No. 24-2745

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE J. WARFIELD, TRUSTEE,
Appellee
v.

JOHNIE LEE NANCE
Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 2:23-cv-00504-DWL
Hon. Dominic W Lanza

MR. NANCE'S OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Debtor Johny Nance states that there are no debtors in this bankruptcy case that are not named in the caption.

Dated: July 17, 2024

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JURISDICTIONAL STATEMENT

The bankruptcy court had jurisdiction to enter the orders at issue under 28 U.S.C. §§ 1334 and 157(b)(2)(B). The bankruptcy court entered the final order denying the Trustee's objection to exemptions on March 15, 2023 (ER 36-41), and Trustee filed his Notice of Appeal on March 23, 2023 (ER 114). The District Court issued its final order on March 26, 2024 (ER 4), and Mr. Nance filed his Notice of Appeal on April 23, 2024 (ER 119). This Court has jurisdiction to review the District Court's order under 28 U.S.C. § 158.

ISSUES PRESENTED

1. Did the District Court err by holding that claim preclusion estopped Mr. Nance from amending his exemptions to change the exemption scheme.

2. Did the District Court err by holding that the bankruptcy court was unable to determine which federal exemptions would apply to Mr. Nance.

STATEMENT OF THE CASE

Determining the proper exemption scheme in a bankruptcy can be a complicated process. Generally speaking, a debtor must choose either a state exemption scheme, or the federal exemption scheme, and claim all of his property

exempt under the same scheme. A debtor cannot entertain multiple theories simultaneously when it comes to exemption schemes.

Under § 522(b)(3)(A)[1], a debtor may protect (exempt) his property as specified in the laws in the state where he has been domiciled continuously for the 2 years (730 days) before he filed his bankruptcy petition. For most, the inquiry ends here.

If the debtor was not domiciled in a single state during that period, however, then the applicable exemption scheme is that of the state in which the debtor was domiciled for the 180 days immediately preceding the 730-day period, or for the longer portion of that 180-day period. *Id*. Some states, however, do not allow non-residents to use all or some of the state exemptions. If the domiciliary requirement renders a debtor ineligible for any state exemptions, the debtor may elect to use the federal exemptions pursuant to the "catch-all" provision of § 522(b)(3), as opposed to filing a bankruptcy completely unprotected. *See also In re Urban*, 375 B.R. 882, 889 (B.A.P. 9th Cir. 2007).

That is what happened here. Johnie Lee Nance, Debtor/Appellant, had a stroke a few years ago and it greatly affected him. (ER 29, line 10-13.) Ultimately, Mr. Nance was forced into bankruptcy. In his bankruptcy, he claimed his RV and land

[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C. § 101, et seq.

exempt under Arizona's homestead exemption. (ER 89-90.) Unfortunately, Mr. Nance hadn't lived in Arizona for the requisite time period. When the Trustee pointed out that Mr. Nance wasn't eligible for the Arizona exemptions, he amended his schedules before the bankruptcy court ruled on the issue. (ER 78; ER 75.) Instead of using Arizona's exemption scheme, this time, Mr. Nance amended his Schedule C to exempt his property pursuant to the laws of the State of Washington, where he lived before moving to Arizona. (ER 75.)

Unfortunately, Mr. Nance didn't realize that Washington prohibits non-resident debtors from using the Washington homestead exemption. The Trustee objected to Mr. Nance's Amended Schedule C on this basis (ER 60.) Ultimately, the Court sustained the objection. (ER 59.)

Thereafter, Mr. Nance again amended his Schedule C, this time exempting his property pursuant to the federal exemption scheme, in accordance with the "catch-all" provision of § 522(b)(3). (ER 48.) This time, the Trustee objected to the claim of federal exemptions based on *res judicata* since the Bankruptcy Court had denied the previous exemption schemes. (ER 43.) The Bankruptcy Court overruled the Trustee's objection on March 15, 2023, holding that Mr. Nance was entitled to claim federal exemptions, and that both the homestead exemption and the wildcard exemption were applicable here. (ER 36-41.) The Trustee appealed the ruling to the District Court. (ER 113.)

The District Court overruled the Bankruptcy Court's order, holding that claim preclusion estopped Mr. Nance from amending his schedules. (ER 4-27.) According to the District Court, the previous final orders regarding the Trustee's objection to exemptions shared a common nucleus of operative fact with the present objection. (ER 16.) The District Court also held that substantially the same evidence was presented in both actions. (ER 18.) This timely appeal followed. (ER 119.)

SUMMARY OF THE ARGUMENT

The Bankruptcy Court properly allowed Mr. Nance to amend his claim of exemptions, as provided by Rule 1009(a), Fed. R. Bankr. P. The District Court improperly applied claim preclusion, which has arguably created an untenable rule prohibiting a debtor from switching exemption schemes after the court determines he is not allowed to use a previously selected scheme. Such a bright line rule is not supported by the facts of this case, the pertinent statutes and rules, or prior cases decided on similar facts. If allowed to stand, the District Court's holding will have far-reaching implications on all future debtors that is contrary to public policy of providing the honest but unfortunate debtor with a fresh start. The District Court also improperly ruled that the Bankruptcy Court did not have the discretion to allow an exemption under the Federal Wildcard Exemption.

ARGUMENT

It has been long established that exemption statutes are to be liberally construed in favor of debtors, "for their manifest purpose is that of 'saving debtors and their families from want by reason of misfortune or improvidence.'" *In re Reaves*, 256 B.R. 306, 310 (B.A.P. 9th Cir. 2000), aff'd, 285 F.3d 1152 (9th Cir. 2002). Also, importantly, the Federal Rules of Bankruptcy Procedure specifically provide that debtors have a "general right to amend" their "voluntary petition, list, schedule, or statement…as a matter of course *at any time* before the case is closed." Fed. R. Bank. P. 1009(a) (emphasis added). "Amendments are and should be liberally allowed at any time," absent certain circumstances not present here. *In re Magallanes*, 96 B.R. 253, 256 (B.A.P. 9th Cir. 1988). This Court reviews the determination of whether issue or claim preclusion applies de novo as mixed questions of law and fact in which legal questions predominate." *In re Cogliano,* 355 B.R. 792, 800 (B.A.P. 9th Cir. 2006)

I. THE DISTRICT COURT INCORRECTLY APPLIED CLAIM PRECLUSION

In analyzing the argument for *res judicata*, the District Court elected to apply claim preclusion instead of issue preclusion, as urged by Mr. Nance. (ER 15.) Claim preclusion applies when there is "1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." (ER 16.) When analyzing the

identity of the claims, the court looks at "(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions." (ER 12-13.) Here, the District Court determined that there was a common nucleus of fact that could potentially make it unnecessary to perform any further analysis. The District Court found that substantially the same evidence was presented in both actions and held that claim preclusion applies. The District Court was wrong on both accounts.

A. A Common Nucleus is Not Outcome Determinative in Bankruptcy.

In looking at whether the orders arose out of the same transactional nucleus of facts, "[w]hether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." (ER 16.) The District Court stated that this factor is often "outcome determinative" and is "easily satisfied here," simply because both orders "involve a determination of entitlement to the same assets under state and federal homestead statutes." (ER 18.) The District Court then notes that simply (and only) finding there is a common nucleus of operative fact may "make[] it unnecessary to go any further" in the claim preclusion analysis. (*Id.*) By proclaiming that a determination of entitlement to the same assets in a bankruptcy case is outcome

determinative and sufficiently invokes claim preclusion, the District Court essentially creates a bright line rule that amendments to all exemptions are forever prohibited once there has been a legal challenge to any exemption.

Under the District Court's ruling, there is never a reason to allow an amendment or a redo of the exemptions (as specifically permitted by the Rules) and any and all subsequent exemption changes are forever barred - regardless of the issues at hand - as long as the court has looked at the exemptions. (*Id*.) This interpretation is not supported by any case that Mr. Nance is aware of. By Mr. Nance's count, the District Court cited 16 cases in which other courts across the 9th Circuit have analyzed *res judicata* issues in the bankruptcy context. Not one of those cases supports the District Court's holding here.

Every single case cited by the District Court analyzing *res judicata* in a bankruptcy context in the 9th Circuit goes beyond the question of whether the previous order "determine[d] the entitlement" of assets under any exemption scheme to also look at whether the two rulings required substantially the same evidence to be presented. This is a requirement that cannot be overlooked. The District Court's ruling to the contrary creates a result that is not supported by the Federal Bankruptcy Rules or the prior relevant cases and will cause disastrous results for debtors if allowed to stand. Such disastrous results are contrary to the purpose of bankruptcy

(providing the honest but unfortunate debtor a fresh start), and the well-settled concept that exemptions are to be liberally construed in favor of debtors.

B. The Final Orders Did Not Look at Substantially the Same Evidence.

After adopting the incredibly broad view of "common nucleus of operative fact" and stating the rest of the analysis arguably isn't necessary, the District Court does proceed to determine that all three exemption schemes required substantially the same evidence and, therefore, that claim preclusion applies in this case. The District Court erroneously states that Mr. Nance was required to "present substantially the same evidence to exempt the Property and RV under the Arizona, Washington, and federal homestead exemptions." (ER 18.) The District Court then differentiates this "substantially the same evidence" from *In re Ladd*, where the 8th Circuit held that "[t]he substance of what the debtors would have to prove in each action is substantially different" because "under federal law, a debtor's focus would be on value, and under Minnesota law it would be on acreage." (ER 18.) The District Court erred by vastly oversimplifying the evidence required for a homestead exemption under the three exemption schemes at issue in this case, and issuing a ruling predicated upon an inaccurate representation of both *Ladd* and the actual arguments presented below.

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i. The Different Exemption Schemes Require Different Evidence.

In analyzing whether the prior final orders precluded Mr. Nance from presenting a new exemption scheme, the District Court erred in ruling that Mr. Nance was required to present "substantially the same evidence to exempt the Property and RV under the Arizona, Washington, and federal homestead exemptions." (ER 18.) According to the District Court, the "key operative facts" for all three exemption schemes is "how [Mr. Nance] uses the property—it must be used as a dwelling or residence— and whether [Mr. Nance's] interest in the homestead was greater than the maximum allowed by each statute." (*Id*.) The first error in this logic is the implication that if Mr. Nance's interest in the homestead is greater than the maximum allowed by statute, then the exemption will not be allowed. This implication is incorrect. The amount of equity in the property has no bearing on whether the homestead exemption may be claimed or allowed. While the trustee may have the authority to sell the homestead if the property has equity greater than the exemption amount, such a situation does not require an objection to the debtor's claim of exemption. Even in the case of a sale, the debtor is eligible for the full homestead exemption amount, and the same will be paid to him upon sale, before the trustee distributes the excess proceeds.

The second error in the District Court's ruling is that it vastly underestimates what Mr. Nance must prove to show he is eligible for the exemption. Yes, each

homestead exemption statute looks at how the property is used, but the analysis does not end there. For a debtor to be eligible to use a particular homestead exemption statute, they must be able to show that they meet *all* of the requirements of that statute. Various factors such as a residency requirement (whether the exemption can be claimed by non-residents), the situs of the property, what types of property qualify for the exemption, how the homestead is determined, and even whether the debtor must live in the property at the time of the bankruptcy filing are all relevant and may need to be shown in order to claim the exemption. As each exemption scheme has different rules, the evidence that must be presented for each factor is often different. With these distinctions, it was reversible error for the District Court to apply claim preclusion when Mr. Nance elected to change statutory exemption schemes from state to federal.

a. Residency and Situs Requirements

In general, Arizona, Washington, and the federal exemptions all have differing eligibility prerequisites/requirements. For example, to be eligible to claim Arizona exemptions, the debtor must be a resident of Arizona. A.R.S. § 33-1133(b). In contrast, neither Washington nor federal exemptions have a residency requirement, and the exemptions may be used by non-residents. Additionally, while Arizona's homestead exemption can be applied to property outside of the state (ER 91), Washington requires the property to be located within the state in order to use the

state's homestead exemption. *In re Wieber*, 347 P.3d 41, 46 (Wash. 2015) ("Washington's homestead exemption law does not apply to property located in other states."). In contrast, under the federal exemption scheme, a debtor's homestead property is not required to be located in any certain state.

b. Place of Residence

Another factual difference between the three exemption schemes is whether or not the debtor is required to be living at the property at the time that the bankruptcy is filed. Under Arizona law, a debtor can have been living at another residence for up to 2 years and still claim the homestead exemption as long as there is not "evidence of a clear intent of permanent removal [from the homestead]." *In re Calderon*, 507 B.R. 724, 732 (B.A.P. 9th Cir. 2014). Furthermore, an Arizona debtor may claim a homestead exemption on a homestead they left over 2 years ago if they can show clear intent that the removal is only temporary. *Id*.

Contrariwise, in Washington, a homestead is statutorily presumed abandoned if the debtor has moved away for more than six months and has not filed a "declaration of nonabandonment of homestead." RCW 6.13.050.

In further contrast, under the federal exemptions, the debtor is required to be living in the homestead as their current residence on the date of the bankruptcy filing. 11 U.S.C. § 522(d)(1).

c. Qualifying for a Homestead Exemption

The three exemption schemes also differ in how a debtor may qualify for the homestead exemption. In Arizona, filing/recording a homestead declaration in the local county is not required, but is permitted. A.R.S. § 33–1102(A). In Washington, certain types of homesteads *require* an owner to file a declaration in order to qualify for the homestead. *City of Seattle v. Long*, 493 P.3d 94, 101 (Wash. 2021.)

In contrast, under the federal exemptions, a debtor is not able to file a homestead declaration; the debtor must only live in the property on the date of filing to qualify for the exemption. 11 U.S.C. § 522(d)(1).

With the myriad of issues that must be analyzed in each exemption scheme, the District Court erred by holding that that Mr. Nance was required to present "substantially the same evidence" in support of differing exemption schemes. The decision should be overturned.

ii. The District Court Order Undercuts Its Own Ruling in This Matter.

Even though the District Court stated that all that Mr. Nance must present is "an interest in property in order to use the Arizona, Washington, and federal homestead exemptions," the court's ruling is contradicted by its own opinion. The District Court was aware of at least some of the differing requirements for establishing a homestead between Arizona and Washington, as the opinion includes

a footnote stating "[Trustee] also raised additional objections, the substance of which is not relevant here." (ER 8 fn 5.) One of these allegedly "not relevant" objections was the question of whether an RV can qualify for a homestead exemption under Washington law - this is yet another issue which differs depending on which exemption scheme a debtor is using. (ER 61.)

The District Court went on to note in its ruling that it was aware of the fact that "Washington's homestead exemption law does not apply to property located in other states." (ER 19 fn 9.) The District Court does not identify how the extra requirements noted by both the footnote and the trustee's objection squares with the assertion that "substantially the same evidence" is required "to exempt the Property and RV under the Arizona, Washington, and federal homestead exemptions" because the "key operative facts" for all three exemption schemes is "how [Mr. Nance] uses the property—it must be used as a dwelling or residence— and whether [Mr. Nance's] interest in the homestead was greater than the maximum allowed by each statute." (ER 18.) When scrutinized, the distinction does not hold up. This Court should rule that the District Court abused its discretion by holding that claim preclusion applies here.

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iii. The District Court misapplied *Ladd*.

The District Court attempts to justify the ruling in this case by distinguishing *Ladd* from the facts at hand, but the effort is without merit. In noting a couple of requirements that are distinct depending upon the exemption scheme being used, the District Court immediately contradicts its effort to distinguish the facts of this case from *In re Ladd*, 450 F.3d 751 (8th Cir. 2006). In *Ladd*, the trustee had successfully objected to the debtor's use of federal exemptions. *Id*. at 753. The debtor amended Schedule C to claim Minnesota exemptions, and the trustee objected due to claim preclusion. *Id*. The *Ladd* court concluded that because the different exemption schemes required different information to be presented, claim preclusion could not prohibit debtor from using the new exemption scheme. *Id*. at 755.

The District Court held that this case was distinguishable from *Ladd* because "[t]he substance of what the debtors would have to prove in each action is substantially different. Under federal law, a debtor's focus would be on value, and under Minnesota law, it would be on acreage." (ER 18.) The District Court went on to state that the "key operative facts for the Arizona, Washington, and federal homestead exemptions are how [Mr. Nance] uses the property—it must be used as a dwelling or residence—and whether [Mr. Nance's] interest in the homestead was greater than the maximum allowed by each statute" which were "substantially the same evidence." (*Id*.) As noted above, the District Court erred in this finding and in

its reading of *Ladd*. The District Court's reading of *Ladd* implies that the debtor in that case was only required to show that the property was below a certain acreage in order to qualify for state exemptions, where federal exemptions only required a debtor to show that the property is below a certain value. The District Court's attempt to distinguish the facts of this case from *Ladd* is not supported by the pleadings nor by a reading of the relevant statutes. It is true that the federal homestead exemption gives a value limit but does not limit the size of the property. 11 U.S.C. § 522(d)(1). The Minnesota homestead exemption, however, is limited by both acreage AND value. Under Minn. Stat. Ann. § 510.02, the homestead may not be larger than 160 acres AND the exemption may not exceed either $480,000 or $1,200,000, depending on the use of the land.

Contrary to the District Court's statement that there are no overlapping requirements between the federal and Minnesota homestead exemptions in *Ladd*, both exemption schemes limit the value. The Minnesota homestead exemption looks at the factor common to both exemption schemes (value) but then adds another factor (a limit on acreage) which is not included in the federal homestead exemption. This additional factor is the reason that the *Ladd* court ruled there was no common nucleus of operative fact between the two statutory schemes that would give rise to claim preclusion.

With this understanding of *Ladd*, it becomes clear that *In re Bryan*, 466 B.R. 460 (B.A.P. 8th Cir. 2012), does not "sidestep *Ladd*" as the Appellee claims. (ER 15.) Instead, the *Bryan* court shows that it understood and agreed that differing requirements of different exemption schemes would prohibit application of claim preclusion. In *Bryan*, the debtor had exempted an annuity under a state exemption and that exemption was disallowed. 466 B.R. at 463. The debtor then amended the exemptions to exempt the same annuity under a different exemption statute *within the same state's exemption scheme*. *Id*. at 466. The *Bryan* court held that claim preclusion was appropriate when the new exemptions are claimed under "similar and sometimes the same state statutes," as opposed to the "issues of fact" that are "different under the state and federal exemptions" in *Ladd*. *Id*. In this case, the District Court should have ruled - as both the *Bryan* and *Ladd* courts did - that the issues of fact are different when a party is electing to use an entirely different exemption scheme with different eligibility requirements. The District Court opinion should be vacated and reversed.

C. Claim Preclusion Does Not Apply Because Mr. Nance Did Not Have the Opportunity to Present Alternative Exemption Schemes.

As explained above, the District Court ruling was overbroad and misapplied legal principles regarding a common nucleus of operative fact and substantially similar evidence for applying claim preclusion. This would be concerning for any

claim preclusion question, but it is especially distressing when determining claim preclusion related to exemptions in the bankruptcy context. Claim preclusion only prevents the relitigation of claims that "were raised or could have been raised in the prior action." *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). Claim preclusion is inappropriate "when a ground of recovery or defense could not have been asserted in the prior action." *Littlejohn v. United States*, 321 F.3d 915, 919–20 (9th Cir. 2003). By its ruling, the District Court essentially imposes a requirement on debtors that they select the correct exemption scheme the first time or be prohibited from protecting any of their assets. This is not supported by the Bankruptcy Rules or the public policy interest of providing a fresh start through bankruptcy.

By holding that claim preclusion applies here, the District Court also implicitly and incorrectly held that Mr. Nance could have asserted an alternate exemption scheme in the prior action and, therefore, that he should now be precluded from doing so. The bankruptcy forms simply do not allow "pleading in the alternative." *Ladd*, 450 F.3d at 755. Debtors are limited to a single set of exemptions to declare when filing bankruptcy; a debtor may not mix and match and assert all applicable exemptions under every exemption scheme. See § 522(b)(1) (requiring debtor to elect to use the federal exemption scheme or, in the alternative, a state exemption scheme). To allow the simultaneous use of alternate exemption schemes

is contrary to the "clear purpose of Fed. R. Bankr. P. 2007, 4003(a), and 1009" which "provide[s] a procedural framework for the raising of exemption issues one at a time." *In re Cochrane*, 178 B.R. 1011, 1018 (Bankr. D. Minn. 1995). See also *Bryan*, 466 B.R. at 466 (allowing preclusion when staying in the same statutory scheme because "even though a party could not claim the same property as exempt under state law and Bankruptcy Code exemptions at the same time, the debtor could (and did) claim the Annuity as exempt under multiple state statutes at once.")

Claiming alternative exemptions schemes at the same time is not only prohibited by the Bankruptcy Code, prior court cases, and the Federal Rules of Bankruptcy Procedure, it is also explicitly disallowed on the official bankruptcy forms. The instructions on the official forms state to choose ONLY Federal or State exemptions.

Official Form 106C

Schedule C: The Property You Claim as Exempt 04/22

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

Adopting the District Court's reading of claim preclusion would apply issue preclusion to every single debtor, because no debtor has the opportunity to claim any alternative exemption schemes in his/her bankruptcy documents. Such an expansive ruling, if allowed to stand, would have far-reaching consequences for every debtor.

D. The District Court's Ruling is Contrary to Public Policy.

The District Court's ruling is contrary to public policy and would encourage, rather than discourage, litigation. "[R]*es judicata* should not be applied where one or both parties have 'little motivation' or 'little incentive' to fully litigate an issue." *Ladd*, 450 F.3d at 753. Currently, litigation is the exception rather than the rule in bankruptcy court, and any issues brought before the court are dealt with on the motion about a singular exception, with everyone understanding that they can look at any other issue that comes up in the future as it comes up. It's not just the trustee who can file an objection to a claimed exemption, any party in interest is able to do so. The District Court's attempt at creating a bright line rule that a debtor must elect the correct exemption scheme or risk losing all assets will undoubtedly force a lot more litigation in the Bankruptcy Court.

II. THE BANKRUPTCY COURT CORRECTLY RULED ON THE WILDCARD EXEMPTION.

The District Court stated that the bankruptcy judge "violated the principle of party presentation by granting relief to [Mr. Nance] based on an exemption that [Mr.

Nance] himself did not assert" because the Bankruptcy Court did not have authority to assert an exemption on behalf of Mr. Nance. (ER 25.) As the District Court cited, it is true that some courts have declined to assert the exemption on a debtor's behalf when they have also allowed "the Debtors to amend their claim of exemptions if they choose to do so." *In re Nothdurft*, 521 B.R. 640, 642 (Bankr. C.D. Ill. 2014), aff'd, 526 B.R. 780 (C.D. Ill. 2015). However, a court declining to exercise its discretion to do something does not equate to not having the discretion.

The District Court did not address the 9th Circuit ruling that "The Supreme Court has made clear that in adjudicating a claim or issue pending before us, we have the authority to identify and apply the correct legal standard, whether argued by the parties or not." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (2013). The Ninth Circuit continued to explain the rights of the trial court:

> Once "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *Id.* Instead, the court "retains the independent power to identify and apply the proper construction of governing law," *id.,* and is free to "consider an issue antecedent to ... and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief," *U.S. Nat'l Bank of Oregon v. Ind. Ins. Agents of Am., Inc.,* 508 U.S. 439, 447, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *Arcadia v. Ohio Power Co.,* 498 U.S. 73, 77, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990)) (internal quotation marks omitted); *see also In re Greene,* 223 F.3d 1064, 1068, n. 7 (9th Cir.2000) (holding that the court could consider a statutory interpretation argument not specifically

> raised by the defendant because, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." (quoting *Ind. Ins. Agents,* 508 U.S. at 446, 113 S.Ct. 2173)).

Thompson v. Runnels, 705 F.3d 1089, 1098 (2013).

Courts are given the authority to look beyond the arguments presented by counsel at times. In *Kamen*, the case quoted extensively above in *Thompson v. Runnels*, the Supreme Court held that "effectively invoke[ing] federal common law as the basis of her right" gave the court of appeals the ability to make a ruling under federal common law that was not advanced by either party. *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99 (1991). In fact, once the court has "undertaken to decide th[e] claim, the Court of Appeals was not free" to rule "without identifying the proper source of. . . law," whether it was argued by the parties or not. *Id*.

While it is true that courts have no *obligation* to act as counsel, courts do have the ability to *sua sponte* raise arguments not advanced by either party in multiple circumstances. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582 (2020) (noting that SCOTUS ordered additional briefing about whether a statute was unconstitutionally vague after the issue was "implicated but not directly presented" in *Johnson v. United States,* 574 U.S. 1069 (2015)). See also *In re Am. W. Airlines, Inc*., 217 F.3d 1161, 1165 (9th Cir. 2000); *Graves v. City of Coeur D'Alene*, 339 F.3d

828, 846 n. 23 (9th Cir.2003), *abrogated on other grounds by Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004).

The Supreme Court has stated that "district courts are permitted, but not obliged, to consider, *sua sponte*" certain arguments. *Day v. McDonough*, 547 U.S. 198, 209 (2006). Stating that there is no "obligation" to perform an action is a far cry from stating that performing the action is prohibited, as the District Court did here.

This Court should reject the District Court's ruling that the Bankruptcy Court was precluded from ruling that Mr. Nance's property could be protected by the wildcard exemption.

CONCLUSION

The District Court cited no fewer than 16 cases from the 9th Circuit plus a number of other published opinions regarding objections to exemptions and attempted to differentiate this case from almost every single one of them. A careful reading of those cases and comparison to the facts of this case do not support such differentiation.

By misconstruing § 522(b)(1), ignoring Federal Bankruptcy Rule 1009(a), and inappropriately applying claim preclusion, the District Circuit's holding incorrectly denies an honest but unfortunate debtor the ability to protect his home and get a fresh

start and will have a broad impact for all future debtors. Mr. Nance respectfully requests the decision be reversed.

Dated: July 17, 2024

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

I am the attorney in this case. This brief contains 5,447 words, including 270 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: July 17, 2024

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No. 24-2745

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE J. WARFIELD, TRUSTEE,
Appellee
v.

JOHNIE LEE NANCE
Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 2:23-cv-00504-DWL
Hon. Dominic W Lanza

Addendum of Statutes and Rules

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11 USC § 522(b)

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.
(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.
(3) Property listed in this paragraph is--
(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;
(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and
(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

11 U.S.C. § 522(d)(1)

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $27,900 [originally "$15,000", adjusted effective April 1, 2022] in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

A.R.S. § 33-1102

A. A person who is entitled to a homestead exemption as prescribed by § 33-1101 holds that exemption by operation of law and no written claim or recording is required. If a person has more than one property interest to which a homestead exemption may reasonably apply, a creditor may require the person to designate which property, if any, is protected by the homestead exemption. The creditor shall demand the designation by sending a letter by certified mail, return receipt requested, to each address of the person which may reasonably be protected by the homestead exemption. The person shall designate the property by recording a homestead exemption in the office of the county recorder where the property is located or by sending the creditor a certified letter, return receipt requested, within thirty days of receiving the creditor's demand letter. If the person receives the creditor's letter and fails to respond as provided by this subsection, the person may only assert the homestead exemption by recording a claim in the office of the county recorder where the property is located.

B. If the person is married, the homestead may be selected from the community property, the joint property or the separate property of the person.

A.R.S. § 33-1133

A. Nothing in this article shall be construed to displace other provisions of law which afford additional or greater protection to a debtor's property.

B. Notwithstanding subsection A, in accordance with 11 U.S.C. 522(b), residents of this state are not entitled to the federal exemptions provided in 11 U.S.C. 522(d). Nothing in this section affects the exemptions provided to residents of this state by the constitution or statutes of this state.

RCW 6.13.050

A homestead is presumed abandoned if the owner vacates the property for a continuous period of at least six months. However, if an owner is going to be absent from the homestead for more than six months but does not intend to abandon the homestead, and has no other principal residence, the owner may execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of nonabandonment of homestead and file the declaration for record in the office of the recording officer of the county in which the property is situated.

The declaration of nonabandonment of homestead must contain:
(1) A statement that the owner claims the property as a homestead, that the owner intends to occupy the property in the future, and that the owner claims no other property as a homestead;
(2) A statement of where the owner will be residing while absent from the homestead property, the estimated duration of the owner's absence, and the reason for the absence; and
(3) A legal description of the homestead property.

Fed. R. Bank. P. Rule 1009(a)

(a) General right to amend
A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Fed. R. Bank. P. Rule 2007

(a) Motion to review appointment
If a committee appointed by the United States trustee pursuant to § 1102(a) of the Code consists of the members of a committee organized by creditors before the commencement of a chapter 9 or chapter 11 case, on motion of a party in interest and after a hearing on notice to the United States trustee and other entities as the court may direct, the court may determine whether the appointment of the committee satisfies the requirements of § 1102(b)(1) of the Code.

(b) Selection of members of committee
The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:
(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over $1,000 or the 100 unsecured creditors having the largest claims had at least seven days' notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection;
(2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the lists and statements required by subdivision (e) thereof have been transmitted to the United States trustee; and
(3) the organization of the committee was in all other respects fair and proper.
(c) Failure to comply with requirements for appointment
After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.

Fed. R. Bank. P. Rule 4003(a)

(a) Claim of exemptions
A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.