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, APPELLEE

ON APPEAL FROM:

THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO
CIVIL CASE NO. 23-CV-02178-PAB
(BANKRUPTCY NO. 21-14949-KHT, CHAPTER 7)

APPELLANT ROBERTSON B. COHEN'S REPLY BRIEF

SUBMITTED BY:
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ORAL ARGUMENT IS REQUESTED
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Appellant Robertson B. Cohen, chapter 7 trustee (the "Trustee"[1]), hereby replies to the Response Brief filed by Appellee Jose L. Garcia-Morales (the "Debtor") and the Amicus Brief filed by the National Association of Consumer Bankruptcy Attorneys and National Consumer Bankruptcy Rights Center (together, the "Amici Curiae") as follows:

I. INTRODUCTION

The Debtor's Response Brief primarily repeats findings and conclusions made by the Bankruptcy Court in the Order and the USDC in its order affirming the Bankruptcy Court. The Trustee has identified only two assertions in the Response Brief that merit response: first, the Debtor's erroneous contention that *In re Borgman*, 698 F.3d 1255 (10th Cir. 2012), was "overruled" by a 2022 "iteration" of C.R.S. § 13-54-102(1)(o), *see Response Brief*, at 2; and second, the Debtor's extensive argument regarding the Tenth Circuit's interpretation of the word "refund" in *Borgman*, which is both unpersuasive and irrelevant.

The Amicus Brief filed by the Amici Curiae should be disregarded in its entirety because it consists of only policy-based arguments that are (a) irrelevant to the issue on appeal, which concerns interpretation of an unambiguous statute, (b)

[1] Capitalized terms are to be ascribed the same meanings as in the Trustee's Opening Brief.

inconsistent with the facts in the instant dispute, and (c) contrary to the language of the statute and the application of the Internal Revenue Code.

II. ARGUMENT

A. C.R.S. § 13-54-102(1)(o) is unambiguous and the Tenth Circuit therefore should not resort to extrinsic aids of construction in deciding the issue on appeal.

Neither the Trustee nor the Debtor argued below that C.R.S § 13-54-102(1)(o) is ambiguous. Similarly, both the Bankruptcy Court and the USDC applied a "plain meaning" analysis to the statute because each concluded the statute is not ambiguous. *Appellant App.* at 145 (Bankruptcy Court); 211 (USDC).

As stated by the USDC in its order, when a statute is unambiguous, "the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what said." *Appellant App.* at 211 quoting *Kouzmanoff v. Unum Life Ins. Co. of Am.*, 374 F. Supp. 3d 1076, 1087 (D. Colo. 2019). "When the statutory language is clear and unambiguous, the statute must be interpreted as written without resort to interpretive rules and statutory construction." *In re Borgman*, 698 F.3d at 1260 (quoting *People v. Zapotocky*, 869 P.2d 1234, 1238 (Colo. 1994). Only if the statutory language is "ambiguous may [a court] resort to extrinsic aids of construction to address the ambiguity." *Cowen v. People*, 431 P.3d 215, 218 (Colo. 2018).

The three arguments advanced by the Amici Curiae in their Brief are based entirely on "extrinsic aids of construction." The arguments are based on public policy concerns, not the statute's language. The Amici Curiae concede as much: "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." *Amicus Brief* at 5. As the USDC did with respect to a legislative history argument made in the USDC appeal, the Tenth Circuit should "decline to address" the Amici Curiae's brief in its entirety because the statute is unambiguous. *Appellant App.* at 217.

Similarly, the Debtor, while acknowledging the lack of ambiguity in the statute, devotes substantial portions of his brief to extrinsic policy-based arguments that the Tenth Circuit should decline to address. *See Response Brief* at 2-3, 11 (discussing subsequent amendments to the statute); 8-9 (discussing rationale behind exemption statutes); and 16-17 (discussing trustee compensation).

B. The Debtor's contention that *Borgman* was overruled by a 2022 "iteration" of C.R.S. § 13-54-102(1)(o) is both erroneous and an extrinsic aid of construction that should be disregarded.

The Debtor argues that *Borgman* was "overruled" by a 2022 "iteration" of C.R.S. § 13-54-102(1)(o) and therefore should not be followed by the Tenth Circuit. *See Response Brief* at 2. The Debtor repeats this argument several times in his brief.

The argument is largely based upon a footnote in the USDC's order in which the USDC describes 2022 amendments to the statute as contradicting the Tenth Circuit's holding in *Borgman* "that a nonrefundable tax credit is not exempt." *Appellant App.* at 217, n.7. What the Debtor fails to mention is that the USDC's comments regarding the 2022 revisions to C.R.S. § 13-54-102(1)(o) were likely placed in a footnote because those revisions are the sort of "extrinsic aid of construction," discussed in the preceding section, that a court may not rely upon when, as here, the statute's language is unambiguous. *See Cowen*, 431 P.3d at 218 (only if the statutory language is "ambiguous may [a court] resort to extrinsic aids of construction to address the ambiguity"). Amendments made by the Colorado legislature to the refund exemption statute after the events giving rise to the instant dispute have no bearing on this appeal.

Moreover, both the Debtor's and the USDC's use of the statute's 2022 amendment as a means of distinguishing *Borgman* overlook the fact that the phrase "attributed to" has remained in the statute, despite two revisions, since *Borgman* was decided. The Trustee relies on *Borgman* in this appeal for its discussion regarding attribution, not for its discussion regarding whether a nonrefundable tax credit may be deemed a "refund."

If anything, the legislature's continued use of the phrase "attributed to" after *Borgman* despite other revisions should be deemed approval of *Borgman*'s findings

with respect to attribution. *See Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 403 (Colo. 2010) (cited in the USDC order) ("When a statute is amended, the judicial construction previously placed upon the statute is deemed approved by the General Assembly to the extent that the provision remains unchanged"). In *Borgman*, the Tenth Circuit applied the "attributed to" phrase in reaching its conclusion that the nonrefundable child tax credit could not be one of the components included in the allocation analysis. By adding the nonrefundable child tax credit to C.R.S. § 13-54-102(1)(o), but not removing "attributed to," the Colorado legislature added another component to the attribution analysis and therefore should be deemed to have approved the Tenth Circuit's methodology. Had the legislature intended to overrule the methodology, it would have removed "attributed to" from the statute.

C. The Debtor's extensive argument regarding the Tenth Circuit's application of the word "refund" in *Borgman* is both unpersuasive and irrelevant.

The Debtor criticizes the Tenth Circuit for its interpretation of the word "refund" in the *Borgman* decision. As set forth above, the Trustee relies on *Borgman* in this appeal for its discussion of the "attributed to" language in C.R.S. § 13-54-102(1)(o), not for its holding regarding the non-refundable tax credit (because that credit is not at issue). Accordingly, the Debtor's argument is irrelevant.

Moreover, the Debtor's criticism of the Tenth Circuit for applying a "technical" IRS definition of "refund" in its opinion instead of the "plain and

ordinary meaning or dictionary definition," is unavailing for at least three reasons. *See Response Brief* at 13. First, the Debtor fails to provide a dictionary definition or any other explanation of his interpretation of what the word "refund" means in the statute. The Debtor cannot credibly assert that the Tenth Circuit applied the wrong definition without offering any alternative definition.

Second, the Debtor inexplicably concludes that the Colorado legislature did not define "refund" in the statute because the legislature intended for the word to have some phantom "plain and ordinary" meaning rather than the Internal Revenue Code definition. This conclusion ignores the fact that a federal tax refund is necessarily whatever the Internal Revenue Code defines it to be. A federal tax refund is exclusively the product of provisions contained within the Internal Revenue Code. *See Borgman*, 698 F.3d at 1260-61 (citing 26 U.S.C. § 6402(a) and describing the means of determining a federal tax refund). It is nonsensical to argue that some other definition might apply.

Third, the contention that *Borgman*'s definition is technical is belied by the plain and ordinary meaning of the word set forth in 26 U.S.C. § 6402(a), which provides as follows:

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f), refund any balance to such person.

26 U.S.C. § 6402(a). Under the Internal Revenue Code, then, a "refund" is the amount a taxpayer overpays his tax liability. There is nothing "technical" about this definition.

D. The policy arguments offered by the Amici Curiae are (a) irrelevant to the issue on appeal; (b) inconsistent with the facts in the instant dispute; and (c) contrary to the language of C.R.S. § 13-54-102(1)(o) and the application of the Internal Revenue Code.

In the Amicus Brief, the Amici Curiae advance three policy-based arguments in support of affirmance. As already discussed, because C.R.S. § 13-54-102(1)(o) is unambiguous, these arguments should not be considered in this appeal. However, if the policy arguments are considered, they should be rejected. The first two policy arguments advanced are complementary and addressed together herein. The Amici Curiae argue that the policy rationales behind exemption statutes generally and the child tax credit exemption specifically support affirming the Bankruptcy Court's Order, but as set forth below, the arguments are inconsistent with the facts of the current dispute and contrary to language of C.R.S. § 13-54-102(1)(o) and the application of the Internal Revenue Code. The third argument concerns how chapter 7 trustees are compensated under the Bankruptcy Code. This argument is also contradicted by the facts of this case and well beyond the scope of the appeal.

(i) The exemption policy arguments are inconsistent with the applicable facts and contrary to the statute's language and application of the Internal Revenue Code.

The first two policy-based arguments advanced by the Amici Curiae regard their contention that the general purpose of exemption statutes and the specific purpose of the child tax credit is to prevent "destitution." *See Amicus Brief* at 3. The Amici Curiae also describe the target of the tax credit statute as "low income" families, which they identify as "families earning less than $35,000." *See id.* at 15, n. 5. What the Amici Curiae fail to acknowledge is that the Debtor in this case earned $99,147 in 2021, more than three times the cited low-income definition. *Appellant App.* at 63. As it cannot be contended that the Debtor was destitute or that the loss of some portion of the $1,455 federal tax refund would have rendered him destitute, the policy argument has no application to this case (or, for that matter, to any other case in which the recipient of a refundable child tax credit is not destitute).

In addition, the policy arguments advanced by the Amici Curiae regarding the supposed sacrosanctity of the Colorado tax refund exemption glosses over an incredibly significant point—the same significant point the Bankruptcy Court missed when it stated that "[p]roperty subject to an exemption should not be burdened with a tax liability." *Appellant App.* at 142. What both the Amici Curiae and the Bankruptcy Court miss is the undisputed fact that a portion of the Debtor's refundable tax credit was applied to his federal tax liability. *Appellant App.* at 64 (Debtor claimed credit of $1,800, but only received refund of $1,455). Indeed, had

the Debtor withheld $1,455 less from his wages in 2021, the entire refundable tax credit would have been "burdened" with his federal tax liability.

This unavoidable fact is significant for multiple reasons. First, and most obviously, it puts to rest the contention that a refundable tax credit cannot be non-exempt property. It can and it was in this case as it was applied, in part, to pre-bankruptcy debt.

Second, the fact that a refundable tax credit may be burdened with a debt obligation exemplifies the many competing policy choices that factor into legislatures' determinations regarding what is exempt and what is non-exempt property. Here, Congress has opted to not exempt these credits at all when tax liabilities exist, despite the potential for "destitution" if a low earner does not receive the credit. If that is the policy of the federal government, there is no reason for the Tenth Circuit to ascribe the exact opposite policy to the Colorado statute.

Third, presumably the Colorado legislature was aware of the fact that a refundable tax credit could be subject to federal tax liability (and therefore be non-exempt) when it enacted and amended C.R.S. § 13-54-102(1)(o). Because the "full amount" that any potential debtor could receive would necessarily be subject to what impairment was imposed by the IRS, the legislature necessarily understood "full amount" to not be 100% of the credit as reflected on the tax return, but merely some portion of what was actually refunded. That understanding, coupled with the

inclusion of the phrase "attributed to," supports the conclusion that the Colorado legislature did not intend to exempt the entirety of the refundable child tax credit.[2]

Fourth, while the Amici Curiae downplay the fact that a refundable child tax credit may be subject to tax liability, they do not criticize that result or make any of the same policy arguments against it. They appear to simply accept the application of the credit to federal tax liability as ordinary course.[3] But that begs the question:

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[2] Further undermining their policy argument, the Amici Curiae concede that 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." *See Amicus Brief* at 9; *see also Wadsworth v. Word of Life Christian Center (In re McGough)*, 737 F.3d 1268, 1273, n. 5 (10th Cir. 2013) ("a good example of one reason why resort to legislative history is problematic: its interpretation is subject to its own ambiguity").

[3] The Amici Curiae describe the non-exempt portion of the tax credit in the following anodyne terms: "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

why is it acceptable policy for the IRS to seize a potentially destitute taxpayer's refunds to cover unpaid taxes but it is unacceptable for a bankruptcy trustee to do the same in a case where, for example, the collected funds could go to pay child support, state taxes, or something similar? If it is acceptable as a policy matter for a refundable tax credit to be applied to federal taxes, there is no reason to treat the credit differently in the bankruptcy context.

Fifth, the allocation result advocated by the Trustee here is exactly what the IRS does without criticism from the Amici Curiae. The IRS's application of credits and wage withholding to tax liability is agnostic: if the tax liability is $5,000, the IRS will keep whatever funds are necessary to satisfy that liability, whether the source of the funds is wage withholding or refundable credits.

For all of these reasons, the policy arguments advanced by the Amici Curiae, if considered by the Tenth Circuit, should be rejected.

(ii) The Bankruptcy Code's chapter 7 trustee commission structure is not at issue and, in any event, the attorneys representing the Trustee will not be seeking fees.

The final argument regarding trustee commissions and administrative expenses are not at issue in this appeal. Nor could they be. The statutes regarding

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owed. If their allowable credit exceeds taxes owed, taxpayers can receive the excess amount as a refund." *See Amicus Brief* at 14, n. 3 (emphasis added).

the payment of trustees and trustee's professionals, 11 U.S.C. §§ 326, 328, and 330, have no connection to the question of whether an asset is exempt or non-exempt. Further, to the extent the Amici Curiae take issue with the compensation structure, that argument should be made to Congress, not the Tenth Circuit.

Finally, although not germane to the issue on appeal, the Trustee and his professionals recognize the small amount at issue in this case. The appeal is being prosecuted because the specific appellate issue is one of great importance. The determination of what portions of a tax refund are exempt and are not exempt arises in hundreds of Colorado cases each year. If the Bankruptcy Court's Order stands, creditors in chapter 7 cases filed in Colorado, in the aggregate, will see a significant reduction in dividends paid. Further, and in recognition of the amount at issue in this case, the Trustee's professionals will not be seeking payment of any fees incurred in representing the Trustee.

III. CONCLUSION

The Trustee requests that the Tenth Circuit enter an order reversing the Order and grant the Turnover Motion as set forth in the Opening Brief.

IV. CERTIFICATE OF COMPLIANCE WITH RULE 8015(a)(7)(B)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) because this brief contains 3,044 words.

This brief complies with the typeface requirements of 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 Office Word 2016 in 14-point Times New Roman font.

V. CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, ESET Endpoint AntiVirus, and according to the program are free of viruses.

Date: January 27, 2025

/s/ *David V. Wadsworth*
David V. Wadsworth

CERTIFICATE OF SERVICE

I do hereby certify that on the 27th day of January, 2025, the **REPLY BRIEF OF APPELLANT ROBERTSON B. COHEN** was served by CM/ECF on the following:

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