No. 20-481

IN THE

Supreme Court of the United States

IN RE: NYREE BELTON,

Debtor.

GE CAPITAL RETAIL BANK,

Petitioner,

v.

NYREE BELTON,

Respondent.

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

RESPONDENTS CITIGROUP INC. AND CITIBANK, N.A.'S BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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November 13, 2020

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents disclose the following:

Respondent Citibank, N.A., successor in interest to Citibank (South Dakota), N.A., is a wholly owned subsidiary of Citicorp LLC, which in turn is a wholly owned subsidiary of Citigroup Inc., a publicly held corporation. No other publicly held corporation owns ten (10) percent or more of Citibank, N.A.'s stock.

Respondent Citigroup Inc. is a publicly traded company. Citigroup Inc. does not have a parent corporation, and no publicly held corporation owns ten (10) percent or more of Citigroup Inc.'s stock.

Respondents were defendants-appellants in *Bruce* v. *Citigroup Inc. (In re Bruce)*, No. 19-0655 (2d Cir.), which was consolidated with *Belton* v. *GE Capital Retail Bank (In re Belton)*, No. 19-0648 (2d Cir.). The appellants in the consolidated proceedings below were GE Capital Retail Bank; Citibank, N.A.; and Citigroup Inc. The appellees in the consolidated proceedings below were Nyree Belton and Kimberly Bruce.

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RESPONDENTS' BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Respondents Citigroup Inc. and Citibank, N.A. ("Citi") respectfully request that this Court grant Petitioner GE Capital Retail Bank's ("GECRB") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Belton* v. *GE Capital Retail Bank (In re Belton/In re Bruce)*, 961 F.3d 612 (2d Cir. 2020).

INTRODUCTION

In two separate cases, plaintiffs brought putative nationwide class actions against GECRB and Citi, asserting that each had violated a provision of the federal Bankruptcy Code known as the discharge injunction provision. Both GECRB and Citi had valid arbitration agreements with the respective plaintiffs that plainly covered any claim concerning a purported violation of this statutory provision. And this Court has held, in a series of cases, that federal statutory claims (including claims brought under laws as varied as the Sherman Act, the Truth in Lending Act, and the Age Discrimination in Employment Act), are subject to arbitration under the Federal Arbitration Act (FAA). Despite this precedent, in the consolidated appeal below, the Second Circuit allowed the plaintiffs to avoid their obligations to arbitrate based on the notion that the Bankruptcy Code impliedly displaces the Federal Arbitration Act.

Citi submits this brief in support of GECRB's petition and urges the Court to review, and reverse, the Second Circuit's ruling. That ruling cannot be reconciled with this Court's precedent and exacerbates the confusion in the lower courts over the standards for determining the arbitrability of such bankruptcy re-

lated claims. The Second Circuit based its decision not on textual evidence of Congress's "clear and manifest" intent to preclude arbitration, as this Court instructed most recently in *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018), but based on an atextual analysis of whether arbitration inherently conflicts with the underlying purposes of the Code. That framework, and similar ones adopted by other courts of appeals, contradicts this Court's arbitration jurisprudence, and requires this Court's review.

Citi submits this brief to emphasize additional errors underlying the Second Circuit's misguided ruling. The Second Circuit's analysis was influenced by a judicial belief that arbitrators cannot resolve whether an entity is in contempt of a bankruptcy discharge order. But the lawsuits brought by Belton and Bruce are contempt actions in name only.

Plaintiffs have not invoked the procedure for seeking civil contempt, and instead rely on an implied cause of action under § 524(a)(2) of the Code. They allege that GECRB and Citi violated the statutory discharge injunction codified in that provision, and ask that a jury award monetary damages on behalf of nationwide classes of similarly situated debtors for that violation. These procedures and remedies, however, are not available in an action for civil contempt for violation of the bankruptcy court's discharge order. In reality, plaintiffs have simply added a request for a contempt *remedy* to an ordinary damages action that turns on whether GECRB and Citi *violated* § 524(a)(2)'s discharge injunction—an issue that is entirely amenable to resolution in arbitration.

Indeed, that issue is one that state courts and arbitrators regularly adjudicate alongside federal courts. Consistent with Congress's grant of non-exclusive jurisdiction to federal courts over bankruptcy-related

civil proceedings, see 28 U.S.C. § 1334(b); *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1803 (2019), state courts and arbitrators routinely evaluate the contours of § 524(a)(2)'s discharge injunction, assessing whether and how the discharge injunction applies as an affirmative claim or as a defense. What is more, federal courts regularly give preclusive effect to those state court and arbitral rulings, which further belies any notion that discharge injunction litigation is—or was designed by Congress to be—uniquely within the province of the bankruptcy court, or that arbitration of such claims "irreconcilably conflicts" with the Code.

In effect, the ruling of the Second Circuit, and similar rulings from other courts of appeals, is that debtors such as plaintiffs may litigate their discharge injunction claim in any forum *but* arbitration. This is precisely the kind of hostility to arbitration that Congress enacted the FAA to extinguish and this Court has spent decades policing. The Court should grant the petition.

STATEMENT OF THE CASE

A. Plaintiff Asserts An Arbitrable Claim Against Citi

When plaintiff Kimberly Bruce opened a credit card account with Citi in April 2007, she agreed to arbitrate "all claims" relating to her account, irrespective of what remedy she pursued. JA44 ¶ 5.[1] The broad arbitration provision stated:

> All Claims relating to your account, a prior related account, or our relationship are subject to

[1] Citations to the Joint Appendix ("JA") and Special Appendix ("SPA") refer to the appendices filed in No. 19-655 (2d Cir.).

> arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims.

JA56. The arbitration provision further instructed that "[a]ny questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act." JA57.

After plaintiff did not pay her credit card debt, Citi "charged off" the debt in December 2009, meaning Citi determined that the debt was likely uncollectable, and reported that change in status to the credit reporting agencies. JA40. Then in June 2011, Citi sold the debt to a third-party consumer debt purchaser and retained no right to recovery against plaintiff. *Id.*

Nearly two years later, in January 2013, plaintiff filed a chapter 7 petition in bankruptcy court and listed Citi as a former creditor for "[n]otice only" and recorded that there was no amount owed for the claim. Appendix at A67, A127, *In re Bruce*, No. 15-cv-03311-VB (S.D.N.Y. May 29, 2015), Dkt. No. 5-1. The bankruptcy court ultimately entered a discharge order, discharging Plaintiff's debts, and closed the case. *Id.* at A116.

In March 2014, plaintiff moved to reopen her bankruptcy case and then filed a class action adversary proceeding against Citi. *In re Bruce*, No. 13-22088-rdd (Bankr. S.D.N.Y. Mar. 9, 2014), Dkt. No. 9. She alleged that Citi's failure to update her credit report, and those of similarly situated debtors, to reflect the bankruptcy discharge constituted an act to collect a discharged debt in violation of § 524's discharge injunction. See generally JA28-33. This despite that Citi had accurately noted the debt's then-current status as "charged off" when Citi sold plaintiff's account two years *before* her discharge. Plaintiff sought to hold Citi liable for violating § 524, to obtain a monetary recovery on behalf of the putative class with respect to every bankruptcy since May 2007 where the debtor has a credit report and Citi sold a debt owed by the debtor prior to bankruptcy, and to secure a jury trial. JA34, JA36-38. Plaintiff styled her claim as seeking relief under § 105 of the Code, which authorizes a court to issue "any order … that is necessary or appropriate to carry out the provisions of [the Code]." 11 U.S.C. § 105(a); see *Taggart*, 139 S. Ct. at 1801 (discussing § 105).[2]

Belton, represented by the same counsel as plaintiff, was party to a substantially similar arbitration agreement with GECRB; she filed a substantially similar complaint against GECRB, alleging that GECRB's similar failure to update her credit report violated § 524(a)(2)'s discharge injunction, and sought similar relief. *In re Belton*, No. 14-08223-rdd (Bankr. S.D.N.Y. Apr. 30, 2014), Dkt. No. 1.

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[2] Plaintiff filed a substantially similar amended complaint after the bankruptcy court's appealed-from order denying Citi's motion to compel arbitration. JA245.

B. The Bankruptcy Court Refuses To Compel Arbitration

GECRB and Citi each moved to compel arbitration pursuant to their respective arbitration agreements with plaintiffs. *In re Bruce*, No. 14-08224-rdd (Bankr. S.D.N.Y. June 30, 2014), Dkt. No. 5; *In re Belton*, No. 14-08223-rdd (Bankr. S.D.N.Y. July 8, 2014), Dkt. No. 9. In a single opinion addressing both motions,[3] the bankruptcy court recognized that GECRB's and Citi's arbitration agreements survived the bankruptcy discharges and that there was "no dispute regarding the terms of the arbitration provision in the credit card agreement at issue, which are broad" enough to "subject[] to arbitration 'any … claim of any kind … that relate in any way'" to plaintiff's Citi account and Belton's GECRB account. JA443, 451. The court also recognized that the text of the Code did not evidence a congressional command to preclude arbitration. JA449-51. But it nonetheless refused to compel arbitration due to what it perceived as a "clear conflict" between the FAA and the Code, "inherent in the underlying structure" of the Code. JA445. The bankruptcy court divined, based on the "policy[] implicit throughout the Bankruptcy Code," that "Congress implicitly provided that this type of dispute not be subject to arbitration." JA446, 451.

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[3] The bankruptcy court applied its reasoning and holding in *In re Belton* to the near-identical action in *In re Bruce*. *See* SPA1 (issuing order denying Citi's motion to compel arbitration for substantially the reasons stated at a hearing on Citi's motion and in the *Belton* opinion); JA233 ("each of [Citi's] arguments [to compel arbitration] is addressed in the *Belton v. GE Capital* opinion[.]").

C. The District Court Initially Reverses And Grants Arbitration

GECRB and Citi appealed to the district court, which issued a single decision reversing the bankruptcy court and granting GECRB's and Citi's motions to compel arbitration. Pet. App. 47a. The district court confirmed that the arbitration agreements were "valid and cover[ed] the claim[] asserted here." Pet. App. 30a-34a. The court held further that although the Code did not expressly accept or reject arbitration, "text and legislative history weigh against the conclusion that Congress intended to preclude arbitration of [§] 524 claims." Pet. App. 39a. The district court noted that 28 U.S.C. § 1334 confers federal district courts with jurisdiction over bankruptcy-related proceedings, but expressly confers *exclusive* jurisdiction over only some proceedings, such as claims under § 327. Pet. App. 37a. It does not do so as to others, such as claims under § 524, which "cuts against the conclusion that Congress intended to exempt [§] 524 claims from arbitration." Pet. App. 38a-39a. The court likewise rejected the notion that an inherent conflict existed between arbitration and plaintiffs' discharge injunction claims. Pet. App. 39a-40a. In response, plaintiffs petitioned the Second Circuit for a writ of mandamus to vacate the district court's order compelling arbitration and the court ultimately denied the writ. *In re Belton*, No. 16-833 (2d Cir. June 26, 2018), Dkt. No. 96; *In re Bruce*, No. 16-830 (2d Cir. June 26, 2018), Dkt. No. 96.

D. The Second Circuit Decides *Anderson* v. *Credit One Bank*

In March 2018, the Second Circuit decided *Anderson* v. *Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382 (2d Cir.), *cert. denied*, 139 S. Ct. 144 (2018). The *Anderson* plaintiff, represented by the same counsel as the plaintiffs in *Bruce* and *Belton*, asserted a similar

class action claim for violations of § 524 and sought money damages. The same bankruptcy judge overseeing GECRB's and Citi's cases held that the Code displaced the FAA and denied the motion to compel arbitration, which was affirmed by a different district court. *Id.* at 385-86.

On appeal, the parties argued over whether the text and legislative history of the Code evidenced congressional intent to preclude arbitration of § 524 claims, but the Second Circuit deemed those arguments waived because the parties had failed to raise them below. *Id.* at 388-89. In "declin[ing] to consider" any argument based on the Bankruptcy Code's text or legislative history, the Second Circuit "only consider[ed] whether there is an 'inherent conflict between arbitration' and the Bankruptcy Code." *Id.* at 389 (quoting *Shearson/Am. Express, Inc.* v. *McMahon,* 482 U.S. 220, 227 (1987)). In other words, the Second Circuit embarked on what is a question of statutory construction by declining to consider whether the text of the Code spoke to an intent to displace the FAA. See *id.* at 388-91 ("Congressional Intent" section of decision). The Second Circuit purported to derive license to consider an "inherent conflict" alone in determining whether the FAA was displaced from this Court's decision in *McMahon*, 482 U.S. 220. The court of appeals construed that three-decade-old precedent to create a tripartite scheme that elevated a purpose-based "inherent conflict" inquiry alongside text and legislative history as equal and independent sources from which to discern congressional intent, *Anderson*, 884 F.3d at 388.[4]

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[4] While *McMahon* mentioned "inherent conflict" alongside text and legislative history, it nowhere stated that each serves as an independent and equal source to discern congressional intent. To the contrary, *McMahon*'s discussion of any "inherent conflict" was

Anderson then inferred such a conflict based on the rationale that "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." *Id.* at 389-90. Given this "inherent conflict," the Second Circuit affirmed the bankruptcy court's denial of arbitration as an appropriate use of the court's discretion. *Id.* at 388, 392.

E. This Court Subsequently Decides *Epic Systems Corp.* v. *Lewis*

Shortly after *Anderson* was decided, this Court confirmed that "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys. Corp.*, 138 S. Ct. at 1624 (quoting *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). This "intention must be 'clear and manifest.'" *Id.* (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)); see *id.* ("[The Court] come[s] armed with the 'stron[g] presum[ption]' that … 'Congress will specifically address' preexisting law …" (third and fourth alterations in original)). *Epic* also reiterated that any "statutory conflict" requiring displacement of the FAA must be "irreconcilable," an exercise of "statutory interpretation" that must not

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itself steeped in the text and legislative history of the RICO statute there at issue. *See, e.g.*, *McMahon*, 482 U.S. at 239 (analyzing interplay of RICO's civil and criminal provisions to help assess arbitrability of § 1964(c) claims in assessing the McMahons' argument "that there is an irreconcilable conflict between arbitration and RICO's underlying purposes").

"too easily find[]" such conflict and instead "aim[] for harmony." *Id.*

This Court then stressed that it has *never* found the FAA impliedly displaced, has "rejected *every* such effort" to "conjure conflicts between the [FAA] and other federal statutes," and found that "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the [FAA]." *Id.* at 1627. *Epic* thus focused on "textual and contextual clues" of congressional intent in the National Labor Relations Act (NLRA), *id.*, with neither the majority opinion nor the dissenting Justices once mentioning an "inherent conflict" standard. Applying this framework, *Epic* concluded that the NLRA does not "offer[] a conflicting command" that overrides Congress's instruction in the FAA "to enforce arbitration agreements according to their terms." *Id.* at 1619.

F. The District Court Vacates Its Arbitration Order In Light Of *Anderson* And The Second Circuit Affirms The Denial Of Arbitration Despite *Epic Systems*

After *Anderson*, plaintiffs moved for reconsideration of the district court's orders compelling arbitration. Plaintiffs argued that the text and legislative history of the Code and the FAA were irrelevant to the statutory displacement question given *Anderson*'s recognition of an inherent conflict between arbitration and the purposes of the Code. Mot. for Recons. at 11-14, *In re Belton*, No. 15-cv-01934-VB (S.D.N.Y. July 10, 2018), Dkt. No. 38; Mot. for Recons. at 11-14, *In re Bruce*, No. 15-cv-03311-VB (S.DN.Y. July 10, 2018), Dkt. No. 31. The district court agreed, holding in a single opinion addressing both motions that evidence of congressional intent could be construed equally and

independently from the statutory text, legislative history, or an "inherent conflict" analysis, and that *Anderson*'s "inherent conflict" finding ended the inquiry. Pet. App. 21a.

GECRB and Citi appealed to the Second Circuit, which consolidated the appeals. The banks argued that a purpose-based "inherent conflict" inquiry was foreclosed under this Court's arbitration jurisprudence, including *Epic*'s reaffirmation of the primacy of textual evidence in determining whether Congress expressed a "clear and manifest" intent to displace the FAA due to an irreconcilably conflicting statute. Despite *Anderson*'s unusual posture and nontextual approach to what is a question of statutory interpretation, the Second Circuit considered itself bound by that precedent. Pet. App. 3a. The panel acknowledged that, "[i]f we were writing on a blank slate, perhaps our conclusion would be different," but it concluded that *Anderson* survived *Epic*, and ruled that the purpose of a federal statute is alone enough to evidence an "inherent conflict" that impliedly displaces the FAA. *Id.* As applied to the Code, the Second Circuit found that the importance of the Code's fresh start provisions inherently conflicted with, and so impliedly displaced, the FAA. And although the Second Circuit recognized that state and federal courts shared concurrent jurisdiction to resolve disputes under § 524, the court held that the fact of state court adjudication did not support arbitrability because plaintiffs' claims were technically ones for contempt for violation of a court order.

ARGUMENT

GECRB's petition details how the decision below conflicts with this Court's clear precedent regarding the scope of the FAA and why this Court's review is necessary to resolve the persistent confusion in the

lower courts over whether the Code displaces the FAA. *Epic* confirmed that a dispute is presumptively arbitrable unless the party challenging arbitration carries the "heavy burden" of demonstrating that the competing statute poses an "irreconcilable" conflict with the FAA and of marshalling textual and contextual statutory evidence that Congress "clearly expressed" a "clear and manifest" intent that the FAA be displaced. 138 S. Ct. at 1624-27. The Second Circuit's use of a purpose-based "inherent conflict" inquiry to discern congressional intent is contrary to that standard. See Pet. at 17-19. Other courts of appeals have had no more success in delineating how and whether to deem the FAA displaced by the Code. Pet. at 21-25. Citi urges the Court to grant GECRB's petition for the reasons stated therein.

Citi offers the following additional reasons for review of the judgment adverse to Citi and GECRB. This Court has repeatedly been called upon to address and remedy the misconception that certain types of statutory claims are not subject to arbitration. See, *e.g.*, *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228 (2013) (Sherman Act); *Green Tree Fin. Corp.–Ala.* v. *Randolph*, 531 U.S. 79 (2000) (Truth in Lending Act); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust laws). The same misconception is at play here—and justifies review in this case as it did in those just cited. But there is a further wrinkle: the Second Circuit believed that plaintiffs' claims were not arbitrable because plaintiffs seek contempt for alleged violations of court orders.

In fact, plaintiffs' request for a contempt remedy is a proverbial red herring. Plaintiffs seek class-wide dam-

ages based on an alleged violation of a statutory provision, namely Code § 524. Whether Citi and GECRB violated that provision is a question entirely amenable to resolution in arbitration. Indeed, state courts routinely resolve that question. Review is thus warranted to confirm that arbitrators may likewise resolve that question.

I. THE SECOND CIRCUIT ERRED IN CONCLUDING THAT CLASS ACTIONS SEEKING DAMAGES FOR ALLEGED VIOLATIONS OF THE STATUTORY DISCHARGE INJUNCTION RAISE NON-ARBITRABLE DISPUTES OVER CONTEMPT.

The Second Circuit's analysis was influenced by its belief that plaintiffs are seeking to have Citi and GECRB held in contempt, and that arbitrators cannot resolve whether an entity is in contempt of a bankruptcy discharge order—an order that is created and exists based solely on statute—§ 524. But that understanding of the issue to be arbitrated is mistaken.

Section 524(a)(2) provides that a bankruptcy court's discharge order "operates as an injunction" against an attempt to collect a discharged debt. That statutory provision does not provide a private cause of action for violations of the discharge injunction. Pet. App. 9a-10a; *Garfield* v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 91-92 & n.7 (2d Cir. 2016). Instead, courts have found that the means to redress violations of the discharge injunction is a motion for contempt under § 105(a). See 11 U.S.C. § 105(a) (authorizing bankruptcy courts to issue "any order … necessary or appropriate to carry out the provisions" of Title 11); see also Pet. App. 9a-10a (discharge injunction enforceable by contempt proceeding); *Crocker* v. *Navient Sols., L.L.C. (In re Crocker)*, 941 F.3d 206, 210-11 (5th Cir. 2019) (same); *Bessette* v. *Avco Fin. Servs., Inc*., 230

F.3d 439, 445 (1st Cir. 2000) (same). Section 105(a) "'gives the court general equitable powers' … to fashion orders in furtherance of [the Code]" but it "does not 'create substantive rights that would otherwise be unavailable under the [Code].'" *Joubert* v. *ABM AMRO Mortg. Grp., Inc. (In re Joubert)*, 411 F.3d 452, 455 (3d Cir. 2005); see also *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000) ("[W]e do not read § 105 as conferring on courts … broad remedial powers [over alleged § 524 violations]. The 'provisions of this title' simply denote a set of remedies fixed by Congress. A court cannot legislate to add to them." (first alteration in original) (quoting *Kelvin* v. *Avon Printing Co. (In re Kelvin Publ'g, Inc.)*, 72 F.3d 129 (6th Cir. 1995) (per curiam))). For this reason, alleged discharge injunction violations "may not independently be remedied through § 105 absent a contempt proceeding in the bankruptcy court." *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 506 (9th Cir. 2002).

But plaintiffs have not filed a motion for contempt under § 105, which would not provide a basis for recovering monetary damages on behalf of nationwide classes. Instead, they have relied on an implied cause of action in order to seek damages while maintaining the veneer that their suits are really about seeking to hold Citi and GECBR in contempt for violating court orders. This packaging of their claims, however, cannot disguise the fact that this case involves alleged violations of a statute—claims that are plainly subject to arbitration.

The plaintiffs' essentially identical bankruptcy filings speak for themselves. When Plaintiff Bruce moved in March 2014 to reopen her Chapter 7 proceeding, her stated basis was to seek an order finding that Citi "willfully violated the discharge injunction under 11 U.S.C. § 524 of the Bankruptcy Code." *In re Bruce*,

No. 13-22088-rdd (Bankr. S.D.N.Y. Mar. 13, 2014), Dkt. No. 9. Among other relief, she asked for "actual and punitive damages" and that Citi be "sanctioned for civil contempt." *Id.* While the *relief* she requested included contempt (alongside damages), the *violation* she alleged was of the statutory discharge injunction.

Plaintiffs' putative class-action adversary complaints echoed these allegations. See, *e.g.*, JA36 ¶¶ 38-39 (labeling Bruce's cause of action Citi's "failure to abide by the injunction contained in § 524(a)(2)"); Compl. ¶¶ 36-37, *In re Belton*, No. 14-08223-rdd (Bankr. S.D.N.Y. Apr. 30, 2014), Dkt. No. 1 (similar as to GECRB).

Even plaintiffs' request for contempt relief is framed as one for GECRB's and Citi's alleged violation of the statutory discharge injunction. See, *e.g.*, JA36 ¶ 1 (seeking declaration that Citi's practice is in "contempt of the statutory injunction set forth in § 524(a)(2)"); JA37 ¶ 4 (seeking order holding Citi "in contempt of court for its willful violation of the injunction set forth in § 524(a)(2)"). Although the Second Circuit accepted plaintiffs' argument on appeal that they are asking for judicial enforcement of the bankruptcy court's own orders, their complaints *nowhere* actually mention enforcement of a court order. That omission is consistent with plaintiffs' demands for jury trials, which is not the means by which a court would exercise inherent powers to enforce its own orders.

Nor are class actions the means for such enforcement. Plaintiffs allege that GECRB's and Citi's conduct violated the discharge injunction as to each class member across "thousands" of bankruptcy cases in districts nationwide. See, *e.g.*, JA28 ¶ 8. Thus, plaintiffs do not seek merely to have the bankruptcy court enforce its own orders: they are asking a single bankruptcy judge to enforce thousands of discharge orders

issued by *other* judges. Indeed, that is inconsistent with rulings by numerous courts of appeals, which have outright rejected or cast doubt upon this method of enforcing § 524(a)(2)'s discharge injunction.[5]

In reality, plaintiffs' class actions are premised on the notion that § 524 discharge orders are materially identical and turn on whether GECRB and Citi violated § 524's discharge injunction, a question that can be adjudicated on a class wide basis by judges *other* than those who entered the discharge orders. An individual court's expertise and familiarity in enforcing its own orders is simply not implicated by plaintiffs' actions.

For all of these reasons, plaintiffs' contempt action packaging cannot obscure that claims alleging violations of a particular federal statute—here § 524(a) of the Code—are consistently held to be arbitrable.

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[5] *See, e.g.*, *Crocker*, 941 F.3d at 216-17 (bankruptcy court cannot "address contempt for violations of injunctions arising from discharges by bankruptcy courts in other districts"); *Alderwoods Grp., Inc.* v. *Garcia*, 682 F.3d 958, 970 (11th Cir. 2012) ("[T]he court that issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order."); *Walls*, 276 F.3d at 509-10 (same); *Cox* v. *Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (same); *see also* Pet. App. 11a ("[W]e question whether a bankruptcy court would even have jurisdiction to hold a creditor in contempt of another court's order. Most circuits that have considered the issue have rejected the notion.").

II. BECAUSE THE ALLEGED VIOLATION OF A STATUTORY DISCHARGE INJUNCTION IS REGULARLY ADJUDICATED OUTSIDE OF BANKRUPTCY COURT, ARBITRATING SUCH ISSUES POSES NO IRRECONCILABLE CONFLICT WITH THE BANKRUPTCY CODE.

Even if plaintiffs' suits are properly viewed as contempt actions, the question they raise—whether a creditor has violated the discharge injunction—is arbitrable. Indeed, whether such a statutory violation of the Code exists is routinely adjudicated *outside of bankruptcy court*. It has been adjudicated by state courts and arbitrators alike, whether as an affirmative claim or a defense.[6] This widespread practice belies

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[6] *See, e.g.*, *In re Antonious*, 373 B.R. 400, 406-07 (Bankr. E.D. Pa. 2007) ("Enforcement of the [§ 524] discharge injunction can be obtained in the Pennsylvania state court system."); *Texaco, Inc.* v. *Wolverine Expl. Co. (In re Texaco, Inc.)*, 218 B.R. 1, 9, 11 (Bankr. S.D.N.Y. 1998) (recognizing arbitration panel's determination of whether creditor violated the discharge injunction from debtor's Chapter 11 bankruptcy); *In re Kean*, 207 B.R. 118, 121-22 (Bankr. D.S.C. 1996) (recognizing arbitration panel's determination of whether creditor violated the discharge injunction from debtor's Chapter 7 bankruptcy); *Othman* v. *Wells Fargo Bank, N.A.,* No. A109606, 2006 WL 880170, at *2, *9 (Cal. Ct. App. Apr. 6, 2006) (affirming dismissal of claim alleging "a purported violation of title 11 United States Code section 524 in attempting to collect on the discharged debt"); *Scoggins* v. *Scoggins*, No. 4-14-0473, 2015 IL App (4th) 140473-U, ¶ 27, 2015 WL 754521, at *5 (Ill. App. Ct. Feb. 20, 2015) (affirming denial of discharge claim because party "failed to demonstrate a violation of [§] 524(a) of the [United States] Bankruptcy Code"); *Cowart* v. *White*, 711 N.E.2d 523, 527-30 (Ind. 1999) (considering on appeal whether trial court violated bankruptcy discharge injunction by finding former debtor in contempt of child support obligations that allegedly had been discharged), *clarifed on reh'g*, 716 N.E.2d 401 (Ind. 1999); *K.W. Enters., Inc.* v. *Keiter*, No. CIV.A. CV-01-337, 2002

any conflict between the Code and arbitration of plaintiffs' suits, let alone an irreconcilable one.

What is more, bankruptcy courts are bound by collateral estoppel to other adjudicators' conclusions about dischargeability, including when parties seek § 105 relief in bankruptcy court premised on the violation of a discharge injunction. This undermines any notion that bankruptcy courts possess unique expertise, or exclusive jurisdictional power, to police the discharge injunction. For example, in a decision affirmed by the Tenth Circuit, the bankruptcy court in *Flanders* v. *Lawrence (In re Flanders)* held that a debtor was precluded from seeking contempt sanctions for an alleged violation of the discharge injunction because he had already unsuccessfully litigated the issue in his state-court divorce proceedings. See 517 B.R. 245, 259-60 (Bankr. D. Colo. 2014), *aff'd*, No. 13-01456, 2015 WL 4641697 (B.A.P. 10th Cir. Aug. 5, 2015), *aff'd in relevant part*, 657 F. App'x 808 (10th Cir. 2016). Similarly, the Ninth Circuit affirmed a decision holding that a bankruptcy court was "required" under collateral estoppel to bar the debtor's "allegation that the state court judgment violated the discharge injunction" because the state court had previously "adjudicated the issue of the applicability of § 524(a)—the discharge injunction." *Watson* v. *Shandell (In re Watson)*, 192 B.R. 739, 749-50 (B.A.P. 9th Cir. 1996), *aff'd*, 116 F.3d 488 (9th Cir. 1997). Instances of bankruptcy court deference to the dischargeability determinations of state courts abound. See, *e.g.*, *In re Barrett*, 377 B.R. 667, 676-77 (Bankr. D. Colo. 2007); *In re Candidus*,

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WL 747914, at *1 (Me. Super. Ct. Apr. 3, 2002) (asserting claim alleging violation of discharge injunction in Maine state court).

327 B.R. 112, 121 (Bankr. E.D.N.Y. 2005); *In re Toussaint*, 259 B.R. 96, 104 (Bankr. E.D.N.C. 2000); *In re Scott*, 244 B.R. 885, 888 (Bankr. E.D. Mich. 1999).[7]

The regularity with which adjudicators outside of bankruptcy court evaluate the effect of bankruptcy discharge orders, including whether and how a discharge injunction should be enforced, disproves the notion that bankruptcy courts alone can appropriately determine whether a discharge injunction has been violated. That bankruptcy courts and the courts of appeals then refuse to second-guess these non-bankruptcy court determinations and treat them as binding upon the bankruptcy court makes the point irrefutable.

These adjudications of discharge violations outside of bankruptcy court are consistent with federal district courts' non-exclusive jurisdiction over bankruptcy-related civil proceedings, see 28 U.S.C. § 1334(b); see generally *Taggart*, 139 S. Ct. at 1803.[8] It also exposes plaintiffs' manufactured conflict between arbitration

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[7] Similarly, bankruptcy courts have applied collateral estoppel based on arbitrators' dischargeability holdings to foreclose actions like those here. For example, the bankruptcy court in *In re Kean* found a debtor precluded from bringing an adversary proceeding against creditors for violations of the § 524 discharge injunction, because the debtor's discharge defense had been fully litigated in arbitration. *See* 207 B.R. at 121-22; *id.* at 122 (finding the arbitration panel's conclusion "binding"); *see also In re Texaco*, 218 B.R. at 9, 11 (similar).

[8] The legislative history of § 524 demonstrates that Congress specifically *declined* to give bankruptcy courts (or federal courts generally) exclusive jurisdiction over § 524 issues. After recognizing that, "in all but extraordinary situations the effect of a discharge had been a matter which would *be determined only in a state court*," H.R. Rep. No. 95-595, at 46-47 (1977) (emphasis added), Congress decided to confer on bankruptcy courts *non-exclusive* jurisdiction to also decide those issues.

of § 524 discharge injunction disputes and the Code as non-existent, never mind one that is irreconcilable. "Congress adopted the Arbitration Act in an effort to counteract judicial hostility to arbitration," *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 543 (2019), yet the Second Circuit's denial of § 524 arbitrations is driven precisely by such hostility, given that state courts and even arbitrators *already* police § 524's discharge injunction and do so *authoritatively*.[9]

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[9] Moreover, whether a party has *violated* the discharge order is a question distinct from whether the violation *merits contempt sanctions*. *See Taggart*, 139 S. Ct. at 1801-02 (recognizing that contempt for a discharge violation is appropriate only where there is no "fair ground of doubt as to the wrongfulness of the defendant's conduct," a standard that "reflects the fact that civil contempt is a 'severe remedy,' and that principles of 'basic fairness requir[e] that those enjoined receive explicit notice' of 'what conduct is outlawed' before being held in civil contempt" (alteration in original) (emphasis omitted) (citations omitted)). Courts have recognized this distinction in requiring arbitration of the underlying merits of a claim where an arbitration agreement delegated the question of violation or liability to an arbitrator while leaving the appropriate remedy to a court. *See, e.g.*, *Noodles Dev., LP* v. *Latham Noodles, LLC*, No. CV 09-1094-PHX-NVW, 2009 WL 2710137, at *3-4 (D. Ariz. Aug. 26, 2009) (requiring party to first arbitrate merits of claim per arbitration agreement before seeking injunctive relief from court); *Midas Int'l Corp.* v. *Chesley*, No. 11-cv-8933, 2012 WL 2425052, at *6 (N.D. Ill. June 26, 2012) (requiring parties to first arbitrate merits of claim per arbitration agreement before seeking damages determination from court). Thus, even if the appropriate sanction for a discharge injunction violation must be fashioned by a court, the antecedent, threshold question of whether the discharge injunction was violated remains with the arbitrator.

CONCLUSION

For the foregoing reasons, and those stated by GECRB, the petition should be granted.

Respectfully submitted,

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