

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**

—◆—
REPLY BRIEF FOR PETITIONER

—◆—
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QUESTION PRESENTED

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

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ARGUMENT

I. Fundamental Interpretative Errors Of Debtor And Her *Amici* Result In A Faulty View Of The Chapter 13 Means Test.

The Chapter 13 version of the means test consists of three pertinent statutes. Those statutes are:

- “Disposable income” and allowed expenses (§1325(b)(2) and (3)),
- “Means test” (§707(b)(2)(A) and (B)),
- “Current monthly income” (§101(10A)(A)(i) and (ii)).¹

A. Debtor And The United States Fail To Properly Consider The Lynchpin Statute, §101(10A).

Debtor ignores the third corner of the statutory triad.² 11 U.S.C. §101(10A) provides, in relevant part:

(10A): The term “current monthly income” –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether

¹ Unless otherwise noted, all statutory references are to the current version of 11 U.S.C.

² Respondent Stephanie Lanning is identified as “Ms. Lanning” or “Debtor.” “The United States” is identified as such. The *amicus* party Ned W. Waxman is identified as “Waxman.”

such income is taxable income, derived during the 6-month period ending on –

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii). . . . (subsection (B) omitted as not relevant here).

Debtor only mentions, without analysis or discussion, §101(10A)(A)(ii) in her attempted explanation of why judicial discretion should be resurrected, when Congress mandated otherwise.³ This omission is fatal to her cause. Necessarily, her conclusions are wrong, since she does not consider all of the operative statutes. The interplay of the three statutes requires a non-discretionary application of the Chapter 13 means test formula, except to the extent expressly

³ Debtor argues that somehow this provision resolves an ambiguity in the pre-2005 code for determining debtor's current income. Resp.Br. 43. This argument is made of whole cloth and is unsupported by either the text of the provisions at issue or any pertinent legislative history. The prior law simply allowed substantial judicial discretion, while the current law largely does not. By definition, the prior version of §1325(b) would, and did, lead to varied results. Congress sought to change that. Pet.Br. 28.

provided. This formula is only used in the Chapter 13 plan confirmation process, if invoked by a proper party in interest.⁴ Pet.Br. 4.

The manner in which these statutes complement each other is not complicated and is straightforward. “Disposable income” is now “current monthly income,” as determined by §101(10A), minus allowed expenses as determined by §1325(b)(3) and §707(b)(2)(A) and (B), as incorporated. On the expense side, the only deviations permitted are ones in accord with §707(b) – where debtor may plead “special circumstances.” The only discretion given to bankruptcy judges on the income side is the ability to determine *which* 6-month period is to be examined by the formula. §101(10A)(A)(ii). If Congress intended that bankruptcy courts retain the power to exercise discretion by ignoring or deviating from the formula, there would have been no need for subsection (ii) of §101(10A)(A). Debtor’s forward-looking interpretation necessarily reads subsection (ii) completely out of the statute.

While the Debtor concedes the sanctity of the expense formula in §1325(b)(3) and §707(b)(2)(B), the United States hints at disputes on other issues.

⁴ Debtor refers to Chapter 13 plans as “wage earner plans.” Resp.Br. 2. This is an archaic term, formerly used in Chapter XIII, which came into existence in the 1938 Chandler amendments to the Bankruptcy Act of 1898. The 1978 Code, and now BAPCPA, requires a debtor to have regular income, which may or may not be “wages.” §109(e). Payments are generally made through the Chapter 13 trustee. §1326(a)(1) and (2).

Resp.Br. 40. Essentially, the United States supports judicial discretion on the expense side of the equation, as well as the income side. U.S.Br. 12. Although expenses are not per se at issue here, the ramifications of discarding the language of §707(b)(2)(B) are enormous. The United States notes *In re Turner*, 574 F.3d 349, 355-356 (7th Cir. 2009), which involves issues pertaining to the deduction of expenses. U.S.Br. 21. That case is representative of the issues that may occur on the expense front. The United States' musings are not developed into argument made applicable to Debtor's circumstances. The point to be made here is that the United States supports, across the board, a view of both the income and expense formulas for Chapter 13, which necessarily requires that the statutes be ignored and judicial discretion be substituted. If the means test is not performing as advertised, the remedy is for Congress to change the statutes, rather than for the courts to rewrite the provisions on an ad hoc basis. Congress required that deviations on the expense side were to be determined by a "special circumstances" process, as set out in §707(b)(2)(B). However, there are no facts at issue here that bring the "special circumstances" procedure into play.

The United States argues that exercising §101(10A)(A)(ii) requires the debtor to violate §521(a)(1)(B)(ii), and could lead to dismissal of the case, because the filing of a Schedule I is mandatory *unless excused by the court*. U.S.Br. 31. The United States properly implies the solution to this apparent

dilemma. *Id.* A debtor may file a motion to ask the court to excuse the debtor from filing Schedule I. *In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009); Pet.Br. 52; *see* Sec. II.A.2, *infra*. The granting or denial of this motion is discretionary, as §101(10A) does not confer upon debtors the absolute right to that relief, so abuses of the system are still subject to the checks and balances of “contested matter” procedure. *See* n.14, *infra*. Such a course is consistent with both §101(10A) and §521(a).⁵

Ultimately, Debtor and the United States suggest judicial revisions to BAPCPA, rather than applying the statutory provisions as enacted.

B. Only The Trustee’s View Of “Projected” And “Effective Date Of The Plan” Is Consistent With The Text And Legislative History Of §1325(b) And Related Statutes.

Fundamental to the interpretative errors of Debtor and the United States is their insistence on rewriting these statutes because of claimed difficulty in applying the phrases “projected disposable income” and “effective date of the plan” to the BAPCPA amendments. They ignore applicable legislative history as

⁵ Fed.R.Bankr.P. 1007(c) permits debtors to file the bankruptcy petition without schedules, and to file schedules 14 days later, or even at some other date as may be permitted by the bankruptcy court.

well as the precise text of the statutes. These words and phrases are not troublesome unless one ignores §101(10A), particularly the disjunctive of subsection (ii).

Debtor's explanation of how §1325 works is mostly wrong.⁶ What she does correctly state is not helpful to her position. She says, "The debtor's 'projected' disposable income is her 'disposable income' multiplied by the number of months in the commitment period, except in the unusual case in which known or virtually certain differences in the debtor's income and/or expenses will cause a substantial difference in her disposable income during the commitment period." Resp.Br. 15. Debtor properly concedes it is necessary to use a multiplier. She also agrees that "projected disposable income" is "disposable income" multiplied. *See* Sec. I.B., *infra*. However, the rest of the quoted paragraph is not accurate and is inconsistent with the Chapter 13 means test.

Debtor argues the phrase "effective date of the plan" is inconsistent with the assertion that the bankruptcy court must make a mechanical calculation based on debtor's income as it stood before the bankruptcy

⁶ Debtor also states that expenses for above median income debtors are determined under "standard schedules." Resp.Br. 6. It is unclear as to what Debtor is asserting here, as that phrase is not a part of the Chapter 13 lexicon. If Debtor means Schedules I and J, then she is incorrect. For an above median income debtor like Ms. Lanning, §1325(b)(1) and (2) determine allowed expenses, incorporating §707(b).

was filed. Resp.Br. 21-23. Debtor misinterprets the application of the new provisions in reaching that result. If a debtor disagrees with the 6-month look back conclusion, then the debtor may ask that the 6-month time frame be moved. It is that simple. Again, by ignoring §101(10A)(A)(ii), the debtor reaches an inaccurate conclusion from a false or incomplete premise.

Debtor's conclusion that the Trustee reads "projected" out of §1325 is simply not accurate.⁷ Resp.Br. 19. The Trustee views "projected" as being the multiplier Congress intended. Debtor states Congress would have used the word "multiplied" if it had intended such. Resp.Br. 19-20. This argument ignores the obvious. A multiplication is inherent in any plan calculation in order to "project" forward debtor's "disposable income" over the life of the plan under *both* the mechanical *and* the forward-looking approaches. There is simply no other way to get from a monthly amount to a total amount to be paid. The utilization of a multiplier in order to determine what should be paid to creditors is necessary and implicit within both the present and prior statute. This point is conceded, properly and by necessity, although Debtor argues weakly to the contrary. She admits, "The debtor's 'projected' disposable income is her 'disposable income' multiplied by the number of months in the

⁷ Debtor, while complaining that the Trustee ignores "projected," tosses out §101(10A)(A)(ii) entirely.

commitment period. . . .” Resp.Br. 15; *also* Sec. I.A., *supra*. So, when all is said and done, Ms. Lanning’s argument on this point is not credible. She first admits the proposition, then argues against it. Resp.Br. 15; *contra* Resp.Br. 19-20. The Trustee honors the word “projected” in the context of “disposable income,” as it makes perfect sense in both its meaning and application, when considered in light of all of §101(10A).

Debtor argues that case law prior to BAPCPA settled issues surrounding the word “projected.” Resp.Br. 34. She misapprehends the pre-BAPCPA “projected versus actual” dispute. Resp.Br. 36-39. Without question, the issue of when the debtor’s income was to be determined under pre-BAPCPA law generally was one made at or near confirmation. Pet.Br. 35-38. Both Debtor and the Trustee cite to pre-BAPCPA cases involving pre-confirmation issues. Pet.Br. 36; Resp.Br. 36. However, it is important to highlight the point Debtor and her *amici* skip – *the standards were different. Congress changed the law.* Debtor’s argument, based on her belief that the mechanical approach cannot be reconciled with the basic structure of Chapter 13, is wholly mistaken. Resp.Br. 25-26. To get to that conclusion she must, and does, completely ignore the fact that the new statute changed the structure of Chapter 13. The point made by the Trustee was that pre-BAPCPA, courts determined a number, pre-confirmation, as “disposable income” and projected it forward by multiplying. Pet.Br. 36-38. Even Debtor concedes that

this was generally the approach. Resp.Br. 37. This was unchanged. What changed is that Congress has now provided a formula for how that number is to be determined. Arguments that this pre-BAPCPA body of law was preserved ignore those statutory changes.

The United States notes that Congress intended to curtail discretion of bankruptcy judges in determining what sources of revenue count as income. But, in the same breath, it discounts everything else in §101(10A). Despite the United States' attempts to reap the benefits of one part of that statute, without accepting the consequences of the rest, it is very apparent that Congress' intent was to effect much more than a mere definitional change. The three statutes, when read together, constitute a formula. The new statute unequivocally creates a new standard, across the board, for determining what constitutes "disposable income." U.S.Br. 24.

Ms. Lanning's real complaint is that *the dollar figure to which the multiplier is applied is not the one she wishes*. Debtor protests that her "disposable income" cannot possibly be properly "projected" by multiplying her average monthly "disposable income" of the prior six months. Resp.Br. 19. Although expressing incredulity at her plight, she does not address the real reason her statutorily derived average "disposable income" does not reflect her actual circumstances. *She used the wrong portion of §101(10A). She used subsection (i) and should have used subsection (ii)*. Of course, she had other options, also not exercised, which are discussed in Sec. II.A., *infra*.

**C. Interjection Of A Presumption Into
The Chapter 13 Means Test Is Not
Supported By The Text Of §1325.**

Debtor favors the Tenth Circuit's finding of an unwritten presumption in §1325(b). Resp.Br. 24. Debtor, as well as the Tenth Circuit, ignores directly related statutes, which are at odds with that interpretation. This imagined presumption is not supported by the text of the interrelated statutes or the legislative history. If Congress wanted to invoke a presumption, it could have done so, knew how to do so, and did so in a statute directly related to §1325. See §707(b)(2)(A)(i) ("In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court *shall presume* abuse exists. . . .") (emphasis added). A more parsimonious view is to read §1325(b) as written, and intended, without judicial edits.

It makes no sense to create a formula, and then permit bankruptcy judges to ignore the entire schema. This is the net effect of any version of the forward-looking approach. If it is correct that judges still have such discretion in determining "disposable income," then §101(10A)(A)(ii) is completely superfluous, and that section would have no meaning. This Court should adopt a reading that does not treat statutory terms as mere surplusage. Pet.Br. 40, *citing Williams v. Taylor*, 529 U.S. 362 (2000).

As in *Lamie*, if there is a mistake, omission or ambiguity here, it is up to Congress to fix it, not for

the courts to rewrite the statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004). Debtor essentially upends the statute with her view of a single word – “projected.” Debtor’s view restores judicial discretion to the “disposable income” analysis, when Congress intended otherwise. Pet.Br. 26-30.

D. The “Non-Presumptive” §105(a) Approach Cannot Properly Be Substituted For The Prescribed Chapter 13 Means Test.

Amicus Waxman, in support of Debtor, interjects into the discussion a so-called “novel approach,” utilizing the court’s equitable powers under §105(a). Waxman Br. 2. However, the use of §105(a) here is neither novel nor appropriate. It is not by accident that the parties, the bankruptcy court, the BAP, and the Tenth Circuit did not so much as mention §105(a). The non-presumptive approach is just another subset of the forward-looking argument, substituting judicial discretion for the statutory formula.⁸

The application of §105(a) to this case is inappropriate. Waxman cites to *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3rd Cir. 2003) in

⁸ Waxman’s argument regarding “absurd results” is fully addressed in Petitioner’s opening brief. Pet.Br. 48-55.

support of utilizing §105(a).⁹ However, the Third Circuit's analysis is not helpful to Waxman's argument. *Id.* at 567. Section 105(a) is there cited for the proposition that equitable powers may be utilized to give effect to the policy of the legislature. That court used it to justify conferring derivative standing upon a creditors' committee to avoid fraudulent transfers. Here, neither the Code nor the legislative history of BAPCPA support Waxman's view of the statute, nor do they provide any support for the utilization of §105(a). The clear text of the statutes under consideration requires a mechanical application of the formula. Section 105(a) cannot be used as an excuse to substitute judicial discretion for the prescribed formula. *Marrama v. Citizens Bank of Massachusetts, et al.*, 549 U.S. 365, n.4 (2006) (“[W]hatever steps a bankruptcy court may take pursuant to §105(a) or its general equitable powers, a bankruptcy court cannot contravene provisions of the code.”) Section 105(a) is not the wild card Waxman suggests.¹⁰

⁹ *Young v. United States*, 535 U.S. 43 (2002), also cited by Waxman, notably provides no analysis of §105(a), but does discuss, in a remote context, the equitable powers of the bankruptcy court.

¹⁰ The Trustee agrees with Waxman in one important aspect – “[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.” Waxman Br. 28, citing *Norwest Bank Worthing v. Ahlers*, 485 U.S. 197, 206 (1988).

E. The Assertion That §1323 And §1329 Support The Forward-Looking Interpretation Of §1325 Is Textually And Historically In Error.

The United States notes §1323, a pre-BAPCPA Code section, which provides for pre-confirmation modification of plans. U.S.Br. 19. It asserts that this provision shows Congress intended for plans to reflect a debtor's actual circumstances, as opposed to utilization of the means test formulary at confirmation. In the next breath, however, it admits debtors are not exempt from the plan confirmation requirements of §1325. *Id.* The United States defeats its own argument. It properly concedes §1323 does not trump or modify §1325. Section 1323 only permits the debtor to move the 6-month look back period to confirmation, since it does not provide a mechanism for ignoring the formula. The provision does not, expressly or impliedly, support the suggestion that the formula may be dispensed with because of post-petition, pre-confirmation, changes in circumstances. Notably, no case is cited by the United States to support its thought in that regard. A debtor, faced with a pre-confirmation, post-petition income reduction, for example, could seek to amend the plan pursuant to §1323 and argue that the court should reset the 6-month look back period to account for the income changes, or even substitute a new income number in the Form 22C calculation. The text of §1323 just does not provide, directly or indirectly, a basis for resorting to judicial discretion if such a motion is filed. Indeed,

such a view would make no sense and is obviously not a result intended by Congress.

Similarly, the argument of Debtor and the United States that the existence of §1329 somehow supports their position is also textually flawed. Resp.Br. 23; U.S.Br. 19-20. Section 1329 has always permitted modification of a plan, but only after confirmation. Pet.App. 94; Pet.Br. 36, n.7. There is nothing in §1329 that suggests a court may throw out the means test formula *as it was used pre-confirmation*. While acknowledging §1329 permits a court to address post-confirmation changes in circumstances, they jump to the conclusion that the results of the formula are discarded. Resp.Br. 23; U.S.Br. 19. In making that conclusion, they assume that §1325(b)(1) cannot be utilized in the context of §1329. This may or may not be true; depending upon the jurisdiction, but that is not really the point.¹¹

¹¹ Interpretative disputes here predate BAPCPA. *See Freeman v. Schulman (In re Freeman)*, 86 F.3d 478 (6th Cir. 1996) (Unexpected tax refunds must be applied to payments under the plan.); *but see, e.g., Forbes v. Forbes (In re Forbes)*, 215 B.R. 183 (8th Cir. BAP 1997). (The disposable income test is not applicable to §1329 modifications.) The Fifth and Ninth Circuits have recognized that “projected” income is fact bound and changes in income should be addressed, post confirmation, by §1329. *Commercial Credit Corp. v. Killough (In re Killough)*, 900 F.2d 61, 66 (5th Cir. 1990); *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir. 1994). *See also In re Sunahara*, 326 B.R. 768, 774-781 (9th Cir. BAP 2005) for a summary of cases addressing the issue of whether §1325(b)(1) is incorporated into §1329.

Debtor and the United States' analysis of §1329 ignore the *res judicata* effect of §1327. If the plan was confirmed based upon the means test formula, then changes in a debtor's financial position should be plugged into the formula to properly account for those circumstances. Disregarding the formula and resorting to Schedules I and J is not supported by the text of §1329, or, for that matter, any other section of the Code. The only way to set aside the formula is to set aside the confirmation order under §1330(a), which requires a finding that the order was procured by fraud. The parties are agreed that it makes no sense to have one set of standards for confirming a plan and different set for post-petition modifications. The Trustee's view of how §1329 should work is consistent with the rest of the statute. Regardless of whether §1329 is viewed as indirectly incorporating §1325(b)(1), it is counterintuitive to throw out the formula and revert to Schedules I and J. As one bankruptcy court put it:

The court cannot allow this Debtor to adjust the entire formulaic budget upon which his modified plan was confirmed and return to Schedules I and J, based on one particular expense (the DSO). It is almost impossible for an above median family income debtor's disposable income to ever match the reality of his or her income and expenses at confirmation. Therefore, if a debtor could always modify his plan to incorporate his actual income and expenses post-confirmation, regardless of the narrowness of the reason

asserted, the means test formula would have limited effect in Chapter 13.

In re Hill, 386 B.R. 670, 677 (S.D. Ohio 2008).

Debtor and the United States ignore the obvious for an above median income debtor. The court could simply substitute a new number into the formula for the one that has changed. In this manner, the formula would be honored and the debtor (or the trustee or allowed unsecured creditor) would get the benefit of the changes in circumstances.

II. Debtor's Choices Created Her Dilemma.

In all Debtor's protestations, which always end with her concluding that the mechanical approach causes anomalies, she ignores that *her choices* led to the unfavorable result.

Debtor first complains that the Trustee's view of her options gives rise to results not intended by Congress. She asserts that the mechanical approach invites abuse of the Chapter 13 system. Resp.Br. 25, 31. Her arguments are simply end runs around the options she did not exercise.

She also concludes that: "[B]ecause the trustee concedes that chapter 13's feasibility requirement would *forbid* the bankruptcy court from confirming a plan that failed to account for the fact that the non-recurring buyout Lanning received from Payless substantially inflated her 'current monthly income,' the lower courts properly calculated her 'projected'

disposable income.”¹² Resp.Br. 15. Debtor erroneously contends she would not be “eligible” for Chapter 13 and that the Trustee conceded this point. Resp.Br. 9. She is wrong on both scores. Nowhere has the Trustee ever stated that Debtor would or could be “ineligible” for a Chapter 13. She has confused the meaning and import of the word “eligible.”¹³ This argument is flawed because the premise is incomplete. What she does not include in the equation is her failure to properly consider, let alone utilize, any of the four options. The real point is that she suggests bankruptcy court discretion should be permitted because her actual income was not before the bankruptcy court at confirmation. Only by ignoring the options not taken can she arrive at her incorrect conclusion.

¹² Contrary to Debtor’s assertion that feasibility is “[t]he hallmark” of a confirmable plan, that is only one factor out of many statutory requirements under §1322 and §1325. Resp.Br. 2.

¹³ “Eligibility” is a term of art in §101, which is used in determining whether an individual or entity qualifies as a debtor. Resp.Br. 9. To illustrate, only an individual may be a debtor in Chapter 13 under §109(e). If an individual is not “eligible,” the filing of the bankruptcy may be a nullity, even though eligibility is not jurisdictional. *E.g. In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006); *contra In re Racette*, 343 B.R. 200 (Bankr. E.D. Wis. 2006). A debtor whose plan is not feasible may still be “eligible” to be a debtor. Feasibility issues may be remedied by acquiring more income, reducing expenses, converting to another chapter, or pursuing other options, discussed *infra*.

A. Debtor Wrongly Dismisses Four Options Available To Her.

Debtor falls into the same trap as the courts below. The essence of the various formulations of her argument lack cogency, because the premise omits necessary considerations. She begins with the notion that the result in this case is wrong; therefore the mechanical plain reading view of the Chapter 13 means test is wrong. What is not included in the premise is that the results occurred, not because of the Chapter 13 means test, but because of her choices. She ignored the options available to her. Pet.Br. 48-55. Those options were:

- Delay the filing of the bankruptcy petition,
- Move the 6-month look back period, as specifically permitted by Congress in §101(10A)(A)(ii),
- Dismiss and refile,
- Convert to Chapter 7.

Contrary to Debtor's assertions, there is nothing "evasive" about any of these alternatives. Resp.Br. 32. Three of these options are hornbook considerations for any debtor lawyer; the other should be, if the Chapter 13 means test is properly viewed and applied.

1. Delay Of Filing Of The Bankruptcy Petition.

Debtor could have avoided this entire dispute by delaying the filing of her petition by less than two months. Resp.Br. 6-7.

Debtor cites *Neufeld* for the proposition that delaying the filing exposes the debtor to allegations of “fraud and dishonesty.” Resp.Br. 33, *citing Neufeld v. Freeman*, 794 F.2d 149, 153 (4th Cir. 1986). *Neufeld* is very fact-driven, as are all bad faith cases. This analysis is not applicable to the facts of this case. Certainly, any debtor guilty of fraud, dishonesty or bad faith may be at risk. Here, however, Debtor’s suggestion that she could actually expose herself to allegations of fraud or dishonesty is theoretically and factually inconsistent with her position in this matter, and the facts of this case, because all she would be doing is picking a time frame representative of her income. Resp.Br. 33.

The record is also devoid of any suggestion that this bankruptcy was filed under pressure of exigent circumstances, such as foreclosure, repossession or garnishment, as evidenced by Ms. Lanning’s Statement of Affairs. J.A.29-44. Debtor controlled the date of filing, since she was not under duress. The significance of the timing of the filing is that the 6-month look back period under §101(10A) could have been a snapshot of a different time period more representative of her situation.

Any suggestion that debtors will not generally file upon a date advantageous to them cannot seriously be made.

[T]he timing of filing the petition may determine whether a particular month puts the debtor over or under the median income safe harbor, or the amount that would create a presumption of abuse under the means test, or some other consequence. If a debtor's income has recently increased, waiting a few months would be preferable if no emergency requires an immediate filing.

Henry J. Sommer, *Consumer Bankruptcy Law and Practice* 366 (9th ed. 2009).

In addition to Henry Sommer's recommendations regarding the timing of the filing of the bankruptcy petition, the Hon. Keith M. Lundin, in his multi-volume treatise, *Chapter 13 Bankruptcy 3rd Edition*, suggests similar planning. "Debtors, with good advice from counsel, can control CMI . . . by the timing of filing . . .," Keith M. Lundin, *Chapter 13 Bankruptcy 3rd Edition*, §468.1 (2007) (footnote omitted). Judge Lundin cites to *In re Beasley*, 342 B.R. 280, 282-85 (Bankr. C.D. Ill. 2006) ("[S]trict compliance with the definition of 'current monthly income' means that some debtors with high but irregular income may be able to avoid the imposition of the longer payment period by the timing of their filings, while debtors with lower incomes are forced to pay for five years. That may be unfair, but that is what the statute requires as it is currently written. *The remedy for*

that problem is legislative, not judicial.") (emphasis added).

It does not take much thought to imagine that the timing of any bankruptcy filing may be strategic, whether in a Chapter 13 context, or not. In a business case, for example, the filing may be after payroll has been made. Perhaps the filing is made immediately before or immediately after the preference period has run on a particular transaction. Any suggestion that timing of the filing of the bankruptcy is not a valid consideration ignores the realities of contemporary bankruptcy practice.

2. 6-Month Look Back – §101(10A).

Debtor also inexplicably ignores her ability to choose the disjunctive in the new “current monthly income” statute. §101(10A)(A)(ii). The statute works in this manner: “The 6-month period is defined as the six months ending on the last day of the month before the petition is filed, or, *if the debtor does not file Schedule I, the date the court determines current income.*” Henry J. Sommer, 366. (emphasis added).

Disregarding the import of the disjunctive nature of §101(10A) results in a flawed analysis and correspondingly incorrect conclusion regarding how the Chapter 13 means test mosaic fits together. Debtor’s argument that moving (or even selecting) the 6-month look back period might be susceptible to abuse also ignores one very important fact – *the 6-month look back period and the ability to move it is a specific*

creature of statute.¹⁴ The statute controls, as it is, for better or for worse, and not as Debtor and the United States wish it to be. *Lamie v. U.S. Trustee*, 540 U.S. at 542 (2004), *citing United States v. Ganderson*, 511 U.S. 39 (1994) (concurring opinion) (“It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result”). Regardless of all other arguments, the existence and applicability of §101(10A)(A)(i) and (ii) simply cannot be disputed. Any result that walks around those two provisions does not follow the text of the statute, let alone its spirit.

3. Dismiss And Refile.

Debtor noted in her “Motion for Determination,” that she might dismiss and refile, if not successful on the merits of her motion.¹⁵ J.A.105. She now disowns that option. Apparently she claims that her own

¹⁴ As a contested matter, all interested parties would have an opportunity to conduct discovery, present evidence, and make argument before the court determined the applicable time frame. Fed.R.Bankr.P. 9014.

¹⁵ The United States asserts and Debtor implies that this is an appeal from a confirmation order. U.S.Br. 7; Resp.Br. 10. They are incorrect. The appeal was from the Memorandum and Opinion of the bankruptcy court, which sustained the Trustee’s objection to the Motion for Determination and denied confirmation. Pet.App. 54-82. The BAP entered an order on July 31, 2007, permitting the appeal to proceed on an interlocutory basis. J.A.15; 28 U.S.C. §158; 28 U.S.C. §1292(b); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764 (10th Cir. BAP 1997).

bankruptcy court pleading was suggesting a “means of evasion.” Resp.Br. 33. In Debtor’s defense, there is no statutory prohibition against this course of action. *See Johnson, infra*. *See also In re Murphy*, 375 B.R. 919, 923 (Bankr. M.D. Ga. 2007) (Debtor’s dismissal of a prior case and refiling to avoid the special treatment of “910 claims” is not “bad faith.”) Pet.Br. 53.

Congress obviously anticipated that the dismissal and refiling of a bankruptcy could be abusive. For example, §§362(c)(3) and (4) were added to the “relief from stay” statutes in the 2005 amendments. These new provisions condition the automatic stay for certain repeat filers. §§1325(a)(3) and (7) always require good faith in the filing of the petition and plan. Pet.Br. 55-56.

4. Conversion To Chapter 7.

Debtor contends she might be precluded from Chapter 7 relief. Although Debtor uses the word “might,” she persists in perpetuating the same interpretative error made by the Tenth Circuit in asserting Ms. Lanning might not have qualified for Chapter 7 protection. Resp.Br. 28-29; Pet.App. 30. Their conclusion is completely wrong. In the Chapter 7 context, the debtor may obtain relief from the means test formula on *both* the income and expense sides. §707(b). *But, Congress did not incorporate the income portion of 707(b) into Chapter 13.* “Although section 707(b)(2)(B), referenced in section 1325(b)(3), allows for adjustment of income, section 1325(b)(3) speaks

only of ‘amounts reasonably necessary to be expended.’” 8 *Collier on Bankruptcy* 1325.08[5][c] (15th ed. rev. 2009). The obvious importance of this omission is that while both an above median income Chapter 13 and Chapter 7 debtor may plead “special circumstances” on the expense side of the equation, as defined by §707(b)(2)(A) and (B), Congress did not permit the pleading of “special circumstances” on the income side in a Chapter 13. Instead, Congress provided that the 6-month look back period could be moved.

The record is silent as to the various and many reasons that could have, or did, lead Debtor to file under Chapter 13. No argument based on §707(b) supports any suggestion that Debtor could not have filed a Chapter 7 bankruptcy, rather than a Chapter 13. Resp.Br. 29; Pet.Br. 53. Debtor concedes as much, since she does not discuss the actual application of §707(b)(2)(B)(i)-(iv) to her circumstances.

5. Debtor Ignores Existing Bankruptcy Protections Against Debtor Abuse.

Debtor plays to a fear all likely have of any bankruptcy law – are abuses possible or likely? Debtor vaguely hints at what might occur, without support and, more importantly, without reference to the facts of this case. In some instances, her concerns simply ignore how the bankruptcy process actually works. Resp.Br. 31-32.

Debtor finds the results from a correct interpretation of the Chapter 13 means test “troubling.” Resp.Br. 31. She fails to mention that in *Kagenveama*, to which she cites, it was the trustee, not the debtor, who supported the forward-looking approach, while the debtor argued the mechanical view. Resp.Br. 30; *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008). In that case, the mechanical results were pro-debtor, while here, the mechanical approach does not favor Ms. Lanning’s position. Resp.Br. 30. Any suggestion that the resolution of this issue will routinely favor one constituency or another is simply incorrect. Regardless, the existence of deviations, one way or the other, does not give cause for these statutes to be judicially rewritten. The policy arguments made by the United States and Debtor are not those adopted by Congress. Any redrafting of the statutes should be done by the legislature, not the courts.

Moreover, inconsistent results on a nationwide scale will surely continue to multiply if Debtor’s view is accepted. Instead of a predictable statute with fairly clear-cut results, the judicial discretion of several hundred bankruptcy judges will be substituted. *This* is exactly what Congress sought to prevent. *See* Sec. III, *infra*, regarding legislative history. If there are any gamesmanship opportunities here, they lie in forum shopping possibilities if the many variations of the forward-looking approach are permitted to survive. What the Trustee desires is

clarity – but in a manner that honors the text and spirit of the Chapter 13 means test.

Debtor’s intimations that utilization of any of these options constitutes fraud or dishonesty are nothing more than scare tactics. She ignores the prior rulings of this Court. As in *Johnson*, Debtor “fails to apprehend the significance of the full range of Code provisions designed to protect Chapter 13 creditors.” *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991). Inherent in any bankruptcy case is the right to pick not only the time of filing, but to file more than one bankruptcy.

Congress has expressly prohibited various forms of serial filings. See, e.g., 11 U.S.C. §109(g) (no filings within 180 days of dismissal); §727(a)(8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing); §727(a)(9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing). The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief. Cf. *United States v. Smith*, 499 U.S. 160, 167, 111 S.Ct. 1180, 1185, 113

L.Ed.2d 134 (1991) (expressly enumerated exceptions presumed to be exclusive).

*Id.*¹⁶

As noted in response to Debtor's varied concerns respecting tactical filings, statutory remedies exist. §1325(a)(3) and (7) require that the petition and plan be filed in good faith. Although objections alleging bad faith are necessarily fact-oriented, many tools exist to assist trustees and creditors. These include testimony taken at the First Meeting of Creditors and examinations conducted pursuant to Fed.R.Bankr.P. 2004. Traditional discovery devices in the event an objection to confirmation or an adversary complaint is filed are also available.

Moreover, statutory protections exist for bad faith dismissals. Dismissing in bad faith is sanctionable under §349. *In re Frieouf*, 938 F.2d 1099, 1103 (10th Cir. 1991) (The bankruptcy court may, for cause, permanently, or for a specified length of time, disqualify from discharge debts scheduled in a dismissed case). Every circuit has a body of good faith/bad faith law, which can be applied to any of these options. In the Tenth Circuit, for example, *Flygare*

¹⁶ Debtor omits reference to Chapter 12 as one of the chapters under which individuals who qualify may file. Resp.Br. 2, n.1; §101(18)(A). Chapter 12, which is for "family farmers," is the most similar to Chapter 13, although the "means test" dispute is not implicated in Chapter 12.

remains the guiding light. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983); Pet.Br. 14, 47.

Statutory tools also exist to protect trustees and creditors from bad faith conversion. Pet.Br. 55-56. For example, §348(b)(2) expands the Chapter 7 estate to post-petition assets, if the debtor converted to Chapter 7 from Chapter 13 in bad faith. Section 1328 now contains additional protections, including the right to revoke a discharge if the same was procured through fraud. Section 1330 permits the revocation of an order of confirmation if such order was obtained by fraud.

In *Marrama*, this Court found that a Chapter 7 debtor forfeited his right to convert under §706 to Chapter 13, because of pre-petition bad faith conduct. *Marrama*, 549 U.S. 365 (2006), *supra*. This conduct, which included failure to disclose assets and transfers, would likely have warranted dismissal or reconversion of the case. *Id.* at 374. In reaching that result, the Court relied on several statutes, including §1307(c) (grounds for dismissal or conversion). *Id.* at 374. Section 105(a) was cited for the proposition that it could be used to prevent an abuse of process, as the statutory language suggests. *Id.* at 375, n.11.

Ultimately, Debtor and the United States casually shrug off these four options, as well as the protections available to guard against abuse, because they have not, and cannot, defend against them.

III. Debtor And The United States Wrongly Reject Pertinent Legislative History Because They Do Not Like The Result.

Debtor and the United States are dismissive of the legislative history developed by the Trustee. Resp.Br. 45. Direct quotes from this history can hardly be rejected out of hand. Pet.Br. 12, 28-29. Debtor and the United States simply choose to ignore the existing history because of the results they presume. Resp.Br. 45; U.S.Br. 23-24. Their brief forays into this area consist of wishing such history came from more people and was more recent.¹⁷ Resp.Br. 46. The legislative history that *does* exist supports the conclusion that Congress intended to limit the discretion of bankruptcy judges. Debtor does not dispute, or even acknowledge, the importance of this history. Neither Debtor nor the United States brings anything of substance to the table to countermand that history. In noting that this history is 5 years prior to BAPCPA, Debtor and United States do not acknowledge that the law being considered at that time was identical to BAPCPA with respect to the propositions considered in this case. Neither the lapse of time nor the sources diminish its relevance. This Court's previous consideration of the legislative

¹⁷ Debtor references Senator Feingold's proposed amendment to BAPCPA in 2005, which was never voted on. It would have allowed adjustments for actual future income to modify "current monthly income." Resp.Br. 47 n.17. Perhaps Congress was pleased with the formula. That is just as likely as Debtor's speculation to the contrary.

history of bills not passed in order to divine congressional intent is not acknowledged by either the Debtor or the United States. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

The legislative history proves Congress intended:

1. To “[B]oth remove unequivocally the bankruptcy court’s discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and to *restrict as much as possible reliance upon judicial discretion* to determine the debtor’s ability to pay.” Pet.Br. 28, *citing* 146 CONG. REC. S11,700 (2000) (Sen. Grassley) (emphasis added).

The plain language of the Chapter 13 means test is in clear accord with this stated intent. Only by ignoring §101(10A) and twisting the meaning and application of the word “projected” can Debtor defeat the statute and stated legislative intent to restrict judicial discretion.¹⁸

2. That “there be a uniform, nationwide standard to determine disposable income used in Chapter 13 cases based on means test calculations . . . (and that) *their disposable income be determined using*

¹⁸ Waxman’s attempt to turn the phrase “as much as possible” into an argument supporting the forward-looking approach fails. Waxman Br. 22. If anything, it is simply recognition that completely eliminating judicial discretion is not possible. For example, §101(10A)(A)(ii) allows the court to move the 6-month period. That clearly involves limited discretionary acts, but does not suggest that the formula may be ignored.

basic means test concepts which define current monthly income (101(10A)) and allowable expenses (707(b)(2)(A)(ii), (iii) and (B)).” Pet.Br. 29, citing 146 CONG. REC. S11,703 (2000) (Sen. Grassley) (emphasis added).

Debtor and the United States argue that the general statements in the legislative history noting Congress wanted debtors to pay the maximum they could afford somehow supports their argument that their expansive view of the Chapter 13 means test is consistent with legislative intent. Ms. Lanning and the United States are off mark on this specious proposition. While the general goal was, we all agree, to require debtors to pay all they can, what is missing from the opposition’s analysis is that the methodology for accomplishing that end was, and is, an objective test – the means test, not substituted judicial discretion. Resp.Br. 31; U.S.Br. 21.

A plain reading of the statutes is confirmed by these telling snippets of legislative history. What debtors are to pay to creditors is to be determined from the statutory prescription and not by judicial invention. The concepts endorsed by the Tenth Circuit of “starting point,” “presumptively correct,” “substantial change in circumstances,” and “presumption,” do not exist in and are not supported by the text of the applicable statutes or the legislative history. Pet.App. 18, 24, and 31.

3. That “*Once net monthly income is determined, it is then multiplied by the applicable commitment*

period to determine the total amount which the plan must apply over its duration to pay unsecured creditors. If the plan does not apply all of disposable income to pay unsecured creditors, the plan is not confirmable.” Pet.Br. 29, *citing* 146 CONG. REC. S11,703 (2000) (Sen. Grassley) (emphasis added).

Debtor goes to great lengths to try to escape what is undeniable – net monthly “disposable income” *must* be multiplied by the “applicable commitment period” to determine the amount to be paid to unsecured creditors. She fails in that endeavor, if for no other reason than she argues inconsistent positions. *See* Sec. I.B., *supra*. However, once again, neither the statute nor the legislative history supports her oblique, result-driven conclusion. Without doubt, debtor’s “disposable income” *is* to be multiplied by the “applicable commitment period.”



CONCLUSION

The legislative history and a fair and plain reading of the Chapter 13 means test support the Trustee's view. This case should be remanded to the bankruptcy court. Calculation of a debtor's "projected disposable income" must be done in accord with the statute, in the first instance. The new BAPCPA provisions allow no judicial discretion except in moving the 6-month look back period and in determining whether special circumstances exist on the expense side. A mandate that requires that the operative statutes be followed, as written, rather than re-written, should issue.

Respectfully submitted,

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