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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly adhered to the Second Circuit's prior decision applying the rule of law in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), in declining to compel arbitration of a contempt proceeding for violation of the discharge injunction in 11 U.S.C. § 524, where compelling arbitration of the contempt proceeding would inherently conflict with the purposes of the Bankruptcy Code, including by frustrating the ability of bankruptcy judges to enforce their own orders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

INTRODUCTION

This Court should deny the petition for a writ of certiorari because none of the bases for granting certiorari under Supreme Court Rule 10 are present. The petition does not demonstrate a split among courts; the opinion below does not conflict with any decision of this Court; and there has been no departure from the usual course of judicial proceedings to justify this Court's review.

First, there is no conflict among the circuit courts of appeals with regard to whether a proceeding for contempt for violation of the discharge injunction in § 524 of the Bankruptcy Code should be arbitrated. Only two courts of appeals (in four separate opinions) have ruled on the issue in the last twenty-three years and both applied the rule of law set forth in this Court's decision in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), consistently and held that such proceedings should be adjudicated by a court. In fact, the decision below represents the Second Circuit's second application of *McMahon* in recent years, the court having previously applied it in a related action, *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 884 F.3d 382 (2d Cir. 2018), *cert. denied*, 139 S.Ct. 144 (2018). This Court denied certiorari in *Anderson*, and nothing has changed that would merit granting review here. In fact, the petition does not cite a *single case* holding that a contempt proceeding should be the subject of a private arbitration. That is not surprising because, as the Second Circuit reasoned in *Anderson*, only a court can make a finding of contempt. *In re Anderson*, 884 F.3d at 391

("violations of [the discharge] injunction are enforceable only by the bankruptcy court and only by a contempt citation"). An arbitrator has no power to hold a party in contempt for violating a court order.

Second, the issue presented by this proceeding is not the sweeping assault on arbitration the petition makes it out to be. The ruling below does not conflict with this Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), nor any other Supreme Court precedent. Rather, the courts below dutifully applied *McMahon* and held that arbitration was inappropriate here under the unique facts and legal claims of this case, *i.e.*, a contempt proceeding for a violation of the discharge injunction in § 524 of the Bankruptcy Code. Nothing in the decisions below suggests that courts will disallow arbitration where different facts or different claims are brought under the Bankruptcy Code or where arbitration is otherwise consistent with the policies of the Bankruptcy Code. Numerous courts have applied *McMahon* and properly ordered arbitration where such arbitration would not interfere with the orderly administration of the estate or the court's ability to enforce its orders. At its core, this petition merely reflects Petitioner's disagreement with the Second Circuit's application of the rule of law of *McMahon* in this particular case. However, the alleged misapplication of a properly stated rule of law is not a compelling reason to grant certiorari.

Third, this case is particularly inappropriate for review by this Court because, rather than presenting an issue of nationwide importance, it comes to the Court in narrow procedural and factual circumstances. In the decision on appeal, the district court below only considered whether the Second Circuit's prior

mandate in *Anderson* applied to the instant case. The district court tread no new ground. In fact, after *Anderson* was decided, the Second Circuit directed the district court below to evaluate whether this case was controlled by *Anderson*. The district court determined that *Anderson* did control the outcome, and on appeal, the Second Circuit agreed that it was bound by its own prior precedent. That is the accepted and usual course of judicial proceedings. There are no exigent circumstances present that require this Court to exercise its supervisory power.

In the end, neither Petitioner GE Capital Retail Bank (hereinafter "GE" or "Petitioner") nor Defendants-Respondents Citigroup Inc. and Citibank, N.A. (hereinafter "Citi") have shown any compelling reason for granting a writ of certiorari. The petition should be denied.

STATEMENT OF THE CASE

I. Factual and Procedural Background

A. The *Belton* and *Bruce* Proceedings.

In October 2007, Respondent Nyree Belton opened a credit card account with GE. JA 45, JA 53.[1] Due to unforeseen financial hardships, Belton was unable to pay her credit card bill, causing GE to report her account as "charged off" to the credit reporting agencies. JA 48-49. GE then sold Belton's account to a third party debt collector, Cach LLC. JA 48. Bruce later filed a petition for Chapter 7 bankruptcy and properly listed GE on her schedule of creditors. JA 126. In September 2012, she was granted an order of discharge, eliminating her obligation to make payments on all properly scheduled dischargeable debts, including the GE credit card account. JA 126. Despite the entry of discharge, GE continued to report Belton's credit card account as "charged off," rather than "included in bankruptcy." JA 126. In April 2014, Belton brought a proceeding for contempt against GE for seeking to collect on discharged debts in violation of the discharge order and the injunction found in 11 U.S.C. § 524. JA 31 (*Belton v. GE Capital Consumer Lending, Inc., aka GE Money Bank* ("*Belton*"), 14-ap-08223 (RDD) (Bankr. S.D.N.Y. Apr. 30, 2014), Dkt. No.

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[1] Where possible, record citations are to the Appendix filed by Petitioner. Additional citations to "JA" refer to the Joint Appendix filed in Case No. 19-0648. Citations to "Bruce JA" refer to the Joint Appendix in Case No. 19-0655. This is consistent with the citing conventions followed by Petitioner and Defendants-Respondents.

1, Complaint). She alleged that GE continued to report her credit card debts as currently due and owing on her credit report and refused to correct that reporting in an effort to get her to pay the debt even though GE knew that the debt had been discharged in bankruptcy. *Id.*

Likewise, Respondent Kimberly Bruce opened a credit card account with Citi in April 2007. Bruce JA 44. Faced with financial hardship, she was unable to pay her credit card debt, ultimately leading Citi to report the debt as "charged off" to the credit reporting agencies in December 2009. Bruce JA 40. In June 2011, Citi sold Bruce's debt to a third-party debt collector, Midland Funding LLC. Bruce JA 40. On January 24, 2013, Bruce filed for Chapter 7 bankruptcy and properly listed Citi on her schedule of creditors. Bruce JA 33. On May 7, 2013, the bankruptcy court entered an order of discharge, which applies to all of Bruce's properly scheduled dischargeable debts, including the Citi credit card account. Bruce JA 33. Despite the entry of discharge, Plaintiff's credit report continued to show her Citi account as charged off, rather than reflecting that the account had been discharged in bankruptcy. Bruce JA 33.

In April 2014, Bruce brought a proceeding for contempt against Citi for seeking to collect on discharged debts in violation of the discharge order and the injunction found in 11 U.S.C. § 524. Bruce JA 26 (*Bruce v. Citigroup Inc., et al.*, 14-ap-8244 (RDD) (Bankr. S.D.N.Y. April 30, 2014), Dkt. No. 1, Complaint). She alleged that Citi continued to report her credit card debts as currently due and owing on her credit report and refused to correct that reporting in an effort to get her to pay the debt even though Citi

knew that the debt had been discharged in bankruptcy. *Id.*

B. Defendants Below Are Charged with Contempt.

The *Belton* and *Bruce* contempt proceedings are similar to several other actions brought before the same bankruptcy judge in the Southern District of New York. Plaintiffs in these actions alleged that the defendant lenders all engaged in the same contemptuous conduct. *See Haynes v. Chase Bank USA, N.A.* (*In re Haynes*), 13-ap-08370 (RDD) (Bankr. S.D.N.Y. Jan. 27, 2014), Dkt. No. 1, Amended Complaint; *Echevarria v. Bank of America Corp.* (*In re Echevarria*), 14-ap-8216 (RDD) (Bankr. S.D.N.Y. Nov. 18, 2014), Dkt. No. 59, Amended Complaint; *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 15-ap-8214 (RDD) (Bankr. S.D.N.Y. Jan. 30, 2015), Dkt. No. 1, Complaint; *Anderson v. Capital One Bank (USA), N.A.* (*In re Anderson*), 15-ap-8342 (RDD) (Bankr. S.D.N.Y. Apr. 1, 2016), Dkt. No. 45, Amended Complaint.

All of the proceedings raised the same issue: whether the creditor's refusal to correct credit reports to reflect that the debts at issue were discharged in bankruptcy was an attempt to collect a discharged debt in contempt of the bankruptcy court discharge orders and § 524 of the Bankruptcy Code. Numerous courts have held that refusing or failing to update credit reporting to pressure debtors to pay discharged debts—in the manner that the creditors below have done here—violates the discharge injunction and is punishable by contempt. *See, e.g.*, *Torres v. Chase Bank USA, N.A.* (*In re Torres*), 367 B.R. 478, 486 (Bankr. S.D.N.Y. 2007) (finding that "false or outdated reporting to credit reporting agencies, even without

additional collection activity, can constitute an act to extract payment of a debt in violation of § 524(a)(2)") (collecting cases); *McKenzie-Gilyard v. HSBC Bank Nevada N.A.* (*In re McKenzie-Gilyard*), 388 B.R. 474, 487-88 (Bankr. E.D.N.Y. 2007) (denying summary judgment, stating that "a failure to update a tradeline to reflect the status of an account may be an intentional—and effective—tool to induce a debtor to make payments on an account"); *Russell v. Chase Bank USA, N.A.* (*In re Russell*), 378 B.R. 735, 741 (Bankr. S.D.N.Y. 2007) (denying motion to dismiss where plaintiff had alleged "a deliberate refusal to correct information previously supplied to credit reporting agencies, for the purpose of coercing him to repay a discharged debt").

In *Torres*, Chase Bank refused to correct its credit reporting to reflect that a debt had been discharged in bankruptcy. *In re Torres*, 367 B.R. at 479. The court held that "a credit report that continues to show a discharged debt as 'outstanding,' 'charged off,' or 'past due' is unquestionably inaccurate and misleading, because end users will construe it to mean that the lender still has the ability to enforce the debt personally against the debtor, that is, that the debtor has not received a discharge, that she has reaffirmed the debt notwithstanding the discharge, or that the debt has been declared non-dischargeable." *Id.* at 487-88. The court further ruled that it was reasonable to infer that Chase, whose business involves making and evaluating credit disclosures, knows that the existence of such inaccurate and misleading entries on their credit reports pressures the plaintiffs to pay their discharged debts. *Id.* at 486-87.

C. The Bankruptcy Court Denies the Motions to Compel Arbitration.

In three of the actions below, the defendant lenders moved to compel arbitration. The bankruptcy court denied the motions to compel arbitration in all three actions. *In re Belton*, 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014) (hereinafter "*Belton I*"), JA 375; *In re Bruce*, 14-AP-08224-RDD (Bankr. S.D.N.Y. Nov. 12, 2014), Dkt. No. 38, Order; *In re Anderson*, 15-AP-08214-RDD, (Bankr. S.D.N.Y May 14, 2015), Dkt. No. 15, Order. Because the causes of action and arguments in the cases were so similar, the court issued one decision and held that all the motions to compel were denied for the reasons stated in the written opinion *Belton I*.

In that decision, the bankruptcy court applied the inherent conflict analysis of *Shearson/American Express v. McMahon*, 482 U.S. 220, 2274 (1987), and held that adjudicating contempt of the discharge injunction before a private arbitrator would inherently conflict with the Bankruptcy Code. Pet.App.69a; *Belton I*, 2014 WL 5819586, at *3. In particular, the bankruptcy court emphasized the deep and specialized jurisdiction Congress gave to the bankruptcy courts to adjudicate debtors' and creditors' rights and the central and "fundamental" importance of the discharge order, the violation of which renders all the procedures that debtors go through meaningless:

> Why then do debtors seek this relief, which subjects them to such scrutiny and liquidation and distribution to their creditors, in a Chapter 7 case. . . . ?

> Why do they file a case in which, as is this practice in this district, at least, Chapter 7 trustees require them to turn over their engagement ring if that ring exceeds the value of the exemption which is relatively small? Why? Because they need the discharge. . . .
>
> If a party subsequently violates the discharge, the debtor's reason for seeking relief and enduring all of the constraints imposed by Congress in the Bankruptcy Code go for nothing. Indeed, if the violation persists the case itself can be said to have been for nothing, which, of course, means that the effectiveness of bankruptcy as a fair, collective remedy for creditors and a fresh start for debtors is eviscerated.

Pet.App.68a-69a; 2014 WL 5819586, at *8.

Both GE and Citi appealed the denial of the motion to compel arbitration to the district court. Bruce JA 269. On appeal, the U.S. District Court for the Southern District of New York reversed the bankruptcy court's decision and ordered the case to arbitration. Pet.App.25a; *In re Belton*, 2015 WL 6163083 (S.D.N.Y. October 14, 2015) (hereinafter "*Belton II*").

Because the district court's decision was not appealable as of right, Ms. Belton and Ms. Bruce sought mandamus relief from the Second Circuit seeking to overturn the district court's decision. *Belton v. GE Capital Consumer Lending, Inc. aka GE Money Bank*, 16-833 (2d Cir. Mar. 17, 2016), Writ of Mandamus; *Bruce v. Citigroup, Inc.*, 16-830 (2d Cir. Mar. 17, 2016), Writ of Mandamus.

D. The Second Circuit's Decision in *In re Anderson.*

While the mandamus petitions were pending, Credit One, the defendant lender in *Anderson*, also appealed the denial of its motion to compel arbitration. That appeal was assigned to a different district judge than the one who heard the *Bruce* and *Belton* appeals. That district judge disagreed with the reasoning in the *Bruce* and *Belton* cases and affirmed the bankruptcy court's order denying the motion to compel arbitration. *In re Anderson*, 553 B.R. 221, 235 (S.D.N.Y. 2016). The *Anderson* district court also applied the inherent conflict analysis of *McMahon* and reached the same conclusion as the bankruptcy court—it held that there was an inherent conflict in allowing adjudication of contempt of a bankruptcy court order to be determined by a private arbitrator. *Id.* at 234.

Credit One appealed the *Anderson* decision to the Second Circuit. On March 7, 2018, the Second Circuit affirmed the denial of the motion to compel arbitration. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 884 F.3d 382 (2d Cir. 2018). The court held that the bankruptcy court had the discretion to deny defendant's motion to stay arbitration because the application of the FAA created an inherent conflict with the policies underlying the Bankruptcy Code. *Id.* at 391. Specifically, the court applied the tri-part test set forth in *McMahon* and held that a Congressional intent to override the FAA "may be discerned through the 'text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.'" 884 F.3d at 388 (quoting *McMahon*, 482 U.S. at 227). The court went on to hold that there was, in fact, an inherent conflict between arbitration and the Bankrupt-

cy Code for three reasons: "(1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with a 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 390. The court added, "[b]ecause there is no matter more 'central to the purposes and policies of the Bankruptcy Code' than the fresh start provided by discharge, arbitration of Anderson's claim presents an inherent conflict with the Bankruptcy Code." *Id.*

The Second Circuit recognized that it was critical for effective enforcement of the rights established under the Bankruptcy Code for bankruptcy courts themselves to be able to enforce their own orders:

> [E]nforcement of injunctions is a crucial pillar of the powers of the bankruptcy courts and central to the statutory scheme. . . .Though the discharge injunction itself is statutory and thus a standard part of every bankruptcy proceeding, the bankruptcy court retains a unique expertise in interpreting its own injunctions and determining when they have been violated. Congress afforded the bankruptcy courts wide latitude to enforce their own orders, specifically granting these specialty courts the power to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of' the Bankruptcy Code. 11 U.S.C. § 105(a).

The court concluded:

> [N]either the statutory basis of the order nor its similarity—even uniformity—across bankruptcy cases alters the simple fact that the discharge injunction is an order issued by the bankruptcy court and that the bankruptcy court alone possess the power and unique expertise to enforce it. Indeed, as one set of amici noted in their brief, violations of a discharge injunction simply cannot be described as "claims" subject to arbitration and the typical tools of contract interpretation. Instead, violations of this court-ordered injunction are enforceable only by the bankruptcy court and only by a contempt citation.

Id. at 391.

The court went on to add that the fact that *Anderson*'s claim came within the form of a putative class action did not "undermine this conclusion." *Id.* at 390.

On October 1, 2018, this Court denied certiorari in *Anderson*, rendering the Second Circuit decision fully final. *Credit One Bank, N.A. v. Anderson*, 139 S.Ct. 144 (2018).

E. Remand of *Belton* and *Bruce* to the District Court in Light of *Anderson.*

Because the Second Circuit knew that its resolution of the *Anderson* appeal would affect the resolution of then-pending mandamus petitions in *Belton* and *Bruce*, it expressly stayed the mandamus petitions pending its ruling in *Anderson*. *Belton*, No.

16-833 (2d Cir. Dec. 15, 2016), Dkt. No. 68; *Bruce*, 16-830 (2d Cir. Dec. 15, 2016), Dkt. No. 69.

On June 26, 2018, after the Second Circuit decided *Anderson*, it directed the parties in *Belton* and *Bruce* to seek relief in the district court in light of *Anderson.* Specifically, the Second Circuit denied the petitions for mandamus "because Petitioner[s] can seek the requested relief by moving in the district court for reconsideration of its order in light of this Court's decision in *In re Anderson*, 884 F.3d 382 (2d Cir. 2018)." *Belton*, No. 16-833 (2d Cir. June 26, 2018), Dkt. No. 96; *Bruce*, No. 16-830 (2d Cir. June 26, 2018), Dkt. No. 96.

On March 4, 2019, the district court reconsidered and reversed its *Belton* and *Bruce* decisions and held that *Anderson* and its application of the *McMahon* inherent conflict test mandated denial of the motions to compel arbitration. Pet.App.19a-23a; *In re Belton*, 2019 WL 1017293, at *3 (Bankr. S.D.N.Y. March 4, 2019). The district court held that it was bound by *Anderson*'s determination that there was an inherent conflict in arbitrating the claim for contempt. *Id.* The district court rejected the argument that *McMahon*'s inherent conflict test did not apply and that Congress's intent could only be shown through the statutory text and legislative history. *Id.* Instead, the court held that the *McMahon* inherent conflict test was one of three ways to prove Congress's intent and that, even if the text or legislative history showed no conflict with arbitration, *Anderson* mandated that there was an inherent conflict in the policies. *Id.*

The district court also rejected GE's argument that *McMahon* was no longer viable by virtue of the Supreme Court's decision in *Epic Systems Corp. v.*

Lewis, 138 S.Ct. 1612 (2018), finding that neither the Supreme Court nor the Second Circuit had overruled *McMahon* and that, in fact, both had continued to apply it. *Id.* at *4.

F. The Second Circuit's Decision Below in *Belton* and *Bruce.*

GE and Citi then appealed the district court's decision to the Second Circuit. Pet.App.1a. Like the courts below, the Second Circuit applied the *McMahon* inherent conflict test in order to determine whether the dispute was arbitrable. Pet.App.6a. And, like the courts below, the Second Circuit recognized that there was no reason to depart from its analysis in *Anderson*. Pet.App.7a. The Second Circuit ruled that "[g]iven the overwhelming similarities between this case and *Anderson*, our hands seem to be bound by that panel's decision." *Id.*

The court of appeals also rejected Petitioner's argument that *Epic Systems* overruled *McMahon*, finding that "despite the difference in tone, 'the test [*Epic Systems*] employs is substantially the same as *McMahon's*." Pet.App.7a (quoting *Henry v. Educ. Fin. Serv.* (*In re Henry*), 944 F.3d 587, 592 (5th Cir. 2019)). The court further added, "*Epic Systems* never stated an intention to overrule *McMahon* or render any prong of its tripartite test a dead letter." Pet.App.7a. In no uncertain terms, the court concluded that *Epic Systems* did nothing to undermine *Anderson*'s conclusion, "that an inherent conflict is sufficient to displace the Arbitration Act where the statutory text is ambiguous." Pet.App.8a.

In *Anderson*, the parties had waived any arguments concerning the Bankruptcy Code's text or

legislative history. Thus, the court of appeals undertook this analysis. The court found that the Bankruptcy Code's silence on the issue of arbitration was not "outcome determinative." Pet.App.9a. The court of appeals found that the only textual argument GE and Citi raised with "some teeth" was the fact that state courts have concurrent jurisdiction to enforce the discharge injunction as an affirmative defense in collection suits. Pet.App.9a. The court quickly rejected this argument, noting that concurrent jurisdiction only arises in the context of an affirmative defense, and is not available for a party seeking a contempt remedy, which must come from the bankruptcy court. *Id.*

Having rejected the textual arguments of Defendants below, and after finding the Bankruptcy Code's legislative history unenlightening, the court of appeals followed its prior ruling in *Anderson* and held that there is an inherent conflict with mandating arbitration under these circumstances. Pet.App.10a.

On October 9, 2020, Petitioner filed a petition for a writ of certiorari seeking review of the Second Circuit's decision. Defendants-Respondents filed a brief in support of the petition on November 13, 2020.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT.

A. The Only Two Circuit Courts of Appeals to Consider the Question Presented Agree.

The Second Circuit's application of *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), in *Belton* and *Bruce* does not conflict with decisions of any other circuit court of appeals. In fact, neither Petitioner GE nor Respondent Citi contend—nor could they—that there is a circuit split on the issue of whether contempt proceedings for violation of § 524 of the Bankruptcy Code are arbitrable. Prior to the Second Circuit's decision below and its own prior decision in *Anderson*, the last (and only) other circuit court of appeals to address this issue, was the Fifth Circuit. The Fifth Circuit first addressed this issue in 1997 in *Insurance Company of North America v. N.G.C. Settlement Trust and Asbestos Claims Management Corporation* (*In re National Gypsum Co.*), 118 F.3d 1056 (5th Cir. 1997). The *National Gypsum* court also applied the rule of law of *McMahon* and also held that contempt proceedings under § 524 are not arbitrable. The Fifth Circuit revisited this issue in 2019, again applying *McMahon*'s inherent conflict test and holding that a contempt proceeding under § 524 was not arbitrable. *Henry v. Wells Fargo Bank, N.A.* (*In re Henry*), 944 F.3d 587, 591-592 (5th Cir. 2019). Like the Second Circuit in *Belton*, the Fifth Circuit in *Henry* expressly evaluated *McMahon*'s viability in light of the Supreme Court's decision in *Epic Systems*, concluding that *Epic Systems* and *McMahon* are

consistent and that *Epic Systems* did not "overrule" *McMahon*. Without a circuit split, the primary basis for granting certiorari identified in Supreme Court Rule 10 is not present here. U.S. Sup. Ct. Rule 10(a).

McMahon acknowledges that the Federal Arbitration Act ("FAA") established a federal policy favoring arbitration which "mandates enforcement of agreements to arbitrate statutory claims." 482 U.S. at 226. However, *McMahon* further states that "[l]ike any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Id*. at 226-27. The *McMahon* Court ruled that a party can demonstrate that a contrary congressional command exists by making a showing of Congress' express or inherent intent "to limit or prohibit waiver of a judicial forum for a particular claim. . . deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Id*. at 227.

With respect to the manner of demonstrating an inherent conflict beyond the statutory text, *McMahon* directs that courts examine the underlying purposes of the specific federal statute at issue and the particular facts presented to determine whether there is an inherent conflict with arbitrating the claim. As lower courts have stated, for a claim brought under the Bankruptcy Code, the inherent conflict test requires a determination of "whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." *United States Lines, Inc. v. Am. S.S. Owners Mut. Prot. and Indem. Assoc., Inc.* (*In re U.S. Lines*), 197 F.3d 631, 640 (2d Cir. 1999). If arbitration would "seriously jeopardize the objectives of the Bankruptcy Code," the arbitration clause should

not be enforced. *Id.*; *see also Anderson*, 884 F.3d at 389-390 (same).

In *Anderson*, the Second Circuit properly applied *McMahon*'s inherent conflict test to hold that a contempt proceeding should not be relegated to private arbitration. *Anderson*, 884 F.3d at 390. The court evaluated the underlying purposes of the Bankruptcy Code and, more specifically, the policy and purpose of the discharge injunction in § 524 of the Bankruptcy Code, in order to determine whether there was an inherent conflict with arbitration. *Id.* Specifically, the court found that (i) § 524's discharge injunction is integral to the bankruptcy court's ability to provide debtors with the financial fresh start that is the very purpose of the Code; (ii) enforcement of the arbitration agreement in this case would interfere with the fresh start bankruptcy promises debtors; and (iii) the ability of bankruptcy courts to enforce their own orders is unique to and a central pillar of the powers of the bankruptcy courts and central to the Bankruptcy Code's statutory scheme. *Id.* Based on this analysis, the court determined that arbitration of Anderson's contempt proceeding would seriously jeopardize the objectives of the Bankruptcy Code and affirmed the lower courts' denial of Petitioner's motion to compel arbitration. *Id.* at 389-390.

The Second Circuit's decision below makes clear that *Epic Systems* and *McMahon* are congruent. The court noted that "despite the difference in tone," the test employed in *Epic Systems* is "substantially the same" as that set forth in *McMahon*. Pet.App.7a. The Second Circuit explicitly recognized the applicability of the *Anderson* decision, noting that the similarities between the cases were "overwhelming," and reject-

ing the argument that *Epic Systems* requires a "text-first" approach that cannot be satisfied by reference to statutory purpose. Pet.App.7a. The court found that *Anderson*'s conclusion was equally applicable to the case at hand, concluding that there was an inherent conflict between compelling arbitration and the purposes of the Bankruptcy Code. Pet.App.10a. Notably, this conflict was significant enough to satisfy *Epic System*'s "clear and manifest" mandate.

Like the Second Circuit, the Fifth Circuit has also correctly and consistently held that a contempt proceeding based on a violation of § 524 of the Bankruptcy Code should not be relegated to private arbitration. Over twenty years ago, in *National Gypsum*, the Fifth Circuit applied *McMahon* in refusing to send a contempt proceeding brought under § 524 to arbitration, ruling, "[w]e are convinced that arbitration of a core bankruptcy adversary proceeding brought to determine whether [defendant's] collection efforts were barred by the section 524(a) discharge injunction . . . would be inconsistent with the Bankruptcy Code." 118 F.3d at 1071. The court further stated that, under *McMahon*, it is the court's duty to "assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Id.* at 1070. When the issue later arose in *Anderson*, the Second Circuit cited *National Gypsum* approvingly, finding that "'the undisputed power of a bankruptcy court to enforce its own orders'" was a particularly relevant consideration where a proceeding for contempt under the discharge

injunction of § 524 was at issue. *Anderson*, 884 F.3d at 389 (quoting *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006), in turn quoting, *National Gypsum*, 118 F.3d at 1070). As discussed *supra*, the Fifth Circuit again applied *McMahon* to the same issue in 2019, finding that *McMahon* was still the dispositive case on the issue, and expressly holding that *Epic Systems* did nothing to alter this conclusion. *In re Henry*, 944 F.3d at 592.

Thus, the only two circuit courts of appeals to address the issue are in agreement that the proceedings for contempt under § 524 presented to them were not arbitrable; no other circuit court has held to the contrary and, indeed, no other circuit court has even been presented with the question of whether a proceeding for contempt under § 524 is arbitrable. Thus, the Second Circuit has not "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

B. There Is No Confusion Among the Lower Courts.

Petitioner attempts to manufacture a conflict by suggesting that there has been "confusion" among the lower courts with respect to the application of the *McMahon* inherent conflict test in the bankruptcy context. Pet.20-25. There has been no such confusion. The analysis that all these courts apply is the same; the results are different only because the facts and the statutory sections at issue are different. In all of the cases cited by Petitioner, the courts of appeals have taken a consistent approach, applying *McMahon* to the particular facts presented.

Moreover, in none of the cases Petitioner cites, save *National Gypsum* and *In re Henry*, was a contempt proceeding at issue and, thus, they are inapposite. Similarly, Petitioner's reliance on commentary in journal articles to claim that there is a conflict among courts (Pet.21) misses the mark. All of the journals recognize the rule of law in *McMahon* as the common starting point for the analysis of whether a claim under the Bankruptcy Code should be compelled to arbitration.

All the cases Petitioner cites tell a consistent story. For example, in *Hays & Company v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1999), the Third Circuit applied the *McMahon* inherent conflict test and held that the Chapter 11 trustee plaintiff's federal and state securities claims and fraudulent conveyance and constructive trust claims were arbitrable. *Id.* at 1161 ("Where, as here, a trustee seeks to enforce a claim inherited from the debtor in an adversary proceeding in a district court, we perceive no adverse effect on the underlying purposes of the Code from enforcing arbitration. . . . "). Likewise, in *Mintz v. American General Financial Services, Inc.* (*In re Mintz*), 434 F.3d 222 (3d Cir. 2006), the Third Circuit applied the *McMahon* inherent conflict test and held that the plaintiff's TILA and federal and state consumer protection law claims were arbitrable. *Id.* at 231-32 ("With no bankruptcy issue to be decided by the Bankruptcy Court, we cannot find an inherent conflict between arbitration of Mintz's federal and state consumer protection issues and the underlying purposes of the Bankruptcy Code."). The Third Circuit further found that its ruling was consistent with its earlier application of *McMahon*

in *Hays*, as well as the application of *McMahon* employed by other courts of appeals. *See id.* at 230-31 (citing, *inter alia*, *Hays*, 885 F.3d at 1156-57; *National Gypsum*, 118 F.3d at 1067; *U.S. Lines*, 197 F.3d at 640).

These cases are entirely consistent with the Second Circuit's decision here and in *Anderson* because (i) they did not involve the bankruptcy court's enforcement of its own orders in a contempt proceeding; (ii) they did not involve bankruptcy law issues where there is a need for uniformity; and (iii) arbitration would not have disrupted the efficient adjudication of the estate, other creditors' rights in that estate, or the protection of the fresh start.

Also consistent with the Second Circuit's decision here is the Fifth Circuit's later application of *McMahon* in *Gandy v. Gandy* (*In re Gandy*), 299 F.3d 489, 495 (5th Cir. 2002). In *Gandy*, the plaintiff brought several Bankruptcy Code causes of action aimed at avoiding a fraudulent conveyance, as well as several related non-Code causes of action. 299 F.3d at 496-97. Finding that the plaintiff's Bankruptcy Code causes of action predominated, the Fifth Circuit affirmed the lower court's denial of the defendants' motion to compel arbitration. *Id.* The court noted that "[s]ome 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 reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Id.* at 500 (citing *National Gypsum*, 118 F.3d at 1069). It concluded that, "[i]n this Debtor's case, each of these concerns is tangible and

justifies the federal bankruptcy forum provided by the Code." *Id.* The Fifth Circuit thus continued to take a consistent approach in its application of *McMahon*.

Likewise, the Fourth Circuit has applied *McMahon* to determine whether bankruptcy claims are arbitrable, consistent with its sister circuits. In *White Mountain Mining Co., L.L.C. v. Mowbray, L.L.C.* (*In re White Mountain Mining Co.*), 403 F.3d 164 (4th Cir. 2005), the Fourth Circuit applied the *McMahon* standard and found an inherent conflict between a Chapter 11 plaintiff's core bankruptcy claim and international arbitration because the arbitration would have substantially interfered with the debtor's efforts to reorganize. *Id.* at 170 (arbitration "was inconsistent with the purpose of the bankruptcy laws to centralize disputes about a chapter 11 debtor's legal obligations so that reorganization can proceed efficiently"). In doing so, the Fourth Circuit explicitly noted that its application of *McMahon* was in accord with the Second Circuit's decision in *U.S. Lines*. *See, e.g.*, *id.* at 168-69; *see also Moses v. CashCall, Inc.*, 781 F.3d 63, 66, 72 (4th Cir. 2015) (*per curiam*) (affirming denial of arbitration as to core bankruptcy claim, reversing as to a non-core claim, and citing sister circuits for the standard for applying *McMahon* in the bankruptcy context) (citing *Cont'l Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 671 F.3d 1011, 1019–20 (9th Cir. 2012); *In re Mintze*, 434 F.3d at 228; *In re Gandy*, 299 F.3d at 494)).

Finally, the Ninth Circuit has been explicit in stating that it joins its sister circuits in applying *McMahon* in an identical fashion. *In re Thorpe Insulation Co.*, 671 F.3d at 1022, *cert. denied*, 568 U.S. 815 (2012) ("We join our sister circuits in holding that,

even in a core proceeding, the *McMahon* standard must be met—that is, a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code.") (citing *McMahon*, 482 U.S. at 227; *The Whiting-Turner Contracting Co. v. Elec. Mach. Enter., Inc.* (*In re Elec. Mach. Enter., Inc.*), 479 F.3d 791, 796 (11th Cir. 2007); *In re Mintze*, 434 F.3d at 231; *In re White Mountain Mining Co.*, 403 F.3d at 169-70; *In re U.S. Lines*, 197 F.3d at 640; *In re National Gypsum*, 118 F.3d at 1069–70); *see also EPD Inv. Co, LLC v. Rund* (*In re EPD Inv. Co.*), 821 F.3d 1146, 1150 (9th Cir. 2016) (citing *Thorpe* and applying the same standard); *Ackerman v. Eber* (*In re Eber*), 687 F.3d 1123, 1129-31 (9th Cir. 2012) (same).

The fact that some courts order arbitration and others do not is not evidence of confusion among the courts. The difference in result is caused by different facts. All of these decisions are consistent: where state law claims or private causes of action are raised in bankruptcy court, but do not directly affect the administration of the estate or the court's power to enforce its own orders, arbitration is appropriate.

In any event, even if there was inconsistency in the courts' application of *McMahon* (and there is not), supervising the lower courts' application of the settled rule of law in *McMahon* to varied circumstances does not present a compelling reason for this Court to grant review. *See* U.S. Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Yet that is exactly what Petitioner is raising here—

the lower courts' application of *McMahon*. Even if Petitioner were right that the lower courts did not properly apply *McMahon* (and it is not), it would not be a sufficient reason to grant review. The Supreme Court is not a general court of error. *See Tolan v. Cotton*, 134 S.Ct. 1861, 1868 (2014) (Alito, J., concurring) (citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons". . . that govern the grant of certiorari.")); *see also City and Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1779 (2015) (Scalia, J., concurring) (agreeing that dismissal of claim as improvidently granted was appropriate where party sought review of how lower court applied a properly stated rule of law). As such, there is no compelling ground for granting review here.

II. The Second Circuit's Approach Does Not Conflict with *Epic Systems* or Any Other Supreme Court Decision.

Petitioner asserts that the decision below is in conflict with this Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). Pet.16. The *Epic Systems* Court stated that Congress's intention to render a federal statutory claim non-arbitrable must be "clear and manifest." *Epic Systems*, 138 S.Ct. at 1617. Petitioner attempts to wring from these words a new rule that a conflict between a federal statute and arbitration can only be derived from the text of the statute and not from an inherent conflict. Pet.17. Petitioner is incorrect.

First, the *Belton* court properly applied both *Epic Systems* and *McMahon*. In so doing, the court expressly rejected the argument that *Epic Systems* overruled *McMahon* by "requiring a text-first approach that cannot be satisfied by reference only to statutory purpose," holding that the test employed in both cases is "substantially the same." Pet.App.7a. The same conclusion was reached by the Fifth Circuit. *In re Henry*, 944 F.3d at 591-592 (finding that *Epic Systems* does not overrule *McMahon* and noting that the two tests are "substantially the same").

Second, the Court's decision in *Epic Systems* and the Second Circuit's decisions in *Belton* and *Anderson* are in accord. In *Epic Systems*, the Court looked at both the language and policies of the statutes at issue, referring to them as "textual and contextual clues" and cited approvingly to *McMahon*. *Epic Systems*, 138 S.Ct. at 1627. The Court later reiterated that the absence of specific statutory language is a "clue" about the conflict, a strong clue, but not dispositive by itself, again citing *McMahon* approvingly. *Id.* The Court evaluated the policies of the FAA and the National Labor Relations Act ("NLRA") to see if they conflicted. *Id.* at 1630. The Court looked at the particular language of the NLRA's Section 7, as well as the "NLRA's broader structure" and section 7's underlying "'policy of protecting workers' 'concerted activities"' in determining "that policy does not conflict with Congress's directions favoring arbitration." *Id.* at 1618, 1625. If the analysis were limited to only the text of the statute at issue, as Petitioner argues, the Court would not have looked beyond the text at all to examine and discuss the context and policies underlying the NLRA as it did. Instead, the *Epic Systems*

Court cited *McMahon* approvingly and looked at the text, history, and purposes of the statute just as the Court's earlier cases had.

Likewise, in both *Belton* and *Anderson*, the Second Circuit examined the policies of the Bankruptcy Code such as "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Anderson*, 884 F.3d at 389. It looked at § 524 and 11 U.S.C. § 105, both of which provide specific and unique judicial and contempt powers to the bankruptcy courts. *Id.* at 391. In doing so, the Second Circuit correctly concluded that "because 1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with the fresh start that is the very purpose of the Code; 2) the claim regards an ongoing bankruptcy matter that requires continuing court supervision; and 3) the equitable powers of the bankruptcy court to enforce its own injunctions are central to the structure of the Code" arbitrating a contempt proceeding would conflict with the Bankruptcy Code. Pet.App.6a; *Anderson*, 884 F.3d at 390. Most notably, the court ruled that "violations of this court-ordered injunction are enforceable only by the bankruptcy court and only by a contempt citation." *Id.* at 391. The Second Circuit then confirmed that this analysis applied in *Belton*, as well. Pet.App. 7a.

Epic Systems' discussion of *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Compu-Credit Corp. v. Greenwood*, 565 U.S. 95 (2012), cited in the Petition at 14, also does not mandate that the Second Circuit was precluded from finding a conflict

here. Those cases determined that the text of the statutes at issue demonstrated that there was no conflict with arbitration.[2] Here, the Second Circuit has not held that anything in the text of the Bankruptcy Code conflicts with arbitration, but rather that the underlying policy of enforcing the discharge injunction through contempt proceedings conflicts with arbitration. Nothing in *Epic Systems* disturbs that holding. Moreover, none of the statutes at issue in *Epic Systems*, *Gilmer*, *CompuCredit* or any of the other cases cited by Petitioner, concerned contempt proceedings like those here.

The true implication of Petitioner's *Epic Systems* argument is that the inherent conflict test of *McMahon* is no longer viable after *Epic Systems.* In other words, Petitioner is arguing that *Epic Systems* overruled *McMahon sub silentio*. However, this Court does not impliedly overrule existing precedent. *See Shalala v.*

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[2] Notably, in *CompuCredit*, only the text of the statute was at issue, not whether the policies of the statute at issue inherently conflicted with arbitration. The petitioner there specifically disclaimed relying on an inherent conflict analysis. *See* 2011 WL 2533009, at *18 (June 23, 2011) (Petitioner's Br. in *CompuCredit*). The district court below rejected the argument that *CompuCredit* required a finding that there was no conflict between arbitration and the Bankruptcy Code. *See Belton*, 2015 WL 6163083, at *5 ("*CompuCredit* cannot be read as impliedly overruling *McMahon*, particularly given that *CompuCredit* cites *McMahon* for the proposition that the FAA may be 'overridden by a contrary congressional command.'") (quoting *CompuCredit*, 132 S. Ct. at 669 (internal quotation marks omitted)). The district court noted that the respondents in *CompuCredit* did not rely on the CROA's legislative history, nor did they make an inherent conflict argument; "'[c]onsequently, the sole question for the Court [wa]s whether the text of the CROA precludes arbitration with sufficient clarity to override the operation of the FAA.'" *Id.*

Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000) ("The Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). In any event, *McMahon* is still viable because *Epic Systems* cited it approvingly several times and discussed the policies and purposes of the statute at issue. Even Petitioner cites the rule of law in *McMahon* and cases applying that rule of law. Pet.12-13.

Epic Systems leaves *McMahon*'s inherent conflict test—and the Second Circuit's ruling applying it in this case—undisturbed. In addition to the Second Circuit's findings in *Belton*, the Fifth Circuit has expressly stated that far from overruling *McMahon*, *Epic Systems* shows that *McMahon*'s inherent conflict test remains sound. *In re Henry*, 944 F.3d at 591. The Fifth Circuit ruled that *McMahon* and *Epic Systems* "apply essentially the same tests for determining whether a statute overrides the FAA's command to enforce arbitration agreements according to their terms." *Id.*

The Second Circuit properly applied that test in *Anderson* and then again in *Belton* to find an inherent conflict existed. Petitioner has not demonstrated that the Second Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," or otherwise established any compelling reason to grant certiorari. U.S. Sup.Ct. Rule 10(c).

Petitioner further criticizes the Second Circuit for rejecting its argument that Congress's decision to give state courts concurrent jurisdiction suggests that a violation of the discharge injunction does not fall within the special purview of the bankruptcy courts. Pet.20. This argument was properly rejected by the Second Circuit. Pet.App.9a. State courts only have

concurrent jurisdiction to enforce the discharge injunction when it is raised as an affirmative defense in collection suits. *See Taggart v. Lorenzen*, 139 S.Ct. 1795, 1803 (2019). Where, as here, a party seeks to bring a contempt proceeding to remedy a violation of the discharge injunction, only the bankruptcy court has the power to adjudicate. Pet.App.10a, *see also Anderson*, 884 F.3d at 391.

None of this Court's prior FAA precedents involve contempt of a court order. This Court has never held that the FAA should preempt a judge's ability to enforce his or her own order. Once both the discharge order and the statutory injunction of § 524 are violated, the matter is no longer a private dispute, and the underlying policy of the FAA in favor of arbitration no longer applies. The bankruptcy court must be able to ensure the availability of the fresh start promised by the Bankruptcy Code by dealing swiftly and directly with violations of its discharge orders.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW.

This case comes to the Court in narrow circumstances that make it a poor vehicle for review.

First, in the decision on appeal, the district court below merely considered whether the Second Circuit's prior mandate in *Anderson* covered the *Belton* case. It held that it did. And that ruling was consistent with the Second Circuit's directive on a mandamus petition that the district court revisit *Belton* in light of the mandate in *Anderson*. *Belton*, No. 16-833 (2d Cir. June 26, 2018), Order (denying the petitions for mandamus "because Petitioner[s] can seek the requested relief by moving in the district court for reconsideration of its order in light of this Court's

decision in *In re Anderson*, 884 F.3d 382 (2d Cir. 2018)."); *see also Bruce*, No. 16-830 (2d Cir. June 26, 2018), Order (same). On reconsideration, the district court confirmed that the *Anderson* mandate in fact controlled the outcome in *Belton* and *Bruce*. Pet.App. 23a. With respect to the scope of its prior mandate in *Anderson*, the Second Circuit concluded that "as our Court's precedent is clear, and as that precedent is not incompatible with intervening caselaw or the text and history of the Bankruptcy Code" the court was bound to adhere to its prior precedent. Pet.App.3a. The court also ruled that "[g]iven the overwhelming similarities between this case and *Anderson*, our hands seem to be bound by that panel's decision." Pet.App.7a. The district court also rejected defendants' argument that *Anderson* was inconsistent with *Epic Systems*. Pet.App.19a-23a.

In the end, what the Petition really seeks to do it to obtain review of the Second Circuit's determination that it is bound by its own precedent. But that is not a proper basis for granting certiorari. *See City and Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765, 1779 (2015) (Scalia, J., concurring). There is nothing unusual or exceptional about a court considering the scope of its prior mandate and whether it is bound by its own precedent. There has been no departure from accepted and usual judicial proceedings to justify invoking this Court's supervisory powers. Sup. Ct. Rule 10a.

CONCLUSION

Petitioner GE and Respondent Citi fail to present a compelling reason for this Court to grant the petition for a writ of certiorari. There is no circuit split on an important matter, no confusion among lower courts, no conflict with Supreme Court precedent, nor are there exigent circumstances or any other compelling reason to grant certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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