No. 17-35716

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DEBRA L. WILSON,
Debtor.

DEBRA L. WILSON,
Debtor/Appellant,

– v. –

JAMES RIGBY and FIRST-CITIZENS BANK & TRUST CO.,
Appellees.

On Appeal from the United States District Court
For the Western District of Washington
Case No. 2:16-cv-01684-RAJ

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 THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, *AMICI CURIAE*
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December 12, 2017

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Wilson v. Rigby et al., No. 17-35716

Pursuant to Fed. R. App. P. 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**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **James Rigby, Chapter 7 Trustee**

This 12th day of December, 2017.

/s/ Jon Erik Heath
J. Erik Heath, Esq.
Attorney for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization, with approximately 3,000 consumer bankruptcy attorney members nationwide. NACBA advocates 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. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Am.'s Servicing Co. v. Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (en banc).

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. Exemptions are essential to achieving the fresh start that is a fundamental goal of bankruptcy. In mandating that exemptions be liberally

construed in favor of the debtor, courts have recognized Congress's intent to protect the essentials of daily life for consumers in financial distress. Here, the debtor claimed her federal homestead exemption to the extent of her equity at the time of filing. When she sought to amend her exemptions upon appreciation of the value of her home, as she had a right to do under Bankruptcy Rule 1009(a), the bankruptcy court erroneously denied the amendment. The denial of the debtor's right to amend to capture an increase in the fair market value of her home has far-reaching implications for consumer debtors nationally.

AUTHORSHIP AND FUNDING OF AMICI BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person/entity other than NACBA, its members, NCBRC, and their counsel made any monetary contribution toward the preparation or submission of this brief.

CONSENT

The debtor has consented to the filing of this brief. Appellees have not consented.

SUMMARY OF ARGUMENT

This case presents high stakes – not just for the elderly woman who has lost her longtime home due to Trustee's unprecedented tactic, but also for many other bankruptcy debtors who seek to use property exemptions to obtain a fresh start under the Bankruptcy Code.

Property exemptions play a crucial role in an individual's fresh start under the Bankruptcy Code. They allow debtors to emerge from bankruptcy with the essentials of daily life (clothing, household items, cars, homes, etc.), so that they can be prepared to embark on their post-bankruptcy lives. Because of their important role, bankruptcy law is fiercely protective of these exemptions, and they can only be denied in the limited circumstances enumerated in the Code.

The Code does not have a specific provision limiting a debtor from exempting post-petition appreciation of an asset. In fact, many cases from the Ninth Circuit have allowed debtors to do just that. *See Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 313 (9th Cir. 1995) (debtor entitled to amend schedules and exempt up to the statutory maximum post-petition appreciation); *In re Woodson*, 839 F.2d 610 (9th Cir. 1988) (similar outcome on life insurance contract). The lack of specific language in the Code, combined with this authority, should squarely resolve this appeal.

But Trustee's position below obfuscates the otherwise axiomatic view that

debtors are entitled to claim full exemptions. He does this by quoting out-of-context a provision from Section 522 (which is inapplicable here), and twisting dicta from this Court's *Gebhart* case. But adopting Trustee's position on Section 522 would impermissibly require the Court to construe Section 522 against the debtor. Further, adopting Trustee's position on *Gebhart* would require the Court to ignore the reality that neither *Gebhart* nor its predecessors actually approved the limitations on a debtor's property exemptions argued by Trustee.

As Trustee acknowledged below, there would not be a live dispute here if only the value of Ms. Wilson's home had appreciated *before* she filed bankruptcy instead of *afterwards*. This callous reading of Section 522 is antithetical to sacrosanct nature of property exemptions, and this Court should fully reject it.

ARGUMENT

The oft-cited principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. *Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1838 (2015); *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974). Property exemptions are among the most important tools the Code uses to accomplish this goal of a fresh start. *See 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.'"). Because of their cherished role, exemptions are structured to allow debtors to maximize their value, and can only

be denied in narrow circumstances enumerated in the Code. *Law v. Siegel*, — U.S. —, 134 S. Ct. 1188, 1194-95 (2014).

Here, it is undisputed that the debtor in this case could have asserted her full $125,000 exemption if only that equity existed at the time of filing her bankruptcy. (ER. 245 (Trustee concedes that "[h]ypothetically speaking, had the Property had $125,000 in equity on the petition date, and the Debtor had amended her exemption claim from $3,560 to $125,000, the parties would not be before the Court today.").) It is also apparently undisputed that Ms. Wilson has the right to amend her exemptions, as long as she states a valid exemption. (*See* ER. 517.) The only issue is therefore whether a debtor can validly exempt values attributable to post-petition appreciation of an asset.

Common sense would dictate that, if property enters the bankruptcy estate, then it is subject to available exemptions – regardless of how or when it enters the estate. The Bankruptcy Code, along with Ninth Circuit precedent, all support this logic, and protect a debtor's ability to exempt post-petition appreciation.

I. PROPERTY EXEMPTIONS ARE CRUCIAL TO THE BANKRUPTCY CODE'S GOAL OF A FRESH START.

Because "exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start,'" *Schwab*, 560 U.S. at 791, it is

important first to explain how those exemptions work, and how they advance the goals of the Bankruptcy Code.

"The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's property." *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985) (citing 11 U.S.C. § 541). The scope of this estate is "broad," including "all legal or equitable interests of the debtor in property as of the commencement of the case." *United States v. Whiting Pools*, 462 U.S. 198, 204-205 (1983) (quoting 11 U.S.C. § 541(a)(1)); *see also Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1139-40 (9th Cir. 2016).

Although most property acquisitions after the petition date are excluded from the estate, there are limited statutory exceptions. For example, certain insurance proceeds to which the debtor becomes entitled within 180 days of filing are brought into the estate, as well as "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." *See* 11 U.S.C. § 541(a)(5)-(7) (listing kinds of after-acquired property that enter the estate). It is through the after-acquired property provision of Section 541(a)(6) that post-petition appreciation of a home enters the bankruptcy estate. *See Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1211 (9th Cir. 2010).

But the inclusion of all of the debtor's property within the estate is not to mean that it is all liquidated. Instead, "[t]o help the debtor obtain a fresh start, the

Bankruptcy Code permits him to *withdraw from the estate* certain interests in property" in the form of exemptions. *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005); *see also Schwab*, 560 U.S. at 774 (the bankruptcy estate is "subject to the debtor's right to reclaim certain property as 'exempt.'"); 11 U.S.C. § 522(l). "An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor." *Owen v. Owen*, 500 U.S. 305, 308 (1991); *see also Schwab*, 560 U.S. at 775-76; *Gladstone*, 811 F.3d at 1142. With only some exceptions, "[p]roperty exempted… is not liable during or after the case for any debt of the debtor that arose… before the commencement of the case." 11 U.S.C. § 522(c).

These exemptions are "crucial to fulfilling the Bankruptcy Code's promise of a fresh start." *In re Demeter*, 478 B.R. 281, 292 (Bankr. E.D. Mich. 2012). They do this "by enabling the debtor to emerge from bankruptcy with adequate and necessary possessions," thus allowing "the debtor to maintain an appropriate standard of living as he or she goes forward after the bankruptcy case." *In re Farr*, 278 B.R. 171, 175 (B.A.P. 9th Cir. 2002) (quoting H. R. Rep. No. 95–595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087); *see also In re Rolland*, 317 B.R. 402, 412-13 (Bankr. C.D. Cal. 2004) ("Exemptions serve to protect and foster a debtor's fresh start from bankruptcy."). Bankruptcy debtors in states such as

Washington can elect either state or federal exemptions in planning their post-bankruptcy lives. *In re Jefferies*, 468 B.R. 373, 378 (B.A.P. 9th Cir. 2012).[1]

Exemptions serve such a fundamental role in a debtor's fresh start that there is "no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code." *Siegel*, 134 S. Ct. at 1197 (bankruptcy court erred by surcharging a debtor's exemption to account for debtor's own fraud).

Further, "the debtor has the absolute right to amend any 'list, schedule, or statement' prior to closure of the case. This right to amend includes the right to amend the debtor's list of property claimed exempt." *In re Goswami*, 304 B.R. 386, 392-93 (B.A.P. 9th Cir. 2003) (citing Fed. R. Bankr. P. 1009(a); *Martinson v. Michael (In re Michael)*, 163 F.3d 526, 529 (9th Cir. 1998)); *see also In re McComber*, 422 B.R. 334 (Bankr. D. Mass. 2010) (allowing amendment to switch between federal and state exemption schemes).[2] Should the debtor choose to amend exemptions, the court's discretion in disallowing the amendment is also

[1] Exemption rights are determined by a patchwork of state and federal statutes. The Bankruptcy Code itself contains a list of exemptions for various types of property, 11 U.S.C. § 522(d), but it allows states to opt out of this federal exemption scheme, *see* 11 U.S.C. § 522(b)(2). Because Washington has not done so, bankruptcy debtors there can elect to claim exemptions under either Washington law or the Bankruptcy Code. *Jefferies*, 468 B.R. at 378.

[2] Although not a statute, Rule 1009 was promulgated by the Supreme Court pursuant to authority granted by Congress under 28 U.S.C. 2075, and it has the force of law. *See American Universal Ins. Co., v. Pugh*, 821 F.2d 1352, 1354 (9th Cir. 1987).

quite limited. *In re Arnold*, 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000) ("[t]he bankruptcy court has no discretion to disallow amended exemptions, unless the amendment has been made in bad faith or prejudices third parties."); *In re Gray*, 523 B.R. 170 (B.A.P. 9th Cir. 2014).

Determining the proper amount of an exemption is a crucial piece of a bankruptcy case. Only after the nature and extent of the estate's property is finally determined, does the Bankruptcy Code authorize the Trustee to collect and reduce to cash the remaining non-exempt property for distribution to creditors. *See* 11 U.S.C. 704(a)(1); *In re Vandeventer*, 368 B.R. 50, 53 (Bankr. C.D. Ill. 2007) ("a trustee is limited to collecting and reducing to money 'property of the estate'"). Debtors may then use the exempt property to embark on their post-bankruptcy lives.

Below, Trustee sought to malign the debtor with the remarkable assertion that, by seeking her full property exemption, "the Debtor in this case is not seeking a fresh start, but a head start." (ER 529.) Needless to say, it is not a "head start" to give a debtor the same exemption that every other debtor in Washington is entitled to receive. And in any event, the elderly debtor here, who has now lost her longtime home with little to show for it, has received neither a fresh start nor a head start.

The Bankruptcy Code demands a different result.

II. DEBTORS ARE ENTITLED TO THE FULL VALUE OF EXEMPTIONS, REGARDLESS OF WHETHER THAT VALUE ARISES PRE- OR POST-PETITION.

Property exemptions are largely sacrosanct. They can only be limited or denied in very few circumstances outlined in the Bankruptcy Code. Because Section 522, which is to be construed in favor of debtors, does not specifically contemplate limits on exemptions against post-petition appreciation, Trustee's position must fail.

Below, Trustee attempted to justify its position by muddying some language from Section 522 and relying on this Court's *Gebhart* case. But both of those efforts miss the mark. The specific language cited by Trustee, 11 U.S.C. § 522(a)(2), is a definition that is not even triggered in this case. Further, the language Trustee cites in *Gebhart* is dicta that, as applied by Trustee, contradicts a long line of Ninth Circuit cases – including some relied upon by *Gebhart* itself. Importantly, neither *Gebhart* nor any of its Ninth Circuit predecessors have ever allowed a debtor's exemption to be limited in the way Trustee attempts to do here. On the contrary, several of them outright support the protection of full exemptions in this instance. *See Alsberg*, 68 F.3d at 315; *Woodson*, 839 F.2d at 621.

A. The Text and Scheme of Section 522 Protects the Sanctity of a Debtor's Full Exemption, Including Here.

Section 522 is designed to protect debtor's exemptions, not limit them, and courts must interpret its provisions in furtherance of that purpose. Applying those principles, it is clear that no language in the section supports Trustee's position.

The starting point for the Court's inquiry should be the statutory language of Section 522 itself. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). When parsing the exemption statute, "[i]t is well-established that § 522 is to be interpreted liberally in favor of debtors in order to facilitate their 'fresh start.' In addition, all parts of a statute are to be read as a whole, and in harmony with one another." *Culver v. Chiu (In re Chiu)*, 266 B.R. 743, 747 (B.A.P. 9th Cir. 2001) (cases cited); *see also Arrol v. Broach (In re Arrol)*, 170 F.3d 934, 937 (9th Cir. 1999); *Lampe v. Williams (In re Lampe)*, 331 F.3d 750, 754 (10th Cir. 2003). As described above, the Supreme Court has long recognized how crucial exemptions are to a debtor's fresh start.

A debtor's entitlement to a full homestead exemption is straightforward. As also described above, Section 522 entitles a bankruptcy debtor to exempt certain property from the bankruptcy estate. *See* 11 U.S.C. § 522(b)(1)-(3). Notably, Section 522(b) "does not contain a temporal element." *In re Cutignola*, 450 B.R. 445, 450 (Bankr. S.D.N.Y. 2011). Exempt property is generally not liable for the payment of pre-petition debts or administrative expenses of the estate. 11 U.S.C. §

522(c), (k); *Siegel*, 124 S. Ct. at 1192. Section 522(b)(3), by reference to state law, allows Washington debtors to exempt their homestead, up to a statutory maximum of $125,000. *See* 11 U.S.C. § 522(b)(3); RCW §§ 6.13.030, 6.13.070. Neither Section 522 nor RCW § 6.13.030 expressly permits a court to further limit the debtor's $125,000 exemption on the sole basis of when that equity is created.

The lack of specific statutory authorization for the bankruptcy court to limit the debtor's exemptions as proposed by Trustee soundly defeats his strategy. In *Siegel*, the Supreme Court examined whether a bankruptcy court could use its inherent authority to surcharge an exemption to pay administrative expenses arising out of the debtor's own fraud. *Siegel*, 124 S. Ct. at 1192. Applying the same straightforward analysis as in the preceding paragraph, the Supreme Court reasoned:

> [T]he Bankruptcy Court's "surcharge" was unauthorized if it contravened a specific provision of the Code. We conclude that it did. Section 522 (by reference to California law) entitled Law to exempt $75,000 of equity in his home from the bankruptcy estate. And it made that $75,000 "not liable for payment of any administrative expense.
> …
> The Bankruptcy Court thus violated § 522's express terms when it ordered that the $75,000 protected by Law's homestead exemption be made available to pay Siegel's attorney's fees, an administrative expense. In doing so, the court exceeded the limits of its authority under § 105(a) and its inherent powers.

Siegel, 134 S. Ct. at 1195. In choosing to uphold the debtor's exemption even in the face of his own fraud, the *Siegel* Court explained that the "Code's meticulous – not to say mind-numbingly detailed – enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Id*. at 1196. Similarly, here, the Bankruptcy Code's "mind-numbingly detailed" exemption scheme contains no authorization for the court to limit a debtor's exemption based on when the asset's value was created.

Even before *Siegel*, courts pointed to the absence of any temporal limitation in Section 522 to allow exemptions in homes acquired post-petition. *See Cutignola*, 450 B.R. at 449-50; *see also In re Walz*, 546 B.R. 836, 838-40 (Bankr. Minn. 2016). Both *Cutignola* and *Walz* involved inherited homes that entered the bankruptcy estate as after-acquired property under Section 541(a)(5). Because Section 522(b)(1) broadly allows debtors to apply exemptions against estate property, without temporal limitations as to when that property entered the estate, the courts allowed the exemptions. *Id*. This result makes practical sense because it would be unfair to prohibit debtors from exempting property they did not even know was coming.

In order to overcome the lack of a temporal limitation here, Trustee has reached for statutory authority in the definition of "value" at Section 522(a)(2), (*see* ER.248-249,) but this definition is largely beside the point here. First,

perusing the use of the word "value" in Section 522, it is noteworthy that the term is not even used in the Bankruptcy Code's reference to state law exemptions, *see* 11 U.S.C. § 522(b)(3)(A), and throughout the lengthy section, "value" is only used in contexts that are not at issue here, (*see e.g.*, 11 U.S.C. § 522(d) (federal exemptions), (f) (lien avoidance).) Simply put, the definition of the word "value" is irrelevant here unless this case involves its use somewhere in Section 522, which it does not.[3]

The most frequent use of the word "value" is in the federal exemption scheme, but even that use would not support Trustee's interpretation. The federal exemption scheme (along with many state law schemes) defines a permissible exemption by the debtor's "interest," not by "equity" or "value." *See* 11 U.S.C. § 522(d). Thus, for example, the federal homestead exemption from Section 522(d)(1) applies to a "debtor's aggregate *interest*, not to exceed $15,000 in *value*, in real property" (emphasis added). The word "interest" is distinct from the word "value" or "equity." *In re Chesanow*, 25 B.R. 228, 229 (Bankr. D. Conn. 1982). "Interest" is a "a broad term encompassing many rights of a party, tangible, intangible, legal and equitable." *In re Maddox*, 713 F.2d 1526, 1530 (11th Cir. 1983). It "includes the right to possession, the right to redeem after default but

[3] The Washington exemption scheme has its own definition of "net value," RCW § 6.13.010(3), which is different from Section 522(a)(2) and also not invoked by the specific homestead exemption claimed by the debtor here, *see* RCW § 6.13.030(3).

prior to foreclosure (the 'equity of redemption'), and the right to make mortgage payments in the future and thus create a future equity." *In re Ricks*, 40 B.R. 507, 508 (Bankr. D.D.C. 1984); *see also Chiu*, 266 B.R. at 751 (word "interest" in Section 522(f) "does not limit the debtor's interest to only present interests or even to 'physical or monetary interests.'").

Under the federal exemption scheme, because the word "interest" is so much broader than the word "value," courts have long ago resolved the question of whether a debtor may exempt an interest greater than the mere equity existing on the petition date. For example, one of the leading cases on this issue is *Chesanow*, where the debtor was allowed to assert an exemption of up to $7,500 on a home that was underwater at the time of filing. *Chesanow*, 25 B.R. at 229-30. The value of the debtor's exemption arose not from equity – as there was none – but it instead "derives from the debtor's possession of his property, his contractual rights, vis-a-vis, his mortgage and his right to make mortgage installment payments and achieve an equity position in the future." *Id*. at 231. Other courts have similarly allowed debtors to exempt values beyond the mere equity existing at the time of filing. *See e.g.*, *Ricks*, 40 B.R. at 509 (debtor allowed to assert exemption of $4,256, even though "his share of the fair-market-value equity would [] be from $915 to $3,915"); *Viet Vu v. Kendall (In re Viet Vu)*, 245 B.R. 644, 647-48 (B.A.P. 9th Cir. 2000) (debtor claimed $75,000 exemption in underwater property, which was later

applied to post-petition appreciation); *In re Smith*, 315 B.R. 636, 637 (Bankr. D. Mass. 2004) (debtor's claimed homestead exemption of $300,000 in underwater property was uncontested).

Finally, even in the highly unlikely event that the definition of "value" in Section 522(a)(2) is relevant to this analysis, it is important to note that it too accounts for value created post-petition. By the express terms of this provision, a valuation can occur not just "as of the date of the filing of the petition," as noted by Trustee and the bankruptcy court, but also "with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate." 11 U.S.C. § 522(a)(2); *see also Walz*, 546 B.R. at 837. Because post-petition appreciation is classified as after-acquired property under Section 541(a)(6), *Gebhart*, 621 F.3d at 1211, it too would fall under this latter valuation standard, especially considering that Section 522 is to be construed in a way that favors full protection of exemptions.

In summary, there is no statutory basis to deny debtors their full statutory exemptions in situations like this. Here, the definition of "value" in Section 522(a)(2) is not even invoked by the debtor's Washington homestead exemption. To the extent the language from that definition could be extrapolated to the section as a whole, Trustee's interpretation of that language runs counter to the well-established rule that Section 522 is to be interpreted liberally in favor of the debtor.

This Court should reject that interpretation, and reinforce the statutory scheme of Section 522, which provides as much protection to exemptions as possible.

B. *Gebhart* And Its Predecessors Support Debtors' Full Exemptions, Not Trustee's Position.

To support his interpretation of Section 522 below, Trustee focused on out-of-context dicta from this Court's *Gebhart* decision. (*See* ER 241-42.) The truth is that *Gebhart* did not involve the exemption limits Trustee proposes here. At the end of the day, the debtors in some cases relied upon by *Gebhart* were even allowed to claim full property exemptions.

First, as the *Gebhart* Court described, its rule on postpetition appreciation expressly applies only "when the total [postpetition] fair market value of the property is in fact greater than the exemption limit at the time of filing." *Gebhart*, 621 F.3d at 1211. By describing its rule in these terms, the court implicitly recognized that debtors would still be able to assert exemptions in amounts up to "the exemption limit" to protect increases in value due to postpetition appreciation – with only the equity beyond that limit inuring to the benefit of the estate. One of the decisions that *Gebhart* affirmed had likewise noted the possibility of amended exemptions when it reasoned that "[w]here the debtor claims a specific dollar amount as exempt, the debtor is bound by that amount and, *in the absence of an amendment*, cannot claim that the entire property is exempt." *Klein v. Chappell (In re Chappell)*, 373 B.R. 73, 81 (B.A.P. 9th Cir. 2007) (emphasis added).

The *Gebhart* Court could not have gone as far as Trustee suggests because the fact patterns from that case did not raise the issue at play here. The *Gebhart* decision was a consolidated case involving two sets of debtors, Gebhart and Chappell. As of their bankruptcy filing dates, the debtors claimed the following values and interests in their homes:

	Gebhart	**Chappell**
Fair Market Value at filing	$210,000.00	$350,000.00
Mortgage	$120,297.00	$328,488.75
Exemption	$89,703.00	$21,511.25
Statutory exemption limit	$100,000.00	$36,900.00

See Gebhart, 621 F.3d at 1208; *Chappell*, 373 B.R. at 75-76.[4] Notably, there was only approximately $10,000 - $15,000 remaining in equity before either debtor reached the exemption limit, and the trustee in each case believed that the fair market value had increased "substantially." *Gebhart*, 621 F.3d at 1208.[5] The *Gebhart* Court did not discuss whether the debtors were attempting to amend schedules in order to exempt the remaining entitlement. Instead, the court's focus was whether the bankruptcy estate had *any* control over the property at all. *See Gebhart*, 621 F.3d at 1209 (primary issue in that case is "whether the Trustee's failure to object to the homestead exemption claim within the period allowed by

[4] The Ninth Circuit did not discuss specific dollar amounts as to Chappell's bankruptcy case, but those numbers are available from the B.A.P. decision.
[5] It is un clear how much appreciation Gebhart faced, but the Chappell property had allegedly increased to a value of $550,000. *Chappell*, 373 B.R. at 75.

statute resulted in the homestead property being withdrawn from the bankruptcy estate at that point."). Even if the debtors were not entitled to receive postpetition appreciation beyond the exemption limits, nothing in the court's reasoning limited the debtor's ability to amend schedules and seek an exemption within those limits.

Second, some of the authority cited by *Gebhart* supports the debtor's full exemption claim here. In a similar fact pattern, this Court's *Alsberg* decision involved a home that actually had negative equity in it at the time of filing (fair market value of $259,000, a mortgage balance of $225,125, and tax liens of approximately $86,000). *Alsberg*, 68 F.3d at 313. The following year, the debtor was able to find a buyer for the property, and sold it at a price of $380,000. After the first mortgage had been paid off, and the remaining $115,000 was paid into escrow, the debtor amended his schedules and "for the first time, [] claimed a homestead exemption of $45,000." *Id*. at 314. Although the Ninth Circuit rejected the debtor's attempt to obtain the full proceeds, it unequivocally reaffirmed his right to assert a homestead exemption against the increased value. *See id*. at 315 ("When Alsberg subsequently filed a claim for a $ 45,000 homestead exemption after the sale of the property, he became entitled to $ 45,000 of the proceeds, and no more.").

Alsberg is not the only case cited in *Gebhart* where a debtor was allowed exempt post-petition appreciation to the limit. The debtors in *Vu* also commenced

bankruptcy with an underwater home, claiming a $75,000 homestead exemption against the property. *Vu*, 245 B.R. at 646. At some point in the proceedings, the value of the property appreciated well beyond that exemption, and the court allowed it to be sold subject to the debtor's exemption. *Id*. The B.A.P., while affirming the principle that post-petition appreciation benefits the estate, noted the result was fair to the debtors who were able to "preserve their exemption" by continuing to make mortgage payments on the property through the bankruptcy. *Id*. at 649.

Another bankruptcy court has looked to *Vu* to express skepticism of the "draconian view" advanced here by Trustee. *See In re Hoffpauir*, 258 B.R. 447, 452 n. 4 (Bankr. D. Idaho 2001). The *Hoffpauir* Court pointed out that "at least one of the authorities relied upon by the Panel in *Vu* cuts against [Trustee's] position, and supports the idea that a debtor still retains the right to assert an exemption against such 'appreciated' value." *Id*. at n. 11 (citing *Potter*, 228 B.R. at 424 ("Except to the extent of the debtor's potential exemption rights, post-petition appreciation in the value of property accrues for the benefit of the trustee.")).

Even this Court's *Hyman* decision, often cited by many courts including *Gebhart*, was concerned about protecting a debtor's full exemption. After deciding that post-petition appreciation benefits the estate, the *Hyman* Court refused to

allow the debtor to reap more of that appreciation value than the exemption limit. *In re Hyman*, 967 F.2d 1316, 1321 (9th Cir. 1992). The Court reasoned that this approach also protected the debtor's exemption from post-petition depreciation by concluding, "[t]he policies of both federal and state law (as well as the interest in simplifying bankruptcy estate administration) are best served if the debtor is *guaranteed the full exemption amount* on the date of sale, regardless of the vicissitudes of the real estate market or the timing of the sale." *Id*. (emphasis added).[6]

Finally, even cases adopting similar positions as *Gebhart* and *Hyman* on post-petition appreciation still routinely qualify that rule by the debtor's potential new exemptions. *See In re Orton*, 687 F.3d 612, 619 (3d Cir. 2012) ("the estate is entitled to any appreciation in the asset's value beyond the amount exempted."); *Stoebner v. Wick (In re Wick)*, 276 F.3d 412, 415 (8th Cir. 2002) ("The Bankruptcy Court properly granted the estate one-third of the options' appreciated value, minus the debtor's exemption."); *Potter*, 228 B.R. at 424; ("Postpetition appreciation in the value of property, except to the extent of the debtor's potential exemption rights

[6] One other decision cited by *Gebhart* did not involve post-petition appreciation, but a property that wrongly claimed as joint tenancy instead of community property. To the extent that any lessons can be gained from that case, it is noteworthy that the debtor was still entitled a full homestead exemption. *In re Reed*, 940 F.2d 1317, 1321 (9th Cir. 1991) (debtor received full $45,000 homestead exemption).

pursuant to 11 U.S.C. § 522, accrues for the benefit of the trustee…"); *In re Musick*, No. 03-13950, 2005 Bankr. LEXIS 3458, at *8 (Bankr. S.D. Ohio Apr. 28, 2005) ("With the exception of a debtor's potential exemption rights, any appreciation in value of estate property accrues for the benefit of the trustee.").

This qualification is important. As logically interpreted by a district court in New Jersey analyzing this precise issue, "[t]he *Orton* and *Gebhart* courts both held that post-petition appreciation was property of the estate and, therefore, may properly be exempted by a debtor." *In re Morgan*, No. 16-614, 2017 U.S. Dist. LEXIS 14210, at *12 (D.N.J. Feb. 1, 2017) (allowing a debtor to exempt post-petition appreciation in homestead).

In the end, *Gebhart* provides no support for Trustee's position because the *Gebhart* Court did not actually curtail the debtor's exemptions as Trustee seeks to do. On the contrary, the cases relied upon by *Gebhart*, along with cases adopting similar holdings, are routinely (and rightly) protective of a debtor's full exemptions.

C. This Court's *Woodson* Decision Generally Permits Debtors to Amend Exemptions For Post-Petition Changes in Value.

Trustee's imprecise reading of Section 522 and the *Hyman*/*Gebhart* doctrine clouds the otherwise axiomatic view that debtors are allowed to assert exemptions against post-petition changes in value. *See* 5 Collier on Bankruptcy ¶ 522.03[2] at 522-23 (16th ed.) ("when exemptions are claimed, the fact that the value of the

property that the debtor seeks to exempt has changed since the filing of the petition will not affect the amount of property that the debtor may exempt.").

Time and again, courts (including this one) have allowed debtors to exempt post-petition appreciation in other contexts. For example, in 1988, this Court wrestled with exemptions in the context of life insurance proceeds. *See Woodson*, 839 F.2d 610. The *Woodson* debtor filed Chapter 11 bankruptcy, exempting the full value an unmatured life insurance contract on his wife pursuant to Cal. Code Civ. Proc. § 704.100(a). The value of this life insurance contract promptly skyrocketed when, three days later, his wife died of brain cancer and he became entitled to over $1 million in benefits. *Id*. at 611-612. Although the debtor attempted to argue that the entire post-petition increase was exempt, this Court ultimately held a more limited exemption was applicable as to the proceeds (as opposed to the unmatured contract), and it remanded the case to determine how much of the proceeds could be exempted under Cal. Code Civ. Proc. § 704.100(c). *Id*. at 617-620, 621. *Woodson* provides an especially useful analogy to this case because, like the after-acquired equity here, *Woodson* also involves an interest that is considered after-acquired property under the Bankruptcy Code. *Compare Woodson*, 839 F.2d at 617 (noting that the property entered the estate pursuant to Section 541(a)(5)) *with Gebhart*, 621 F.3d at 1211 (post-petition appreciation entering estate pursuant to Section 541(a)(6)).

Although this Court's *Woodson* decision expressly departed from a Fourth Circuit case, it is notable that both cases cut against Trustee's position here. In *BancOhio Nat'l Bank v. Walters*, the joint debtors (husband and wife) initially omitted their interest in life insurance proceeds from their bankruptcy schedules. 724 F.2d 1081, 1082 (4th Cir. 1984). As in *Woodson*, however, the value of those life insurance contracts promptly accelerated when, seven days after filing bankruptcy, their son died and they became entitled to benefits of approximately $140,380. The debtors subsequently amended their bankruptcy schedules, and the Court allowed them to assert exemptions against the life insurance proceeds on the basis that the contracts were unmatured at the time of filing. *Id*. (citing exemption from 11 U.S.C. § 522(d)(7)). But the debate between *Woodson* and *BancOhio* is *which* exemption applies to the post-petition proceeds, not *whether* an exemption applies at all. Trustee's position here would pull the rug out from both *Woodson* and *BancOhio*, and prohibit debtors from exempting *any* such life insurance proceeds.

There are other contexts where it also already clear that post-petition value remains subordinate to a debtor's exemption. For example, there is a multitude of cases concerning postpetition appreciation in equity arising from the reduction of mortgage balances in the controversial context of negotiated "carve-out agreements." These cases typically involve homes that were underwater as of the

petition date. The trustee and the mortgage company will cut a deal to short sell the home, and carve out a nominal amount to distribute to unsecured creditors. Because these homes were underwater on the petition date, the value created in these transactions occurs solely post-petition. However, as controversial as this practice is, *see e.g.*, *In re Bird*, — B.R. —, 2017 Bankr. LEXIS 4071 (B.A.P. 10th Cir. Nov. 30, 2017), *In re KVN Corp.*, 514 B.R. 1, 7 (B.A.P. 9th Cir. 2014), it is uncontroversial that, at a minimum, the debtor is able to assert exemptions against the value that is created postpetition, *In re Wilson*, 494 B.R. 502, 506 (Bankr. C.D. Cal. 2013) (value created by postpetition short sale that included a distribution to the estate was an exemptible interest); *see also In re Mannone*, 512 B.R. 148, 153-54 (Bankr. E.D.N.Y. 2014) (same).

Other common instances where debtors can amend exemptions include those when valuations were not known at the time of filing the case, but were later determined upon liquidation. *In re Lopez*, No. 03-40205, 2005 Bankr. LEXIS 3037, at *4-6 (Bankr. D. Idaho Sep. 18, 2005) (debtors entitled to file amendment to exempt settlement proceeds of legal claim, the value of which was uncertain on the day of petition); *In re O'Brien*, 443 B.R. 117, 131-32 (Bankr. W.D. Mich. 2011) (amending schedules to reflect subsequent tax refunds). These common practices would be disrupted entirely if Trustee's rule were adopted.

In its decision, the district court below relied upon four other cases in contexts outside the *Gebhart* line of authority, but none of those cases addressed exemption values. For example, in *Jacobson*, the debtors were initially entitled to their full homestead exemptions, but that lost entitlement due to a state law requirement that they reinvest the exempt proceeds within six months of receipt. *In re Jacobson*, 676 F.3d 1193, 1199 (9th Cir. 2012). The *Gitts* case is entirely silent about exemption values, but ultimately allowed the debtors to claim their Washington homestead exemption based on a post-petition filing of a declaration. *In re Gitts*, 116 B.R. 174, 180 (B.A.P. 9th Cir. 1990); *see also Myers v. Matley*, 318 U.S. 622, 627-28 (1943) (same issue under Nevada law); *White v. Stump*, 266 U.S. 310 (1924) (same issue under Idaho law). None of this authority undoes this Court's approach in *Woodson*, which should control here.

In the end, just as with any other kind of estate property, Section 522 entitles debtors to exempt post-petition appreciation. This Court's precedent, whether through *Gebhart* and its predecessors, or through *Woodson*, demand that same result. Only when debtors receive full exemptions can they truly achieve the fresh start promised by the Bankruptcy Code.

CONCLUSION

For the above reasons, *amici curiae* ask this court to reverse the decision of the district court.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Amici hereby states that there are no related cases in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,205 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Ninth Circuit by using the appellate CM/ECF system on December 12, 2017. 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.

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