No. 18-20809

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of: Stephanie Marie Henry
Debtor

STEPHANIE MARIE HENRY, formerly known as Stephanie Marie Henschel,
Appellee

v.

EDUCATIONAL FINANCIAL SERVICE, a Division of Wells Fargo Bank, N.A.,
Appellant

On Appeal from the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division, Case No. 13-30519, Adversary No. 18-3154

BRIEF OF AMICI CURIAE PROFESSOR JAY L. WESTBROOK, NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

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April 12, 2019

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Henry v. Educational Financial Service, No. 18-20809.

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by the appellant. **NOT APPLICABLE.**

This day of April 12, 2019.

s/ Tara Twomey

Tara Twomey, Esq.
Attorney for Amici Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Henry v. Educational Financial Service, Case No. 18-20809.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant: Educational Financial Service.

Appellee: Stephanie Marie Henry.

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Other: Various consumer bankruptcy debtors and their counsel nationally and in the Fifth Circuit, including the membership of the National

Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center.

This 12th day of April, 2019.

s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE

Professor Jay L. Westbrook is the Benno C. Schmidt Chair of Business Law at the University of Texas Law School. He is a leading scholar of bankruptcy law who has been teaching, researching and writing about bankruptcy law for decades. He is a coauthor of two of the most important empirical studies of consumer bankruptcy, as reported in As We Forgive Our Debtors and The Fragile Middle Class. He has been Visiting Professor at Harvard Law School and the University of London, and is a member of the American Law Institute, the National Bankruptcy Conference, and the American College of Bankruptcy. As a sought-after expert on bankruptcy law, Professor Westbrook serves as a consultant to the International Monetary Fund and the World Bank, and was the United States Reporter for the ALI's Transnational Insolvency Project and co-head of the United States delegation to the UN (UNCITRAL) conference that created the Model Law on Cross-Border Insolvency.

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in

systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization of more than 2,000 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

Amici have a vital interest in the outcome of this case. The result in the case at bar will affect the administration of many consumer cases in this Circuit. If required here, arbitration would turn over enforcement of a bankruptcy court's order and statutory injunction to private parties, an unprecedented abdication of judicial authority. It would impede determination of an important question of law whose resolution by authoritative court order would guide future debtors and creditors in the administration of many of the thousands of consumer bankruptcy cases that are brought in this Circuit every year.

Amici believe the issue presented to this Court is of fundamental importance to the bankruptcy system and seek to provide the Court with additional background on the principles of law at stake in this case.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

No party's counsel authored this Amicus Curiae Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amicus curiae, it members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

CONSENT

This amicus brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

I. The injunction that a debtor receives to protect his or her discharge and opportunity for a fresh start is the promise of the bankruptcy laws. It is a statutory injunction triggered by judicial order that cannot be controlled by an arbitration clause; it is not a "claim" subject to arbitration.

This appeal thus does not require a determination of the extent or scope of the duty to arbitrate in a bankruptcy case and whether this Court and the other circuits have faithfully applied applicable Supreme Court authority to give effect to both the Federal Arbitration Act and the Bankruptcy Code. This case involves the power and duty of a Federal court to construe and enforce its own order, a right and obligation that cannot be turned over to an arbitrator.

II. In providing an injunction to protect the bankruptcy discharge, Congress recognized the need for a Federal judicial remedy and acted specifically to lodge that remedy in the courts. Congressional intent should not be undermined by requiring arbitration after the discharge order has been entered and the injunction to enforce it has been issued.

STATUTORY FRAMEWORK

This case involves the protection of the debtor's fresh start, which is a foundational cornerstone of the Bankruptcy Code. So that the Court may better understand the context in which this dispute arises, a brief overview of the relevant bankruptcy framework is provided below.

Bankruptcy: Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). Individuals seeking bankruptcy relief generally seek liquidation under chapter 7 of the Bankruptcy Code or propose a plan for repayment of a portion of their debt under chapter 13.

Chapter 13: Chapter 13 permits an individual debtor with a source of regular income to receive a discharge of certain debts after completing a bankruptcy plan that meets the Code's requirements. At the outset of the case, the Bankruptcy Code instructs debtors to file various schedules identifying assets, liabilities, income, expenses, and exemptions. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007 (describing lists, schedules, statements, and other documents that must be filed). Chapter 13 debtors must file a debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. The chapter 13 plan, if confirmed, is the blueprint for adjusting debtor-

creditor relationships. Creditors, who have submitted claims, are paid by the chapter 13 trustee pursuant to the confirmed chapter 13 plan. Upon completion of the plan, the bankruptcy court enters a discharge order.

In this case, Mr. Henry filed a chapter 13 bankruptcy on February 1, 2013 [R.125]. Wells Fargo filed a claim in the bankruptcy case and received payments from the chapter 13 trustee pursuant to the confirmed plan. Ms. Henry completed her chapter 13 plan and the bankruptcy court entered a discharge order on May 17, 2018 [R.125].

The Discharge: The central purpose of federal bankruptcy law is to "give the debtor a 'new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.'" *Lines v Frederick,* 400 U.S. 18, 19 (1921) (quoting *Local Loan Co. v Hunt*, 292 U.S. 234, 244-45 (1914). The discharge granted to the debtor and the discharge injunction imposed by 11 U.S.C. § 524(a) serve this purpose by first discharging the debtor from liability for most prepetition claims and second prohibiting "the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [prepetition] debt as a personal liability of the debtor." *Green Point Credit, LLC v McLean (In re McLean)*, 794 F.3d 1313, 1320 (11th Cir. 2015); *see* 11 U.S.C. §§ 523, 524, 727. Legislative history demonstrates that the purpose of the modern discharge injunction is to "eliminate any doubt concerning the effect of

the discharge as a total prohibition on debt collection efforts." H.R. Rep. 95-595, 95th Cong., 1st Sess., at 365-66 (1977).

To achieve the Bankruptcy Code's overall "fresh start" aim, the discharge injunction is viewed expansively and accounts for the myriad ways in which prepetition creditors might coerce debtors to pay an otherwise discharged debt. *Hardy v United States ex rel. Internal Revenue Service (In re Hardy)*, 97 F.3d 1384, 1388-89 (11th Cir. 1996). In practice, if the debtor satisfies the conditions of the Bankruptcy Code, the court grants the debtor a discharge, which relieves the debtor of personal liability for any discharged debt. *See* 11 U.S.C. §§ 727, 1328. Section 524 of the Bankruptcy Code further specifies the effects of that federal order. Section 524(a)(2) provides that: "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or 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." Thus, section 524 provides for injunctive relief to enforce the federal bankruptcy discharge. Section 524 does not specify a remedy for a violation of the discharge injunction. However, the general consensus of bankruptcy and circuit courts around the country is that discharge violations may be remedied under section 105(a), which allows courts to issue any order necessary or appropriate to carry out the provisions of the Code. *See Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 442

(1st Cir. 2000); *In re Cano*, 410 B.R. 506, 537-541 (Bankr. S.D. Tex. 2009).

Ms. Henry completed her approved chapter 13 plan and through that plan paid as much of her debt as she could. Wells Fargo profited from Ms. Henry's efforts by receiving payments from the chapter 13 trustee that were at least equal to what it would have received had Ms. Henry sought liquidation under chapter 7. However, despite the payments Wells Fargo received through the plan and the subsequent discharge order, Wells Fargo sought to collect more money from Ms. Henry after her case concluded. When Ms. Henry sought to enforce her discharge, Wells Fargo asked that an arbitrator, not the court, decide whether it violated the court order and statutory injunction.

ARGUMENT

I. There is No "Claim" Against Which the Arbitration Agreement Can Operate, Only Enforcement of an Existing Court Order.

The discharge injunction is not a "claim" subject to arbitration. Nor is the central issue in this case a question of contractual interpretation about the scope of any particular arbitration clause. Rather, violations of the discharge injunction are inherently non-arbitrable. As further discussed in Point II below, the discharge injunction vindicates a federal right that a federal court already has awarded the debtor, the bankruptcy discharge.

Only Congress can enact a bankruptcy law that provides for a discharge of indebtedness. The Constitution empowers Congress to enact "uniform Laws on the subject of Bankruptcies," U.S. Const., art. I, § 8, while it simultaneously prohibits states from "impairing the Obligation of Contracts." *Id*. § 10. Because of the Contract Clause and the preemptive effect of the uniform Federal bankruptcy discharge in force for over 115 years, States cannot pass laws that discharge debts. The plenary power to provide for a discharge of indebtedness lies solely with Congress. Every lawyer knows that bankruptcy changes rights. For this reason every well-drafted opinion on the enforceability of a contract has a bankruptcy exception clause.[1] These clauses recognize that the enforceability of every contractual provision – including the obligation to arbitrate -- is subject to applicable bankruptcy law.

Congress has exercised its power to enact "uniform Laws on the subject of Bankruptcies" through title 11 of the United States Code and by giving the Federal district courts "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Congress also has given the federal district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in

[1] A typical enforceability exception reads: "Our opinion is subject to and limited by (i) the effect of applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, receivership, conservatorship, arrangement, moratorium or other laws affecting or relating to the rights of creditors generally…." *See In re Sonicblue, Inc.,* 2007 WL 926871 (Bankr. N.D. Cal. March 26, 2007).

or related to cases under title 11." *Id*. § 1334(b). Among other things, the Bankruptcy Code directs the Federal court with jurisdiction over the bankruptcy case to issue the bankruptcy discharge upon finding the debtor has met certain conditions. The discharge is relief requested by the filing of the bankruptcy petition commencing the bankruptcy "case." Arguably, the discharge itself is an exercise of jurisdiction over the "case under title 11" and thus within the court's exclusive jurisdiction. Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief*, 76 Am. Bankr. L.J. 461, 511 (2002). The only other possibility is that the discharge is a "civil proceeding arising under title 11" (although it would be an odd phrasing to call an automatically issuing decree a "proceeding").[2]

In any event, upon filing her chapter 13 petition, debtor Stephanie Henry commenced a procedure – a bankruptcy case – in the federal court from which the

[2] The statute nominally designates a federal court's jurisdiction over a "civil proceeding arising under title 11" as "original but not exclusive." In regard to the discharge, however, the distinction between "case" jurisdiction versus "proceeding" jurisdiction is a distinction without a difference. See Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory,* 41 Wm. & Mary L. Rev. 743, 837 (2000) ("[A]s a jurisdictional unit, a bankruptcy 'case' is an invention of the drafters of the 1978 Reform Act."). Only the federal court with jurisdiction over the bankruptcy can issue a discharge, and the only way to get a discharge order is to be a "debtor," which requires commencing a bankruptcy case in federal court. As the Supreme Court has held, bankruptcy discharge is a "decree of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character." *Local Loan Co.,* 292 U.S. 234, 244 (1934) (emphasis added).

discharge would issue. Neither Henry nor any of her creditors could force arbitration of the bankruptcy case. An arbitrator cannot issue a bankruptcy discharge. For that matter, no one can issue a bankruptcy discharge other than the federal court that exercises jurisdiction over a debtor's bankruptcy. Henry now simply asks a federal court to enforce the order. Before 1970, she could have requested an injunction from that court, but section 524 now obviates the need to do so. Importantly, as discussed in Point II, an injunction is already in place.

Allowing the parties' boilerplate arbitration agreement to relegate the inquiry to a private arbitrator eviscerates the power of a court to enforce its injunction. In a judicial proceeding, the court could develop an evidentiary record on matters such as (1) whether Wells Fargo violated its order, (2) whether any violations were unintentional or willful, (3) the extent of any violations, and (4) the ability to fashion an appropriate remedy, including the possibility of awarding attorneys' fees. It is beside the point that an arbitrator also may be professionally competent to do these things or may do these things more or less expensively or expeditiously than the court. An arbitrator is not the court. Sending the case to an arbitrator undermines the power of the court to enforce its own orders.

In short, the bankruptcy court correctly concluded that Henry's claim that Wells Fargo violated the "discharge order and statutory injunction provided by 11 U.S.C. § 524 is not, and cannot be, part of a contractual negotiation between

private parties." R. 309. Wells Fargo scoffs at this, asserting that it merely evidences "a hostility to arbitration of the type the FAA was enacted to prevent." Appellant's Br. at 25. It is no such thing. This was a chapter 13 case in which unsecured creditors, like Wells Fargo, filed their claims. A confirmation order was entered, providing for certain payments to unsecured creditors. The Supreme Court has time and again emphasized the binding effect of a confirmation order in a bankruptcy case. As the Supreme Court recently held in another chapter 13 case, citing its prior opinion in *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 275 (2010):

> "When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. 11 U.S.C. §1327(a). Confirmation has preclusive effect, foreclosing relitigation of 'any issue actually litigated by the parties and any issue necessarily determined by the confirmation order.' 8 Collier [on Bankruptcy, 15th ed.] ¶1327.02[1][c], at 1327–6; see also *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 275, 130 S.Ct. 1367, 176 L.Ed. 2d 158 (2010)(finding a confirmation order 'enforceable and binding' on a creditor where the creditor had notice of the error and failed to object or timely appeal.)."

Bullard v. Blue Hills Bank, 135 S.Ct. 1686, 1692, 191 L.Ed.2d 621 (2015).

In any event, an obligation to arbitrate cannot be thought of as "riding through" the discharge order. In this case, debtor Henry duly paid her unsecured creditors the amounts required under the confirmation order and any subsequent modifications, and only at the end of this five-year period did she receive her discharge and the fresh start that is the promise of the bankruptcy laws. 11 U.S.C. §

1328(a). Only when her case had concluded, and she asked Wells Fargo to remove its alleged debt from her credit report, did Wells Fargo strike. This Court has held that "The burden is on the person who asserts non-dischargeability of a debt to prove its exemption from the discharge." *In re Benich,* 811 F.2d 943, 945 (5th Cir. 1987). Wells Fargo could have obtained a judicial decision on the dischargeability of the debt while the debtor's case was open, and it still can.[3] But it cannot obtain a non-judicial determination.

The only appellate cases to consider the arbitrability of a bankruptcy discharge have upheld the lower courts' decisions not to send the matter to arbitration. The first and still seminal case on the arbitrability of the discharge injunction in a bankruptcy case is this Court's decision in *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997). A creditor demanded repayment of a debt the

[3] As the Court said in *In re Haroon,* 313 B.R. 686, 689 (Bankr. E.D.Va. 2004),

> "A student loan creditor is not required to seek a dischargeability determination during the pendency of the bankruptcy case. The failure to seek a dischargeability determination does not alter the fact that the debt is or is not discharged upon entry of the discharge order. It merely avoids a judicial declaration of that fact at that time…. If a creditor wants to avoid the adverse consequences of an erroneous analysis, he can come to this court at anytime, even after the case has been closed, and seek an adjudication of the dischargeability issue….If he fails to do that and seeks to collect the debt, the debtor may use a show cause order to have this determination made. If the creditor is wrong and the debt was discharged, he has violated § 524." (internal citation omitted).

debtor claimed was discharged in the chapter 11 proceeding. The *National Gypsum* court distinguished "between those actions derived from the debtor and those created by the Bankruptcy Code" to explain "the consistent reluctance of courts to permit arbitration of actions brought to adjudicate bankruptcy rights." 118 F.3d at 1068. This Court stated:

> We are convinced that arbitration of a core bankruptcy adversary proceeding brought to determine whether INA's collection efforts were barred by the section 524(a) discharge injunction or by the confirmation of National Gypsum's reorganization plan, as a nondebtor-derivative action to enforce asserted rights created by the Bankruptcy Code that are completely divorced from National Gypsum's prepetition rights under the Wellington Agreement, would be inconsistent with the Bankruptcy Code. Whether premised, as the District Court suggested, on a finding that enforcement of the arbitration provision would irreconcilably conflict with the Bankruptcy Code, or on the view that bankruptcy courts have discretion to deny enforcement of arbitration clauses in core cases when the only rights at issue were created by the Bankruptcy Code rather than inherited from a debtor's pre-petition property, the Bankruptcy Court was within its discretion to deny INA's motion to stay under the Federal Arbitration Act. *Id.* at 1071 (citation and footnotes omitted).

More recently, the Second Circuit in *Anderson v. Credit One Bank, N.A.,* 884 F.3d 382 (2d Cir. 2018), *cert. denied,* 139 S.Ct. 144 (2018), came to precisely the same conclusion. The Court said

> The power to enforce an injunction is complementary to the duty to obey the injunction, which the Supreme Court has described as a duty borne out of "respect for judicial process." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 387, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980) (internal quotation marks omitted). That same respect for judicial process requires us to hold that the bankruptcy court alone has the power to enforce the discharge injunction in Section 524. Arbitration of the claim would thus present an inherent conflict with the Bankruptcy Code.

Id. at 391. The Supreme Court denied certiorari. 139 S.Ct. 144 (2018).

Wells Fargo asserts that a panel of this Court should overrule the Court's own decision in *National Gypsum* and ignore the Second Circuit's unanimous opinion in *Anderson* because both courts were implicitly overruled by the Supreme Court's later decision in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (May 12, 2018). There was no overruling, explicit or implied. The Federal statutes at issue in *Epic Systems* were the Fair Labor Standards Act and the National Labor Relations Act. Neither statute involves the critical features of a bankruptcy case – the exercise of exclusive *in rem* jurisdiction by a Federal court over all of the property of a debtor and ultimately the issuance of a discharge injunction and the fresh start that is at the heart of the bankruptcy laws. *See Central Virginia Community College v. Katz,* 546 U.S. 356 (2006). In *Epic Systems,* the Court noted, in rejecting the claim that the NLRA was at odds with the Federal Arbitration Act : "Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute." 138 S. Ct. at 1626. As further discussed in Part II below, Congress has indeed provided a particular "dispute

resolution procedure" in providing a Federal court injunction to protect the bankruptcy discharge and the debtor's opportunity for a fresh start.

The Supreme Court also said in *Epic Systems* that

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive " 'to give effect to both.'"

138 S. Ct. at 1624 (citations omitted)

Following this Court's decision in *National Gypsum,* every Circuit to consider the issue has indeed striven to "give effect to" both the Bankruptcy Code and the Federal Arbitration Act. The courts have developed a comprehensive jurisprudence that preserves arbitration notwithstanding the bankruptcy of a party to a contract with an arbitration clause. These cases start with the recognition that a debtor's admitted right to reject a contract does not include the right to reject an arbitration clause in the contract. To different degrees the courts reserve "core" bankruptcy disputes, including statutory bankruptcy causes of action, for judicial resolution and then remit all other matters to arbitration.

This Court took this approach in *Gandy v. Gandy (In re Gandy),* 299 F.3d 489, 495 (5th Cir. 2002), recognizing that the Federal Arbitration Act "directs courts to rigorously enforce arbitration agreements", 299 F.3d at 494, but nonetheless that a bankruptcy court possesses "discretion to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of a

proceeding derives exclusively from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicts with the purpose of the Code." *Id.* at 495. And the *Gandy* Court continued:

> "Some of the purposes of the Code we mentioned in *National Gypsum* as potentially conflicting with the Arbitration Act include the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganized debtors from piecemeal litigation and the undisputed power of a bankruptcy court to enforce the court's own orders." *Id.* at 500.

The other circuits generally take the same approach. *See In re United States Lines, Inc.,* 197 F.3d 631, 640 (2d Cir. 1999); *In re Mintze,* 434 F.3d 222, 231 (3d Cir. 2006); *In re White Mountain Mining Co.,* 403 F.3d 164, 169-70 (4th Cir. 2005); *In re Thorpe Insulation Co.,* 671 F.3d 1011, 1020 (9th Cir. 2011); *In re Electric Machinery Enterprises, Inc.,* 479 F.3d 791, 796 (11th Cir. 2007).

Wells Fargo suggests that multiple judges of the Courts of Appeal have over many years failed to faithfully follow Supreme Court authority in these cases. We submit they have not. In any event, this Court need not determine the precise point at which the mandate of the Federal Arbitration Act ends and title 11 prevails. There is nothing in the Federal Arbitration Act to suggest that a court must turn over to an arbitrator the question of whether its own order has been violated.

II. History Demonstrates Congress Consciously Chose Injunctive Relief to Enforce the Bankruptcy Discharge.[4]

The issue on appeal revolves around the enforcement of an injunction. Wells Fargo's position is based on the premise that section 524(a)(2)'s use of the word "injunction" is a historical accident of no importance. It is not. Congress deliberately chose to vest the Federal court presiding over a bankruptcy case with injunctive power to enforce the bankruptcy debtor's discharge. Congress did so precisely to give a bankruptcy debtor access to a Federal court's power to enforce its own order.

The bankruptcy discharge order is a Federal decree that the debtor no longer has legal liability for a debt. *See, e.g., Zavelo v. Reeves*, 227 U.S. 625, 629 (1913). The Bankruptcy Code directs the court to grant a discharge if the debtor satisfies the conditions of the relevant bankruptcy chapter. 11 U.S.C. §§ 727(a), 1141(d), 1228(a), 1328(a). The discharge order is a basic declaratory order, stating in its entirety, "IT IS ORDERED: A discharge under 11 U.S.C. § . . . is granted to," followed by the name of the debtor, the date, and the judge's signature. This simple order is reflected in mandatory, official forms. *See* Official Bankruptcy Forms 318, 3180F, 3180R1, 3180W.

[4] The history discussed in this section draws heavily from and summarizes the more detailed discussions in Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge,* 65 Am.Bankr. L.J. 325 (1971), and Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief,* 76 Am. Bankr. L. J. 461, 511-28 (2002).

Section 524 of the Bankruptcy Code then specifies the effects of that Federal order. At issue in this case is section 524(a)(2), "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or 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." Thus, section 524 provides for injunctive relief to enforce the Federal bankruptcy discharge.

The Bankruptcy Acts of 1800, 1841, and 1867 all provided for a bankruptcy discharge. The substantive contours of the discharge varied – for example, the 1800 law provided a discharge only for "merchants" – but drawing on their English antecedents these laws all had the same procedural features. The Federal court with jurisdiction over the bankruptcy case issued a discharge decree, but before 1970 the bankruptcy law itself provided no explicit Federal enforcement mechanism. Instead, the bankrupt debtor would plead the discharge as an affirmative defense in any later proceedings to enforce a debt discharged in the bankruptcy case. If a dispute arose as to whether the bankruptcy case had discharged a particular debt, it would be resolved in this later collateral proceeding and by a tribunal other than the Federal court that issued the discharge decree.

Our nation's first permanent bankruptcy law, the Bankruptcy Act of 1898, retained these procedural features. The law specified that a court could deny a

discharge for certain conduct, such as hiding assets. The Federal court with jurisdiction over the bankruptcy case might, for example, stay a State-court debt-collection proceeding until the Federal court determined whether the debtor was eligible for a discharge. Once the Federal court determined the debtor was eligible, it granted a discharge. After that, "[t]he correct procedure is to interpose the discharge as a defense in the state proceeding." *In re Scheffler*, 68 F.2d 902 (2d Cir. 1934); *see also In re Havens*, 272 F. 975 (2d. Cir. 1921).

These procedures began to change with *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), which is the fount of the discharge injunction now codified in section 524. In *Local Loan*, a small-loan company had taken a wage assignment from debtor Hunt. Hunt later filed bankruptcy and received a discharge. Under the case law of Hunt's native Illinois, the wage assignment was a lien on his future wages. The loan company sued Hunt's employer in state court to enforce the wage assignment claiming the bankruptcy could not affect its lien. Hunt then asked the Federal court with jurisdiction over his bankruptcy case to enjoin the state-court action.

The U.S. Supreme Court ruled that treating the wage assignment as a lien was inconsistent with the purposes of the Federal bankruptcy law, *id.* at 244-45. The Court further ruled that the Federal court with jurisdiction over the bankruptcy, like all Federal courts, had the power to entertain the request for an

injunction "to secure or preserve the fruits and advantages of a judgment or decree rendered therein." *Id.* at 239. The injunction would vindicate an important policy of the Federal bankruptcy fresh start, otherwise thwarted by an Illinois law regarding the nature of the wage assignment. The power to issue a discharge injunction flowed directly from the power to issue the discharge decree itself. "The jurisdiction of the court follows that of the original cause." *Id.* By definition, then, no other tribunal had the power to issue the injunction.

After *Local Loan*, the case law surrounding enforcement of the discharge devolved into a morass. The Federal courts varied widely on what constituted "unusual circumstances" sufficient to justify a *Local Loan* injunction. Some courts granted injunctions freely. Others found unusual circumstances in the effects of wage assignments or garnishments. "But in other jurisdictions, and particularly in the Second Circuit, the exception from the usual practice created by *Hunt* was regarded as an 'exceedingly narrow' one – so narrow, in fact, that another case presenting 'unusual circumstances' seemed never to arise." Vern C. Countryman, *The New Dischargeability Law*, 45 Am. Bankr. L.J. 1, 4-5 (1971).[5]

[5] Professor Countryman was "a towering figure in bankruptcy" who played a prominent role in the drafting of the 1970 law that is a direct precursor to § 524. David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist Bankruptcy Scholarship,* 113 Harv. L. Rev. 1075, 1075, 1109-10 (2000). His explanation of the 1970 law is therefore particularly helpful for understanding the reasons for its passage and its intended effect.

In the absence of an injunction, debtors who neglected to assert the discharge in a later State-law action might find that the doctrine of res judicata blocked any attempt to return to Federal court for an injunction. *Id.* at 5-6. With *Local Loan*'s authorization for Federal courts to enjoin collection of discharged debts came the concomitant obligation sometimes to decide which debts had been discharged. Thus, Federal courts and State courts might engage in protracted jurisdictional debates about who could decide that a particular debt had been incurred fraudulently and was therefore not covered by the discharge. *Id.* at 6-8. As the case law developed, aggressive creditors even began asking the Federal court hearing the bankruptcy case to issue prophylactic determinations about which particular debts were covered by the discharge. *Id.* at 8-10.

To clean up this case-law quagmire, in 1970 Congress enacted "the dischargeability amendments" to the bankruptcy law. Pub. L. No. 91-467, 84 Stat. 990 (1970). Among these amendments was a new § 14f for the Bankruptcy Act of 1898. This new section had two components. First, Congress provided that all judgments obtained on a discharged debt were null and void. *Id.* § 3, 84 Stat. at 991. The second component was a codification of the *Local Loan* injunction declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt." *Id.* By

enacting the 1970 law, "[i]n effect . . . Congress made a determination that a threat of irreparable injury to debtors' federal discharge rights sufficient to warrant injunctive relief of the sort authorized in *Local Loan* existed in *all* cases with respect to *all* discharged debts." 76 Am Bankr. L.J. at 524-25 (2002).

Just eight years later, Congress rewrote the bankruptcy laws and gave us what is today's Bankruptcy Code. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The first paragraph of what is now section 524 provides that all judgments obtained on discharged debts are null and void. The second paragraph states that the discharge shall "operate as an injunction" against creditor collection efforts. *Id.* § 101, 92 Stat. at 2592-93.[6] The provenance of §524 in the 1970 amendments and, in turn, in the injunction authorized by *Local Loan* could not be more patent. *See also* Staff of the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess., Table of Derivation of H.R. 8200 (Comm. Print No. 6, 1977, and available at 1977 WL 201780) (identifying § 14f(2) of the Bankruptcy Act of 1898 as the origin of § 524(a)(2)); S. Rep. No. 91-1173, at 9 (1970) (discussing the statutory discharge injunction to be codified at 1898 Act § 14f, incorporating by reference an explanatory memorandum of the National Bankruptcy Conference, and stating that

[6] The 1978 law also added a new, third paragraph to section 524(a) to clarify issues that had arisen in regard to community property where only one spouse filed a bankruptcy case.

such power "presently resides in the bankruptcy court by virtue of the decision of the Supreme Court in *Local Loan v. Hunt*"); H.R. Rep. No. 91-1502, at 8 (1970) (same), *reprinted in* 1970 U.S.C.C.A.N. 4156, 4163.

It is difficult to imagine how Congress could have been clearer that section 524(a)(2) has actual injunctive force. A Federal court decree of discharge triggers the injunction, the effects of which then ineluctably follow from the Supreme Court precedent that first authorized the injunction. Congressional use of the word "injunction" was not meant as a metaphor but was intended to give a bankrupt debtor the enforcement powers of the Federal court that had granted the discharge.

Section 524 thus is not "injunction-like;" it is an injunction. Congress codified *Local Loan*'s injunctive relief to ensure debtors received the full effect of these enforcement powers. Debtors who do not have the wherewithal to assert the bankruptcy discharge as a defense in collateral creditor collection actions now get injunctive protection from the Federal court automatically. It is inconceivable that, in codifying the *Local Loan* injunction, Congress somehow intended to shrink the authority of the Federal courts to enforce the discharge order or that it intended that the Federal Arbitration Act would override the courts' power and obligation to do so.

CONCLUSION

The judgment of the Bankruptcy Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 12, 2019. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 5th Cir. R. 29.3 because this brief contains 5,848 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

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