Case No. 23-15860

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDEN MARIE SALDANA,

Debtor-Appellant,

v.

MARTHA G. BRONITSKY, Chapter 13 Trustee,
Trustee-Appellee,

On Appeal from the United States District Court
for the Northern District of California
No. 5:22-cv-06223-BLF
Hon. Beth Labson Freeman

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS AND
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September 28, 2023

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

In re Jordan Marie Saldana, Case No. 12-15860

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys and National Consumer Bankruptcy Rights Center make the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court, but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by Appellant. **NOT APPLICABLE.**

Pursuant to 9th Circuit Local Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth Sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

National Association of Consumer Bankruptcy Attorneys
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Dated: September 28, 2023

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 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 adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The NACBA membership has a vital interest in the outcome of this case. Many consumer debtors who file for bankruptcy protection contribute to retirement plans, and the inability to continue saving for retirement over a 36-to-60-month plan is very damaging to their financial recovery and fresh start. Because of the importance of retirement accounts, Congress has legislated to protect retirement accounts through The Employment Retirement Security Act of 1974 (ERISA) as well as the Bankruptcy Code. This Court should not ignore the statutory language in 11 U.S.C. § 541(b)(7), which helps determine disposable income, the amount of income a debtor can pay under a chapter 13 plan. Since the Code follows a statutory framework meant to limit discretion and good faith requirements for the amount debtors contribute to chapter 13 plans in bankruptcy,[1] this Court should avoid penalizing debtors who contribute to retirement plans during bankruptcy when the statutory language allowing those contributions reflects Congress's clear legislative intent.

The National Consumer Bankruptcy Rights Center (NCBRC) 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.

NCBRC has filed *amicus curiae* briefs in numerous cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023); *Evans v. McCallister (In re Evans)*, 69 F.4th 1101 (9th Cir. 2023); *Numa Corp. v. Diven*, 2022 U.S. App. LEXIS 32224, 2022 WL 17102361 (9th Cir. 2022).

[1] *See Drummond v. Welsh* **(***In re Welsh***),** 711 F.3d 1120, 1132 (9th Cir. 2013).

The result in the case at bar will affect the administration of many consumer cases in this Circuit. If the district court decision is not reversed, it will prevent debtors from contributing to their retirement plans during the three to five years of a chapter 13 bankruptcy. If this happens, not only would debtors not save for retirement, but it would lead many individuals to opt out of chapter 13 because it would put them in a materially worse position than they would have been in if they had chosen to file a chapter 7 case. This is contrary to the intent of Congress and the incentives built into the Code to encourage chapter 13 bankruptcy cases. *See* H.R. Rep. No. 109-31(I), at 10-11, as reprinted in 2005 U.S.C.C.A.N. 88, 96-97.

CONSENT

This brief is filed by NACBA and NCBRC with the consent of all parties.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did a party or party's counsel contribute money intended to fund this brief and no person other than NACBA and NCBRC contributed money to fund this brief.

INTRODUCTION

The days when employers bade farewell to retiring employees with a gold watch and a comfortable pension are long gone. In recent decades, employers have increasingly left retirement planning in the hands of the employees themselves. The first step was replacing pensions with defined contribution plans such as 401(k) plans, which leave the investment decisions up to the employee and typically require employees to contribute their own money to the plan, which the employer may then match up to a point. (Many retirement plans today feature no employer matching at all.) At the same time, individual retirement accounts (IRAs), which remove the employer from the equation altogether, have boomed in popularity as traditional pensions have dwindled.

Despite the increasing availability of retirement plan options, however, millions of Americans have fallen short in planning for their later years. Forced in many cases to choose between contributing to a retirement plan and making next month's rent, many employees are increasingly opting out of any such plans. Employees who adequately save for their own retirement have become a minority of working Americans, with many others doing the best they can under the circumstances to contribute amounts that are far from sufficient to fund a comfortable life. According to the Employment Benefit Research Institute, in 2015, 66% of workers surveyed had less than $50,000 saved for retirement, excluding equity in primary residences and defined benefit plans.[2] Thirty-five percent of workers stated that they had less than $1000 in total savings.[3]

These fundamental changes in the way Americans save for retirement are intrinsically entangled with how retirement savings are treated in bankruptcy, with the trend over the past several decades favoring more protection for retirement savings, rather than less. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") notably included a host of provisions that made clear Congress's intent to promote debtors saving for retirement and to prioritize that goal over payment of unsecured creditors in bankruptcy. That both Congress and the courts have recognized the vital need to protect retirement savings instruments that may have barely existed in 1978 plainly demonstrates the public policy decision to allow bankruptcy debtors, particularly older debtors, to continue their efforts to secure their future in retirement and avoid becoming a burden on the public.

STATEMENT OF THE CASE

Debtor-Appellant Jorden Marie Saldana contributed to an employer-sponsored retirement plan in the amount of $484 a month as a payroll deduction

[2] Emp. Benefit Research Inst., The 2015 Retirement Confidence Survey: Perceived Savings Needs Outpace Reality for Many 16 (April 2015), available at ebri.org/pdf/surveys/rcs/2015/EBRI IB 413 Apr15 RCS-2015.pdf.

[3] *Id.*

for consecutive months during the six-months prior to a bankruptcy. Because the debtor's income was above the median state income, she was subject to a 60-month commitment period in her chapter 13 plan. 11 U.S.C. § 1325(b)(4). The debtor's chapter 13 plan proposed making ongoing contributions to her retirement plan and payment of retirement plan loans. The proposed ongoing contributions were in the same amounts she made prior to the filing of her bankruptcy case.

Ms. Saldana proposed a chapter 13 plan and a few amended plans. At a confirmation hearing there the Trustee-Appellee objected to her ongoing retirement plan payments because they reduced the disposable income used for payments to creditors. In a court hearing on confirmation of that plan, the bankruptcy court sustained the objection. Thereafter, Ms. Saldana again amended her plan a few times, but finally confirmed a chapter 13 plan that did not include continued contributions on September 26, 2022. Ms. Saldana appealed the confirmation order to the United States District Court for the Northern District of California, which affirmed the bankruptcy court's decision, prompting the Debtor-Appellant to appeal that ruling to this Court on June 4, 2023.

SUMMARY OF ARGUMENT

The debtor asks the Court to reverse the district court's holding that postpetition contributions to a retirement plan during a chapter 13 case are not allowed under section 1325(b) of the Bankruptcy Code. Even though no one disputes that prepetition assets and contributions to a retirement plan or pension plan are not property of the estate under 11 U.S.C. § 541(a), there is a dispute over whether the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) permits a chapter 13 debtor to make retirement contributions after a bankruptcy petition is filed.

BAPCPA amended the Bankruptcy Code to include provisions broadly protecting retirement assets and retirement contributions from mandatory payment to creditors in chapter 13. BAPCA excludes defined contribution plan amounts (1) "withheld by an employer from the wages of employees for payment as contributions" and (2) "received by an employer from employees for payment as contributions" from the bankruptcy estate. *See* §§ 541(b)(7), 1325(b)(1), (b)(2), 101(10A). The provision also includes a hanging paragraph which reads as follows:

> "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2).

The lower courts' reasoning follows *In re Parks*, 475 B.R. 708 (B.A.P. 9th Cir. 2012) and interprets the hanging paragraph in § 541(b)(7)(A) as merely a clarification that voluntary prebankruptcy retirement contributions already excluded from property of the estate are not post-petition income to the debtor. *Id.* Those courts' conclusions run counter to BAPCPA's obvious intent to increase protections for retirement plans and social security. They also make no sense in light of the meaning of "disposable income" in the Bankruptcy Code, which encompasses only income received after the bankruptcy petition. If this Court affirms the District court, it would dissuade debtors from filing chapter 13 payment plans, encouraging chapter 7 liquidations instead, contrary to Congressional intent to encourage chapter 13.

Thus, the District Court decision, which follows the Bankruptcy Appellate Panel's ruling, should be reversed.

ARGUMENT

A. Retirement Plans Have a History of Protection Under the Bankruptcy Code

When Congress passed the Employment Retirement Security Act of 1974 (ERISA),[4] it gave broad protections to beneficiaries' interest in qualified employee pension plans and retirement plans. 29 U.S.C. § 1056(d)(1). ERISA contained provisions aimed to prevent the sale or assignment of these plans in order to preserve them for their intended purpose, retirement. *Id.* Moreover, Congress proved its commitment to ERISA retirement plans by allowing those that met certain criteria to be tax-qualified. *See* 26 U.S.C. § 401(a).

Under the 1978 Bankruptcy Code, most retirement assets were excluded from the bankruptcy estate by 11 U.S.C. § 541(c)(2). In *Patterson v. Shumate*, 504

[4] 29 U.S.C. § 1002(34) defines an employee contribution plan (like a 401(k)) under The Employment Retirement Security Act of 1974 (ERISA).

U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992), the Supreme Court cemented their protected status, preventing ERISA qualified pension plans and retirement plans from being liquidated for the benefit of creditors. 504 U.S. at 765–66 (1992). So long as the funds remain in an ERISA plan without distribution to beneficiaries for the plan's duration, the 1978 Code supported Congress's goal of protecting pension benefits. *Id.* at 765; *see also* 29 U.S.C. §§ 1001(b) and (c)).

The goal of ERISA is to "ensur[e] that 'if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he actually will receive it.'" *Patterson*, 504 U.S. at 765 (1992) (*quoting Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 375 (1980)). Thus, prior to the passage of Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Supreme Court interpreted the Code and ERISA to exclude prepetition 401(k) accounts and other ERISA – qualified plans from the bankruptcy estate, making them unreachable by creditors or a bankruptcy trustee, pursuant to 11 U.S.C. § 541(c)(2). *See Patterson*, 504 U.S. at 760. Limited exemption provisions in 11 U.S.C. § 522(d)(10)(E), as well as some state exemption statutes, also protected the debtor's right to receive benefits in the future.

The Code was not explicit about the protection of retirement contributions in bankruptcy or repayment of loans from retirement funds after a chapter 13 case was filed. That changed with the passage of the 2005 amendments.

B. BAPCPA Greatly Increased Protections for Retirement Assets and Retirement Contributions Though Specific Statutory Provisions

The 2005 amendments to the Code included a host of provisions that protected retirement assets and retirement contributions and that allowed retirement plans to continue to operate unaffected by a bankruptcy case. These comprehensive new provisions evidenced a clear Congressional intent to ensure that bankruptcy did not interfere with retirement plans, and to prioritize retirement savings over payments to unsecured creditors. Under BAPCPA, 401(k) plans are now protected in bankruptcy through the following sections of title 11:

- Enhanced exemptions protecting retirement assets from creditors. 11 U.S.C. § 522 (b)(3)(C) and (d)(12);
- Establishment of a presumption in favor of exemption when a retirement fund receives favorable treatment from the IRS. § 522(b)(4);
- Permitting continued collection of tax-qualified retirement loans notwithstanding the automatic stay. § 362(b)(19);
- Exception of most retirement loans from being affected by the discharge.

§ 523(a)(18);

- Prohibition of altering terms of a retirement plan loan in a chapter 13 plan. § 1322(f);
- Exclusion of retirement plan loan payments from disposable income for purposes of the chapter 13 projected disposable income test. § 1322(f).

1. 2005 Statutory Changes to protect Retirement Contributions

BAPCPA also added a specific and robust provision to protect a debtor from being required to divert retirement contributions to payment of creditors in chapter 13. Section 541 (b)(7) provides the following protections:

> (b) Property of the estate does not include- …
> (7) any amount-
> (A) withheld by an employer from the wages of employees for payment as contributions-
> (i) to-
> (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986; …
>
> *except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2).*

11 U.S.C.A. § 541(b)(7) [emphasis supplied].

Following the addition of this provision, the majority view, including the only precedential court of appeals decision on the issue, is that Congress intended to exclude postpetition retirement contributions from the amount deemed available for payment to creditors in chapter 13. In Chapter 13 cases, retirement contributions are allowed as a deductible expense in the determination of "disposable income" under § 1325(b). *Davis v. Helbling* (*In re Davis*), 960 F.3d 346 (6th Cir. 2020) (continuation of prepetition contributions to 401(k) not disposable income under language of section 541(b)(7)); *Miner v. Johns*, 589 B.R. 51 (W.D. La. 2018) (voluntary 401(k) contributions not disposable income under plain language of section 541(b)(7)); *RESFL FIVE, L.L.C. v. Ulysse*, 2017 WL 4348897 (S.D. Fla. Sept. 29, 2017) (all voluntary retirement contributions deductible under plain language); *In re Whitt*, 616 B.R. 323 (Bankr. S.D. Miss. 2020); *In re Garza*, 575 B.R. 736 (Bankr. S.D. Tex. 2017); *In re Cantu*, 553 B.R. 565 (Bankr. E.D. Va. 2016), *aff'd, Gorman v. Cantu*, 713 Fed. Appx. 200 (4th Cir. 2017) (debtor could deduct voluntary retirement contributions after repayment of loan from retirement plan was completed); *In re Anh-Thu Thi Vu*, 2015 WL 6684227 (Bankr. W.D. Wash. June 16, 2015); *In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014) (good faith contributions could be deducted, even if begun after petition filed); *In re Melander*, 506 B.R. 855 (Bankr. D. Minn. 2014) (continuation of good faith prepetition contributions permitted); *In re Jensen*, 496 B.R. 615 (Bankr. D. Utah 2013) (contributions that debtors were making before petition may continue and may be deducted); *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013) (good faith contributions, even if interrupted before the petition filing, due to hardship, should be excluded); *In re Hall*, 2013 WL 6234613 (Bankr. N.D. Ill. Oct. 22, 2013); *In re Bruce*, 484 B.R. 387 (Bankr. W.D. Wash. 2012) (excluding prepetition contributions from current monthly income meant that they should not be counted in determining disposable income); *In re Roth*, 2010 WL 2485951 (Bankr. D.N.J. June 14, 2010); *In re Glisson*, 430 B.R. 920 (Bankr. S.D. Ga. 2009); *In re Gibson*, 2009 WL 2868445 (Bankr. D. Idaho Aug. 31, 2009) (contributions could be deducted even though debtor had not made any contributions in six months prior to petition); *In re Njuguna*, 358 B.R. 849 (Bankr. D.N.H. 2007) (funds used for contributions to pension plan not disposable income); *In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006) (same).

These courts have differed on whether retirement contributions can be deducted in determining disposable income if a debtor was not making contributions before the bankruptcy case. Because the debtor in this case had been making prepetition contributions, this Court has no reason to decide that issue.

2. Disposable Income is Forward Looking and Does Not Include Prepetition Income or Assets

For chapter 13 cases, the requisites for plan confirmation changed from earlier iterations of the Code that, upon objection to confirmation under 11 U.S.C. § 1325(b), had required debtors to include as "disposable income" payable to creditors through a plan any retirement contributions, as well as amounts used to repay pension loans. *See, e.g., Anes v. Dehart (In re Anes)*, 195 F.3d 177 (3d Cir. 1999).

The term "disposable income" is used for only one purpose in the Bankruptcy Code. It refers to the amount that a debtor must pay *from postpetition income* to fund a bankruptcy plan. "[I]f a trustee or an unsecured creditor objects to a chapter 13 debtor's plan, a bankruptcy court may not approve the plan unless it provides for the full repayment of unsecured claims or 'provides that all of the debtor's projected disposable income to be received' *over the duration of the plan* 'will be applied to make payments' in accordance with the terms of the plan. *Hamilton v. Lanning*, 560 U.S. 505,509, 130 S. Ct. 2464,2469 (2010) [emphasis supplied]. (Besides section 1325(b), parallel provisions in chapter 11 and chapter 12 using the term "disposable income" have the same purpose.)

Therefore, the reasoning of the BAP decision in *Parks* and of the lower courts in this case – that the term "disposable income" in section 541(b)(7) concerns only prepetition contributions to a retirement plan – makes no sense and it does not serve the policy goals underlying the Bankruptcy Code. Prepetition income and assets were never a part of disposable income, so there would have been no need to exclude them from disposable income. As the Supreme Court held in *Lanning,* disposable income is income the debtor will receive during the postpetition plan period, an amount that is projected forward to determine plan payments. A phrase very similar to section 541(b)(7)'s hanging paragraph is used in section 1322(f) to prevent amounts used for pension loan repayments during a chapter 13 case from being used for plan payments: "any amounts required to repay such loan *shall not constitute 'disposable income' under section 1325."* [emphasis supplied] And no party disputes that this phrase in section 1322(f) requires amounts used for pension loan repayments to be deducted in the disposable income calculation.

Indeed, exclusion of pension loan repayments and exclusion of pension contributions from disposable income has exactly the same effect. If the debtor repays $1,000 on a pension loan, the payment increases the net amount of the debtor's retirement savings by $1,000. If the debtor makes a $1,000 contribution to a retirement plan, the contribution increases the net amount of retirement savings by $1,000. Frequently, the debtor has the same amount or percentage withheld from wages over time and, once a loan is repaid, the wage deductions that were used for loan repayments again become plan contributions. Thus, there is no logical reason to treat pension loan repayments differently from pension contributions.

Moreover, the *Parks* court was incorrect in holding that section 541(b)(7) refers only to prepetition pension contributions. That provision has no such temporal limitation. It applies to funds withheld from wages for pension contributions both before and after a bankruptcy case is filed. *Parks* refers to section 541(a)(1), which includes all property held as of the petition date in property of the estate, and conveniently overlooks other parts of section 541(a), such as section 541(a)(5) and (a)(6), that include some property acquired postpetition in property of the estate. For example, a postpetition divorce property settlement could include a provision that required a nonbankruptcy debtor spouse to receive a percentage of the retirement savings of the other spouse. That postpetition interest in property, withheld from the non-debtor spouse's wages, could become property of the estate under section 541(a)(5)(B).[5] Section 541(b)(7) would protect that interest in property, acquired postpetition, from inclusion in property of the estate and from disposable income.[6]

[5] *See, e.g., Lerbakken v. Sieloff & Assocs., P.A. (In re Lerbakken)*, 949 F.3d 432 (8th Cir. 2020) (debtor could not exempt interest in former spouse's retirement account). While *Lerbakken* did not opine on whether the debtor's interest was property of the estate because the issue was waived, it illustrates that a divorce settlement interest in a nondebtor spouse's retirement account requires specific statutory protection in bankruptcy. Such a settlement could occur after the bankruptcy petition is filed and be brought into the estate under section 541(a)(5)(B).

[6] Similarly, property acquired postpetition by the estate under section 541(a)(6) in the form of proceeds, profits or rents would be protected by section 541(b)(7). If a corporate debtor pays pension contributions after the petition from proceeds, profits or rents, the amounts withheld for those contributions is not property of the estate. If a chapter 13 debtor owned a corporation that paid the debtor wages, the amounts withheld from those wages for pension contributions would be protected and would not be disposable income.

C. Protections for Retirement Savings in Debt Collection Outside of Bankruptcy Is Consistent with Protection of those Savings in Bankruptcy

Outside of bankruptcy, retirement savings maintain robust protections. When lenders extend credit, they do so with the knowledge that if a borrower defaults, any retirement funds of a borrower/beneficiary will be shielded from debt collection. Retirement funds held in an ERISA account are distributed by virtue of age, disability, or in some cases, extreme financial hardship. Credit granted to consumers through loans and credit cards is provided with full knowledge that if the loans or credit cards go into default, retirement savings, including new contributions, are untouchable. Even when a person is living solely on social security and pension distributions, the pension rights are not available for collection. Creditors also know that when an individual files for bankruptcy, those same retirement accounts will not provide an avenue for collection. This is a known risk of doing business in the consumer credit market, and therefore the protection of retirement savings in bankruptcy does not upset creditors' nonbankruptcy expectations.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to reverse the decision of the District Court.

Date: September 28, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 3,755 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt, Times New Roman-point font.

I certify under penalty of perjury that the foregoing is true and correct.

Date: September 28, 2023.

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