"—but never satisfied—across a "rang[e]" of federal statutes, *Epic Systems*, Slip op. 16, this is an opportune case to "clear the confusion" in the bankruptcy context, *id.* at 4.

The courts of appeals have taken a range of divergent approaches to determining the arbitrability of claims arising in bankruptcy—none of which reflects a straightforward application of this Court's precedent. For example, the Third Circuit has held that, regardless of whether the proceeding is "core," "[w]here an otherwise applicable arbitration clause exists, a bankruptcy court lacks the authority and discretion to deny its enforcement, *unless* the party opposing arbitration can establish congressional intent, under the *McMahon* standard, to preclude waiver of judicial remedies for the statutory rights at issue." *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006). And, the court determined, there is no "inherent conflict" between the Bankruptcy Code and arbitration of federal claims that were not "created by the Bankruptcy Code." *Id.* at 231-232. Reaching a similar conclusion in an earlier case, the Third Circuit had determined that, given this Court's precedent, it could not "subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over [the Arbitration] Act." *Hays & Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1155, 1161 (3d Cir. 1989).

Meanwhile, the Fifth Circuit has declared that, "at least where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the pur-

pose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *In re National Gypsum Co.*, 118 F.3d 1056, 1069 (5th Cir. 1997). Further, that court has said, "where a core proceeding involves adjudication of federal bankruptcy rights wholly divorced from inherited contractual claims, … the adjudication of [such] actions outside the federal bankruptcy forum could in many instances present the type of conflict with the purpose and provisions of the Bankruptcy Code alluded to in *McMahon*." *Id.* at 1068. Applying these principles, the court concluded that a debtor's action to enforce a discharge injunction (a "core" bankruptcy proceeding) was not subject to arbitration because it "raised no issues under [a pre-bankruptcy contract] and was restricted entirely to the adjudication of federal bankruptcy issues." *Id.* at 1069-1070; *see also In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002) (bankruptcy court had discretion to deny arbitration of fraudulent conveyance action arising under the Bankruptcy Code).

The Fourth Circuit—like the Second Circuit—has found that, with respect to core bankruptcy proceedings, "[a]rbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights contingent upon an arbitrator's ruling rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." *In re White Mountain Mining Co.*, 403 F.3d 164, 169 (4th Cir. 2005) (quotation marks omitted). Given that sweeping rationale, the Fourth Circuit, echoing the Second Circuit, has declared categorically that "'[i]n the bankruptcy setting, congressional intent … to

enjoin arbitration is sufficiently clear to override … arbitration agreements.'" *Id.* at 168 (quoting *In re United States Lines, Inc.*, 197 F.3d 631, 639 (2d Cir. 1999)); *see also Moses* v. *CashCall, Inc.*, 781 F.3d 63, 72-73 (4th Cir. 2015) (per curiam) (arbitral agreement held unenforceable against debtor's claim to declare loan void because arbitration would "interfere" with purposes of Bankruptcy Code to "provide debtors and creditors with the prompt and effectual administration and settlement of the debtor's estate" and "to centralize disputes over the debtor's assets" (quotation marks omitted)).

In the Ninth Circuit, a rule similar to the Second and Fourth Circuits' prevails, with courts holding that arbitration inherently conflicts with "centralization of disputes concerning a debtor's legal obligations" and "protecting creditors and reorganizing debtors from piecemeal litigation." *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1022 (9th Cir. 2012) (quotation marks and brackets omitted). Although the Ninth Circuit acknowledged that this Court has rejected such concerns as a basis for refusing to enforce arbitration agreements, that court nonetheless stated that this Court's reasoning "does not hold in the bankruptcy context." *Id.* at 1023 n.9; *see also In re EPD Inv. Co.*, 821 F.3d 1146, 1150 (9th Cir. 2016) (arbitration agreement unenforceable with respect to claims of fraudulent conveyance, subordination, and disallowance because of conflict with Code's centralization purpose); *In re Eber*, 687 F.3d 1123, 1130-1131 (9th Cir. 2012) (applying *Thorpe Insulation* to hold arbitration agreement unenforceable with respect to dischargeability of debt).

In short, the courts of appeals have devised an array of bespoke approaches to addressing the arbitrability of bankruptcy claims—none of which comports with

this Court's clear dictate in *Epic Systems*. This Court should grant certiorari to harmonize the courts of appeals' approaches to this issue and bring them into accord with every other statutory regime where questions of arbitrability routinely arise.

CONCLUSION

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

Respectfully submitted.

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