No. 16-2496

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: Orrin S. Anderson, AKA Orrin S. Anderson,
AKA Orinn Scott Anderson,
Debtor.

Orrin S. Anderson, on behalf of himself and all others similarly situated,
AKA Orinn Scott Anderson,
Plaintiff-Appellee
— v. —

CREDIT ONE BANK, N.A.,
Defendant-Appellant

On Appeal from the United States District Court for the
Southern District of New York, No. 15-c-4227

BRIEF OF *AMICI CURIAE* PROFESSORS RALPH BRUBAKER, ROBERT M. LAWLESS, AND BRUCE A. MARKELL IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Federal Statutes

Federal Rules

Legislative History

Other Authorities

CONSENT

This *amici curiae* brief is being filed with the consent of the parties.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5) and Local Rule 29.1(b), *amici curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

Amici curiae ("Amici") are three leading scholars of bankruptcy, commercial, and business law who have been teaching, researching, and writing about bankruptcy law for decades. They believe the issue presented to the court is of fundamental importance to the bankruptcy system and seek to provide the court with a fuller background about the development of the law at stake in this case.

Ralph Brubaker is the Carl L. Vacketta Professor of Law at the University of Illinois. He is the co-author of a bankruptcy law textbook as well as the editor-in-chief of West's *Bankruptcy Law Letter*. He is an elected member of the American Law Institute and a fellow of the American College of Bankruptcy, for which he currently serves as scholar-in-residence.

Robert M. Lawless is the Max L. Rowe Professor of Law at the University of Illinois. He is the co-author of a textbook on the law of secured transactions. He is also an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of Bankruptcy.

Bruce A. Markell is a former bankruptcy judge and currently Professor of Bankruptcy Law and Practice at Northwestern University. He is the co-author of four textbooks on bankruptcy, contracts, secured transactions, and securitization. He is a member of the board of editors of *Collier on Bankruptcy*, an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of Bankruptcy.

SUMMARY OF ARGUMENT

This case presents a simple issue. Can a predispute arbitration agreement strip a court of the inherent power of contempt to enforce its own orders? The obvious answer is "no."

Congress has directed that a bankruptcy discharge "operates as an injunction." 11 U.S.C. § 524(a)(2). Casting section 524's remedy as injunctive relief was not an accident of phrasing. Rather, Congress deliberately chose to codify Supreme Court precedent and lower-court decisions authorizing injunctions to vindicate the fresh start given by federal bankruptcy law.

Courts enforce injunctions by contempt citations. Holding someone in contempt of court is not a new cause of action or a new claim but the enforcement of an existing court order. An arbitration agreement between private parties cannot strip the court of this inherent power.

This is hardly the first case to raise an issue about the arbitrability of matters governed by another federal statute. When that occurs, "[t]he party opposing arbitration has the burden to show Congress intended to preclude arbitration of the statutory rights at issue. Congressional intent can be deduced from the statute's text, legislative history, or from an 'inherent conflict' between arbitration and the statute's underlying purposes." *MBNA Am. Bank v. Hill*, 436 F.3d 104, 108 (2d

Cir. 2006) (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

Here, the burden is handily met. Section 524's textual direction for an "injunction" along with section 524's history demonstrate a congressional intent to preclude arbitration of discharge violations. Indeed, section 524 does not create any new statutory rights that might be subject to arbitration. Rather, section 524 provides for injunctive enforcement of rights already awarded a debtor by decree of a federal court. There is nothing in section 524 against which an arbitration agreement can operate. Section 524 itself provides that its injunctive relief operates "whether or not discharge . . . is waived," 11 U.S.C. § 524(a)(2), further indicating the parties cannot strip the court of the power to enforce the discharge such as by a preemptive arbitration agreement.

There is also an inherent conflict between the bankruptcy discharge, a central piece of the Bankruptcy Code, and arbitration. Anderson's allegations, if true, raise serious questions about effective compliance with a lawful order of a federal court. Turning enforcement of this court order over to a nonpublic, private arbitrator would deprive a court of the ability to develop an evidentiary record about the intent behind and the extent of any violation of its own orders. Wherever the line is to be drawn for other conflicts between the Bankruptcy Code and the

Federal Arbitration Act, the statutory discharge injunction falls well over the non-arbitration side of the line.

ARGUMENT

I. History Demonstrates Congress Consciously Chose Injunctive Relief to Enforce the Bankruptcy Discharge.[1]

The issue on appeal revolves around the enforcement of an injunction. This case has been framed with the premise that section 524(a)(2)'s use of the word "injunction" is a historical accident. It is not. Congress deliberately chose to vest the federal court presiding over a bankruptcy case with injunctive power to enforce the bankruptcy debtor's discharge. Congress did so precisely to give a bankruptcy debtor access to a federal court's power to enforce its own orders. In understanding why Congress codified the discharge injunction, it also is important to keep in mind the critical distinction between the bankruptcy discharge order and the discharge injunction, a distinction also often lost in these proceedings.

The bankruptcy discharge order is a federal decree that the debtor no longer has legal liability for a debt. *See, e.g., Zavelo v. Reeves*, 227 U.S. 625, 629 (1913). The Bankruptcy Code directs the court to grant a discharge if the debtor satisfies the conditions of the relevant bankruptcy chapter. 11 U.S.C. §§ 727(a), 1141(d),

[1] The history discussed in this section draws heavily from and summarizes the more detailed discussions in Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325 (1991) and Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 Am. Bankr. L.J. 461, 511-28 (2002).

1228(a), 1328(a). The discharge order is a basic declaratory order, stating in its entirety, "IT IS ORDERED: A discharge under 11 U.S.C. § . . . is granted to," followed by the name of the debtor, the date, and the judge's signature. This simple order is reflected in mandatory, official forms. *See* Official Bankruptcy Forms 318, 3180F, 3180R1, 3180W.

Section 524 of the Bankruptcy Code then specifies the effects of that federal order. At issue in this case is section 524(a)(2), "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Thus, section 524 provides for injunctive relief to enforce the federal bankruptcy discharge. The discharge decree and the discharge injunction are procedurally distinct concepts.

The Bankruptcy Acts of 1800, 1841, and 1867 all provided for a bankruptcy discharge. The substantive contours of the discharge varied – for example, the 1800 law provided a discharge only for "merchants" – but drawing on their English antecedents these laws all had the same procedural features. The federal court with jurisdiction over the bankruptcy case issued a discharge decree, but the bankruptcy law itself provided no enforcement mechanism in the federal court. Instead, the bankrupt debtor would plead the discharge as an affirmative defense in any later

proceedings to enforce a debt discharged in the bankruptcy case. If a dispute arose as to whether the bankruptcy case had discharged a particular debt, it would be resolved in this later collateral proceeding and by a tribunal other than the federal court that issued the discharge decree.

Our nation's first permanent bankruptcy law, the Bankruptcy Act of 1898, retained these procedural features. The law specified that a court could deny a discharge for certain conduct, such as hiding assets. The federal court with jurisdiction over the bankruptcy case might, for example, stay a state-court debt-collection proceeding until the federal court determined whether the debtor was eligible for a discharge. Once the federal court determined the debtor was eligible, it granted a discharge. After that, "[t]he correct procedure is to interpose the discharge as a defense in the state proceeding." *In re Scheffler*, 68 F.2d 902 (2d Cir. 1934); *see also In re Havens*, 272 F. 975 (2d. Cir. 1921).

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

federal court with jurisdiction over his bankruptcy case to enjoin the state-court action.

The U.S. Supreme Court ruled that treating the wage assignment as a lien was inconsistent with the purposes of the federal bankruptcy law, *id.* at 244-45. The Court further ruled that the federal court with jurisdiction over the bankruptcy, like all federal courts, had the power to entertain the request for an injunction "to secure or preserve the fruits and advantages of a judgment or decree rendered therein." *Id.* at 239. The injunction would vindicate an important policy of the federal bankruptcy fresh start, otherwise thwarted by Illinois's law regarding the nature of the wage assignment. The power to issue a discharge injunction flowed directly from the power to issue the discharge decree itself. "The jurisdiction of the court follows that of the original cause." *Id.* By definition, then, no other tribunal had the power to issue the injunction.

After *Local Loan*, the case law surrounding enforcement of the discharge devolved into a morass. The federal courts varied widely on what constituted "unusual circumstances" sufficient to justify a *Local Loan* injunction. Some courts granted injunctions freely. Others found unusual circumstances in the effects of wage assignments or garnishments. "But in other jurisdictions, and particularly in the Second Circuit, the exception from the usual practice created by *Hunt* was regarded as an 'exceedingly narrow' one – so narrow, in fact, that another case

presenting 'unusual circumstances' seemed never to arise." Vern C. Countryman, *The New Dischargeability Law*, 45 Am. Bankr. L.J. 1, 4-5 (1971).[2]

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

To clean up this case-law quagmire, in 1970 Congress enacted "the dischargeability amendments" to the bankruptcy law. Pub. L. No. 91-467, 84 Stat. 990 (1970). Part of these amendments was a new section 14f for the Bankruptcy Act of 1898. This new section had two components. First, Congress provided that

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

all judgments obtained on a discharged debt were null and void. *Id.* § 3, 84 Stat. at 991. The second component was a codification of the *Local Loan* injunction declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt." *Id.* By enacting the 1970 law, "[i]n effect . . . Congress made a determination that a threat of irreparable injury to debtors' federal discharge rights sufficient to warrant injunctive relief of the sort authorized in *Local Loan* existed in *all* cases with respect to *all* discharged debts." Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex parte Young *Relief*, 76 Am. Bankr. L.J. 461, 524-25 (2002).

Just eight years later, Congress rewrote the bankruptcy laws and gave us what is today's Bankruptcy Code. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The first paragraph of what is now section 524 provides that all judgments obtained on discharged debts were null and void. The second paragraph, at issue in this appeal, states that the discharge shall "operate as an injunction" against creditor collection efforts. *Id.* § 101, 92 Stat. at 2592-93.[3] The provenance of section 524 in the 1970 amendments and, in turn, in the injunctions

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

authorized by *Local Loan* could not be more patent. *See also* Staff of the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess., Table of Derivation of H.R. 8200 (Comm. Print No. 6, 1977, and available at 1977 WL 201780) (identifying § 14f(2) of the Bankruptcy Act of 1898 as the origin of § 524(a)(2)); S. Rep. No. 91-1173, at 9 (1970) (discussing the statutory discharge injunction to be codified at 1898 Act § 14f, incorporating by reference an explanatory memorandum of the National Bankruptcy Conference, and stating that such power "presently resides in the bankruptcy court by virtue of the decision of the Supreme Court in *Local Loan v. Hunt*"); H.R. Rep. No. 91-1502, at 8 (1970) (same), *reprinted in* 1970 U.S.C.C.A.N. 4156, 4163.

It is difficult to imagine how Congress could have been clearer that section 524(a)(2) has actual injunctive force. A federal court decree of discharge triggers the injunction, the effects of which then ineluctably follow from the Supreme Court precedent that first authorized the injunction. Congressional use of the word "injunction" was not meant as a metaphor but was intended to give a bankrupt debtor the enforcement powers of the federal court that had granted the discharge. Section 524 is not "injunction-like"; it is an injunction. Congress codified *Local Loan*'s injunctive relief to ensure debtors received the full effect of these enforcement powers. Debtors who do not have the wherewithal to assert the bankruptcy discharge as a defense in collateral creditor collection actions now get

the injunctive protection from the federal court automatically. It is inconceivable that, in codifying the *Local Loan* injunction, Congress somehow intended to shrink the authority of the federal courts to enforce the discharge.

II. There Is No "Claim" Against Which the Arbitration Agreement Can Operate, Only Enforcement of an Existing Order.

As its history demonstrates, the discharge injunction is not a "claim" subject to arbitration. This point should not be confused with a question of contract interpretation about the scope of any particular arbitration clause. Rather, violations of the discharge injunction are inherently non-arbitrable. The discharge injunction vindicates a federal right that a federal court already has awarded the debtor, the bankruptcy discharge.

Only Congress can enact a bankruptcy law that provides for a discharge of indebtedness. The Constitution empowers Congress to enact "uniform Laws on the subject of Bankruptcies," U.S. Const., art. I, § 8, while it simultaneously prohibits states from "impairing the Obligation of Contracts," *id.* § 10. Because of the Contract Clause and the preemptive effect of the uniform federal bankruptcy discharge in force for over 115 years, states cannot pass laws that discharge debts. The plenary power to provide for a discharge of indebtedness lies solely with Congress.

Congress has exercised this power by enacting the Bankruptcy Code at title 11 of the United States Code and giving the federal district courts "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Congress also has given the federal district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11." *Id.* § 1334(b).[4]

As explained in section I of the brief, the Bankruptcy Code directs the federal court with jurisdiction over the bankruptcy case to issue the bankruptcy discharge upon finding the debtor has met certain conditions. The discharge is

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[4] Congress has granted the federal district courts jurisdiction over bankruptcy matters under 28 U.S.C. § 1334. The federal district courts then may refer that jurisdiction to the bankruptcy judges in the district, *id.* § 157, which act as "a unit of the district court," *id.* § 151. All federal district courts have standing orders to refer all bankruptcy cases and proceedings to their bankruptcy court units as occurred in Anderson's case. *See In re Standing Order of Reference Re: Title 11*, 12 Misc. 32 (S.D.N.Y. Jan. 31, 2012). There are constitutional and statutory limits on the non-Article III bankruptcy courts' ability to render final orders and judgments in certain matters. *E.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011); 28 U.S.C. § 157(c). Nonetheless, section 157 authorizes reference of the entirety of a district court's federal bankruptcy jurisdiction (including matters within its exclusive jurisdiction) to its bankruptcy court, and that statutory referral "does not implicate the constitutional defect identified by *Stern*." *Exec. Bens. Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014).

The court's decision in *MBNA Am. Bank v. Hill*, 436 F.3d 104, 110 (2d Cir. 2006), appears, at least in part, to rest upon a misperception about the interaction between sections 157 and 1334. That a matter is within exclusive federal bankruptcy jurisdiction does not prevent referral of that matter to the bankruptcy court. That a matter can be referred to the bankruptcy court (and, thus, litigated and decided by either the district court or its bankruptcy court unit) is wholly unrelated to the exclusive or nonexclusive nature of the court's (the district court and its bankruptcy court unit) bankruptcy jurisdiction over the matter.

relief requested by the filing of the bankruptcy petition commencing the bankruptcy "case." Arguably, the discharge itself is an exercise of jurisdiction over the "case under title 11" and thus within the court's exclusive jurisdiction. Brubaker, 76 Am. Bankr. L.J. at 511. The only other possibility is that the discharge is a "civil proceeding arising under title 11" (although it would be an odd phrasing to call an automatically issuing decree a "proceeding").

The statute nominally designates a federal court's jurisdiction over a "civil proceeding arising under title 11" as "original but not exclusive." In regard to the discharge, however, the distinction between "case" jurisdiction versus "proceeding" jurisdiction is a distinction without a difference. *See* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 837 (2000) ("[A]s a jurisdictional unit, a bankruptcy 'case' is an invention of the drafters of the 1978 Reform Act."). Only the federal court with jurisdiction over the bankruptcy can issue a discharge decree. A bankruptcy debtor cannot walk into another tribunal and file an action seeking a discharge order based on a bankruptcy case filed in federal court. The discharge order is issued by "[t]he court" presiding over the bankruptcy case to the "debtor," *e.g.* 11 U.S.C. § 727(a), who is the "person . . . concerning which a case under this title has been commenced," *id.* § 101(13). The only way to get a discharge order is to be a "debtor," which requires commencing a

bankruptcy case in federal court. A bankruptcy discharge is a "decree of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially *federal* and *exclusive* in character." *Local Loan Co.*, 292 U.S. at 244 (emphasis added).

In filing his bankruptcy petition, Anderson commenced a procedure – a bankruptcy case – in the federal court from which the discharge would issue. Neither Anderson or any of his creditors could force arbitration of the bankruptcy case. An arbitrator cannot issue a bankruptcy discharge. For that matter, no one can issue a bankruptcy discharge other than the federal court exercising jurisdiction over a particular debtor's bankruptcy.

Anderson now simply asks the federal court that issued his discharge to enforce it. Before 1970, Anderson could have requested an injunction from that court, but section 524 now obviates the need to do so. An injunction is already in place. The remedy to enforce an injunction is a contempt citation. *Walls v. Wells Fargo Bank*, 276 F.3d 502, 507 (9th Cir. 2002) (For a violation of the discharge injunction, "contempt is the appropriate remedy and no further remedy is necessary."); *In re Nassoko*, 405 B.R. 515, 520 (Bankr. S.D.N.Y. 2009) ("There is no serious question that a violation of the discharge provided in § 524(a)(2) is

punishable by contempt.").[5] "A court has the inherent power to hold a party in civil contempt in order 'to enforce compliance with an order of the court or to compensate for losses or damages.'" *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir. 1981) (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)). The parties, whether through a predispute arbitration agreement or any other agreement, cannot strip a court of an inherent power and certainly not the inherent power to enforce its own orders.

Put plainly, the bankruptcy discharge is a federally created right from "soup to nuts." Congress has created a process that leads to a decree of discharge, placed that process under the exclusive jurisdiction of the federal court presiding over the bankruptcy case, and provided for enforcement through the injunctive and

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[5] Citing the same cases as above, Credit One states that violations of the discharge injunction are enforced through section 105 of the Bankruptcy Code. Appellant's Brief p. 28. This is an odd position for Credit One to adopt as it seems to concede that Anderson has a private right of action for a violation of the discharge injunction. *See Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2009). Moreover, Credit One quotes *Walls* as saying "a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction," Appellant's Brief at pp. 28-29, without noting that *Walls* was summarizing the holding in a different case, *Bessette*, on its way to rejecting it. 276 F.3d at 503.

Section 105 may provide additional express statutory authority for non-Article III bankruptcy judges to issue contempt citations. *See* COLLIER ON BANKRUPTCY ¶ 105.02[1] (Alan N. Resnick & Henry J. Sommers, eds., 16th ed.). The jurisdictional scheme that allows referral of bankruptcy matters to the bankruptcy courts is explained *supra* note 5. Whether a federal bankruptcy court, as opposed to a federal district court exercising bankruptcy jurisdiction, would have inherent contempt powers in the absence of section 105 may be an interesting legal question but is not relevant to this appeal.

contempt powers of that federal court. There is no role for an arbitrator or, for that matter, any other tribunal to play. *Alderwoods Group, Inc. v. Garcia*, 682 F.3d 958 (11th Cir. 2012) (holding a Florida bankruptcy court could not enforce a discharge entered by a Delaware bankruptcy court).

The only appellate case to consider the arbitrability of a bankruptcy discharge upheld the lower courts' decisions not to send the matter to arbitration. *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997). Although the facts are complex, the question in *National Gypsum* revolved around the interpretation of a confirmation order in a large chapter 11 reorganization. A creditor demanded repayment of a debt the debtor claimed that the chapter 11 proceeding had discharged. The *National Gypsum* court distinguished "between those actions derived from the debtor and those created by the Bankruptcy Code" to explain "the consistent reluctance of courts to permit arbitration of actions brought to adjudicate *bankruptcy rights*." 118 F.3d at 1068.

Credit One takes issue with the conclusion *National Gypsum* draws from this principle, Appellant's Brief pp. 36-37 n.12, namely that a bankruptcy court "retains significant discretion" to deny arbitration when the debtor is asserting rights entirely conferred by the Bankruptcy Code. 118 F.3d at 1068. Amici agree that *National Gypsum*'s blanket conclusion about the general non-arbitrability of all rights created by the Bankruptcy Code likely goes too far (and is probably best

characterized as dicta). But, *National Gypsum*'s invocation of the idea that the discharge is such a non-arbitrable "bankruptcy right" alludes to the points advanced by Amici. Congress has put some matters within the exclusive province of the federal court with jurisdiction over the bankruptcy case. The discharge injunction is one of them.

III. The Discharge Injunction Is a Central Piece of the Bankruptcy Code and Inherently Conflicts with the FAA.

This case ultimately comes down to two congressional directives that point in different directions. It would be of great help to the courts if, every time Congress passed a new law, it went through and specified how the new statute interacted with every other part of the U.S. Code. Of course, that does not happen, nor do we want it to happen lest the legislative process become even more unwieldy than it already is. Courts often have to reconcile conflicting directives from the legislature.

The question always is legislative intent. In the case of the bankruptcy discharge and the discharge injunction, there is an entire statutory edifice placing enforcement within the sole power of the federal court hearing the bankruptcy case. Short of an explicit statutory directive, it is difficult to imagine a clearer indication of congressional intent.

The principal briefs have fully discussed the analytical framework for arbitrability of claims in the federal court. The text and history of the discharge injunction – indeed the whole statutory scheme – deduce congressional intent to preclude enforcement of the FAA. This text and history also provide evidence of the "inherent conflict" between the purposes of the discharge injunction and the FAA.

The specific allegations raised by Anderson further bear witness to the important bankruptcy purposes served by the discharge injunction. Anderson alleges that Credit One willfully maintained a policy in regard to credit reporting that would have the practical effect of forcing debtors to forgo the relief granted by federal law and pay debts discharged in a bankruptcy case. Amended Class Action Adversary Complaint ¶ 13 (JA 385). The allegations go to the heart of the purpose of the federal bankruptcy laws. The seriousness of the allegations is evidenced by the United States Trustee's request for a subpoena duces tecum and examination under Federal Rule of Bankruptcy Procedure 2004. (JA 201, 257, 362). Anderson's assertions about Credit One's credit reporting practices are not allegations about mere technicalities.

If Anderson's allegations are true, Credit One may be found to have willfully flouted a federal court order. Having that order enforced by the court that issued the order is not merely more efficient, it may also be necessary to vindicate

the court's authority by way of criminal contempt. Allowing the parties' boilerplate arbitration agreement to relegate the inquiry to a private arbitrator eviscerates the power of the court to enforce its injunction. In a contempt proceeding, the court could develop an evidentiary record on matters such as (1) whether Credit One violated its order, (2) whether any violations were unintentional or willful, (3) the extent of any violations, and (4) the ability to fashion an appropriate remedy including the possibility of awarding attorneys' fees. It is beside the point that an arbitrator also may be professionally competent to do these things, Appellant's Brief at pp. 45-47, or may do these things more or less expensively or expeditiously than the court, *id.* at pp. 38-44. An arbitrator is not the court. Sending the case to an arbitrator very much undermines the power of the court to enforce its own orders.

CONCLUSION

Amici have filed this brief because it raises important issues for the bankruptcy system. According to the Administrative Office of U.S. Courts, there were over 790,000 bankruptcy cases filed in 2016 alone. Almost every one of these cases may be routine, but at the center of these cases is the discharge order and discharge injunction. Together, they give each of the debtors in these bankruptcy cases the fresh start for the "honest but unfortunate debtor" that holds out the hope

of a better and more productive life. *Local Loan Co.*, 292 U.S. at 244. This fresh start would be jeopardized if the federal courts could be stripped of their inherent powers to enforce the discharge injunction by predispute arbitration agreements, which are ubiquitous in the consumer financial industry.

Anderson's complaint raises issues that the parties may develop if the case is sent back to the lower courts:

- Can violations of the discharge injunction be prosecuted on behalf of a class of debtors?
- Do federal courts have the power to enforce the discharge injunctions entered in bankruptcy cases from other districts where the debtor has not registered that discharge order with the court pursuant to Fed. R. Bankr. P. 4004(f)?
- What remedies do bankruptcy courts, as opposed to district courts, have the constitutional authority to impose for contempt?
- Can violations of the discharge injunction be prosecuted as an adversary proceeding under Fed. R. Bankr. P. 7001? *Cf.* Fed. R. Bankr. P. 9022 (directing that a motion for an order of contempt is a "contested matter" governed by Fed. R. Bankr. P. 9014).

- Is there a private right of action for violations of the discharge injunction?[6]

In the lower courts, Credit One also would be able to assert the typical procedural and substantive defenses against the plaintiff's allegations.

None of these issues are before this court. In his complaint, Anderson seeks relief for violations of section 524(a)(2) and contempt. Amended Class Action Adversary Complaint ¶ 80 (JA 398). Credit One presents its issue to this court as "Whether the Federal Arbitration Act, 9 U.S.C. § 1 et seq., requires the enforcement of the parties' written arbitration agreement with respect to Anderson's claim for violation of 11 U.S.C. § 524." Appellant's Brief p. 1. In their

[6] A demand for arbitration of an implied private right of action for violation of the discharge and the discharge injunction would raise different issues than the ones discussed in this brief. An implied private right of action does not ask for enforcement of the existing injunction but requests new relief. Indeed, it is likely a debtor could bring an implied private right of action directly in any federal district court pursuant to general federal-question jurisdiction under 28 U.S.C. § 1331. Of the four appellate courts to consider the issue, three have held there is no implied private right of action to enforce the discharge injunction. *Compare Walls v. Wells Fargo Bank*, 276 F.3d 502, 507 (9th Cir. 2002); *Cox v. Zale Delaware, Inc.*, 239 F.3d 910 (7th Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000) *with Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2009). *See also Alderwoods Group, Inc. v. Garcia*, 682 F.3d 958 (11th Cir. 2012) (holding no cause of action existed to allow enforcement of another court's bankruptcy discharge).

It does not appear that in the appeal the parties are treating Anderson's claim as an implied private right of action to enforce the discharge injunction.

professional judgment, Amici believe the answer to this question is clearly "no." The opinion below should be affirmed.

Respectfully submitted,

_/s/ Tara A. Twomey
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Date: February 27, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 5,345 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

_/s/Tara A. Twomey_____

TARA A. TWOMEY

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2017, I electronically filed the foregoing document, along with ten paper copies, with the Clerk of the Court for the Second Circuit Court of Appeals by using the CM/ECF system and First-Class Mail.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

_/s/ Tara A. Twomey_____

TARA A. TWOMEY