No. 08-998

IN THE

Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Interest Of *Amicus Curiae*

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,400 consumer bankruptcy attorneys nationwide. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.[1]

NACBA has participated as *amicus* in various courts seeking to protect the rights of consumer bankruptcy debtors and advocates nationally on issues that cannot adequately be addressed by individual member attorneys. Among other things, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA and its membership have a vital interest in the resolution of the question presented, because the calculation of a debtor's "projected disposable income" is of fundamental importance to the administration of Chapter 13 cases, and member attorneys represent

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

individuals in a large portion of all Chapter 13 cases filed. Through its educational and representational functions, NACBA seeks to ensure the predictability of Chapter 13 relief for both consumer bankruptcy debtors and the consumer bankruptcy bar.

Statement

A. Chapter 13 Plan Confirmation Before BAPCPA

1. *Pre-BAPCPA Statutory Provisions.* Before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 ("BAPCPA"), Section 1325(b)(1) of the Bankruptcy Code precluded a court from confirming a proposed Chapter 13 plan over the objection of the trustee or a creditor,

> unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's *projected disposable income* to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1)(B) (2000) (emphasis added). Section 1325(b)(2) defined "disposable income" to mean "income which is received by the debtor and which is not reasonably necessary to be expended." 11 U.S.C. § 1325(b)(2)(B) (2000). Although the Code did not further define "reasonably necessary" expenses, a bankruptcy debtor was required to list monthly income and expenses on Schedules I

("Current Income of Individual Debtor(s)") and J ("Current Expenditures of Individual Debtor(s)"). Fed. R. Bankr. P. Official Form 6, Schedules I-J (2004).

2. *Pre-BAPCPA judicial applications.* Under this statutory regime, "'disposable income' was calculated by subtracting the debtor's monthly expenses (reported on Schedule J) from the debtor's monthly income (reported on Schedule I)." *In re Boyd*, 414 B.R. 223, 230 (Bankr. N.D. Ohio 2009); *see also In re Reeves*, 405 B.R. 135, 138 (Bankr. D. Del. 2009); Fed. R. Bankr. P. Official Form 6, Schedule J (2004). Upon objection to a plan, however, bankruptcy courts enjoyed wide discretion to determine, on a case-by-case basis, which items listed in a debtor's Schedule I could be properly counted as income[2] and the extent to which Schedule J expenses were reasonably necessary.[3] Accordingly,

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[2] *See, e.g., In re Killough*, 900 F.2d 61, 66 (5th Cir. 1990) (per curiam) (overtime is not income); *In re Taylor*, 212 F.3d 395, 397 (8th Cir. 2000) (pension funds constitute income); *Watters v. McRoberts*, 167 B.R. 146, 147–48 (S.D. Ill. 1994) (personal injury recovery is income); *In re Ferretti*, 203 B.R. 796, 800 (Bankr. S.D. Fla. 1996) (personal injury proceeds are not income).

[3] *See, e.g., In re Watson*, 403 F.3d 1, 8 (1st Cir. 2005) (private school tuition not a reasonable expense); *In re Woodman*, 379 F.3d 1, 4 (1st Cir. 2004) (monthly cigarette expenditure reasonably necessary); *In re Taylor*, 243 F.3d 124, 129 (2d Cir. 2001) (whether pension contributions represent income or reasonably necessary expenses depends on "the facts of each individual case"); *In re Lynch*, 299 B.R. 776, 779–80 (W.D.N.C.
(continued…)

the highly discretionary pre-BAPCPA "disposable income" standard led to disparate, unpredictable results among bankruptcy courts.[4]

Once disposable income was determined in this manner, courts calculated "*projected* disposable income" by multiplying the debtor's monthly "disposable income" by the number of months in the plan. *See, e.g., In re Gonzales*, 157 B.R. 604, 613 (Bankr. E.D. Mich. 1993) (describing judicial discretion over "disposable income," followed thereafter by multiplication); *In re Campbell*, 198 B.R. 467, 474 (Bankr. D.S.C. 1996) (stating that the "court should determine projected disposable income by calculating a debtor's present monthly income and expenditures and extending those amounts over the life of the plan" (citations omitted)). That figure represented the amount the debtor was obliged to pay all creditors over the life of the plan.

B. BAPCPA's Revisions to Chapter 13

1. "[S]ection 1325(b) was substantially amended by the 2005 amendments to the Bankruptcy Code."

2003) (holding Catholic school tuition for debtors' children was not reasonably necessary, and stating that matter must be resolved "on a case-by-case basis, heavily dependent on the facts").

[4] *Compare, e.g., In re Hagel,* 184 B.R. 793, 796–99 (B.A.P. 9th Cir. 1995) (social security benefits constitute income) *with In re Brady*, 86 B.R. 616, 617 (W.D. Mo. 1987) (social security is not income).

8 *Collier on Bankruptcy* ¶ 1325.08[1], pp. 1325–53 (15th ed. rev. 2009). Section 1325 now provides that a court may not confirm a plan over the objection of the trustee or an unsecured creditor,

> unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's projected disposable income to be received in the [~~three–year~~] *applicable commitment* period beginning on the date that the first payment is due under the plan will be applied to make payments *to unsecured creditors* under the plan.

11 U.S.C. § 1325(b)(1)(B) (2009) (added language in italics; removed language in strike-out and brackets). Significantly, BAPCPA restricts a debtor's "projected disposable income" to repayment of unsecured creditors only.

In addition, BAPCPA fundamentally redefines a Chapter 13 debtor's "disposable income." Section 1325(b)(2) now provides, in relevant part, "[f]or purposes of this subsection, the term 'disposable income' means *current monthly income* received by the debtor . . . less amounts reasonably necessary to be expended." 11 U.S.C. § 1325(b)(2) (emphasis added). In turn, BAPCPA defines "current monthly income" as "the average monthly income from all sources that the debtor receives . . . derived during the 6-month period" prior to filing the bankruptcy petition. 11 U.S.C. § 101(10A)(A)(i); *see also id.* § 101(10A)(A)(ii) (if debtor does not file Schedule I, six-month lookback period begins when court determines debtor's current income). This figure

excludes certain income, such as social security benefits. 11 U.S.C. § 101(10A)(B).[5]

On the expense side, for a debtor whose "current monthly income" is above the median monthly income in the debtor's state for the debtor's household size (known as "above-median debtors"), BAPCPA provides that the amounts reasonably necessary to be expended "shall be determined in accordance with subparagraphs (A) and (B) of [S]ection 707(b)(2)." 11 U.S.C. § 1325(b)(3). Section 707(b)(2), in turn, provides deductions for standardized "expense amounts specified under the National and Local Standards . . . issued by the Internal Revenue Service for the area in which the debtor resides," secured debts, and other specifically permitted expenses. 11 U.S.C. § 707(b)(2)(A). Departures from this scheme are expressly restricted, *see* 11 U.S.C. § 707(b)(2)(A)(ii)(II)–(V), and require the debtor to demonstrate "special circumstances" with prescribed documentation signed under oath, 11 U.S.C. § 707(b)(2)(B). Form 22C provides entry lines for the specified deductions and directs the above-median debtor to calculate "disposable income" by subtracting those deductions

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[5] Under Federal Rule of Bankruptcy Procedure 1007(b)(6), all Chapter 13 debtors calculate "current monthly income" on Form 22C, entitled "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income." In addition, Chapter 13 debtors must still file Schedules I and J. *See* 11 U.S.C. § 521(a).

from "current monthly income." *See* Fed. R. Bankr. P. Official Form 22C.

2. BAPCPA thus amended Section 1325(b) to provide a fixed, bright-line formula to calculate "disposable income." *See* 8 *Collier on Bankruptcy*, *supra*, ¶ 1325.08[1], pp.1325–53. On the income side of the equation, Congress prescribed a historical average as the best approximation of "current monthly income" and excluded certain types of income that bankruptcy courts had previously included. *See, e.g.,* 11 U.S.C. § 101(10A) (excluding Social Security payments and reversing cases like *In re Hagel,* 184 B.R. 793). On the expense side, Congress established standard deductions for above-median debtors and specified the narrow circumstances in which departures from the standardized amounts are permitted. *See* 11 U.S.C. § 1325(b)(3). The changes BAPCPA made to the definition of "disposable income" on both the income and expense sides reflect Congress's rejection of the broad discretion courts exercised under the pre-BAPCPA regime in favor of a prescribed formula that produces more uniform and predictable results.[6]

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[6] BAPCPA adopted bright-line rules to restrict pre-existing judicial discretion in other areas as well. *See e.g.,* 11 U.S.C. §§ 707(b) (means test), 511 (setting interest rates on tax claims), 362(b) (exceptions to automatic stay), 362(c)(3),(4) (limiting applicability of automatic stay for repeat filers).

C. Proceedings Below

1. On October 16, 2006, respondent filed a petition in the United States Bankruptcy Court for the District of Kansas ("bankruptcy court") seeking relief pursuant to Chapter 13. The petition included Form B22C (now designated 22C) and other schedules.[7] Within the six-month period before her filing, respondent received a buyout from her former employer for $11,990.03 in April 2006 and $15,356.42 in May 2006. As a result, Form 22C indicated Lanning's "current monthly income" as $5,343, making her an above-median debtor in Kansas. Subtracting the permitted deductions from this value yielded a monthly "disposable income" of $1,114.98.

Although respondent's Form 22C indicated substantial "disposable income," her plan proposed monthly payments of only $144 (initially for 36 months), an amount reflecting her rough net income according to Schedules I and J. The Trustee—petitioner herein—acknowledged that respondent could not afford to fund a $1,114.98-per-month plan, but still, at his discretion, objected to confirmation of the proposed plan, arguing that Section 1325(b) requires respondent either to repay her unsecured

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[7] Respondent did not avail herself of the option to reset the period for determining "current monthly income." *See* 11 U.S.C. § 101(10A)(A)(ii).

creditors in full or commit the "disposable income" calculated on Form 22C to repayment. Pet. App. 58.[8]

2. These facts do not present a paradigmatic Chapter 13 case and suggest that respondent's inflated "disposable income" could easily have been avoided. Had respondent, or her counsel, waited only several more weeks before filing her petition, her "current monthly income" would not have been distorted by the one-time severance payments from her former employer. Respondent's plan, statement of financial affairs, and the claims register do not indicate that an immediate bankruptcy filing was necessary to avert a foreclosure, repossession of an automobile, or any other collection activity presenting imminent harm.

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[8] The Trustee's objection to respondent's Chapter 13 plan—and corresponding reliance on the plain-language approach to Section 1325—is contrary to the position taken by trustees in similar cases, many of whom have advocated a return to the former discretionary practices and using Schedules I and J to determine disposable income. *See e.g.*, *In re Kibbe*, 361 B.R. 302, 306–07 (B.A.P. 1st Cir. 2007); *In re Austin*, 372 B.R. 668, 672 (Bankr. D. Vt. 2007); *In re Guzman*, 345 B.R. 640, 644–45 (Bankr. E.D. Wis. 2006). The decision to object, moreover, is within the discretion of the Trustee, who could have accepted respondent's plan as the maximum repayment she could afford. *See* 8 *Collier on Bankruptcy* ¶ 1325.08 [5][a], pp. 1325–66 (15th ed. rev. 2009) (reasoning that neither trustees nor unsecured creditors have an "interest in objecting to plans where debtors are paying all that they can truly afford").

Moreover, even if her filing was urgent, respondent could have sought to modify the start date of the six-month "lookback" period for calculating "current monthly income." *See* 11 U.S.C. § 101(10A)(A)(ii) (pegging start date of lookback period to date "on which current income is *determined by the court*" rather than to date petition is filed, where debtor does not file Schedule I with petition (emphasis added)). Alternately, respondent could have filed for, or converted to, Chapter 7 relief, 11 U.S.C. § 706(a), and argued that the buyout constituted special circumstances justifying an adjustment to her "current monthly income," *see* 11 U.S.C. § 707(b)(2)(B).[9] Even if successful in this case, respondent would appear to be better served by converting to Chapter 7 because (1) she has no arrears to cure or secured debts that require modification in Chapter 13; and (2) she would no longer have to pay any post-petition income to her unsecured creditors.

3. In determining whether respondent's Chapter 13 plan committed to unsecured creditors all of her "projected disposable income," 11 U.S.C. § 1325(b)(1)(B)—and could, therefore, be confirmed

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[9] Respondent also could have argued that her severance payments did not constitute income "derived" during the six-month lookback period and, thus, were not part of her "current monthly income." *See* 11 U.S.C. § 101(10A). *Cf.* 8 *Collier on Bankruptcy* ¶ 507.05 [5][b], pp. 507–38 (15th ed. rev. 2009) (citing cases holding that severance benefits are "earned" under 11 U.S.C. § 507(a)(4) "pro rata over the period of the employee's employment").

over the Trustee's objection—the bankruptcy court concluded "that the term 'projected' is a forward-looking concept that . . . requires [ ] this Court to consider at confirmation the debtor's actual income as it is reported on Schedule I . . . , as well as any reasonably anticipated changes in that income." Pet. App. 69. The bankruptcy court thus construed Section 1325(b) to "presume that the number resulting from [Form 22C] is the debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in circumstances." *Id.* at 73.

Comparing respondent's Form 22C "current monthly income" to the monthly income reflected on her Schedule I (which reflects the debtor's estimate of her monthly income at the time the petition is filed), the bankruptcy court observed that "her [Form 22C] 'current monthly income' . . . was skewed upwards" by the pre-petition buyout from her former employer. Pet. App. 56–57. As a result, the bankruptcy court identified respondent's Schedule I as the proper measure of her "projected disposable income." *See id.* at 80. Without considering the alternatives available to the debtor—such as resetting the lookback period—the bankruptcy court reasoned that applying Form 22C would produce the "absurd" result that debtors, like respondent, suffering a sudden and significant decrease in income would be prevented "from ever being able to file a feasible and confirmable Chapter 13 repayment plan." *Id.* at 70–71. Because the bankruptcy court applied respondent's Schedule I income, subtracting her Form 22C expenses resulted in a negative

number.[10] The court thus overruled petitioner's objection and permitted respondent to elect to pay any amount to unsecured creditors over a five-year period. *See id*. at 80.

Reviewing only the income side of respondent's "projected disposable income," both the United States Bankruptcy Appellate Panel of the Tenth Circuit and the United States Court of Appeals for the Tenth Circuit affirmed. Pet. App. 51–53, 31–32.

Summary Of Argument

I. BAPCPA's plain language requires a reviewing court to calculate "projected disposable income" by multiplying "disposable income"—"current monthly income" less standardized deductions—across the life of the Chapter 13 plan. First, the ordinary meaning of "projected" contemplates multiplication of "disposable income." Second, the structure of Section 1325(b) links "projected disposable income" to the adjacent definition of "disposable income" in a manner that makes clear that the word "projected" does not change the meaning of "disposable income." Finally, Section 1325(b)(3)'s command that an above-median debtor's authorized deductions reflect established IRS standards (and other specified expenses) subject

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[10] The bankruptcy court determined that Section 1325(b)(3) required above-median debtors, such as respondent, to "deduct from income the expenses they itemize on Form B22C." Pet. App. 75.

only to express exceptions confirms both BAPCPA's creation of a bright-line calculation of "projected disposable income" and Congress's decision that any deviations be clearly authorized by the statutory text.

The Tenth Circuit's "forward-looking" approach to calculating "projected disposable income"—which permits a reviewing court to set aside Congress's definition of "disposable income" in calculating the "projected disposable income" available to pay unsecured creditors—violates BAPCPA's plain language. First, the approach inserts into Section 1325(b)(2) a rebuttable presumption that Congress did not adopt. Second, by permitting courts to displace Congress's six-month lookback method for calculating "disposable income" with different income data, the forward-looking approach reduces Section 1325(b)(2)'s careful definitions of "current monthly income" and "disposable income" to mere surplusage. Finally, viewed in context, the statutory terms relied upon as support for the forward-looking approach are fully consistent with the plain-language approach.

II. While the language chosen by Congress is conclusive, additional indicia of congressional intent buttress the plain-language approach to calculating "projected disposable income." The relationship that the plain-language approach posits between the term "projected" and the defined phrase "disposable income" mirrors the pre-BAPCPA judicial method for generating "projected disposable income": the debtor's "disposable income" was "projected" by multiplying the debtor's "disposable income" by the

duration of the plan. Signaling Congress's acceptance of this mode of calculation, BAPCPA largely retains the language of its predecessor provision, except to substitute Section 1325(b)(2)'s definition of "disposable income" for the judicial discretion used to establish that value before BAPCPA.

Although purporting to interpret "projected disposable income," the forward-looking approach, in practice, effects a judicial redefinition of "disposable income" to restore the pre-BAPCPA understanding of those terms. Under that approach, courts justify *rejecting* use of BAPCPA's six-month lookback period by misplacing reliance on certain statutory terms and phrases in Section 1325(b). Because Congress's redefinition of "disposable income" does not deprive those terms and phrases of meaning, they provide no basis to reinstitute judicial discretion over "disposable income" and undermine Congress's response to pre-BAPCPA judicial practice.

III. The plain-language approach vindicates Congress's deliberate choice to adopt a bright-line calculation of "projected disposable income." Congress anticipated that the rule it created could be overinclusive and underinclusive in particular applications by prescribing limited exceptions to permit a reset of the six-month lookback period on the income side and additional deductions in "special circumstances" on the expense side. The results of applying this approach are not absurd, but rather the product of rational policy choices made by Congress. If those choices prove unjust or

unworkable in practice, it is for Congress, not the courts, to rewrite the statute.

The forward-looking approach undercuts the policies—predictability and uniformity—supporting BAPCPA's creation of a clear rule. Moreover, in authorizing departures from BAPCPA's integrated bankruptcy regime, the forward-looking approach distorts calculations elsewhere in the statutory scheme, thereby threatening anomalous results.

IV. In the alternative, if the Court rejects the plain-language approach, it should adopt a forward-looking approach that minimizes deviations from BAPCPA's definition of "disposable income" on the income side. Because, on the particular facts of this case, the bankruptcy court did not include in its calculation of respondent's "projected disposable income" any income categories BAPCPA expressly excludes from "disposable income," and because the case does not provide a proper vehicle to question application of BAPCPA on the expense side, the Court could affirm.

Argument

I. The Plain Language of Section 1325 Precludes the Forward-Looking Approach to Calculating a Chapter 13 Debtor's "Projected Disposable Income."

"The starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). "It is well established that 'when the statute's

language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Here, BAPCPA plainly directs that an above-median debtor's "projected disposable income" is the value derived by multiplying "disposable income"—the debtor's "current monthly income" less permitted deductions—over the life of the plan. The Tenth Circuit's contrary forward-looking approach, under which courts may *dispense with* Congress's formula for calculating "disposable income" upon "a showing of a substantial change in circumstances," Pet. App. 32, ignores BAPCPA's clear command and improperly reads into the statute terms Congress chose not to adopt. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." (citation omitted)).

A. BAPCPA's plain language and structure tie "projected disposable income" to "disposable income" in a clear mathematical formula.

BAPCPA redefined the concept of "disposable income." On the income side, Section 1325(b)(2) requires calculation of the debtor's average monthly income for an historic six-month period, excluding specified sources of income. *See* 11 U.S.C. § 1325(b)(2) (relying on "current monthly income");

id. § 101(10A) (defining "current monthly income" as an historical average with specified exclusions). On the expense side, for above-median debtors, Congress specifically defined the allowable deductions from "current monthly income." *See id.* § 1325(b)(2) (subtracting from "current monthly income" "amounts reasonably necessary to be expended"); *id.* § 1325(b)(3) (defining "amounts reasonably necessary to be expended" according to IRS standards and other specified categories as provided in 11 U.S.C. § 707(b)(2)). In this way, BAPCPA eliminated the substantial discretion bankruptcy courts previously exercised in calculating a debtor's "disposable income." *See supra* pp. 3–7. And, by redefining "disposable income" in terms of historical income and standard deductions, Congress provided a "clear indication" of its intent to eliminate any pre-existing judicial practices to the contrary. *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998).

In Section 1325(b)(1)(B), Congress directed that the figure derived from applying its new definition of "disposable income" be "projected" to determine whether the court may approve a Chapter 13 plan over the objection of the trustee or an unsecured creditor. *See* 11 U.S.C. § 1325(b)(1)(B). As explained below, BAPCPA clearly links "projected" with the new definition of "disposable income" in a manner that equates "projected disposable income" with "disposable income" "projected" (or multiplied) over the plan period.

1. A common meaning of "projected" illustrates that Section 1325(b)(1)(B)'s use of that term is not meant to modify or supplant BAPCPA's definition of

"disposable income." *See United States v. Rodgers*, 466 U.S. 475, 479 (1984) ("We . . . start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.") (citation omitted). "Projected" is defined to mean, *inter alia*, "thrown or as if thrown or cast forward." *Webster's Third New International Dictionary*, at 1813 (1993). This understanding is particularly apt where, as here, the value to be "projected" is fixed or known in the past (*i.e.*, "current monthly income"). For example, the "projected" path of a straight line is simply the continuation of its past, known path. Congress's use of the word "projected" in connection with a fixed value—"disposable income" as Congress defined it—indicates that Congress intended that value to be "cast forward" over the life of the bankruptcy plan.

2. Reading the language and considering the structure of Section 1325 "as a whole," *United States v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007), further demonstrates that Congress intended "projected disposable income" to mean nothing more than "disposable income" "projected" or multiplied over the life of the plan. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme."). Section 1325(b)(2)'s definition of "disposable income" and Section 1325(b)(1)(B)'s use of "projected disposable income" are in "adjacent" provisions and "can be understood only with reference" to one another. *Atl. Research Corp.*, 551 U.S. at 135. "Bolstering the structural link, the text also [expressly] denotes a

relationship between the two provisions." *Id.* Specifically, Section 1325(b)(2) states that "disposable income" is defined "for the purposes of this subsection," *i.e.*, Section 1325(b). The only other mention of "disposable income" in the section is in the requirement that a debtor's "projected disposable income" be applied to repay unsecured creditors. 11 U.S.C. § 1325(b)(1)(B). Thus, if BAPCPA's definition of "disposable income" is to serve its structurally demonstrated purpose, it must provide the value that is "projected" to determine the amount a debtor must pay unsecured creditors over the life of the plan. *See, e.g., Cohen*, 523 U.S. at 220 (presuming "equivalent words have equivalent meaning when repeated in the same statute"). If "projected disposable income" is read instead as an "undefined and free-standing" phrase, *In re Austin*, 372 B.R. 668, 677 (Bankr. D. Vt. 2007), then Congress's new definition of "disposable income" loses its place in the statutory scheme.

3. Finally, BAPCPA's express delineation of "special circumstances" exceptions on the expense side supports reading "projected disposable income" as the value defined by "disposable income" (then "projected" into the future). *See Atl. Research Corp.*, 551 U.S. at 135. Section 1325(b)(3) includes a plain command, directing that "reasonably necessary" expenses "shall" be determined in accordance with provisions that also serve to determine whether a Chapter 7 debtor has engaged in abuse. 11 U.S.C. § 1325(b)(3) (referencing 11 U.S.C. § 707(b)(2)(A) and (B)). *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress's "use of a mandatory 'shall' . . . to

impose discretionless obligations"). Those provisions specify both expense amounts and expense categories, *see* 11 U.S.C. § 707(b)(2)(A)(ii), and also establish a method for the debtor to depart from the standard calculation upon a showing of "special circumstances," *id.* § 707(b)(2)(B) (outlining documentation necessary to establish "special circumstances, such as a serious medical condition or . . . active duty in the Armed Forces").

Section 1325(b)(3) and the expense provisions it references demonstrate that Congress, in drafting BAPCPA, knew how to authorize deviations from otherwise mandatory calculations to avoid unintended consequences. It is significant, therefore, that Congress chose not to authorize the same "special circumstances" deviation with respect to the income side of BAPCPA's formula for determining "disposable income." *Cf. Clay v. United States*, 537 U.S. 522, 528 (2003) ("When Congress includes particular language in one section but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Instead, Congress provided a different mechanism on the income side, permitting a debtor to seek a reset of the six-month lookback period, to run from the date the court determines the debtor's current income rather than from the filing of the petition. *See* 11 U.S.C. § 101(10A)(A)(ii).

B. The forward-looking approach violates BAPCPA's plain language.

The forward-looking approach construes Section 1325 to authorize, at the reviewing court's discretion, deviations from the precise calculations mandated by Congress. Under one version of this approach, courts read the concept of "projected disposable income" to "necessarily contemplate[] a forward-looking number" that "take[s] into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J." *In re Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008). Courts applying this approach reject Congress's definition of "disposable income" because it "does not take into consideration a debtor's current financial situation, which may have changed." *Id*. at 658–59.

Recognizing that this approach "renders the new definition of 'disposable income,' with its link to historic 'current monthly income,' nearly meaningless," Pet. App. 24, the Tenth Circuit adopted another version of the forward-looking approach, under which Congress's definition of "current monthly income" produces the presumptively correct value, subject to being "rebutted by showing a substantial change in circumstances," *id*. *See also In re Turner*, 574 F.3d 349, 356 (7th Cir. 2009) (holding that "disposable income" is a "starting point" subject to changes in circumstances). As the Tenth Circuit acknowledged, however, its approach "requires a certain disregard of the notion that Congress knows how to create a presumption when it intends one." Pet. App. 24.

That approach also deprives Congress's definition of any effect in all cases involving a "substantial change in circumstances." Moreover, taken in context, the statutory phrases that the Tenth Circuit and other courts rely upon to support the forward-looking approach cannot bear the weight placed upon them.

1. In defining the income side of "disposable income," Section 1325 includes no language of presumption or "special circumstances," and a reviewing court cannot read additional terms into congressional text. *See, e.g., Lamie*, 540 U.S. at 538 (rejecting attempt to "read an absent word into the statute"). And "BAPCPA's changes to the Bankruptcy Code made it clear that Congress knows how to create a presumption." *In re Kagenveama*, 541 F.3d 868, 874 (9th Cir. 2008). For example, Congress expressly outlined circumstances under which a court "shall presume abuse exists" in the filing of a bankruptcy petition. *See* 11 U.S.C. § 707(b)(2)(A)(i). "When Congress includes particular language in one section but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Clay*, 537 U.S. at 528.

2. Given that Section 1325's plain language precludes a rebuttable presumption, the forward-looking approach improperly displaces Section 1325(b)(2)'s definition of "disposable income" in any case in which a debtor shows a "substantial change in circumstances." By permitting a reviewing court to ignore the income figure—a historical average—generated by application of the six-month lookback

period and to consider data not expressly authorized by Congress, and even expressly prohibited by Congress, the forward-looking approach violates the basic "assumption that Congress intended each of its terms to have meaning." *Bailey*, 516 U.S. at 145.

The Government posits that the forward-looking approach reserves a role for Section 1325(b)(2) in describing the basic types of income that may be included in calculating "projected disposable income." *See* Brief for the United States as Amicus Curiae on Pet. for a Writ of Certiorari (No. 08-998), at 11. *See also In re Kibbe*, 361 B.R. 302, 311–12 (B.A.P. 1st Cir. 2007); 11 U.S.C. § 101(10A) (excluding, *inter alia*, Social Security benefits). This alternative reading is unpersuasive because BAPCPA did far more than merely identify the types of income properly considered as part of "disposable income" and, by extension "projected disposable income." It mandates a *method* of calculating income that relies on historic income. *See* 11 U.S.C.§ 101(10A). Even under the Government's reading, therefore, the forward-looking approach authorizes a court to nullify this historical approach.

3. The Tenth Circuit and like-minded courts support their forward-looking construction by reference to a series of Section 1325's terms and phrases: (1) "projected"; (2) "as of the effective date of the plan"; and (3) "to be received." *See, e.g.*, Pet. App. 17–18, 24. Their reliance is misplaced. "In expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (citation omitted).

Viewed in context, the terms are completely consistent with the plain-language approach.

"*Projected*." Most fundamentally, the forward-looking approach concludes that "[i]t would be inappropriate to give heed only to the historical perspective set forth in the term 'disposable income,' as this would effectively write the term 'projected' out of § 1325(b)." *In re Kibbe*, 361 B.R. at 312. *See also In re Jass*, 340 B.R. 411, 415–6 (Bankr. D. Utah 2006). Under the plain-language approach, however, the term "projected" establishes the method of calculation (*i.e.*, multiplication) by which the historically based "disposable income" value is "cast forward" into the future so that it may "be applied to make payments to unsecured creditors" over the length of the plan. 11 U.S.C. § 1325(b)(1)(B).

Moreover, "[t]hose courts that argue Congress intended something more when it referred to 'projected disposable income' in § 1325(b)(1)(B) fail to address the fact that Congress defined 'disposable income' subsequently in § 1325(b)(2)." *In re Kagenveama*, 541 F.3d at 874 (citation omitted). *See also Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Those courts also fail to justify elevating "one word . . . in importance so as to gut an entire" subsection. *In re Hanks*, 362 B.R. 494, 499 (Bankr. D. Utah 2007), *abrogated by In re Lanning*, 545 F.3d 1269. *See also Kelly*, 479 U.S. at 43.

"*As of the effective date of the plan*." Section 1325(b)(1) provides that "the court may not approve the plan unless, *as of the effective date of the plan*," the plan commits all "projected disposable income" to unsecured creditors. 11 U.S.C. § 1325(b) (emphasis added). The Tenth Circuit observed that "[t]he date of plan confirmation is practically certain to be later than the date on which the petition is filed, and it is the filing date that starts the backward-looking assessment of 'current monthly income.'" Pet. App. 25. But the court concluded from this simple truth that the "effective date" phrase "suggests consideration of the debtor's actual financial circumstances as of the effective date." *See id.*

The Tenth Circuit's reasoning reflects an over-reading of the "effective date" language. The phrase simply directs the bankruptcy court to ensure that, starting on the plan's effective date, all of the debtor's "projected disposable income" is committed to paying unsecured creditors. The "effective date" language has nothing to do with the manner by which Congress intended income to be calculated; rather, the language establishes a precondition to a court's approval of the plan. The fact that a plan is not likely to be confirmed until some time after the petition is filed provides no basis for concluding that Congress intended to plug that gap by dispensing with the historic calculation it mandated in favor of considering the debtor's "actual financial circumstances" at the time of confirmation. Congress was well aware when it defined "current monthly income" as an historical average that the plan's

confirmation date would always postdate the petition. *See* 11 U.S.C. § 1324(b).

Moreover, as noted above, Congress did not limit the historic calculation to the six months preceding the filing of the petition, but permits a debtor to petition the court to reset the lookback period to include months that postdate the petition by appealing to the court's discretion over the filing of Schedule I. *See* 11 U.S.C. § 101(10A)(A)(ii) (lookback date runs from date court determines current income where debtor does not file Schedule I); *see also, e.g., In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009) (granting debtor's motion to excuse filing of Schedule I and resetting lookback period); *In re Dunford*, 408 B.R. 489 (Bankr. N.D. Ill. 2009) (resetting period where debtor's income declined significantly prior to petition).

"*To be received*." Finally, the Tenth Circuit rejected the plain-language approach as rendering superfluous Section's 1325(b)(1)(B)'s reference to "projected disposable income *to be received*." Pet. App. 25 (emphasis added)). The court reasoned that, where the debtor's income decreases during the six-month lookback period, the debtor has "no realistic expectation" of actually "receiv[ing]" the level of income indicated by "current monthly income." *Id*. at 27.

The Tenth Circuit's position is flawed. Under either approach—plain-language or forward-looking—"to be received" works in tandem with the word "projected." Under the forward-looking approach, the amount "to be received" reflects the

approach's assumption that "projected" is a future-oriented concept that contemplates taking into account changed circumstances. Likewise, under the plain-language approach, "to be received" reflects Congress's assumption that the debtor's future income is best determined by reference to historic income. Thus, the phrase cannot distinguish the two approaches. Instead, the Tenth Circuit's interpretation appears to reflect nothing more than a disagreement with Congress's choice of "historical income as a 'better' predictor of 'projected disposable income.'" Pet. App. 27 (citation omitted). That the debtor's actual income during the plan period may deviate from the amount of "projected disposable income"—whether calculated by reference to "current monthly income" or some other method—does not render the phrase "to be received" superfluous because that phrase is part of a necessarily predictive judgment.

In sum, the forward-looking approach effectively reads an entire subsection—Section 1325(b)(2)—out of BAPCPA. The asserted textual justification for doing so—the supposed meaning of isolated terms and phrases taken out of context—ignores the rule that statutory construction may "not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law." *Kelly*, 479 U.S. at 43 (citation omitted). At any rate, the plain-language approach, which is faithful to Congress's definition of "disposable income," is perfectly consistent with the remainder of Section 1325.

II. Additional Indicia of Congressional Intent Confirm the Plain-Language Approach to "Projected Disposable Income."

The history of the calculation of "projected disposable income" under Chapter 13 "reinforces" the plain reading of BAPCPA. *See Cohen*, 523 U.S. at 221 (reviewing history of Bankruptcy Code's fraud exception to confirm statutory construction). This "tool of construction" "informs [the] understanding of the language of the Code," *Hartford Underwriters Ins. Co.*, 530 U.S. at 10, illustrating that the plain-language approach conforms with that part of prior practice that Congress did not intend to change.

A. The plain-language approach is consistent with the pre-BAPCPA method of projecting "disposable income."

Before BAPCPA, Chapter 13 similarly permitted a court to confirm a debtor's challenged repayment plan if the plan provided for payment of all of the debtor's "projected disposable income." *See supra* p. 2. In practice, courts determined a debtor's "projected disposable income" by first calculating the debtor's monthly "disposable income." Exercising substantial discretion, courts typically calculated "disposable income" by considering the debtor's Schedules I and J as well as "other evidence" to establish the income side of the figure. *See, e.g.*, *In re Kibbe*, 361 B.R. at 307 & n.5 (describing pre-BAPCPA regime); *In re Killough*, 900 F.2d 61, 65 (5th Cir. 1990) (relying on debtor's testimony); *supra*

pp. 3–4.[11] Courts then "projected" the income side of "disposable income" by "multiplying" this value by the number of months in the plan. *See Anderson v. Satterlee*, 21 F.3d 355, 357 (9th Cir. 1994); *In re Killough*, 900 F.2d at 64; *In re James*, 260 B.R. 498, 515 (Bankr. D. Idaho 2001); 5 *Collier on Bankruptcy* ¶ 1325.08 [4][a] (15th ed. 1985); *supra* p. 4. Under pre-existing practice, therefore, courts construed the term "projected" simply to signal a method of calculation—multiplication.

BAPCPA maintained this relationship between "disposable income" and "projected disposable income." Section 1325(b)(2) still directs a court to calculate the debtor's "disposable income." And Section 1325(b) still requires a court to "project[ ]" that "disposable income" over the life of the plan. Just as "projected" signaled multiplication of "disposable income" before BAPCPA, "projected disposable income" now signals multiplication of Congress's new definition of "disposable income." BAPCPA's principal alteration to the existing method of determining "projected disposable income" was its redefinition of "disposable income" as an historic value less standard deductions, *see id.* § 1325(b)(2), to replace the prior discretionary figure. In reenacting the terms of pre-BAPCPA practice,

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[11] Courts exercised similar discretion on the expense side. *See supra* pp. 3–4; *In re Guzman*, 345 B.R. at 642 (observing that expense side involved "many difficult questions of lifestyle and philosophy") (quoting 5 *Norton Bankruptcy Law & Prac. 2d* § 122:10 (2006)).

Congress intended to retain the same, mathematical relationship between them, merely substituting a new, less discretionary value as the multiplicand. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (Congress presumed aware of existing judicial interpretations when reenacting laws); *In re Kagenveama*, 541 F.3d at 873 ("Any change in how 'projected disposable income' is calculated only reflects the changes dictated by the new 'disposable income' calculation; it does not change the relationship.").

B. The forward-looking approach perpetuates a concept of "disposable income" that Congress expressly repudiated by redefining "disposable income" in Section 1325.

Courts adopting the forward-looking approach "view the phrase 'projected disposable income' as a discrete term of art that has a meaning distinct from the new statutory definition of 'disposable income.'" *In re Austin*, 372 B.R. at 675 (citing cases). *See also* Pet. App. 26 (adopting forward-looking approach); *In re Frederickson*, 545 F.3d at 659; *In re Kibbe*, 361 B.R. at 307–08, 312 (same); *In re Jass*, 340 B.R. at 415–16 (same); *In re Hardacre*, 338 B.R. 718, 722–23 (Bankr. N.D. Tex. 2006) (same). Treating "projected disposable income" as a separate term of art, the forward-looking approach nullifies BAPCPA's definition of "disposable income" through consideration of non-historic income values.

For example, in this case, the lower courts adopted respondent's Schedule I, rather than the

figure produced by calculating her "current monthly income," as the proper measure of her income. *See* Pet. App. 80. In so doing, the courts applied the pre-BAPCPA conception of "disposable income" under the guise of construing the phrase "projected disposable income" in BAPCPA. But the term "projected" should not be permitted to swallow Congress's redefinition of "disposable income" when there is a readily assignable alternative meaning that continues the prior practice of multiplying the debtor's "disposable income" by the number of months in the plan. The lower courts' reliance on other terms and phrases that Congress reenacted without change (*e.g.*, "to be received") similarly provides no basis for denying effect to the language that Congress did change. By applying the pre-BAPCPA concept of "disposable income," the forward-looking approach perpetuates the past judicial practice that Congress expressly *repudiated* when it redefined "disposable income."[12]

III. The Plain-Language Approach Vindicates Congress's Policy Choices.

It is well-settled that the plain language of a statute governs unless "the disposition required . . . [is] absurd." *Lamie*, 540 U.S. at 534. Invoking this maxim to justify departure from BAPCPA's plain

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[12] On the expense side, Congress's adoption of IRS standards and other specified deductions, *see supra* pp. 6–7, signals its intent to preclude courts from scrutinizing and second-guessing a debtor's budget in assessing a repayment plan.

language, courts adopting the forward-looking approach have focused on the perceived "harsh" results of applying that language in some circumstances. *See In re Kibbe*, 361 B.R. at 313–14. Mistaking overinclusiveness and under-inclusiveness for "inaccuracy" and "absurdity," these courts have substituted their own judgments of appropriate bankruptcy policy for Congress's rational decision to employ a predictable, bright-line rule for calculation of "projected disposable income." But courts "do not sit to assess the relative merits of different approaches to various bankruptcy problems." *Hartford Underwriters Ins. Co.*, 530 U.S. at 13. Rather, "[a]chieving a better policy outcome—if what [respondent] urges is that—is a task for Congress, not the courts." *Id.* at 13–14. Moreover, Congress prescribed limited means to avert unintended consequences of its redefinition of "disposable income." *See supra* pp. 10, 26.

A. Application of the plain-language approach implements policy choices made by Congress.

With the enactment of BAPCPA, Congress chose to adopt a bright-line rule for calculating "disposable income" based on monthly income averaged from known historic data, *see* 11 U.S.C. § 1325(b)(2); 11 U.S.C. § 101(10A), and established deductions, *see* 11 U.S.C. § 1325(b)(2)–(3); 11 U.S.C. § 707(b)(2). "Instead of simply looking at the debtor's actual income and expenses, [BAPCPA's] amendments in many cases attempt to create a bright line test to determine whether a debtor's plan is committing all disposable income." 8 *Collier on Bankruptcy*

¶ 1325.08 [1] (15th ed. rev. 2005). *See also In re Barr*, 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006) (concluding Congress adopted a rigid test for above-median debtors).

In comparison to a standard that allows discretionary consideration of case-by-case individualized facts, a rule promotes efficiency, predictability and simplicity in application. *See, e.g., Califano v. Jobst*, 434 U.S. 47, 53, 56–57 (1977) (noting efficiency and simplicity of rule enacted to govern distribution of Social Security benefits to married disabled dependents). By its nature, the bright line drawn by a rule "is to some extent both underinclusive and overinclusive." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (considering retirement rule differentiating between Civil Service and Foreign Service employees). As courts have recognized, the rule adopted by BAPCPA demonstrates this characteristic where a debtor's income changes drastically soon before or after filing a Chapter 13 petition. *See* Pet. App. 30–31; *In re Kibbe*, 361 B.R. at 314.[13] Because "[v]irtually *every* legal (or other) rule has imperfect applications in particular circumstances," *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (emphasis original), in drawing a bright line, "perfection is by no means required," *Vance*, 440 U.S.

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[13] If the debtor's income increases relative to historic income, the calculation of "current monthly income" obligates the debtor to pay less than he or she can now afford. If the debtor's income decreases, "current monthly income" obligates the debtor to pay a monthly sum he or she can no longer afford.

at 108 (quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960)).

If—as in most applications—the debtor's income does not change drastically, "current monthly income" "is a reliable indicator" of the debtor's future income. *Califano*, 434 U.S. at 57. Congress's adoption of "current monthly income" as the measure of a Chapter 13 debtor's income reflects its judgment that historic income is an accurate indicator of a debtor's earning potential for the purpose of funding a repayment plan, and "[t]here is no question about the power of Congress to legislate on the basis of such factual assumptions." *Id.* at 53; *see In re Austin*, 372 B.R. at 679 ("There is no inherent flaw in calculating disposable income based upon an historical figure" and such a policy decision "is well within the prerogative of our Legislative branch."). As a rational policy choice, BAPCPA's clear, easily applied rule is not rendered illegitimate by its over- or underinclusiveness in particular applications. *See Vance*, 440 U.S. at 108–09 (upholding statutory classification based on rational factual assumptions despite over- and underinclusive applications). In fact, there is no "absurdity in reading" a statute "as setting forth a simple, bright-line rule instead of a complex, after-the-fact inquiry." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2339 (2008).

Moreover, undesirable results in peculiar circumstances, without more, do not render a statutory construction "absurd." Despite "the potential for harsh results in some cases," a court is "not free to rewrite the statute that Congress has

enacted." *Dodd v. United States*, 545 U.S. 353, 359 (2005) (upholding construction of habeas statute of limitations even though it "makes it difficult" for certain applicants to ever obtain relief); *see also Griffin*, 458 U.S. at 575 ("refusing to nullify [statutory language], however hard or unexpected the particular effect"). It is enough that the plain language prescribes a clear rule. "The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court." *Griffin*, 458 U.S. at 576.[14]

B. The forward-looking approach frustrates the policy choices embodied in BAPCPA.

Congress's implementation of a clear rule for calculating "projected disposable income" was a response to unpredictable Chapter 13 results caused by unencumbered judicial discretion. The forward-looking approach undermines the congressional policy embodied in that rule by authorizing a return

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[14] Although the results of BAPCPA's expense-side rule have raised additional questions, *see, e.g., In re Barr*, 341 B.R. at 185, the facts of this case—in which the use of standard deductions has never been challenged—do not provide a proper vehicle for their consideration. In any event, the bankruptcy court correctly applied BAPCPA's plain language in determining respondent's expenses. To the extent application of BAPCPA's plain language could facilitate debtor abuse of Chapter 13 (on either the expense or income side), any further alterations to the statutory scheme must come by congressional, not judicial, amendment.

to judicial discretion through consideration of data—including Schedules I and J—that were a cornerstone of the pre-BAPCPA regime Congress replaced. *See supra* pp. 3–4.

The forward-looking approach also threatens to distort the complex, integrated bankruptcy regime created by BAPCPA. *See Fed. Trade Comm'n v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960) (refusing to "derange . . . integrated statutory scheme . . . [by] read[ing] other conditions into the law"). For example, before BAPCPA, "projected disposable income" defined a debtor's repayment obligation to *all* creditors; secured and unsecured. *See supra* p. 2. But under BAPCPA, the calculation of "disposable income" takes into account amounts to be paid for secured claims. Congress thus made a corresponding amendment to Section 1325(b)(1)(B) to make clear that "projected disposable income" will be applied to make payments to *unsecured creditors only*. By relying on data—such as Schedules I and J—used to calculate the pre-BAPCPA broad repayment obligation, the forward-looking approach upsets the BAPCPA formula for determining a debtor's repayment obligations.

IV. If the Court Adopts a Forward-Looking Approach, BAPCPA's Language Requires that Deviations from Section 1325's Definition of "Disposable Income" Be Limited.

In the alternative, if the Court rejects the plain-language approach, the language, intent and policies described above require that the Court adopt a

forward-looking calculation of "projected disposable income" that honors BAPCPA's express exclusion of certain types of income from "disposable income." *See* 11 U.S.C. § 1325(b)(2) (incorporating "current monthly income"); 11 U.S.C. § 101(10A) (excluding from "current monthly income," *inter alia*, "benefits received under the Social Security Act"); *see also In re Kibbe*, 361 B.R. at 311–12 (adopting forward-looking approach while excluding "the Income Exclusions" delineated in BAPCPA).[15] On the peculiar facts of this case, the bankruptcy court's disposition could be affirmed under this approach because the bankruptcy court did not use any expressly excluded values in calculating respondent's "projected disposable income."

First, with respect to the income component of "projected disposable income," the bankruptcy court considered respondent's "disposable income" as calculated on Form 22C, but ultimately relied upon her Schedule I. *See* Pet. App. 56–58, 80. Because respondent's Schedule I did not include any of the income categories expressly excluded under Section 101(10A)—or otherwise expressly excluded under 11 U.S.C. §§ 541(b)(8) and 1322(f)—the bankruptcy

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[15] Congress has demonstrated a plain intent to protect retirement savings and benefits from unsecured creditors. *See, e.g.*, 11 U.S.C. § 541(b)(7) (excluding from estate, *inter alia*, contributions to employee benefit plan); 11 U.S.C. § 1322(f) (repayment plan "may not materially alter" amounts included in pension or other benefits plans). *See also* 42 U.S.C. § 407(a) (excluding Social Security benefits from operation of bankruptcy law).

court's use of Schedule I would be acceptable under the statutory scheme, assuming that Congress's historic approach to income can be abandoned. *See* Pet. App. at 69 & n.21, 80; *see also* Brief for the United States as Amicus Curiae on Pet. for a Writ of Certiorari (No. 08-998), at 11 (recognizing that courts may not expand the categories of income excluded from "projected disposable income").

Second, on the expense side, the bankruptcy court applied the standardized deductions to respondent as an above-median debtor. *See* Pet. App. at 75, 80.[16] Finally, the parties agreed that respondent's prior severance payments affected her "current monthly income," resulting in a "disposable income" she could not afford to pay out to unsecured creditors. *See id.* at 58 (petitioner acknowledges respondent could not fund her plan at her "disposable income").

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[16] The facts of this case, therefore, provide no ground to address any expense-side issues, a number of which have split lower courts. *See, e.g.*, *In re Washburn*, 579 F.3d 934 (8th Cir. 2009) (holding that above-median debtor may claim vehicle-ownership expense for vehicle debtor owns outright without encumbrance); *In re Ransom*, 577 F.3d 1026 (9th Cir. 2009) (reaching opposite conclusion on vehicle ownership); *In re Rudler*, 576 F.3d 37 (1st Cir. 2009) (holding that debtor may deduct payments due on secured debt notwithstanding debtor's intention to surrender the collateral); *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006) (reaching opposite conclusion on secured debt payments). For this reason, although the question presented references the expense side, *see* Cert. Grant (11/2/2009), neither petitioner's merits brief nor the United States' brief on the petition for a writ of certiorari addressed the expense side in detail.

On these specific facts, if this Court rejects the plain-language approach, the bankruptcy court's limited deviation from the statutorily prescribed definition of "disposable income" could be affirmed.

Conclusion

The plain-language approach should be adopted in determining whether a Chapter 13 debtor's plan commits all "projected disposable income" to the repayment of unsecured creditors. In the alternative, deviations from the statutory definition of "disposable income" should be minimal and not include income sources expressly excluded from "current monthly income."

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