

No. 24-1384

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE JOSE L. GARCIA-MORALES,
Debtor.

ROBERTSON B. COHEN, CHAPTER 7 TRUSTEE
Appellant,

— v. —

JOSE L. GARCIA-MORALES
Debtor – Appellee.

On Appeal from the United States Bankruptcy Court for the District of Colorado,
Bankruptcy Case No. 21-14949 KHT,
District Court Appeal, Civil Case No. 23-CV-2178 PAB.

**BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER
BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLEE AND
FOR AFFIRMANCE OF THE DECISION BELOW**

January 13, 2025

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Cohen v Garcia-Morales, No. 24-1384

Pursuant to FRAP 26.1 Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, make the following disclosure:

- 1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**
- 2) Does party/amicus have any parent corporations? **NO**
- 3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**
- 4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

This 13th day of January 2025.

/s/ Tara E. Salinas

Tara E. Salinas

Attorney for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (“NACBA”) is a non-profit organization of more than 1500 consumer bankruptcy attorneys nationwide. NACBA’s corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot be adequately addressed by individual members. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The National Consumer Bankruptcy Rights Center is a non-profit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. To those ends it provides assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law importantly. Among other things, it submits amicus curiae briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts’ decisions will not depend solely on the parties directly involved in the case. The Center also strives to influence the national conversation on bankruptcy laws and debtors’ rights by increasing public awareness of and media attention to the important issues involved in bankruptcy proceedings.

NACBA and NCBRC regularly file amicus curiae briefs in systemically important cases to ensure that courts have a comprehensive understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors. *See Goodman v. Doll (In re Doll)*, 57 F.4th 1129 (10th Cir. 2023); *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. 2022); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 143 S. Ct. 1689 (2023); and *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 140 S. Ct. 582 (2020).

NCBRC and NACBA's members have a strong interest in the outcome of this case, as the result may have a broad impact on the rights of consumers throughout the nation. A decision by this Court reversing the District and Bankruptcy Courts and will drastically reduce the benefit of the non-refundable child tax credit to other debtors and their children. Further, it would encourage trustees throughout the nation to likewise seek to reduce this benefit.

STATEMENT UNDER FED. R. APP. P. 29(a)(2)

Both Appellant and Appellee consent to the filing of this brief.

STATEMENT UNDER FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored this amici curiae brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amici curiae, their members, or

their counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This appeal centers on the interpretation of Colorado's exemption statute, which allows debtors to exempt the entirety of tax refunds attributable to the Child Tax Credit (CTC) or Earned Income Tax Credit. The debtor, Jose L. Garcia-Morales, claimed his \$1,800 CTC refund as fully exempt, a determination upheld by the bankruptcy and district courts. This amicus brief highlights three key arguments to support this outcome:

Purpose of Exemption Statutes: Exemption statutes are essential to providing debtors a "fresh start," a cornerstone of bankruptcy law. By allowing debtors to retain certain assets, such statutes shield families from destitution and prevent reliance on public assistance. Consistent with both Colorado's legislative history and broader policy objectives, courts liberally construe exemptions in favor of debtors.

Critical Role of the Child Tax Credit: The refundable CTC, a vital component of the modern social safety net, offsets the rising costs of raising children and alleviates poverty for low-income families. Empirical studies show that the CTC reduces child poverty, improves financial stability, and provides significant material and psychological benefits to families. Exempting these funds

aligns with the humanitarian goals of exemption statutes, ensuring families maintain a minimal standard of living.

Bankruptcy Trustee Compensation Dynamics: Current trustee compensation structures perversely incentivize Chapter 7 trustees to pursue minimal assets like tax refunds, even when doing so primarily benefits trustees and their attorneys rather than unsecured creditors. In this case, the Trustee’s litigation expenses will likely consume the disputed funds, undermining the legislative intent of exemptions and the purpose of the CTC.

Given the significant public policy considerations and the established precedent of construing exemptions broadly, the amici urge the Court to affirm the lower courts’ decisions, ensuring the refundable Child Tax Credit remains fully exempt under Colorado law.

ARGUMENT

I. Introduction

The present appeal primarily concerns the interpretation of the Colorado exemption statute that permits individuals to exempt “[t]he full amount of any federal or state income tax refund attributed to an earned income tax credit or a child tax credit.” Colo. Rev. Stat. Ann. § 13-54-102(1)(o) (2021). The debtor, Jose L. Garcia-Morales, claimed an \$1,800 Child Tax Credit refund for the 2021 taxable year (receiving a total refund of \$1,455). Robertson B. Cohen, the bankruptcy trustee

(“Trustee”) for the Chapter 7 estate claims that Mr. Garcia-Morales is not entitled to the full amount of the refund under his reading of the Colorado exemption statute, but rather that the estate is entitled to \$914.40 of the funds (currently held in trust).

Both the bankruptcy court and the district court sided with Mr. Garcia-Morales, holding that the \$1,455 was fully exempt under the Colorado exemption statute. *See generally In re Garcia-Morales*, 653 B.R. 660 (Bankr. D. Colo. 2023); *Cohen v. Garcia-Morales (In re Garcia-Morales)*, No. 23-cv-02187-PAB, 2024 WL 4473768 (D. Colo. Sep. 3, 2024).

While the appeal is one of statutory interpretation, the purpose of this amicus brief is not to wade into this doctrinal thicket, but rather to provide the Court with significant contextual material that was not robustly addressed by the pleadings and decisions below. First, the brief will highlight for the Court the centrality and purposes behind exemption statutes and their relevance for providing individual debtors with a “fresh start” in their post-bankruptcy lives. Second, this brief will address the significance of the federal Child Tax Credit for the financial and economic lives of working families with children, and as a mechanism for relieving child poverty in the United States for families with little to no taxable income. The refundable Child Tax Credit mostly benefits lower income families with children, the types of families that the Trustee’s interpretation of the Colorado exemption statute would harm the most. Third, this brief will highlight the problematic nature

by which Chapter 7 bankruptcy trustees are presently compensated under the Bankruptcy Code, which serves to incentivize trustees to strip debtors of their federal public assistance benefits.

II. Nature and Purposes of Exemption Statutes

The United States bankruptcy system balances two distinct purposes simultaneously, namely, providing an individual debtor with a fresh financial start in life free from overwhelming debt on the one hand, and on the other enabling the debtor's creditors to realize an equitable distribution of the debtor's available assets. Michael D. Sousa, *Seizing Welfare from the Bankrupt*, 93 CINCINNATI LAW REVIEW 350, 366 (2024).

The concept of the “fresh start” is famously connected to the United States Supreme Court decision in *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) where the Court articulated the purpose of the bankruptcy laws: to give “the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.” *Id.* at 292 U.S. 234, 244 (citations omitted).

In the consumer Chapter 7 context, an individual debtor's fresh start is undergirded by two policy rationales embedded in the Bankruptcy Code itself: the ability to discharge many types of prepetition debts and the ability to exempt

certain property from the reach of creditors. William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 NORTH CAROLINA LAW REVIEW 769, 801 (1980). *See also Schwab v. Reilly*, 560 U.S. 770, 791 (2010) (“[E]xemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a ‘fresh start.’”). The ability to exempt property from creditors forms a foundational principle of consumer bankruptcy law, and scholars have long-maintained that property exemption statutes serve four distinct social policies: (1) to leave the debtor with some property necessary for their physical subsistence; (2) to afford the debtor an opportunity to rehabilitate financially and earn future income; (3) to protect the debtor’s family from the harshness of poverty; and (4) to shift the burden of providing the debtor and their family with a minimal level of financial support from the state to the debtor’s creditors. *See, e.g., Alan N. Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS LAW REVIEW 615, 621 (1978). The Colorado Supreme Court has identified the historical purpose behind the Colorado exemption statute as a mechanism “to preserve the debtor’s means of support.” *Roup v. Commercial Research, LLC*, 349 P.3d 273, 276 (Colo. 2015) (citation omitted). This court has construed exemption statutes in a similar manner. *See, e.g., First Bank of Catoosa v. Reid (In re Reid)*, 757 F.2d 230 (10th Cir. 1985) (“‘The purposes of the

exemption statute are to prevent improvident debtors from becoming subjects of charity by preserving to them sufficient definitely classified property that they may maintain a home for themselves, and to prevent inconsiderate creditors from depriving them of the necessities of life.’”) (internal citation omitted).

Indeed, in *Mathai v. Warren (In re Warren)*, 512 F.3d 1241 (10th Cir. 2008) this Court asserted that a “debtor’s right to make full use of statutory exemptions is fundamental to bankruptcy law.” *Id.* at 1249.

To effectuate their humanitarian purposes, courts construe claimed exemptions liberally in favor of the debtor. *Carlson v. Diaz (In re Carlson)*, 303 B.R. 487, 482 (B.A.P. 10th Cir. 2004) (citing *Lampe v. Williamson (In re Williamson)*, 331 F.3d 750, 754 (10th Cir. 2003)). See also *Roup v. Commercial Research, LLC*, 349 P.3d 273, 276 (Colo. 2015) (noting that courts in Colorado “liberally construe exemptions in favor of debtors”); *In re Keyworth*, 47 B.R. 966, 974 (Bankr. D. Colo. 1985) (“The purpose of the Bankruptcy Code, and the Colorado exemption statutes, are to provide the debtor with a ‘fresh start.’”).

In fact, the Constitution of Colorado specifically requires the legislature to pass “liberal homestead and exemption laws.” Colo. Const. art. XVIII, § 1. Because the state of Colorado has “opted-out” of the federal bankruptcy exemption scheme, debtors can only select exemptions provided by Colorado law, and specifically in this case, § 13-54-102(1)(o) that allows a debtor to exempt “[t]he full amount of any

federal or state income tax refund attributable to an earned income tax credit or a child tax credit.” Colo. Rev. Stat. Ann. § 13-54-102(1)(o). The legislative history in Colorado amending the exemptions statute to include a refundable child tax credit does not include a sense of why the legislature felt compelled to include these public assistance benefits among those protected by creditors. Nonetheless, the federal legislative history of the Child Tax Credit and its statutory evolution over the past several decades is instructive regarding why such public assistance benefits should be protected in the bankruptcy process in affording debtors a fresh start in life.

III. The History and Significance of the Federal Child Tax Credit for Working Families

In the United States today, economic life for working families has become increasingly difficult to maintain due to structural changes in the economy since the 1980s. David Roediger, *THE SINKING MIDDLE CLASS: A POLITICAL HISTORY OF DEBT, MISERY, AND THE DRIFT TO THE RIGHT* 88-91 (2022). While wages have generally remained stagnant since the 1970s and jobs have become more precarious and unpredictable, both middle-class and working-class Americans are also pressed by skyrocketing costs for groceries, housing, healthcare, education, and childcare. Bradley Hardy, Timothy Smeeding & James P. Ziliak, *The Changing Safety Net for Low-Income Parents and Their Children: Structural or Cyclical*

Changes in Income Support Policy? 55 DEMOGRAPHY 189, 195 (2018) (noting that “[i]nflation-adjusted wages have been stagnant or declining in the lower half of the wage distribution for the better part of four decades”) (citation omitted).

Household debt as a percentage of personal income has also grown astronomically since the 1980s. Kevin T. Leicht & Scott T. Fitzgerald, *POST-INDUSTRIAL PEASANTS: THE ILLUSION OF MIDDLE-CLASS PROSPERITY* 59 (2007). Surviving economically is even more difficult for millions of American families living and struggling near or below the poverty line.

Although they are meager in comparison to other developed nations, the United States has historically had a host of means-tested spending programs that provide cash assistance to working families or those residing in poverty. However, over the course of the past four decades there has been a profound shift in safety-net programs in the United States. While drastic financial cuts have been made to direct cash assistance programs—such as Temporary Assistance to Needy Families and federal Unemployment Insurance—tax benefits for families with children are now a major component of the contemporary social safety net in the United States. Jacob Goldin & Katherine Micheltore, *Who Benefits from the Child Tax Credit?* 75 *National Tax Journal* 123, 123 (2022). Indeed, the American social welfare system is ideologically premised upon assisting adults with dependent children. Bradley Hardy, Timothy Smeeding & James P. Ziliak, *The Changing Safety Net for Low-*

Income Parents and Their Children: Structural or Cyclical Changes in Income Support Policy? 55 DEMOGRAPHY 189, 191 (2018). Cash benefits provided under the United States Tax Code through refunds—pursuant to the Earned Income Tax Credit¹ and the Child Tax Credit—have expanded greatly over the past decades and arguably represent the bulk of the contemporary social safety net for working families with children. Robert Greenstein, *The 2021 Child Tax Credit in U.S. Historical Context*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 19, 26 (2023). In 2023, federal expenditures for the Earned Income Tax Credit reached \$62 billion and the refundable portion of the Child Tax Credit reached \$48 billion. Peter G. Peterson Foundation, *6 Key Charts on Tax Breaks*, Mar. 7, 2024, <http://www.pgpf.org/article/6-key-charts-on-tax-breaks/?form=MG0AV3>. The Earned Income Tax Credit and the Child Tax Credit “are intended to help families with children and can help alleviate financial stress, lower child poverty rates, and support children’s development.” *Id.* In sum, the Earned Income Tax Credit and the Child Tax Credit have become permanent fixtures

¹ The Earned Income Tax Credit, established in 1975, represented “the first refundable credit in the federal tax code in a bid to increase the incentive to work by offsetting the regressive Social Security payroll tax among low-wage workers.” Bradley Hardy, Timothy Smeeding & James P. Ziliak, *The Changing Safety Net for Low-Income Parents and Their Children: Structural or Cyclical Changes in Income Support Policy?* 55 DEMOGRAPHY 189, 191 (2018) (citation omitted).

of spending programs that assist households with children to eke out a respectable financial existence in the American economy.

The Child Tax Credit was created as part of the Taxpayer Relief Act of 1997 as a means to “reduce the individual income tax burden of [families with dependent children, to] better recognize the financial responsibilities of raising dependent children, and [to] promote family values.” *Hardy v. Fink (In re Hardy)*, 787 F.3d 1189, 1193 (8th Cir. 2015) (quoting *H.R. Rep. 105-148*, at 310 (1997)). Since its inception, the Child Tax Credit has expanded drastically and now assists lower-income tax paying families with children.² Most significantly for present purposes, the Economic Growth and Tax Reconciliation Act of 2001 incorporated a refundable child tax credit for low-income working families. As noted by the United States Court of Appeals for the Eighth Circuit in *Hardy v. Fink*, the inclusion of a refundable portion of the tax credit “overwhelmingly benefitted lower income taxpayers.” *Id.* at 1194. *See also In re Farnsworth*, 558 B.R. 375, 380 (Bankr. D. Idaho 2016) (recounting the evolution of the ACTC and stating that it was “clearly intended to benefit low-income families, and in particular, to ‘lift them out of poverty’”).

² For an expanded treatment of the legislative changes to the Child Tax Credit from 1997 to 2021, *see generally* Margot L. Crandall-Hollick, *The Child Tax Credit: Legislative History*, CONGRESSIONAL RESEARCH SERVICE REPORT NO. R45124, 1 (Dec. 23, 2021), <http://crsreports.congress.gov>.

Consequently, the refundable Child Tax Credit in actuality comprises a safety net spending program designed to assist low-income working households with raising children. Scholars have found that the Child Tax Credit reduces the child poverty rate in the United States by approximately 10%. Sophie Collyer et al., *The Child Tax Credit and Family Well-Being: An Overview of Reforms and Impacts*, 706 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 224, 237 (2023).

The COVID-19 pandemic and its related economic recession caused Congress to temporarily amend the tax code—and modify the contours of the refundable Child Tax Credit—to provide increased financial assistance to American families during that time. In doing so, Congress enacted the American Rescue Plan Act of 2021 (ARPA) that made temporary changes to the Child Tax Credit effective only for 2021, the taxable year implicated by the present appeal. Jonathan Fisher, Jake Schild & David S. Johnson, *Spending Responses to the Child Tax Credit Expansions*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 108, 120 (2023). Commentators and scholars refer to this temporary amendment as the “expanded Child Tax Credit.” Among other amendments, the ARPA made the Child Tax Credit temporarily available to almost all children—particularly children residing in households with the lowest incomes or no incomes—and made the credit fully refundable. Zachary Parolin et al., *The Effects of the Monthly and Lump-Sum*

Child Tax Credit Payments on Food and Housing Hardship, 113 AEA PAPERS AND PROCEEDINGS 406, 406 (2023).

The ARPA also temporarily changed the way the credit is ordinarily delivered. Usually, tax refunds are received once a year as a lump sum payment after the filing of an income tax return. Margot L. Crandall-Hollick, *The Child Tax Credit: Legislative History*, CONGRESSIONAL RESEARCH SERVICE REPORT NO. R45124, 11 (Dec. 23, 2021), <http://crsreports.congress.gov>. But from July to December of 2021, the ARPA allowed families to estimate their Child Tax Credit and provided families with monthly periodic payments of up to half of the 2021 credit (i.e., six equal payments amounting to either \$1,500 or \$1,800 based upon the age of the child). *Id.* The balance of the refundable 2021 Child Tax Credit would then be paid as a lump sum payment of either \$1,500 or \$1,800 through a 2021 tax return refund. *Id.* It is this \$1,800 lump sum payment that Jose L. Garcia-Morales claimed as exempt in his bankruptcy case.³

³ Since the expiration of the expanded Child Tax Credit in 2021, the current Child Tax Credit is maxed up to \$2,000 per child under the age of 17. It is once again partially refundable. Taxpayers first use the credit to offset any taxes owed. If their allowable credit exceeds taxes owed, taxpayers can receive the excess amount as a refund. “The refundable portion of the total tax credit is calculated as 15 percent of earnings in excess of \$2,500. Families can receive up to \$1,600 per child as a refundable credit.” Elaine Maag, Nikhita Airi & Sophie Collyer, *Implications of Alternative Designs of the Child Tax Credit*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 209, 210 (2023).

While there is a substantial body of empirical scholarship on the beneficial effects of the Earned Income Tax Credit upon low-income working families,⁴ scholars have historically paid less attention to the Child Tax Credit. Nevertheless, because the ARPA effectively created a natural experiment on how families might spend these funds, the expansion sparked a flurry of research among scholars endeavoring to capture how the expanded Child Tax Credit improved the lived experiences of low-income working families with children.⁵ Studies have suggested that the expanded Child Tax Credit lifted 5.3 million individuals out of poverty during 2021. Marianne P. Bitler, *The Effects of the 2021 Child Tax Credit on Poverty*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 75, 80 (2023). Further, the six monthly payments from July of 2021 to December of 2021 decreased the child poverty rate in the United States by almost 45%. Sophie Collyer et al., *The Child Tax Credit and Family Well-Being: An Overview of Reforms and Impacts*, 706 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND

⁴ See, e.g., Gordon B. Dahl & Lance Lochner, *The Impact of Family Income on Child Achievement: Evidence from the Earned Income Tax Credit*, 102 AMERICAN ECONOMIC REVIEW 1927, 1951 (2012) (finding that EITC receipt improves children's math and reading scores); Kate W. Strully et al., *Effects of Prenatal Poverty on Infant Health: State Earned Income Tax Credits and Birth Weight*, 75 AMERICAN SOCIOLOGICAL REVIEW 534, 556 (2010) (finding that EITC receipt increases birth weights which may later reduce negative outcomes for children's life chances).

⁵ Policy analysts have considered families earning less than \$35,000 to be low income.

SOCIAL SCIENCE 224, 241 (2023). Although child poverty rates among all racial and ethnic groups declined during 2021, the largest declines were among non-Hispanic Black children (8.9%), Native American children (7.8%), and Hispanic children (6.3%). Marianne P. Bitler, *The Effects of the 2021 Child Tax Credit on Poverty*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 75, 79 (2023).

Empirical studies have demonstrated that the refundable portion of the expanded Child Tax Credit provided a host of material and psychological advantages for families with children. For instance, the expanded Child Tax Credit enabled families with children to: cure arrears on rent or mortgage payments;⁶ maintain housing stability;⁷ prevent food insufficiency;⁸ reduce food insecurity;⁹ pay loans

⁶ Zachary Parolin et al., *The Effects of the Monthly and Lump-Sum Child Tax Credit Payments on Food and Housing Hardship*, 113 AEA PAPERS AND PROCEEDINGS 406, 409-10 (2023).

⁷ Natasha V. Pilkauskas, Katherine Micheltore & Nicole Kovski, *The Effects of the 2021 Child Tax Credit on Housing Affordability and the Living Arrangements of Families with Low Incomes*, 61 DEMOGRAPHY 1069, 1090 (2024).

⁸ Zachary Parolin et al., *The Effects of the Monthly and Lump-Sum Child Tax Credit Payments on Food and Housing Hardship*, 113 AEA PAPERS AND PROCEEDINGS 406, 409-10 (2023). “Food insufficiency” is a measure that captures whether households sometimes or often do not have enough food to eat. *See also* Nicole C. McCann et al., *Association Between Child Tax Credit Advance Payments and Food Insufficiency in Households Experiencing Economic Shocks*, 2 HEALTH AFFAIRS SCHOLAR 1, 6 (2024) (finding that the ACTC was associated with reduced food insufficiency among families with children experiencing economic shocks).

⁹ Nicholas Moellman, Cody N. Vaughn & James P. Ziliak, *The Effects of the 2021 Child Tax Credit on Food Insecurity and Financial Hardship*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 90, 100 (2023)

and other types of debt;¹⁰ purchase school supplies and pay school tuition;¹¹ buy children's clothes and diapers;¹² acquire childcare;¹³ maintain utility service;¹⁴ build

(summarizing studies). “Food insecurity” denotes whether at some point during the year a household was “unable to acquire food for one or more household members.” *Id.* at 90.

¹⁰ Katherine Micheltmore & Natasha V. Pilkauskas, *The 2021 Child Tax Credit: Who Received It and How Did They Spend it?* 113 AEA PAPERS AND PROCEEDINGS 413, 416 (2023).

¹¹ Claire Zippel, *9 in 10 Families With Low Incomes Are Using Child Tax Credits to Pay for Necessities, Education*, CENTER ON BUDGET AND POLICY PRIORITIES, Oct. 21, 2021, <http://www.cbpp.org/blog/9-in-10-families-with-low-incomes-are-using-child-tax-credits-to-pay-for-necessities-education>.

¹² Katherine Micheltmore & Natasha V. Pilkauskas, *The 2021 Child Tax Credit: Who Received It and How Did They Spend it?* 113 AEA PAPERS AND PROCEEDINGS 413, 416 (2023).

¹³ Katherine Micheltmore & Natasha V. Pilkauskas, *The 2021 Child Tax Credit: Who Received It and How Did They Spend it?* 113 AEA PAPERS AND PROCEEDINGS 413, 416 (2023).

¹⁴ Claire Zippel, *9 in 10 Families With Low Incomes Are Using Child Tax Credits to Pay for Necessities, Education*, CENTER ON BUDGET AND POLICY PRIORITIES, Oct. 21, 2021, <http://www.cbpp.org/blog/9-in-10-families-with-low-incomes-are-using-child-tax-credits-to-pay-for-necessities-education>.

an emergency savings;¹⁵ pay health care expenses;¹⁶ pay for routine expenses;¹⁷ and offset the effects of inflation and rising prices.¹⁸

Moreover, scholars have demonstrated that the refundable portion of the Child Tax Credit has significant psychological benefits for lower-income households, affording them both some solace from the stress and anxiety of meeting daily living expenses while at the same time reducing some of the internalized shame and stigma that can result from living with a lower social status. *See generally* Vicki Lens, Lily Bushman-Copp & Christopher Wimer, *Fostering Financial and Family Well-Being: A Qualitative Study on How Parents Utilized the Expanded Child Tax Credit*, ____ JOURNAL OF POVERTY 1 (2024). *See also* Akansha Batra, Kaitlyn Jackson & Rita Hamad, *The Effects of the 2021 Expanded Child Tax Credit on Adults' Mental Health: A Quasi-Experimental Study*, 42 HEALTH AFFAIRS 74, (2023) (finding that

¹⁵ Claire Zippel, *9 in 10 Families With Low Incomes Are Using Child Tax Credits to Pay for Necessities, Education*, CENTER ON BUDGET AND POLICY PRIORITIES, Oct. 21, 2021, <http://www.cbpp.org/blog/9-in-10-families-with-low-incomes-are-using-child-tax-credits-to-pay-for-necessities-education>.

¹⁶ Jason Jabbari et al., *The New Child Tax Credit Does More than Just Cut Poverty*, BROOKINGS, Sept. 24, 2021, <http://www.brookings.edu/articles/the-new-child-tax-credit-does-more-than-just-cut-poverty>.

¹⁷ Jason Jabbari et al., *The New Child Tax Credit Does More than Just Cut Poverty*, BROOKINGS, Sept. 24, 2021, <http://www.brookings.edu/articles/the-new-child-tax-credit-does-more-than-just-cut-poverty>.

¹⁸ Jonathan Fisher, Jake Schild & David S. Johnson, *Spending Responses to the Child Tax Credit Expansions*, 710 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 108, 113 (2023).

the refundable Child Tax Credit was associated with reduced anxiety symptoms among low-income families with children).

As these studies evidence, the refundable Child Tax Credit provides significant material and financial benefits to lower-income working families with children, particularly in offsetting the ever-rising costs of daily living expenses. Rebekah Keller, Note, *The Eighth Circuit Allows a Child Tax Credit Exemption in Bankruptcy Proceedings: A Minty Fresh Start or Abuse of the System?* 81 *Missouri Law Review* 561, 579 (2016) (noting that the Additional Child Tax Credit “works as a bonus for working parents who are raising families and gives them an incentive to earn income and maintain a constant source of revenue to provide for their families”).

If the purposes of exemption laws are in part to allow for a modest standard of living for individuals and families and to prevent impoverishment or reliance upon the state, then allowing debtors to retain their full refundable Child Tax Credits under the Colorado exemption statute advances these fundamental tenets of the bankruptcy laws. However, because of the way Chapter 7 bankruptcy trustees are presently compensated for their work, they are oftentimes incentivized to deprive lower-income families of their refundable Child Tax Credits.

IV. Chapter 7 Bankruptcy Trustee Compensation under the Bankruptcy Code

The Chapter 7 Trustee contends on appeal that the bankruptcy estate is entitled to \$914.40 of the debtor's Child Tax Credit for 2021. However, the great irony in all this litigation effort—and not addressed by the parties below—is the fact that the creditors will likely receive *no* distribution from these funds. As the Court is aware, upon the filing of a bankruptcy petition, an estate is created that is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C.A. § 541(a)(1). Once appointed, a trustee is both the designated representative of, and fiduciary for, the bankruptcy estate. 11 U.S.C.A. § 323. *See also Salazar v. McCormick (In re Crestview Funeral Home, Inc.)*, 287 B.R. 832, 838 (Bankr. D.N.M. 2002) (“A bankruptcy trustee owes a fiduciary duty to the bankruptcy estate.”).

Section 704 of the Bankruptcy Code establishes the duties of a Chapter 7 trustee. Most relevant here is the responsibility of the trustee to “collect and reduce to money the property of the estate for which the trustee serves.” *See generally* 11 U.S.C.A. § 704. As the Bankruptcy Appellate Panel for the Tenth Circuit acknowledged in *Jubber v. Bird (In re Bird)*, 577 B.R. 365 (2017), a critical element of a Chapter 7 trustee's fiduciary duties is to maximize the value of the estate for the greatest possible distribution of non-exempt assets to, most prominently, unsecured creditors. *Id.* at 375. In exchange for administering the bankruptcy estate and liquidating any non-exempt property, the trustee receives compensation. In a

presumptive no-asset bankruptcy case—which comprise most individual Chapter 7 cases—the trustee receives as little as \$60 in total compensation that is paid through debtors’ filing fees.¹⁹ *Id.* at 387. Because of this presumptive \$60 fee, courts have observed that deciding to be a Chapter 7 trustee is a “risky business.” *Id.* (citation omitted).

A consequence of this stingy compensation scheme is that bankruptcy trustees are personally and financially incentivized to scour the landscape for any property the debtor may have an interest in to liquidate because if there is an eventual distribution to creditors—that is, an initial no-asset case later becomes an asset case—then §§ 326 and 330 of the Bankruptcy Code awards trustees with a sliding scale compensation based upon any amounts distributed to creditors. 11 U.S.C.A. §§ 326(a) & 330. In a Chapter 7 case, a court can award reasonable compensation to the trustee in accordance with a sliding scale schedule. *Id.* § 326(a). For asset cases with less than a \$5,000 recovery for creditors, a Chapter 7 trustee is entitled to 25% of the distribution.

In this case, this means that of the \$914.40 of estate funds claimed by the Chapter 7 Trustee, the Trustee would receive compensation in the amount of \$228.60, leaving a potential \$685.80 distribution for unsecured creditors. Precisely

¹⁹ Under a temporary amendment to 11 U.S.C. § 330(e), chapter 7 trustees may receive additional fees of up to \$60 per case, depending on the availability of funds in the Chapter 7 Trustee Fund created by that amendment.

because of the stingy \$60 compensation fee in no-asset Chapter 7 cases, along with the possibility of a sliding scale commission if non-exempt assets are recovered, if trustees wish to make money the bankruptcy system perversely incentivizes them to augment the estate to generate the largest pot of money possible with which to pay both themselves and the creditors, even if this includes seizing tax benefits and credits that Congress bestowed upon working-class families with children.

But the problematics of this case get even murkier. To assist him in litigating this case before the bankruptcy court, the Chapter 7 Trustee retained authority to hire a law firm in accordance with § 327(a) of the Bankruptcy Code, which the Trustee contended was “in the best interests of the estate.” Bankruptcy Docket # 46 (filed July 13, 2022). The attorney hired to represent the Trustee was permitted to charge the estate the rate of \$310 *per hour*. In addition, the Chapter 7 Trustee also retained permission to hire a second law firm to represent him in the appeal to the district court. Based upon the Trustee’s application to employ appellate counsel, the potential hourly rate for attorney time ranged from \$325 to \$500 *per hour*. Under the bankruptcy scheme, attorneys hired under § 327(a) of the Bankruptcy Code can apply to the court to have their fees and expenses paid. The ultimate award of any fees and expenses paid to the trustee and its professionals are independently reviewed by the bankruptcy court. *See* 11 U.S.C.A. § 330. “The purpose of the

independent review is to ensure that the services provided were necessary, reasonable, and justified.” *Bird*, 577 B.R. at 374.

Significantly, a trustee’s statutory compensation and expenses along with the fees and expenses of their professionals are administrative expense claims that are paid before any available estate funds can be used to pay unsecured creditors. *In re Machevsky*, 637 B.R. 510, 544 (Bankr. C.D. Cal. 2021). In other words, if the Trustee’s collective counsel have spent any more time than two hours litigating this case since its inception, then the remaining \$685.80 of Mr. Garcia-Morales’s Child Tax Credit will be awarded to attorneys, and not to his unsecured creditors.

Indeed, the Executive Office of the United States Trustee Program established a Trustee Handbook that guides trustees in the performance of their duties. In the introduction to a Chapter 7 trustee’s duties, the Trustee Handbook explicitly provides in part as follows:

A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals The trustee must be guided by this fundamental principle when acting as trustee. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case.

Bird, 577 B.R. at 377 (citation omitted). Although the contours of whether “sufficient funds” are available “to make a meaningful distribution to unsecured creditors” are undefined and rely upon case-specific inquiries, it was not difficult to foresee that

litigating this issue before the bankruptcy court and on appeal to the district court would have left no funds available to unsecured creditors. Even if the trustee had never hired counsel, the minimal amount of money available in the estate after payment of the trustee's commission would not yield a meaningful distribution to creditors. While amici do not infer any ill intention on the part of the Chapter 7 Trustee administering Mr. Garcia-Morales's bankruptcy case, we make these points to demonstrate another reason why trustees should not seek to administer small amounts of tax credits due to debtors. *See also* 6 Collier on Bankruptcy ¶ 704.02[1], *citing* H.R. Rep. No. 595, 95th Cong., 1st Sess. 93 (1977) for proposition that trustees should not administer nominal asset cases.

The policy implications of these dynamics should be readily apparent. That is, in small asset individual bankruptcy cases where the recoveries are ordinarily debtors' tax refunds (either under the Child Tax Credit or the Earned Income Tax Credit), all or most of the assets that might arguably be said to benefit unsecured creditors instead benefit private bankruptcy trustees and their attorneys. Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases* 83 *American Bankruptcy Law Journal* 795, 797 (2009) (finding that a federal or state income tax refund is often a source for an asset Chapter 7 consumer bankruptcy case).

This presents a tension between the rationales of the bankruptcy system to maximize a return to unsecured creditors against the intentions of Congress of assisting families with offsetting the significant expenses of raising children by offering a refundable portion of the Child Tax Credit. When viewed in conjunction with the long-standing doctrine of construing exemptions liberally in favor of debtors, the refundable portion of the Child Tax Credit should be fully exempt from trustee capture in the state of Colorado.

CONCLUSION

Since its inception in 1997, the Child Tax Credit has “become a central component of family policy in the United States.” Joshua T. McCabe & Elizabeth Popp Berman, *American Exceptionalism Revisited: Tax Relief, Poverty Reduction, and the Politics of Child Tax Credits*, 3 SOCIOLOGICAL SCIENCE 540, 540 (2016). Indeed, researchers have repeatedly found that the Child Tax Credit is a powerful tool to reduce poverty rates in the United States. Elaine Maag, Nikhita Airi & Sophie Collyer, *Implications of Alternative Designs of the Child Tax Credit*, 710 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 209, 212 (2023).

Putting aside the temporary expansion of the Child Tax Credit in 2021 that made the credit fully refundable to families with children, because the Child Tax Credit has once again become only partially refundable, in practice it is low- and

moderate-income households with low tax liabilities due to meager earnings that are the families who receive the partially refundable Child Tax Credit. Sophie Collyer et al., *The Child Tax Credit and Family Well-Being: An Overview of Reforms and Impacts*, 706 THE ANNALS OF THE AMERICAN ACADEMIC OF POLITICAL AND SOCIAL SCIENCE 224, 225 (2023). And any refundable Child Tax Credit is currently capped at \$1,700 per child. The refundable portion of the Child Tax Credit assists low- and moderate-income families shoulder the burden of raising children in a harsh economic environment.

The centrality of the refundable Child Tax Credit to the quotidian lives of families with children dovetails nicely with the purposes of exemption statutes more generally, namely, to leave debtors and their families with the basic material necessities in life and to ensure that they do not become so destitute as to require public assistance. Accordingly, the Colorado legislature recognized the beneficial effects of the refundable Child Tax Credit and sought to protect them from the reach of both trustees and creditors in the bankruptcy process. For these reasons, the amici urge the Court to uphold the decisions of the district court and the bankruptcy court below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,361 words, excluding parts exempted by Fed. R. App. P. 32(f).
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.
3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on January 13, 2025. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara E. Salinas

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