NO. 17-1652

In the Supreme Court of the United States

CREDIT ONE BANK, N.A.,

Petitioner,

–v–

ORRIN S. ANDERSON,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts below properly applied the rule of law in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), to not 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 the unique power and expertise of the bankruptcy courts to enforce their own orders.

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INTRODUCTION

This Court should deny the petition for a writ of certiorari because it does not demonstrate a split among courts, full appellate treatment of the issues, exigent circumstances or any other compelling reason for 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 have ruled on the issue in the last twenty 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 a proceeding should be decided by a court. Petitioner does not cite a single case holding that a contempt proceeding should be the subject of a private arbitration. That is not surprising because only a court can make a finding of contempt. Pet.App.15a-16a ("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 that Petitioner makes it out to be. It 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. At its core, the Petitioner merely disagrees with the court of appeal's application of the rule of law of *McMahon*. However, correcting perceived errors should not be this Court's role nor is it 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 unique and limited procedural and factual circumstances. Petitioner waived two principal arguments below that are part of the *McMahon* test, (whether the statute's text or legislative history demonstrates a conflict) and thus the appellate record on those arguments has not been developed for this Court to consider. Pet.App.10a-11a. Also, Petitioner was held to be in default on the merits because of its willful violation of discovery orders and its misrepresentations to the court, which pretermitted discovery in the case. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. Nov. 10, 2016), Dkt. No. 104, Hrg. Tr. at 4. As a result, there has not been a normal nor fulsome development of the factual record. Perhaps most importantly, Petitioner has already voluntarily entered into an injunctive order agreeing to fix its customers' credit reports and to refrain from listing discharged debts as "charged off" in the future. Pet.App.7a ("Credit One[ ] stipulate[ed] that it would update the credit

reports of Anderson and other consumers."). Two other major banks have also agreed to do the same, all together covering over 1.5 million consumers. Thus, this is not a complete record nor exigent issue of importance that needs Supreme Court resolution.

In the end, Petitioner has not shown any compelling reason for granting a writ of certiorari.

STATEMENT OF THE CASE

In January 2015, Respondent Orrin Anderson brought an adversary proceeding seeking to hold Petitioner Credit One in contempt for willfully seeking to collect a discharged debt in violation of the discharge injunction found in 11 U.S.C. § 524.

At the outset it is important to note that Petitioner was found in default as to the merits of Anderson's claim as a sanction for Petitioner's discovery abuse. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. Nov. 10, 2016), Dkt. No. 101, Hrg. Tr. at 4 ("I have concluded . . . that the appropriate sanction here is a default judgment on the merits, but not with respect to class certification or damages."). Thus Petitioner's factual statements that purport to diminish its liability or explain its behavior should be given no weight by the Court.

A. Factual and Procedural Background

Anderson incurred a consumer credit card debt with Credit One prior to July 2011. Pet.App.63a at

¶ 19. When Anderson fell behind on his credit card payments, Credit One reported to consumer credit reporting agencies that the account should be noted as "charged off." *Id.* at ¶¶ 20-21. Anderson subsequently commenced a bankruptcy proceeding in January 2014 and received an order discharging all of his debts in May 2014. Pet.App.64a at ¶¶ 22-23. Credit One was notified of the discharge. *Id.* at ¶ 24.

In August 2014, Anderson discovered that his credit reports continued to show his Credit One debt as "charged off" rather than discharged in bankruptcy. *Id.* at ¶ 25. Anderson contacted Credit One and requested that it remove the "charged off" notation from his credit reports. *Id.* at ¶¶ 26-28. Credit One refused to do so, even though it knew Anderson's debt had been discharged. *Id.*

Earlier, in 2012, Credit One had sold Anderson's debt to a third-party debt buyer. Pet.App.65a at ¶ 29. The debt buyer did not furnish any information to consumer credit reporting agencies regarding the debt. *Id.* at ¶¶ 33-35. Credit One is the only creditor capable of updating its reporting of Anderson's debt to accurately report that debt was discharged in bankruptcy. *Id.* For over two years, and even after the start of this litigation, Credit One continued to report Anderson's debt as "charged off" and due and owing and not as discharged.

Debtors who are unable to remove "charged off" notations from their credit reports often end up paying the debt to clear up their credit report and thereby regain access to housing, jobs or credit. Credit One maintained a policy of refusing to correct its reporting

on discharged debts to pressure debtors to pay the debt even though it was no longer owed. *Id.* at ¶¶ 42-43.

Numerous courts have held that refusing or failing to update credit reporting to pressure debtors to pay discharged debts—in the manner that Credit One did here—violates the discharge injunction. *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").

The bankruptcy court followed that reasoning when it denied Credit One's motion to dismiss in this case. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. May 5, 2015), Dkt. No. 16, Hrg. Tr. at 69-81. The bankruptcy court also rejected Credit One's argument (repeated again now at Petition at 5) that it is not necessary to update credit reporting from "charged off" to "included in bankruptcy" on sold accounts

because the fact that the debt was charged off "remains true." The bankruptcy court ruled that having a credit report that lists a discharged debt as "charged off" or otherwise lists it as currently due and owing is inaccurate and detrimental to the debtor. *Id.*, Dkt. No. 16, Hrg. Tr. at 76 ("[T]he bases for denial of discharge generally and denial of discharge of a particular debt [are] all ugly—fraud, theft, embezzlement. So in essence the statement [denoted by "charged off"] that we don't think we're going to collect anything from this person —and by the way, they've been in bankruptcy but they haven't gotten a discharge—is about as bad as you can get.").[1]

B. Current Status of the Proceedings

The parties continued to litigate this case while Credit One's appeal of its motion to compel arbitration was pending. On September 22, 2016, Credit One was found to have engaged in significant discovery mis-

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[1] Although Credit One argues that its refusal to update Anderson's credit report was in accordance with federal regulations and industry guidance, Petition at 5 n.2, the "regulation" they purport to cite is not a regulation at all, but merely the Federal Trade Commission's discussion of comments people submitted in advance of its Fair Credit Reporting Act (FCRA) rule-making. *Id.* (citing 74 Fed. Reg. 31484-01, 31494 (July 1, 2009)). The bankruptcy court has ruled that reliance on this "advisory note in connection with proposed rule-making under the FCRA" was unpersuasive. *Haynes v. Chase Bank USA, N.A.* (*In re Haynes*), Adv. Proc. No. 13-08370-RDD (Bankr. S.D.N.Y. June 16, 2014), Dkt. No 61, Hrg. Tr. at 89-90 (noting that "no rules were adopted as part of [the rule-making] process and the statute itself [FCRA, 15 U.S.C. § 1681s-2(a)(2)] is more broadly worded, requiring reporting, including a duty to correct and update information [that the creditor learns is no longer accurate].").

conduct. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y Sept. 22. 2016), Dkt. No. 89, Hrg. Tr. at 53-64. On November 10, 2016, the bankruptcy court ruled that Credit One's discovery abuse was so severe that it was entering a default on the merits against Credit One thereby finding liability against it. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. Nov. 10, 2016), Dkt. No. 101, Hrg. Tr. at 4.

Thereafter, on March 22, 2017, Credit One voluntarily agreed to an order to fix the reports of its consumers and to be enjoined from reporting discharged debts as "charged off" in the future. Pet.App.7a; *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. Mar. 22, 2017), Dkt. No. 104 (stipulation and order).

On October 12, 2017, the bankruptcy court held a hearing on Anderson's motion for class certification. That motion remains pending.

C. Credit One's Motion to Compel Arbitration

Earlier, on March 3, 2015, Credit One moved to compel arbitration, based on an arbitration clause in the credit card agreement between the parties.

On May 14, 2015, the bankruptcy court entered an order denying Credit One's motion. Pet.App.42a. The court relied on the reasoning in its earlier decision in a similar action, *Belton v. GE Capital Consumer Lending, Inc. a/k/a GE Money Bank* (*In re Belton*), Adv. Proc. No. 14-08223-RDD, 2014 WL 5819586 (Bankr. S.D.N.Y. Nov. 10, 2014). PetApp.48a ("and except to the extent I have supplemented the record

here, I'll rely on the logic of *Belton*"). The bankruptcy court applied the rule of law of *Shearson/American Express v. McMahon*, 482 U.S. 220, 226-27 (1987), and held that, under the specific facts presented, compelling arbitration of the contempt proceeding would inherently conflict with the underlying purposes of the Bankruptcy Code. *Belton*, 2014 WL 5819586 at *8-9, *12.

The bankruptcy court noted that no court had ever compelled arbitration of a contempt proceeding for violation of the discharge injunction. The court found that the discharge (and the related fresh start that it provides a debtor) is the fundamental purpose underlying the Bankruptcy Code and that forcing arbitration of contempt proceedings for violations of the discharge injunction would seriously jeopardize the value of the discharge and the related fresh start and would undermine the adjustment of debtor/creditor relations that are committed to bankruptcy courts. *Belton*, 2014 WL 5819586 at *9; Pet.App.48a. The bankruptcy court noted that its ruling was consistent with the Second Circuit's ruling in *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006), which "articulated in very strong dicta that when the debtor's fresh start is at issue, an enforcement proceeding in the bankruptcy court should not be stayed in favor of arbitration." *Belton*, 2014 WL 5819586 at *8 and Pet.App.48a (both citing *Hill*, 436 F.3d 104). The bankruptcy court also noted that obtaining injunctive relief (such as the enforcement of the discharge injunction) in arbitration is "uncertain and cumbersome, with enforcement power resting in the district court, not the arbitrator or arbitration panel that issued the decision." *Belton*, 2014 WL 5819586 at *10; Pet.App. 48a.

Credit One appealed that ruling to the U.S. District Court for the Southern District of New York. On June 14, 2016, the district court affirmed the bankruptcy court's order denying Credit One's motion to compel arbitration. Pet.App.19a. Just like the bankruptcy court, the district court applied the inherent conflict analysis of *McMahon* and held that arbitrating the contempt proceeding would inherently conflict with the policies and objectives of § 524 of the Bankruptcy Code. Pet.App.24a-37a.

The district court determined that arbitrating the contempt proceeding would conflict with the policies of the Bankruptcy Code for several reasons. First, providing debtors with a financial fresh start is a central objective of the Bankruptcy Code and because "the discharge is so fundamentally related to a debtor's fresh start," arbitrating a claim for violation of the discharge injunction would jeopardize the fresh start. Pet.App.36a.

Second, the district court found that because the discharge injunction is an affirmative order of the bankruptcy court, and because bankruptcy courts are uniquely suited to interpret and enforce their own orders, a proceeding for contempt of such an order could not be arbitrated. Pet.App.36a-37a (citing, *inter alia*, *Hill*, 436 F.3d at 108-09 (finding that bankruptcy court has "undisputed power . . . to enforce its own orders"); *Deep v. Copyright Creditors*, 122 F. App'x 530, 533 (2d Cir. 2004) ("The bankruptcy court [is] in the best position to interpret its own orders.") (citing *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999))). Third, the district court found that the uniform application of the Bankruptcy Code is an important policy goal

and that goal is "furthered by federal, class action litigation." Pet.App.38a. By contrast, arbitrating individual claims in separate arbitrations "could create wildly inconsistent results," especially given that arbitrators have broad discretion in determining whether to apply collateral estoppel offensively. Pet.App.39a.

Credit One then appealed the district court's ruling and the U.S. Court of Appeals for the Second Circuit affirmed. Pet.App.1a-2a. Like the bankruptcy court and the district court, the court of appeals analyzed the motion to compel under the rule of law of *McMahon.* The court of appeals scrutinized the particular facts and claims in the case. The Second Circuit emphasized that only bankruptcy courts have the power to enforce the discharge injunction: "violations of this court-ordered injunction are enforceable only by the bankruptcy court and only by a contempt citation." Pet.App.15a-16a. The court of appeals determined that arbitrating a contempt proceeding would conflict with the policies of the Bankruptcy Code and the power of the bankruptcy courts to determine contempt of their own orders. The court of appeals rejected Credit One's argument that because the discharge injunction is statutory and executed by the court as a standard form, the unique powers of the bankruptcy court to enforce its own orders were not implicated. *Id.* ("Neither 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 possesses the power and unique expertise to enforce it.").

The Second Circuit also noted that "discharge is the paramount tool used to effectuate the central goal of bankruptcy: providing debtors a fresh financial start." Pet.App.13a. The court of appeals held, "Because 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." Pet.App.13a (quoting *Hill*, 436 F.3d at 110).

The Second Circuit distinguished the outcome in its *Anderson* decision from the outcome in its earlier decision in *Hill*, which concerned the automatic stay provision of the Bankruptcy Code and not the discharge injunction, reasoning that, "Unlike the automatic stay, the discharge injunction is likely to be central to bankruptcy long after the close of proceedings. The automatic stay exists only while bankruptcy proceedings continue to ensure the status quo ante, while the integrity of the discharge must be protected indefinitely." Pet. App.14a. Thus, the court of appeals concluded that "[e]nforcement of the arbitration agreement in this case would interfere with the fresh start bankruptcy promises debtors, which would create an inherent conflict with the Code." *Id.*

For all of these reasons, the Second Circuit found that "arbitration of a claim based on an alleged violation of [the discharge injunction] would '"seriously jeopardize a particular core bankruptcy proceeding."' Pet.App.17a (quoting *In re U.S. Lines, Inc.*, 197 F.3d 631, 641 (2d Cir. 1999)).

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 *Anderson* does not conflict with decisions of any other circuit court of appeals. In fact, Petitioner does not contend—nor could it—that there is a circuit split on the issue of whether contempt proceedings for violation of § 524 of the Bankruptcy Code are arbitrable. For the twenty years preceding this case, no circuit court of appeals even addressed the issue. The last (and only) other circuit court of appeals to address this issue was the Fifth Circuit in 1997 in *Insurance Company of North America v. N.G.C. Settlement Trust and Asbestos Claims Mgmt. Corp.* (*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. Indeed, no circuit court has ever held that parties, by private agreement, can divest a court of its power to enforce its own orders. Without a circuit split, a 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. *McMahon* 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. Thus, under *McMahon*, a party may rely on (1) a statute's text; (2) its legislative history; or (3) an inherent conflict between arbitration and the statute's underlying purposes to demonstrate that Congress intended that particular claims should not be arbitrated. Pet.App.10a. Petitioner seems to agree this rule of law applies. Petition at 12-13.

With respect to the manner of demonstrating an inherent conflict, which has been called "the inherent conflict test," *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." *U.S. Lines*, 197 F.3d at 640. If arbitration would "seriously jeopardize the objectives of the Bankruptcy Code," the arbitration clause should not be enforced. *Id.*; *see also* Pet.App.30a (same).

The Second Circuit properly applied *McMahon*'s inherent conflict test in *Anderson*. 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. Pet.App.10a-17a. 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. Pet.App.17a.

Over twenty years earlier, in *National Gypsum*, the Fifth Circuit also applied *McMahon* and did not compel a contempt proceeding brought under § 524 to arbitration, ruling, "We 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 *National Gypsum* 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. Pet.App.14a (quoting *Hill*, 436 F.3d at 108, in turn quoting, *National Gypsum*, 118 F.3d at 1070).

Thus, the 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. Petition at 22-27. 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*, was a § 524 claim 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, Petition at 23, 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 of the cases Petitioner cites tell a clear and consistent story. For example, in *Hays & Co. 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 *In re Mintze*, 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. 434 F.3d 222, 231-32 (3d Cir. 2006) ("With no bankruptcy issue to be decided by the Bankruptcy Court, we cannot find an inherent conflict between arbitration of Mintze'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 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 *In re Gandy*, 299 F.3d 489 (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 *In re White Mountain Mining Co., L.L.C.*, 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 Code 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 1011, 1022 (9th Cir. 2012), *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; *In re Elec. Mach. Enters., Inc.*, 479 F.3d 791, 796 (11th Cir. 2007); *In re Mintze*, 434 F.3d at 231; *In re White Mountain Mining*, 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 In re EPD Inv. Co.*, 821 F.3d 1146, 1150 (9th Cir. 2016) (citing *Thorpe* and applying the same standard); *In re Eber*, 687 F.3d 1123, 1129-31 (9th Cir. 2012) (same).

Despite this, Petitioner suggests that certain circuits employ a "sweeping rationale," Petition at 25, that improperly considers the Bankruptcy Code's centralization purpose as a factor in determining whether a bankruptcy claim is arbitrable. Petition at 25-26. But all of the circuit courts of appeals have been uniform in their recognition that the centralized resolution of bankruptcy matters, which is a primary goal of the Bankruptcy Code, is a proper consideration under *McMahon*. *See, e.g.*, Pet.App.11a (quoting *Hill*, 436 F.3d at 108); *Hays*, 885 F.2d at 1157-58; *White Mountain Mining Co.*, 403 F.3d at 169-170; *Gandy*, 299 F.3d at 500 (citing *National Gypsum*, 118 F.3d at 1069); *Thorpe Insulation Co.*, 67 F.3d at 1022-23. Sending one issue to arbitration where that issue affects numerous creditors' rights and the entire reorganization of the estate may create an inherent conflict with the mandate of the FAA. Whether that consideration was strong enough, either alone or in concert with other

bankruptcy policy considerations, to override the countervailing policy in favor of arbitration, was a matter of the particular claims and facts before each court. *Id.*

Thus, far from applying "an array of bespoke approaches to addressing the arbitrability of bankruptcy claims," as the Petitioner decries (Petition at 26), the courts of appeals have taken a singular and conventional approach—they have all applied *McMahon*.

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*, it would not be a sufficient reason to grant review. The Supreme Court should not be 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.")). As such, there is no compelling ground for granting review here.

II. THE SECOND CIRCUIT'S DECISION IN *ANDERSON* DOES NOT CONFLICT WITH *EPIC SYSTEMS* OR ANY OTHER SUPREME COURT DECISION AND WAS DECIDED CORRECTLY

Petitioner asserts that the Second Circuit's decision in *Anderson* "directly contradicts" this Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). Petition at 11. 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. Petition at 20-22. Petitioner waived raising that argument here and it is incorrect.

First, Petitioner has waived the argument that the text or legislative history of the Bankruptcy Code shows no conflict with arbitration. Pet.App.10a ("Though Credit One argues on appeal that intent may be discerned through the text and legislative history, these arguments were not raised by either party below."); Pet.App.24a at n.3 ("The parties in the instant case do not assert that any such intent is present in the statute's text or history."). This Court has not "allow[ed] a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *United*

States v. Wells, 519 U.S. 482, 488 (1997) (question presented in a petition for certiorari will only be considered if it was "pressed in or passed on" by the court of appeals) (quoting *United States v. Williams*, 504 U.S. 36, 42 (1992)). The Supreme Court is "a court of final review and not first view" such that it often declines to rule on questions where it "is without the benefit of thorough lower court opinions to guide [its] analysis on the merits." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). Even though *Epic Systems* was decided after *Anderson*, Petitioner cannot use it as a vehicle to resurrect arguments that Petitioner waived below concerning the text of the statute at issue. *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (Court will not review inadequately preserved argument).

Second, the Court's decision in *Epic Systems* and the Second Circuit's decision in *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. *See, e.g., id.* at 1630. The Court looked at the particular language of the NLRA's Section 7, at the "NLRA's broader structure" and to Section 7's underlying "policies of protecting workers' concerted activities" in determining "that policy does not conflict with Congress's directions favoring arbitration." 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 have done.

Petitioner also argues that under *Epic Systems*, a provision in the Bankruptcy Code that provides for some type of legal action, like the injunction provision of § 524, is not enough on its own to create an inherent conflict. Petition at 22 ("even a statute's express provision for [some type of] legal action[ ] does not necessarily mean that it precludes . . . arbitration.") (citing *Epic Systems*, 138 S.Ct. at 1627). That may be, but the argument creates a straw man that is not at issue here. First, the quoted language from *Epic Systems* stands for the unremarkable proposition that the analysis of the text of a statute requires some depth and not merely a surface review to determine if there is a conflict. In any event, even if the express provision for judicial action in a statute is not enough to demonstrate a conflict with arbitration, *Epic Systems* does not hold the converse, that an express provision for judicial action in a statute prohibits finding a conflict.

The argument is also a straw man because the Second Circuit did not undertake the analysis that the Petitioner claims would be contrary to *Epic Systems*. Again, because Petitioner waived its argument about the text of the statute, the Second Circuit did not determine that the express provision of a judicial right in the statutory text demonstrated the presence or absence of a conflict. The Second Circuit looked at

much more, including 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." Pet.App.11a. 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. Pet.App.15a-16a. 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.[2] Pet.App.13a. 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." Pet.App.15a-16a.

Epic Systems' discussion of *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991), and *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), cited in the Petition at 22, also does not mandate that the Second Circuit was precluded from finding a conflict

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[2] Anderson also continues to contend that the claims at issue here, a contempt proceeding under § 524, do not constitute a private dispute that arises out of the parties' contractual relationship, and is therefore outside the scope of the arbitration provision in the credit card agreement.

here. Those cases determined that the text of the statutes at issue demonstrated that there was no conflict with arbitration.[3] 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 import 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 System* overruled *McMahon sub silentio*. However, this Court does not impliedly overrule existing precedent. *See Shalala v. 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*

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[3] 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 legislative history or an inherent conflict analysis. *See* 2011 WL 2533009, at *18 (June 23, 2011) (Petitioner's Br. in *CompuCredit*). Here, the district court below rejected the argument that *CompuCredit* overruled *McMahon sub silentio* and eliminated the inherent conflict test. *See* 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)).

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. Petition at 12-13.

Epic Systems leaves *McMahon's* inherent conflict test—and the Second Circuit's ruling applying it in this case—undisturbed. The Second Circuit properly applied that rule in *Anderson* 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." U.S. Sup. Ct. Rule 10(c).

III. PETITIONER'S OTHER ARGUMENTS ABOUT THE STATUTORY TEXT AND LEGISLATIVE HISTORY WERE WAIVED AND ARE WITHOUT MERIT

Separate from its *Epic Systems* argument, Petitioner bases its Petition on the argument that the statutory text and legislative history text require arbitration here. Petition at 16-18 (arguing that "[n]othing in the text or legislative history of the Bankruptcy Code suggests an intent to preclude arbitration"). As noted above, these arguments were waived below and the Second Circuit explicitly declined to consider these arguments. Pet.App.10a. Again, given that these arguments did not benefit from the analysis of the lower courts, they are not good candidates for review in this Court.

Moreover, even if Petitioner had not waived its text and legislative history arguments, they are without merit. The legislative history of § 524 of the Bankruptcy Code, and its predecessor § 14(f) of the Bankruptcy Act, shows that Congress enacted § 524 to centralize

the enforcement of the discharge injunction in bankruptcy court and eliminate conflicting adjudications in other forums, including state court. 4 Collier on Bankruptcy P 524.LH[1], (15th rev. ed., Lawrence P. King ed. 2000). Filing state court actions had been a common practice of creditors and unsuspecting former debtors would often default in those actions and thus have to pay on discharged debts, which undermined the efficacy of the bankruptcy discharge. *Id.* Section 524 was enacted to change that practice and provide for enforcement of the injunction by contempt in the bankruptcy court. Pet.App.15 and n.3.

Likewise, contrary to Petitioner's assertion, Petition at 17-18, Congress's decision to grant non-exclusive jurisdiction to the bankruptcy courts over claims to enforce the discharge injunction is not controlling as to whether Congress intended for those claims to be subject to arbitration. Petitioner relies on two cases in which the Supreme Court found that Congress's grant of concurrent jurisdiction to federal and state courts with respect to other federal claims suggested that those claims could be arbitrated. Petition at 17 (citing *Gilmer*, 500 U.S. at 29; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482-83 (1989)). These cases are inapposite because, as the bankruptcy court has explained, bankruptcy court jurisdiction differs from either federal district court or state jurisdiction in fundamental ways. Pet.App. 44a-46a. *See also Belton*, 2014 WL 5819586 at *4 (Congress has granted bankruptcy courts "specialized" and "deep" jurisdiction over "issues central to the bankruptcy process in the interests of efficiency, expertise and fairness"). And "violations of this court-ordered injunction [in § 524] are enforceable only by

the bankruptcy court and only by a contempt citation." Pet.App.15a-16a.

Petitioner also argues that Anderson did not show an inherent conflict through the effective vindication doctrine. Petition at 13-16. As Petitioner acknowledges, however, the Second Circuit did not pass on that issue either and thus it should not form the basis of certiorari for this Court. *See* Petition at 19 ("the court below never considered . . . whether Anderson could use arbitration to effectively vindicate [his rights]"). The argument is also without merit. While a showing that a plaintiff cannot effectively vindicate his rights in arbitration may be sufficient grounds for a court to refuse to enforce an arbitration agreement, such a showing is not necessary to demonstrate that there is an inherent conflict between arbitration and the underlying purposes of a statute. The effective vindication doctrine is a "judge-made exception" to the FAA, in which courts will invalidate, on public policy grounds, arbitration agreements that "'operate . . . as a prospective waiver of a party's right to pursue statutory remedies.'" *Italian Colors*, 133 S.Ct. at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). This Court has stated that the effective vindication doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11.

The inherent conflict test and the effective vindication doctrine are two separate grounds on which courts

may refuse to enforce arbitration agreements. And, in order to satisfy the inherent conflict test, a party need not demonstrate that he or she cannot effectively vindicate their rights in arbitration. This Court did not so hold in *McMahon*, nor have any of the circuit courts of appeals.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW

This case comes to the Court in unique and limited procedural and factual circumstances that make it a poor vehicle for review.

First, as noted above, Petitioner has waived its arguments concerning two of the three prongs of the *McMahon* standard and the courts below did not consider or pass on these arguments.

Additionally, Petitioner has defaulted as to the merits of Anderson's claim that Petitioner violated the discharge injunction in § 524 of the Bankruptcy Code. *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. Nov. 10, 2016), Dkt. No. 101, Hrg. Tr. at 4 ("I have concluded . . . that the appropriate sanction here is a default judgment on the merits, but not with respect to class certification or damages."). Thus, a fulsome record has not been developed as to the facts of the case. Moreover, the courts below noted that their holdings only applied to the particular § 524 claims that were presented to them. *See, e.g.*, Pet.App. 35a-36a ("This is not to say that whenever the debtor's fresh start is at issue, arbitration is unavailable; however, in the instant case, where the discharge is so fundamentally related to a debtor's fresh start, this conclusion is warranted.").

Also, notably, Petitioner has voluntarily agreed to fix its customers' credit reports and to injunctive relief enjoining it from listing such debts as charged off in the future. Pet.App.7a; *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), Adv. Proc. No. 15-08214 (RDD) (Bankr. S.D.N.Y. Mar. 22, 2017), Dkt. No. 104 (stipulation and order). Two other major banks have agreed to do the same thing. *See Haynes v. Chase Bank USA, N.A.* (*In re Haynes*), Adv. Proc. No. 13-08370-RDD (Bankr. S.D.N.Y. April 4, 2018), Dkt. No. 125 (preliminary approval of settlement); *Echevarria v. Bank of America Corp., et al.* No. 17-cv-08026-VB (S.D.N.Y. Mar. 14, 2018), Dkt. No. 23 (final order approving settlement). All together, the injunctive relief covers millions of consumers and prevents harm from befalling millions of others. Only two cases concerning whether § 524 claims can be arbitrated have been ruled upon by the circuit courts of appeals in the last twenty years. Thus, this case does not present exigent or compelling questions that need to be addressed by this Court now.

CONCLUSION

Credit One fails to present a compelling reason for this Court to grant its petition for a writ of certiorari. There is no circuit split on an important matter, no conflict with Supreme Court precedent, no circuit case has addressed the issue for twenty years, this case has a limited factual and appellate record, and Credit One voluntarily agreed to stop the offending conduct as have two other major banks. This Court should deny Credit One's petition for a writ of certiorari.

Respectfully submitted,

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