No. 23-55680

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: JOSEPHINA LOPEZ,
Debtor.

JOSEPHINA LOPEZ AND
VICTORIA FIRE AND CASUALTY COMPANY
Appellants,
v.
ERIC AND CHRISTINA BEJAR, AND
HOWARD EHRENBERG, TRUSTEE,
Appellees.

Appeal from the United States District Court for the Central District of California, Case Nos.: 2:23-cv-01365-JFW, 2:23-cv-00455-JFW, 2:23-cv-04286-JFW
The Honorable John F. Walter

AMICI CURIAE BRIEF OF THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF NEITHER PARTY

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Lopez et al. v. Bejar et al., No. 23-55680.

Pursuant to Fed. R. App. P. 26.1, Amici Curiae, the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

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

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

This day of November 8, 2023.

s/ Christina L. Henry

Christina L. Henry

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 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 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 and NACBA have 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).

NCBRC, NACBA and NACBA's members have a vital interest in the outcome of this case. A broad and precedential ruling in the case at bar will affect the administration of many consumer cases in this Circuit. If this court were to render a broad ruling that a debtor's appeal rights are always property of the estate, it would likely result in certain dischargeable debts becoming nondischargeable, family law disputes determined in favor of the highest bidder and a host of other unintended consequences that would weaken the ability of a good faith debtor to receive a fresh start in bankruptcy.

No parties have responded to amici's November 2, 2023, request for consent to the filing the filing of this amicus brief. NACBA and NCBRC are filing a Motion for Leave To File Amicus Brief contemporaneously with this brief.

SUMMARY OF ARGUMENT

The court should not adopt a precedential ruling on the question of whether all appellate rights are part of a bankruptcy estate. The facts in this case are complex and unusual. A broad and precedential ruling would have ramifications in a host of problematic factual situations involving areas ranging from family law matters to criminal law to the ability of debtors to discharge debts.

Instead, *Amici* respectfully request the court to render a decision narrowly tailored to the facts of this case in order to allow the law to develop as individual situations present themselves.

ARGUMENT

I. The Court Should Not Adopt a Broad and Precedential Ruling that the Right Of An Individual Debtor To Appeal a Court Decision is Property of the Estate.

Amici submit this brief regarding only one issue – whether the right of an individual debtor to appeal a court decision is property of the bankruptcy estate -- and urge this Court not to adopt a broad and precedential holding based on the complex, convoluted and unusual facts of this case.

Property of the bankruptcy estate is broadly defined in 11 U.S.C. § 541(a) as "all of the following property, wherever located and by whomever held" of a variety of types listed in that subsection., including "all legal and equitable

interests *in property*." However, neither Section 541 nor 11 U.S.C. § 101, the definitions section of the Code, defines the word "property".

The relatively few courts to have addressed the issue have split on whether the right to appeal a judgment is property of the estate. Some, in cases involving nonindividuals and involving little analysis, have held that it is. *E.g.*, *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 232 (3d Cir. 2001). But the rights of a corporate entity in bankruptcy are different than those of an individual who has an ongoing personal existence apart from being a bankruptcy debtor.

Some courts have cited a statement in *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979) that "[p]roperty interests are created and defined by state law". However, *Butner* did not decide whether the interests in question in that case were property. The only issue in *Butner* was whether a mortgage interest, which all parties agreed was property, included future rents and profits. *Butner* held only that that issue, the extent of a property interest, was to be determined based on state law.

Some courts have simply assumed that if something has monetary value it is necessarily property. *E.g.*, *Croft v. Lowry* (*In re Croft*), 737 F.3d 372 (5th Cir. 2013). Others have held that the mere fact that someone is willing to pay money for control of a debtor's right to appeal does not make that right property. *In re*

Morales, 403 B.R. 629 (Bankr. N.D. Iowa 2009). *See also Butwinick v. Hepner*, 128 Nev. 718, 291 P.3d 119 (2012).

The fact that something has monetary value is not sufficient, by itself, to make it property of the estate. Just as no one would argue that a debtor's kidneys should be property of the estate because they could have monetary value, it is not difficult to find many examples of situations in which classifying a right to appeal as property, simply because a trustee could sell it, would be extremely problematic. A debtor could be involved in a hotly-contested custody case, where a very questionable decision was appealed. The opposing party, perhaps far wealthier than the debtor, could offer to buy from the trustee the debtor's right to appeal for more than the debtor could afford, thus ending the appeal. Similarly, a debtor could be involved in a contested divorce, in which a clearly erroneous support order for $100,000, which would not be dischargeable in bankruptcy, 11 U.S.C. § 523(a)(5), was entered against the debtor. In that situation, too, the opposing party could offer the trustee $10,000 for the right to appeal, cutting off any review of the support order and leaving the debtor with a $100,000 debt after bankruptcy.

And such situations are not limited to family law matters. A debtor could be appealing an erroneous criminal conviction. The alleged crime victim, or even a prosecutor trying to save the costs of appeal, could purchase the debtor's right to appeal from a bankruptcy trustee, perhaps causing the debtor to be imprisoned for

years. Or the debtor might be appealing an erroneous judgment or other decision that would lead to loss of a professional license, which would severely impair the debtor's fresh start.

The loss of a debtor's right to appeal could also lead to large debts becoming nondischargeable in bankruptcy when, in fact, they should be discharged. For example, a debtor could erroneously be found liable for a large amount in a fraud judgment that, if not reversed, would result in a nondischargeability determination under 11 U.S.C. § 523(a)(2). *See Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654 (1991) (collateral estoppel applies in dischargeability determination). If the plaintiff could pay the bankruptcy trustee for the debtor's right to appeal, and then dismiss the appeal, the debt would not be discharged.

In all these situations, and undoubtedly many others, the fact that a right may have monetary value to the bankruptcy estate, and could be sold by the trustee, should not, by itself, make that right property. This case is not an appropriate vehicle for deciding the thorny issue of whether appeal rights are always property of the estate. Therefore, *Amici* urge the court to avoid any broad precedential opinion that would have ramifications that go far beyond the facts and issues in this case.

CONCLUSION

The question whether appellate rights are considered property of the bankruptcy estate should be narrowly determined on the particular facts of each case. A broad ruling would have negative ramifications in other cases where compelling arguments could be presented.

For all of these reasons, *Amici* respectfully request the court to narrowly tailor its decision to the facts of this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 23-55680

I am the attorney or self-represented party.

This brief contains 2261 words, including zero (0) 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 *(select only one)*:

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Signature /s/ Christina L. Henry **Date November 8, 2023**

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2023. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system.

s/ Christina L. Henry

Christina L. Henry

Attorney for Amici Curiae

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

No party's counsel authored this amicus 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 amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

s/ Christina L. Henry

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