16-2496

U.S. Court of Appeals for the Second Circuit

IN RE: ORRIN S. ANDERSON, AKA ORRIN S. ANDERSON, AKA ORRIN SCOTT ANDERSON,

Debtor.

****

ORRIN S. ANDERSON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, AKA ORRIN SCOTT ANDERSON,

Plaintiff-Appellee,

v.

CREDIT ONE BANK, N.A.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York, No. 15-CV-4227, before the Honorable Nelson S. Román

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT CREDIT ONE BANK, N.A.

KATE COMERFORD TODD
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER
1615 H STREET, NW
WASHINGTON, DC 20062
(201) 463-5337

EVAN M. TAGER
MAYER BROWN LLP
1999 K STREET, NW
WASHINGTON, DC 20006
(202) 263-3000

CHARLES E. HARRIS, II
MAYER BROWN LLP
71 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606
(312) 782-0600

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. Consequently, no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. *See*, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Patterson v. Raymours Furniture Co.*, --- F. App'x ---, 2016 WL 4598542 (2d Cir. Sept. 2, 2016). The Chamber has a strong interest in this case because many of its members rely on arbitration as a fast, efficient

[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), the Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

and less expensive forum to resolve disputes with consumers and others. The continued availability of these benefits of arbitration depends on the courts' faithful enforcement of arbitration agreements and consistent application of the fundamental principles of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA" or the "Act").

INTRODUCTION AND SUMMARY OF ARGUMENT

The courts below made what should have been a very simple case difficult and got the wrong answer as a result.

It is well established that the FAA embodies a "federal policy favoring arbitration," which requires that the courts "rigorously enforce agreements to arbitrate." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226. It is equally well established that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). In other words, a court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226.

The Supreme Court has made clear that the duty to compel arbitration can be overridden only by a congressional command evincing "an intention to preclude a waiver of judicial remedies for the statutory

rights at issue." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). The standard for determining whether Congress intended to override the FAA is a strict one. Either Congress must have spoken with "clarity" in the plain language or legislative history of the statute (*CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2012)) or there must be an "irreconcilable conflict" between arbitration and the purposes of the statute (*McMahon*, 482 U.S. at 239). This standard is so strict that the Supreme Court has never found it satisfied—holding in a series of cases that there is no congressional command to override the FAA in the antitrust laws, the Exchange Act of 1934, RICO, the Securities Act of 1933, the Age Discrimination in Employment Act, or the Credit Repair Organizations Act.[2]

The courts below deviated from the Supreme Court's strict "congressional command" standard in this case. Acknowledging that neither the Bankruptcy Code's text nor its legislative history evinces an intention to override the FAA, the courts below nonetheless held that there is an "inherent conflict" between arbitration and the policies

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[2] The ***only*** case in which the Court has ever held that a statutory claim could not be arbitrated was *Wilko v. Swan*, 346 U.S. 427 (1953). That case pre-dated the Court's adoption of the strict "irreconcilable conflict" standard and was overruled in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

underlying Section 524 of the Code—most particularly, the objective of providing debtors with a "fresh start" by ensuring enforcement of discharge injunctions.

That impressionistic conclusion fails to heed the Supreme Court's admonition that the perceived conflict must be "irreconcilable." There is no basis for the lower courts' evident assumption that arbitrators are incapable of or unwilling to enforce discharge injunctions. Instead, it appears to rest on the kind of antiquated hostility to arbitration that the FAA was enacted to repudiate.

The district court's assertion that bankruptcy courts are better suited than arbitrators to interpret their own discharge orders similarly fails to appreciate that the conflict between arbitration and the policies of the statute must be "irreconcilable." Even assuming *arguendo* that bankruptcy courts enjoy an institutional advantage in interpreting discharge orders, it does not follow that arbitrators lack the competence to interpret such orders, much less that allowing them to do so would be inimical to the purposes of Section 524. And in any event, no interpretation of a discharge order is required here.

Finally, the lower courts' concern about the uniform application of the Bankruptcy Code is a manifestly invalid basis for refusing to submit

appellee Orrin Anderson's Section 524 claim to arbitration. Congress gave the state and federal courts concurrent jurisdiction over such claims (*see* 28 U.S.C. § 1334(b))—meaning that any member of Anderson's putative class could bring his or her own Section 524 claim in any federal district court or state court that has personal jurisdiction. The risk of non-uniformity is one that ***Congress*** created; it follows that there is no basis for inferring that Congress intended to exalt uniformity over the strong federal policy favoring enforcement of arbitration agreements according to their terms.

In short, there is no true "irreconcilable conflict" between arbitration and the policies underlying Section 524. Accordingly, the courts below erred in failing to enforce the parties' arbitration agreement as written.

ARGUMENT

The courts below asked the wrong question, and as a result came up with the wrong answer. The question they should have asked is whether there is an "irreconcilable conflict" between arbitration and the purposes of Section 524 of the Bankruptcy Code, such that Congress should be presumed to have intended to make Section 524 claims off limits to arbitration. The answer is manifestly no.

A. The FAA Mandates That Courts Enforce Agreements To Arbitrate Statutory Claims Unless There Is A Clear Congressional Command To The Contrary.

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. As this Court has explained, prior to enactment of the FAA, courts regarded arbitration agreements as "anathema." *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959). They accordingly "resorted to a great variety of devices and formulas to destroy this encroachment on their monopoly of the administration of justice, protecting what they called their 'jurisdiction.'" *Id.*; *see also Concepcion*, 563 U.S. at 342 ("the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas'") (quoting *Robert Lawrence*, 271 F.2d at 406).

The FAA thus reflects an "emphatic federal policy in favor of arbitral dispute resolution" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)) that requires courts to "rigorously enforce agreements to arbitrate" (*Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). That duty is "not diminished when a party bound

by an [arbitration] agreement raises claims founded on statutory rights." *McMahon*, 482 U.S. at 226. As the Supreme Court repeatedly has made clear, the agreement must be enforced according to its terms "even when the claims at issue are federal statutory claims." *CompuCredit*, 132 S. Ct. at 669; *see also Italian Colors*, 133 S. Ct. at 2309 (explaining that requirement that courts rigorously enforce arbitration agreements according to their terms "holds true for claims that allege a violation of a federal statute"); *Gilmer*, 500 U.S. at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."); *Mitsubishi*, 473 U.S. at 626 ("There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.").[3]

Although the requirement that courts enforce agreements to arbitrate statutory claims may be "overridden by a contrary congressional command" (*McMahon*, 482 U.S. at 226), that exception is a narrow one. The "contrary congressional command" must be deducible either from "'[the statute's] text or legislative history,' or from an inherent conflict

[3] This rule applies with full force to agreements in consumer contracts. *See*, *e.g.*, *CompuCredit*, 132 S. Ct. at 672; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) ("Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.").

between arbitration and the statute's underlying purposes." *Id.* at 227 (quoting *Mitsubishi*, 473 U.S. at 628); *accord MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 107-08 (2d Cir. 2006). And "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227.

The Supreme Court has emphasized that "obtuse" legislative language is insufficient to support the conclusion that Congress intended to make particular statutory claims off limits to arbitration. *CompuCredit*, 132 S. Ct. at 672. Indeed, because all doubts must be resolved in favor of arbitrability, the basis for concluding that Congress intended to override the FAA must be clear before a court may refuse to enforce an agreement to arbitrate a statutory claim. *Id.* at 675 (Sotomayor, J., concurring) (if the parties' arguments are "in equipoise, . . . our precedents require that" the agreement to arbitrate be enforced because "the opponents of arbitration[] bear the burden of showing that Congress disallowed arbitration of their claims, and because we resolve doubts in favor of arbitration").

The burden is thus an exceptionally heavy one—as the Supreme Court's case law well illustrates. After determining in 1953 that claims

under the Securities Act of 1933 are non-arbitrable on the ground that "judicial direction" is necessary "to fairly assure the[] effectiveness" of the substantive provisions of that Act (*Wilko*, 346 U.S. at 437), the Court underwent a course correction. In its first foray into the topic after recognizing the "liberal federal policy favoring arbitration agreements" (*Moses H. Cone*, 460 U.S. at 24), the Court observed in 1985 that nothing in the language of the antitrust laws indicated any intention by Congress to preclude arbitration of antitrust claims. *Mitsubishi*, 473 U.S. at 640; *see also Italian Colors*, 133 S. Ct. at 2309. Two years later, the Court held that there was no congressional command to override either the Exchange Act of 1934 or RICO. *McMahon*, 482 U.S. at 238, 242. Two years after that, the Court made official what had already become an open secret, overruling *Wilko* and holding that "[o]nce the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act" that the Act's antiwaiver provision may be viewed as a congressional command to override the FAA. *Rodriguez de Quijas*, 490 U.S. at 481. Another two years after that, the Court held that in enacting the Age Discrimination in Employment Act Congress "did not explicitly preclude arbitration or other nonjudicial

resolution of claims." *Gilmer*, 500 U.S. at 29. Finally, in 2012 the Court reached the same conclusion regarding the Credit Repair Organizations Act. *CompuCredit*, 132 S. Ct. at 673.

Indeed, so stringent is the Court's "contrary congressional command" standard that in still another case the plaintiff implicitly conceded that the Truth in Lending Act does not "evince[] an intention to preclude a waiver of judicial remedies." *Green Tree*, 531 U.S. at 90. And federal courts of appeals have held that there was no congressional command to preclude arbitration of claims under either the Fair Labor Standards Act (*see, e.g.*, *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1330-37 (11th Cir. 2014) (joining Second, Fifth, and Eighth Circuits)) or the Uniformed Services Reemployment Rights Act (*see, e.g.*, *Ziober v. BLB Resources, Inc.*, --- F.3d ---, 2016 WL 5956733 (9th Cir. Oct. 14, 2016) (joining Fifth and Sixth Circuits)).

The Supreme Court has provided examples of the kind of unmistakably clear statutory language that ***is*** sufficient to override the FAA. Specifically, 7 U.S.C. § 26(n)(2) provides that "[n]o pre-dispute arbitration agreement shall be enforceable, if the agreement requires arbitration of a dispute arising under this section," and 15 U.S.C. § 1226(a)(2) provides that "[n]otwithstanding any other provision of law,

whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." *See CompuCredit*, 132 S. Ct. at 672 (citing both of these statutes).

In the absence of that degree of "clarity," the Supreme Court has deemed it "unlikely" that "Congress would have sought to achieve the same result"—i.e., preclude the arbitration of a particular statutory claim. *CompuCredit*, 132 S. Ct. at 672-73. For instance, the Supreme Court held that RICO's creation of a right to sue "in any appropriate United States district court" was not a sufficient indicium of congressional intent to prohibit arbitration of RICO claims. *Id.* at 671 (discussing *McMahon*). And it likewise held that provisions in the Credit Repair Organizations Act requiring credit repair organizations to provide notice to consumers of their right to sue, setting forth how "the court" should go about setting punitive damages, and barring waiver of the protections of the statute were too "obtuse" to constitute the requisite congressional command to override the FAA. *Id.* at 669-73.

Just as it has never held since its post-*Wilko* course correction that the plain language of a statute was sufficiently clear to preclude arbitration of claims under the statute, so too has the Court never found the kind of "inherent conflict" between arbitration and a statute's "underlying purposes" necessary to justify refusing to permit arbitration of a statutory claim—not in the antitrust laws, RICO, the Age Discrimination in Employment Act, the Exchange Act of 1934, the Securities Act of 1933, or the Credit Repair Organizations Act.

And that is as it should be. There would be no point to embracing such a strict standard for determining whether the statutory language evinces an intent to override the FAA if the "inherent conflict" aspect of the inquiry were any less stringent. Indeed, unless carefully cabined, the "inherent conflict" inquiry would be rife with the potential for subjectivity and judicial bias against arbitration to infect the analysis. It would, in fact, be just a modern-day "device[]" or "formula[]" for expressing the antiquated judicial hostility to arbitration that it was the very point of the FAA to banish. *See Concepcion*, 563 U.S. at 342.

Thus, it is quite clear that courts are not free to refuse to enforce arbitration agreements merely because they believe that providing a judicial forum for a particular statutory claim would be more efficient or

lead to more consistent results. Instead, there must be an "irreconcilable conflict"—not a mere tension—"between arbitration and [the statute's] underlying purposes." *McMahon*, 482 U.S. at 239.

The Supreme Court has explained that statutory provisions cannot be said to be in "irreconcilable conflict" unless there is a "positive repugnancy" between them such that they "cannot mutually coexist." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Or, as this Court has put it, two statutes are in "irreconcilable conflict" when enforcement of one would "effectively nullify" the other. *In re Ionosphere Clubs, Inc.*, 22 F.3d 403, 407 (2d Cir. 1994).

It is against this background that this Court's decision in *Hill* must be understood. The Court explained in *Hill* that Congress will be presumed to have overridden the FAA only when there is "a severe conflict" between arbitration and the relevant bankruptcy policies. 436 F.3d at 108. And it then proceeded to hold that the arbitration of a post-discharge class action alleging violations of the automatic stay entailed no such "severe conflict." *Id.* at 109-10.

In reaching that conclusion, the Court noted that arbitration of the claims at issue would not jeopardize the important purposes served by the automatic stay. *Id.* at 109. But given the Supreme Court's case law on

this issue, that statement cannot reasonably be understood as an endorsement of the converse proposition that courts are free to refuse to enforce an arbitration agreement whenever they perceive that resolving a claim in court would advance the purposes of the automatic stay or, as in this case, the purposes of a discharge. Instead, for *Hill* to be consistent with Supreme Court case law, it must be understood to require—as in every other context—that there be an "irreconcilable conflict" between arbitration and the policies of the Bankruptcy Code (*McMahon*, 482 U.S. at 239) such that requiring arbitration of the bankruptcy claim in question would "effectively nullify" the relevant Bankruptcy Code provision (*Ionosphere Clubs*, 22 F.3d at 407).

B. The Courts Below Erred In Holding That Congress Intended To Preclude Arbitration Of Anderson's Section 524 Claim.

Under the standards articulated by the Supreme Court and this Court, the resolution of this appeal should be straightforward. Anderson does not maintain that the necessary congressional command to override the FAA may be found in either the text or the legislative history of the Bankruptcy Code. JA 600 n.3. The case accordingly turns on whether arbitration of Anderson's claim on an individual basis as required by the

parties' arbitration agreement would "irreconcilably conflict" with the policies of Section 524. Plainly it would not.

The question is—for all intents and purposes—answered by Congress's decision not to bestow exclusive jurisdiction over Section 524 claims on the bankruptcy courts. Instead, it granted concurrent jurisdiction to state and federal courts to hear civil cases arising under or related to Section 524 and other provisions of the Bankruptcy Code. *See* 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising" under the Bankruptcy Code); *see also Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 (3d Cir. 1989) ("it is clear that in 1984 Congress did not envision all bankruptcy related matters being adjudicated in a single bankruptcy court"); *Laurich-Trost v. Wabnitz*, 2003 WL 22805159, at * 2 (Ohio Ct. App. Nov. 25, 2003) (holding that trial court order granting set-off against appellant violated Section 524 because the judgment against appellant had been discharged in bankruptcy); *Ramdharry v. Gurer*, 1995 WL 41353, at *2, *3 (Conn. Super. Ct. Jan. 25, 1995) (holding that judgment against defendant was "null and void" as "violative of 11 U.S.C. § 524"); *Brown v. Nat'l City Bank*, 457 N.E.2d 957, 961 (Ohio Mun. Ct. 1983) (holding that employer and bank violated

Section 524 by deducting funds from employee's paycheck based on a discharged debt).

Since Congress did not see fit to centralize all claims under Section 524 in the same bankruptcy court, it logically cannot be deemed to have had an intent to preclude arbitrators from resolving such claims. To the contrary, as the Supreme Court has explained, "arbitration is consistent with Congress' grant of concurrent jurisdiction . . . to state and federal courts, 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.'" *Gilmer*, 500 U.S. at 29 (quoting *Rodriguez de Quijas*, 490 U.S. at 483) (alteration and citation omitted).[4]

As Judge Briccetti explained in a decision conflicting with the decision below, Congress amended the Judiciary Code provisions relating

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[4] Indeed, even if Congress ***had*** conferred exclusive jurisdiction over Section 524 claims upon the federal district courts, that still would not be a sufficiently clear expression of intent to preclude arbitration of such claims. The Supreme Court has explained that "a statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in a federal court." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996). Applying that principle, the Court has held that exclusive-jurisdiction provisions are not sufficiently clear indicia of congressional intent to preclude arbitration. *See, e.g., McMahon*, 482 U.S. at 227; *see also CompuCredit*, 132 S. Ct. at 671 (discussing *Mitsubishi*).

to jurisdiction over bankruptcy matters "after 'a string of Supreme Court decisions compelling arbitration pursuant to contractual stipulations had alerted [it] to the utility of drafting anti-arbitration prescriptions with meticulous care.'" *In re Belton*, 2015 WL 6163083, at *6 (S.D.N.Y. Oct. 14, 2015) (quoting *CompuCredit*, 132 S. Ct. at 669 (Ginsburg, J., dissenting)) (ellipses and brackets omitted). To put it bluntly, "had Congress intended to give federal courts exclusive jurisdiction over Section 524 claims, or otherwise express its intent to preclude arbitration of those claims, it knew how to do so." *Id*.

That should be reason enough to reject the notion that such claims are non-arbitrable. But even allowing that there remains room to refuse to enforce an arbitration agreement in the limited circumstance in which there is an "irreconcilable conflict" between arbitration and the policies underlying the statute, there manifestly is no such conflict here.

The lower courts' principal basis for holding that there is an "inherent conflict" between arbitration and the purposes of Section 524 was that the question "whether a discharge injunction has been violated is essential to proper functioning of the Bankruptcy Code, and arbitration is inadequate to protect such core, substantive rights granted by the Code." JA 608; *see also* JA 492.

But the courts below did not—and could not—explain why an arbitrator is incapable of determining whether Credit One's actions (or, more accurately, lack thereof) ran afoul of the discharge injunction. As the Supreme Court held—more than 30 years ago—there is no basis for presuming "that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634. Nor is there any "reason to assume at the outset of the dispute that . . . arbitration will not provide an adequate mechanism." *Id.* at 636. That is just as true—if not even more true—of claims regarding a single act deemed to violate a discharge injunction as it is of complex antitrust claims.

As with the assumptions that "arbitration lacks the certainty of a suit at law under the [Securities] Act to enforce the buyer's rights" and that arbitrators cannot adequately "protect buyers of securities," the lower courts' assumption that an arbitrator would not be able to adequately protect Anderson's right to a "fresh start" is "pervaded by . . . the old judicial hostility to arbitration." *Rodriguez de Quijas*, 490 U.S. at 480 (internal quotation marks and brackets omitted). "Once the outmoded presumption of disfavoring arbitration proceedings is set to one side" (*id.* at 481), it should be clear that there is no other basis on which to conclude

that arbitration is not a perfectly good means of ensuring that discharge orders are not violated.

The district court's second rationale—that bankruptcy court judges are in the best position to interpret their own orders (JA 610)—is likewise insufficient. For one thing, Anderson asked the bankruptcy court to find that Credit One's purported practices are "in violation of [his] rights . . . under the Bankruptcy Code and a contempt of the statutory injunction set forth in § 524(a)(2)," not to interpret its discharge order. JA 398. Moreover, under Section 524(a)(2), an injunction was instituted by operation of law once the bankruptcy court entered the discharge order. Therefore, the single paragraph in the discharge order that mentions an injunction is redundant and did not afford additional relief to the debtor. *See In re Latanowich*, 207 B.R. 326, 334 (Bankr. D. Mass. 1997) (explaining that a discharge order only "reiterate[s]" the statutory injunction under Section 524(a)(2)). The bankruptcy court, in fact, entered a form order containing injunction language that mirrors Section 524(a)(2)'s language. *Compare* JA 73 ¶ 3, *with* 11 U.S.C. § 524(a)(2). In other words, because the discharge order was boilerplate, the fact that the bankruptcy court issued it gave the court no special competence to interpret it. But even if the order really were a bespoke product of the

bankruptcy judge, that does not mean that an arbitrator would be incompetent to interpret it. That a bankruptcy court may arguably enjoy an institutional advantage in interpreting a discharge order does not mean that there is an "irreconcilable conflict" between arbitration and the policies underlying Section 524.

The lower courts' final rationale was that "uniform application of the Bankruptcy Code is furthered by federal, class action litigation," whereas arbitration of Section 524 claims "could create wildly inconsistent results." JA 611, 612; *see also* JA 493. As the Supreme Court has explained, however, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Byrd*, 470 U.S. at 221.

The Bankruptcy Code manifests no such "countervailing policy" in favor of class action litigation in bankruptcy court. To the contrary, the very fact that each member of Anderson's putative class could bring his or her own Section 524 claim in any federal or state court that has personal jurisdiction proves definitively that whatever interest there may be in uniformity is not so weighty as to override the parties' agreement to

arbitrate. Where, as here, there is no evidence—only assumption—that Congress cared more deeply about uniformity than about the enforcement of agreements to arbitrate, the arbitrable claims must be sent to arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Byrd*, 470 U.S. at 217; *see also Hays & Co.*, 885 F.2d at 1158 ("even if there were some potential for an adverse impact on the core proceeding, such as inefficient delay, duplicative proceedings, or collateral estoppel effect, [the debtor] has not shown that it would be substantial enough to override the policy favoring arbitration").

In sum, none of the rationales of the courts below comes close to demonstrating the kind of "irreconcilable conflict" between arbitration and the policies of Section 524 that is necessary under the Supreme Court's and this Court's precedents to presume a congressional command to override the FAA. Accordingly, the decision below must be reversed, and the parties' arbitration agreement must be enforced.

CONCLUSION

This Court should reverse and remand with instructions to enter an order compelling arbitration and staying the bankruptcy proceeding.

November 16, 2016

Respectfully submitted,

/s/ *Evan M. Tager*

Kate Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(201) 463-5337

Evan M. Tager
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Charles E. Harris, II
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for the *amicus* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 4,580 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

November 16, 2016 /s/ *Evan M. Tager*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on November 16, 2016, the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

November 16, 2016 /s/ *Evan M. Tager*