22-1000-bk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KIMBERLY BRUCE, DEBTOR AND PLAINTIFF ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED AKA KIMBERLY A. BRUCE, AKA KIMBERLY ANTRELL BRUCE,

Plaintiff-Appellee.

V.

CITIGROUP INC. AND CITIBANK, N.A.,

Defendants-Appellants,

U.S. TRUSTEE,

Trustee

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (DRAIN, J.)

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Bruce v. Citigroup, Inc., No. 22-1000.

Pursuant to 2d Cir. R. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys, the National Consumer Bankruptcy Rights Center, make the following disclosure:

1) Is party/amicus a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party. **NO**

2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list below the identity of the corporation and the nature of the financial interest. **NO**

This day of November 23, 2022.

s/ Tara Twomey
Tara Twomey, Esq.
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STATEMENT OF INTEREST OF AMICI CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization with consumer bankruptcy attorney members nationwide. NACBA advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Harris v. Viegelahn,* 135 S. Ct. 1829 (2015); *Weber v. SEFCU,* 719 F.3d 72 (2d Cir. 2013).

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all consumer bankruptcy petitions filed, the vast majority of whom are honest but unfortunate debtors seeking a fresh start under the Bankruptcy Code (the

"Code"). However, that fresh start would be denied to a debtor who continues to face pressure to pay a discharged consumer debt such as the ones at issue in this case, simply because of the creditor's unilateral (and incorrect) decision not to reflect that discharge on the debtor's credit report. By doing so, a creditor ignores the statutory discharge injunction.

Because debtors are often unable to pay for or otherwise obtain counsel after their bankruptcy cases are closed, it is of vital importance that the bankruptcy court have the power to enforce Section 524 of the Code through a nationwide class action in an appropriate case.

CONSENT AND CERTIFICATION OF AUTHORSHIP

This amicus curiae brief is being filed with consent of the parties. Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person/entity other than NACBA, its members, NCBRC, and their counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Bankruptcy Code provides honest but unfortunate debtors a fresh financial start enforced through the discharge injunction found at 11 U.S.C. § 524. To obtain this discharge, debtors submit detailed and often embarrassing financial history publicly to the bankruptcy court and their creditors. Debtors must appear

and answer questions orally and under oath by a bankruptcy trustee and their creditors. This process is not for the faint of heart. It is a grueling process both before and after the bankruptcy is filed. However, debtors persevere with the promise of one thing, a fresh financial start to their lives.

That fresh start is stymied, however, by the coercive effect of an inaccurate credit report that a discharged debt is still outstanding. Debtors have little recourse to correct the report except by paying the debt. Alternatively, debtors can individually file actions in the bankruptcy court to address these collection efforts. However, the piecemeal enforcement of the discharge by individual debtors does nothing to stop the coercion placed on debtors by incorrect credit reports.

Systemic abuse and coercion to repay discharged debts is much more efficiently and appropriately addressed in class action lawsuits. These lawsuits promote both principal goals of the Bankruptcy Code to give debtors a fresh start and to resolve bankruptcy issues promptly and efficiently.

A class action is uniquely appropriate to enforce the bankruptcy discharge. The bankruptcy discharge is distinct from a classic federal injunction and as such can be enforced by courts other than the original bankruptcy court that entered the discharge order. The bankruptcy injunction is uniform and codified in 11 U.S.C. § 524. When dealing with a purely statutory injunction, it is not necessary to return to the original court. Furthermore, the law allows bankruptcy courts jurisdiction to

hear all bankruptcy matters including class actions. The bankruptcy court is also empowered by 11 U.S.C. § 105 to adjudicate bankruptcy proceedings not original to the district. Finally, 28 U.S.C. § 1409 concerning venue gives a non-original court permission to hear cases from other districts.

A class action is also necessary to stop the coercive effect on debtors to repay discharged debts that is caused by inaccurate credit reporting. Reporting that a debt is still owing is a violation of the discharge injunction. This is settled law and is consistent with the legislative intent of the bankruptcy discharge that once a debt is discharged, the debtor will not be pressured in any way to repay it. The issue is whether there is pressure or coercion placed on debtors to repay discharged debts. Allowing a false statement concerning the status of the discharged debt crosses the line to coercion and violation of the discharge injunction.

ARGUMENT

I. Nationwide Class Actions Against Creditors That Engage in Systemic Abuse Support the Principal Purpose of the Bankruptcy Code and Promote the Prompt and Effectual Resolution of Bankruptcy Cases.

The principal purpose and goal of all debtors who submit themselves to a bankruptcy proceeding is to obtain permanent relief from debt. This relief, the "fresh start", gives debtors a fresh opportunity in life unhindered by the anxiety and pressure of overwhelming debt.

> One of the "main purpose[s]" of the federal bankruptcy system is "to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Stellwagen v. Clum*, 245 U.S. 605, 617, 38 S. Ct. 215, 62 L. Ed. 507 (1918). To that end, the Bankruptcy Code contains broad provisions for the discharge of debts, subject to exceptions.

*Lamar, Archer & Cofrin, L.L.P. v. Appling, 13*8 S. Ct. 1752, 1758 (2018); *see also Perez v. Campbell*, 402 U.S. 637, 648, 91 S. Ct. 1704, 1710-11 (1971) ("This Court on numerous occasions has stated that 'one of the primary purposes of the bankruptcy act' is to give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'")

The discharge of debts and accurate credit reporting are vital components in any debtor's ability to make a fresh start. Creditors, employers, insurers, landlords and other entities rely heavily on credit reports in making determinations of whether to extend credit, employment, housing or insurance to consumers. Maintaining financial credibility following a bankruptcy is essential for debtors hoping to start with a clean slate. And while, the effect of a bankruptcy on a consumer's credit score is, of course, initially devastating, it is a static event and, all other things being equal, a consumer's credit score will continue to improve each day that passes post-discharge. This assumes that creditors do their part in properly notating the debt as discharged in bankruptcy.

Another chief purpose of the Bankruptcy Code is to avoid unnecessary federal litigation, costs and delays in the administration and resolution of bankruptcy cases. As the Supreme Court recently stated:

> Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual'" resolution of bankruptcy cases "'within a limited period.'" Katchen v. Landy, 382 U. S. 323, 328, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966) (quoting Ex parte Christy, 44 U.S. 292, 3 How. 292, 312, 11 L. Ed. 603 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Taggart v. Lorenzen, 139 S. Ct. 1795, 1803 (2019). In *Taggart*, the debtor suggested that creditors unsure of whether a debt was discharged could come into court to obtain an advance determination before collection. The Supreme Court rejected that approach as it would require many mini-trials to determine dischargeability. Similarly, Appellants suggest that instead of class actions to enforce the discharge injunction, Appellee and other similarly situated debtors should file their motions for contempt individually and in the original jurisdiction.

The consequences of such a requirement are evident. It is unlikely that all class members would have the time or resources to litigate their claims. It would be much easier and faster to just bow to the pressure the inaccurate credit report causes and pay the debt. This runs completely contrary to a debtor's fresh start. For those who muster the resources and time, their filings may result in thousands

of individual cases, all asserting the same facts and the same violation. Clearly this result is completely contrary to a chief purpose of the Bankruptcy Code -- the efficient administration of cases.

II. The Appellee is Enforcing the Statutory Bankruptcy Discharge of 11 U.S.C. § 524, Not An Individual Order of a Particular Bankruptcy Court.

It is axiomatic that a bankruptcy court can enforce bankruptcy law. The Code gives bankruptcy courts ample authority to do so. Appellants attempt to distort the bankruptcy decision below as enforcing other court's orders, when in reality, the court is enforcing Section 524 of the Code. This statutory discharge injunction is the result of a constitutional and statutory need for (a) uniformity; and (b) effective discharge orders.

As contrasted from other court injunctions, the statutory discharge injunction is uniform by design. So strong is the need for uniformity that it is the only reference to bankruptcy law in the U.S. Constitution. Art. I, § 8, clause 4 (empowering Congress "[t]o establish... uniform Laws on the subject of Bankruptcies throughout the United States").

> "'[T]he bankruptcy discharge order is a form, a national form, which is issued in every case when there is, in fact, a discharge. By statute, in [Section] 524(a)(2), it operates as an injunction . . . . It is not a handcrafted order.'" *In re Golden*, 630 B.R. at 918 (quoting *Haynes v. Chase Bank USA, N.A. (In re Haynes)*, 2014 Bankr. LEXIS 3111, 2014 WL 3608891, at *8 (Bankr. S.D.N.Y. July 22, 2014)). **<u>That is the "'fundamental difference between [a] normal injunction issued by a court after considering the factors required to be applied in issuing an injunction order and the injunction created</u>**

> **by Congress in [Bankruptcy Code] Section 524(a) to support the discharge under Section 727.**'" *In re Golden*, 630 B.R. at 918-19 (quoting *In re Haynes*, 2014 Bankr. LEXIS 3111, 2014 WL 3608891, at *8). See *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 445-46 (1st Cir. 2000) (holding that **"when dealing, as here, with violation of a purely statutory order," such as the discharge injunction imposed by Section 524, it is not necessary to return to "the court that issued the original discharge order"**).

In re Hilal Khalil Homaidan, Nos. 08-48275-ess, 13-46495-ess, 17-1085-ess, 2022 Bankr. LEXIS 2426, at *51-52 (Bankr. E.D.N.Y. Sep. 2, 2022) (Emphasis added.)

This constitutional need for uniformity arose from the pre-Constitution patchwork of insolvency laws. A full discharge of debts was practically impossible at the time due to the "uncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 366 (2006). Thus, a debtor could be discharged in one state, but then still held accountable by imprisonment for the unpaid debt in a different state that refused to recognize the discharge. *Id.* at 366-68 (citing James v. Allen, *I Dal.* 188 (1786)). A national bankruptcy system gained support when these concerns were raised at the Philadelphia Convention. As soon as the following year, courts began recognizing the weaknesses of the old patchwork, as declining to recognize another state's discharge "would be to attempt to compel [the debtor] to perform an impossibility, that is, to pay a debt after he has been deprived of every means of payment, -- an attempt which would, at least, amount to perpetual

imprisonment, unless the benevolence of his friends should interfere to discharge [his] account." *Id.* at 368 (quoting *Miller v. Hall*, *I Dal.* 229, 232 (1788)).

This early history of bankruptcy law sets the stage for two important lessons here. First, ever since the Philadelphia Convention, the legislative trend has been to strengthen the effectiveness of the discharge through mechanisms such as the discharge injunction. Second, the constitutional drive for uniformity differentiates the statutory injunction from individualized court orders requiring interpretation by their makers.

A. Congress Has Consistently Sought To Strengthen The Discharge With Various Mechanisms, Including The Statutory Injunction.

Creditors often conflate the discharge order with the discharge injunction, which are procedurally distinct concepts.

The discharge order is the decree, issued as a ministerial act by the bankruptcy court, that the debtor is no longer legally liable for a debt. The Bankruptcy Code directs the court to issue this decree if the debtor satisfies the conditions of the relevant bankruptcy chapter. *See* 11 U.S.C. §§ 727(a), 1141(d), 1228(a), 1328(a). Contrary to widespread assumptions amongst non-bankruptcy practitioners, the discharge order does not contain any substantive analysis - or even an individualized list of discharged debts. Instead, the decree takes the form of a short generic statement, as published in the forms prescribed by the Judicial

Conference of the United States. In Chapter 7 cases, the discharge order is mandated to take the following simple form:

Order of Discharge **12/15**

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

______________________ [___________________________]

[include all names used by each debtor, including trade names, within the 8 years prior to the filing of the petition]

____________ **By the court:** __________________________

MM / DD / YYYY United States Bankruptcy Judge

Official Form B-318 (available at Microsoft Word - B_318_1215.7.22.15 (uscourts.gov); *see also* Director's Forms B-3180F, -3180RI, -3180W for orders in non-chapter 7 cases. Bankruptcy courts cannot deviate from Official forms in their discharge orders. Fed. R. Bankr. P. 4004(e), 9009.

On its face, the Order of Discharge does not compel any action or inaction by creditors. It simply states the fact of the discharge. When questions arise as to whether a particular debt was discharged, litigants are not even required to return to that bankruptcy court for interpretation, but can raise the issue in any forum with jurisdiction - even in state court.

> The widespread use of this procedure also would alter who decides whether a debt has been discharged, **moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts.** See 28 U. S. C. §1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

Taggart v. Lorenzen, 139 S. Ct. 1795, 1803 (2019) (emphasis added); *see also Hamilton v. Herr* (*In re Hamilton*), 540 F.3d 367, 373 (6th Cir. 2008) (noting the grant of "concurrent jurisdiction to state courts to determine the nondischargeability of debts"); *In re Stabler*, 418 B.R. 764, 770 (B.A.P. 8th Cir. 2009); *In re Whitten*, 192 B.R. 10, 14 (Bankr. D. Mass. 1996); *Sunbeam Corp. v. Dortch*, 313 S.W.3d 114, 115-16 (Ky. 2010). Thus, it has been noted that a "bankruptcy court can share its jurisdiction with other courts." *Blachy v. Butcher*, 221 F.3d 896, 909 (6th Cir. 2000) (citing *Noletto v. NationsBanc Mortg. Corp.* (*In re Noletto*), 244 B.R. 845 (Bankr. S.D. Ala. 2000)).

The discharge order itself has historically faced enforcement challenges, owing to the inevitable abuses by creditors - notwithstanding the framers' intent to make the discharge more effective. For much of the nation's history, the discharge order did not automatically enjoin further collection activity on the discharged debt, but instead operated as an affirmative defense in a subsequent civil action. (Appellants' Br., 14 (citing Vern C. Countryman, The New Dischargeability Law, 45 Am. Bankr. L.J. 1 (1971) ("Countryman")). But that approach proved unworkable. Even after the Supreme Court clarified in 1934 that bankruptcy courts could permissively enjoin post-discharge collection activity, *Local Loan Co. v. Hunt*, 292 U.S. 234, 242 (1934), those powers were exercised inconsistently in the various jurisdictions. For example, bankruptcy courts in the Fifth Circuit

apparently entered such injunctions with regularity, while the Second Circuit may not have ever approved of one. *See* Countryman, *supra* at 4 (citing *Davison- Paxon Co. v. Caldwell*, 115 F.2d 189 (5th Cir. 1941)). But even if "some ancillary assistance from the bankruptcy court" were available from courts like those in this Circuit,...the bankrupt faced with post-bankruptcy collection efforts frequently needed more legal advice than he or she had in order to take advantage of it. For the bankrupt who got no assistance from the bankruptcy court, or who did not seek it soon enough, and who did not appreciate the necessity for litigating dischargeability in the other court which the creditor selected for his action, there were the pitfalls of res judicata. Countryman, *supra* at 10. These inadequacies remained, and were referenced in multiple legislative sessions, including in 1958 and 1967, as momentum again built to ensure the discharge was working the way it should. *Id.* at 18, 20-21.

Finally, in 1970, Congress acted to "effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors," H.R. Rep. No. 91-1502, at 1-2 (1970), and enacted the predecessor to Section 524. *See* Pub.L. No. 91-467, § 3, 84 Stat. 991 (1970). In doing so, Congress expressly sought to stop the practice of creditors filing lawsuits in hopes of receiving default judgments or, by chance, an incorrect ruling by a non-bankruptcy judge. The bill's floor leader, Congressman (later-Circuit judge) Charles Wiggins described the

then-existing law as a "loophole," and noted that "[m]any bankrupts do not realize the consequences of ignoring the State court proceeding. Others who do have great difficulty obtaining counsel because, having just gone through bankruptcy, they have no resources with which to pay an attorney's fee." 116 Cong. Rec. 9549 (1970).

This enactment (imported into the Bankruptcy Code in 1978) helped effectuate the discharge injunction with two distinctive concepts.

First, the discharge injunction "voids any judgment at any time obtained" on a discharged debt. 11 U.S.C. § 524(a)(l). The bankruptcy statute therefore has the remarkable power to void subsequent state court judgments, notwithstanding general principles of comity. *See Hamilton*, 540 F.3d at 373.

Second, the Code itself enjoins future collection activity on a discharged debt. 11 U.S.C. § 524(a)(2). The statute provides that the discharge "operates as an injunction", 11 U.S.C. § 524(b), just as the filing of a petition "operates as a stay" under the automatic stay provision of 11 U.S.C. § 362(a). The scope of this statutory injunction is quite broad, as it proscribes all acts to enforce *in personam* liability on a discharged debt. *See, e.g.,* G*reen Point Credit, L.L.C. v. McLean (*In *re McLean)*, 794 F.3d 1313 (11th Cir. 2015) (filing a proof of claim in a subsequent bankruptcy); *In re Andrus*, 189 B.R. 413 (N.D. Ill. 1995) (sign about debtor erected in creditor's yard); *Kimco Leasing, Inc. v. Knee*, 144 B.R. 1001,

1010 (N.D. Ind. 1992) (filing of civil action in state court); *In re Sanchez*, 545 B.R. 55 (Bankr. D.N.M. 2016) (refusal to provide trash pickup unless discharged debt was paid); *In re Nassoko*, 405 B.R. 515 (Bankr. S.D.N.Y. 2009) (selling discharged debt); *Burke v. Georgia* (*In re Burke*), 200 B.R. 282, 288 (Bankr. S.D. Ga. 1996) (collection letters).

These historical developments—from the framing of Article I through Section 524—show the enduring constitutional and legislative aim to provide a meaningful discharge that truly enables the debtor's fresh start.

B. The Bankruptcy Court Is Empowered To Adjudicate Nationwide Class Actions Remedying Violations Of The Code.

Against this background, it is clear that the bankruptcy court is empowered to adjudicate nationwide abuses of the Code.

First, bankruptcy courts can adjudicate class actions in appropriate circumstances. *Wilborn v. Wells Fargo Bank, N.A.* (*In re Wilborn*), 609 F.3d 748, 754 (5th Cir. 2010); *Fezler v. Davis* (*In re Davis*), 194 F.3d 570, 577-79 (5th Cir. 1999) (cases cited); *see also Turner v. Talbert* (*In re Talbert*), 347 B.R. 804, 811 (Bankr. E.D. La. 2005) (certifying a class in a dischargeability action); Fed. R. Bankr. P. 7023 (incorporating Fed. R. Civ. P. 23). Indeed, as the *Davis* opinion thoughtfully explained, the default presumption is that class relief is available "absent a direct expression by Congress of contrary intent." *Davis*, 194 F.3d at 577 (citing *Califano v. Yamasaki*, 442 U.S. 682, 699-700 (1979)).

Here, there is no "direct expression by Congress of contrary intent." In fact, the policy goals underlying class actions largely mirror Congress' objective with the discharge injunction. As with typical consumer class actions, bankruptcy class actions can often be "the most suitable method for resolving suits to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to encourage the lone consumer to file suit." *Carr v. Trans Union Corp.*, Civil Action No. 94-0022, 1995 U.S. Dist. LEXIS 567 (E.D. Pa. Jan. 12, 1995) (misleading debt collection notices); *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 172 (5th Cir. 2015) (class action appropriate device for consumers who all suffered from the same course of conduct by a bank, which violated the same federal law against each). Class actions also provide legal representation for many class members who would never file a case on their own because they are ignorant of their rights, intimidated by the legal system, or barred by the economics of litigation. As noted above, these concerns about access to justice were the driving force behind the Section 524 statutory injunction.

Moreover, the bankruptcy court has the authority to address systemic abuses through its Section 105 powers. Under that broad authority: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua*

sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a); *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 n.1 (5th Cir. 2008) (bankruptcy court may use section 105 to impose sanctions on parties who attempt to abuse the procedural mechanisms within the bankruptcy court).

Clearly, the discharge injunction can be enforced through Section 105. *See Mickens v. Waynesboro Dupont Emps. Credit Union, Inc.* (*In re Mickens*), 229 B.R. 114, 118 (Bankr. W.D. Va. 1999) (citing *Hardy v. U.S.* (*In re Hardy*), 97 F.3d 1384 (11th Cir. 1996)); *In re Walters*, 868 F.2d 665 (4th Cir. 1989). As the Court of Appeals for the Fifth Circuit explained the statute:

> The language of this provision is unambiguous. Reading it under its plain meaning ... a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code. We find that an order, such as the one entered by the bankruptcy court, which compensates a debtor for damages suffered as a result of a creditor's violation of a post-confirmation injunction ... was both necessary and appropriate to carry out the provisions of the bankruptcy code.

Placid Ref. Co. v. Terrebonne Fuel & Lube (In re *Terrebonne Fuel & Lube), 108 F.*3d 609, 613 (5th Cir. 1997).

But "[t]he plain meaning of section 105 goes beyond contempt of court power." *Kestell v. Kestell* (*In re Kestell*), 99 F.3d 146, 149 (4th Cir. 1996) (citing *Hammers v. IRS* (*In re Hammers*), 988 F.2d 32, 34-35 (5th Cir. 1993)). Moreover,

the awesome power conferred on bankruptcy courts by Section 105 has been viewed not just as an ability to act, but as enshrining "duty" to act when needed to protect the integrity of the bankruptcy system. *See In re Busy Beaver Bldg. Ctrs.*, 19 F.3d 833, 841 (3d Cir. 1994) (citing *In re Martin*, 817 F.2d 175, 180 (1st Cir. 1987)); see also *In re Metro Transp. Co.*, 107 Bankr. 50, 53 (E.D. Pa. 1989).

In enforcing the Code, the court below is not interpreting swaths of individualized court orders, but is applying Section 524—a statutory protection. This distinction is important. In seeking to fulfill the constitutional mandate for uniformity, Congress has time and time again sought uniformity in the enforcement of the bankruptcy discharge. Thus, there is little need here to return to each of the bankruptcy courts for enforcement.

Many bankruptcy courts around the country have allowed nationwide class actions to proceed when systematic abuses are at stake. *See, e.g., Bank United v. Manley,* 273 B.R. 229 (N.D. Ala. 2001); *Haynes v. Chase Bank USA, N.A. (In re Haynes)*, 2014 Bankr. LEXIS 3111 (Bankr. S.D.N.Y. July 22, 2014); *Cano v. GMAC Mortg. Corp.* (*In re Cano*), 410 B.R. 506 (Bankr. S.D. Tex. 2009); *In re Rojas*, 2009 Bankr. LEXIS 2220 (Bankr. S.D. Tex. Aug. 12, 2009); *Kerney v. Capital One Fin. Corp.* (*In re Sims*), 278 B.R. 457, 485-86 (Bankr. E.D. Tenn. 2002; *Singleton v. Wells Fargo Bank, N.A.* (*In re Singleton*), 275 B.R. 189 (Bankr. D.R.I. 2002); *Tate v. NationsBanc Mortg. Corp.* (*In re Tate*), 253 B.R. 653 (Bankr.

W.D.N.C. 2000); *Noletto v. NationsBanc Mortg. Corp.* (*In re Noletto*), 244 B.R. 845 (Bankr. S.D. Ala. 2000); *Aiello v. Providian Fin. Corp.* (*In re Aiello*), 231 B.R. 693 (Bankr. N.D. Ill. 1999); *Madison Assocs. v. Baldante* (*In re Madison Assocs.*), 183 B.R. 206, 209, 213 (Bankr. C.D. Cal. 1995); *Shaw v. Whirlpool Fin. Corp.* (*In re Appliance Store*), 158 B.R. 384, 387 (Bankr. W.D. Pa. 1993); *Cardinal Indus. v. Buckeye Fed. Sav. & Loan Ass'n, 10*2 B.R. 991, 993 (Bankr. S.D. Ohio 1989); *Smith v. Smith*, 95 B.R. 286, 291 (Bankr. N.D.N.Y. 1988); *Fleet v. Fleet*, 53 B.R. 833 (Bankr. E.D. Pa. 1985).

Appellants do not contest that bankruptcy courts in general have jurisdiction to hear Appellee's adversary proceeding, only the venue. The appropriate venue for a bankruptcy proceeding is controlled by 28 U.S.C. § 1409 entitled "Venue of proceedings arising under title 11 or arising in or related to cases under title 11." This statute states that a bankruptcy proceeding may be brought in a different district than the district where the main bankruptcy case was filed. Indeed, if Appellants' argument is correct that only the original court has jurisdiction, then this venue statute would be read out of existence.

Section 1409(a) states that "Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending."

Therefore, it is discretionary whether a non-original filing court, as in the instant case, may properly be the forum for a class action.

> On the other hand, the question whether a proceeding should be brought in the home court or the outpost court is one of venue, which is addressed separately in 28 U.S.C. § 1409. Section 1409(a) provides that "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending." 28 U.S.C. § 1409(a) (emphasis added). This provision is permissive, meaning proceedings may be filed in a district court other than the district court where the bankruptcy case is pending, provided such court has jurisdiction under § 1334(b). In this regard, "outpost courts" have exercised jurisdiction over proceedings related to cases pending in other districts, notwithstanding the lack of any conceivable effect on a bankruptcy case pending in the outpost courts. See, e.g., Calumet Nat'l Bank v. Levine, 179 B.R. 117, 120 (N.D. Ind. 1995) (jurisdiction over proceeding related to bankruptcy case pending in the District of Arizona); Farmers Bank v. March (In re March), 140 B.R. 387, 388, 390 & n.3 (E.D. Va. 1992) (because jurisdiction lies over proceeding related to case pending in Southern District of New York, bankruptcy court's order to the contrary was reversed). If jurisdiction over bankruptcy-related proceedings vested only in the court where the bankruptcy case is pending, § 1409(a) would be meaningless.
>
> In addition, the removal statute, 28 U.S.C. § 1452, lends further support to the conclusion that jurisdiction over bankruptcy-related proceedings is not confined to the district where the bankruptcy case is pending. Section 1452(a), in pertinent part, provides that a "party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under [28 U.S.C. § 1334]." Under this statute, a state court action that arises under Title 11 or arises in or relates to a case under Title 11 may be removed to the district court. Because the district where the civil action is pending "will not necessarily be the same district wherein the bankruptcy case itself is pending, the plain meaning of § 1452 indicates the district courts generally may exercise § 1334(b)

> jurisdiction." Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1212 n.6 (3d Cir. 1991).
>
> It is thus clear that a bankruptcy proceeding will not always be brought in the same district where the bankruptcy case is pending. And when a proceeding is brought in an outpost court, which is permissible and at times required by the venue provision, that proceeding clearly will have no relation to any case pending in the outpost court. But that fact does not deprive the outpost court of jurisdiction over a proceeding that otherwise falls within the purview of § 1334(b). The contrary view, advocated by DFS, confounds jurisdiction and venue.

Patrick v. Dell Fin. Servs., No. 3:CV-06-0978, 2008 U.S. Dist. LEXIS 124263, at *41-43 (M.D. Pa. Mar. 19, 2008).

The venue provisions are meaningless if the original court is the only proper forum with jurisdiction.

> To the extent that the defendants argue that there is not subject matter jurisdiction because these suits (as they relate to debtors in other courts) are not "related to" the individual debtors in this Court, they ignore the language "arising under" or "arising in" a case under title 11. Section 1334(b) is phrased disjunctively. The three categories offer alternative bases of bankruptcy jurisdiction.
>
> Section 1334(b) must be read this way as well in order to give meaning to another part of title 28 -- the venue provisions covering the most appropriate place for bankruptcy proceedings to be filed. See, BLACKS LAW DICTIONARY 795 (7th ed. 1999) (statutes on the same subject matter may be construed together to avoid inconsistencies pursuant to the cannon of statutory construction in pari materia). Both the venue provisions and section 1334(b) are found in chapter IV of title 28. If there were not nationwide jurisdiction over bankruptcy cases, there would be no need for the venue provisions. Richard A. Gibson, Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings, 62

> AM. BANKR. L.J. 37, 42 (Winter 1988) (citing Coleman American Companies, Inc. v. Littleton National Bank (In re Coleman American Companies, Inc.), 6 B.R. 251, 253-54 (Bankr. D. Colo. 1980). The venue provisions are meaningless if the "home court" is the only forum with jurisdiction over bankruptcy proceedings. 3 See, Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969, 1976, 141 L. Ed. 2d 242 (1998) (court normally should not adopt a construction of statute making another statutory provision superfluous) (citing Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90 (1998)).
>
> Bankruptcy jurisdiction was purposefully designed to encompass all of the issues debtors could encounter in a bankruptcy case. The Court found no evidence that debtor class actions were envisioned by the drafters, but the jurisdictional statutes were written in a manner to cover even these actions. This is appropriate. Otherwise there might be no affordable universal redress for creditor bankruptcy abuses which could arise.

Noletto v. NationsBanc Mortg. Corp. (In re Noletto), 244 B.R. 845, 849 (Bankr. S.D. Ala. 2000).

Overall, Appellants' position is not that class relief is not available at all, but that it is unavailable on behalf of a nationwide class. Ironically, this position means that the creditor demands many more class actions to be filed against it—one class action in each of the 94 judicial districts in the United States. Not only does this position create a significant strain on the country's judicial resources, but it risks inconsistent outcomes on the enforcement of Section 524 that undermine the constitutional mandate for uniform bankruptcy laws.

There is no reason to limit the bankruptcy court's ability to enforce Section 524—a bankruptcy statute—as Appellants propose.

III. It is Black Letter Law That A Creditor Violates the Bankruptcy Discharge If It Coerces Payment of A Discharge Debt By Failing to Update A Credit Report.

The law is settled that an incorrect trade line on a credit report violates the discharge without a fair ground of doubt. In addition to the cases collected in Appellant's brief, this principle is recognized by the preeminent treatise on bankruptcy law.

> The failure to update a credit report to show that a debt has been discharged is also a violation of the discharge injunction if shown to be an attempt to collect the debt. Because debtors often feel compelled to pay debts listed in credit reports when entering into large transactions, such as a home purchase, it should not be difficult to show that the creditor, by leaving discharged debts in the credit report despite failed attempts to have the creditor update the report, is attempting to collect the debt.

4 Collier on Bankruptcy P 524.02 (Richard Levin and Henry J. Sommer, eds., 16th ed.). There is no reason to continue to report a discharged debt as still outstanding on a credit report except to receive payment from distressed debtors.

Indeed, the discharge injunction was intended to give complete effect to the discharge and intended to eliminate any pressure on the debtor to repay a debt.

> **The injunction is to give complete effect to the discharge** and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, relatives, or employers, harassment, threats of repossession, and the like. The change is consonant with the new policy forbidding binding reaffirmation agreements under proposed

> 11 U.S.C. 524(d), **and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.** In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that.

Report of the Committee on the Judiciary, House of Representatives, to Accompany H.R. 8200, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977) at 365-366 reprinted in Collier on Bankruptcy, App. Pt 4(d) (Richard Levin and Henry J. Sommer, eds., 16th ed.) (emphasis added).

Further the arguable lack of an affirmative act does not excuse a discharge violation. A failure to act that allows a coercive attempt to collect a debt is a violation of the discharge injunction.

In *Perez v. Campbell*, 402 U.S. 637, 642, 91 S. Ct. 1704 (1971) the court addressed an Arizona state law that required discharged debtors to repay pre-bankruptcy judgments arising from automobile accidents in order to reinstate their drivers' licenses and registrations. While the state of Arizona did nothing affirmatively, its law coerced debtors to repay discharged debts in order to obtain their driving privileges. The court reinforced the primacy and importance of the bankruptcy discharge.

> This Court on numerous occasions has stated that "one of the primary purposes of the bankruptcy act" is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Accord, e. g., Harris v. Zion's Savings Bank & Trust Co., 317 U.S. 447, 451 (1943); Stellwagen v. Clum, 245 U.S.

> 605, 617 (1918); Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549, 554-555 (1915).

Perez v. Campbell, 402 U.S. at 648. The court ultimately held that Arizona's law was constitutionally invalid as it contradicted the discharge injunction.

In *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006), a car lender refused to repossess or release its lien to the debtors, after debtors had surrendered the vehicle in their chapter 7 bankruptcy. Under state law, the debtors could not junk their car until the lien was released. The lender refused to release the lien until the debtors agreed to repay the debt in full. This refusal coerced the debtors to repay the discharged liability on the loan in order to junk the car. The court held that the creditor's actions were objectively coercive and effectively amounted to a demand for reaffirmation, violating the discharge injunction.

In both of these cases, the creditors coerced repayment of discharged debts through a policy of failing to act. Similarly, Appellants are coercing payment of a discharged debt by their policy of failing to correct the Appellee's credit report.

There is no room for an objective reasonable doubt that Appellants' (sophisticated and knowledgeable creditors) failure to correct credit reports is a violation of the bankruptcy discharge.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision of the Bankruptcy Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on November 23, 2022. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,171 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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