No. 09-907

IN THE
Supreme Court of the United States

JASON M. RANSOM,

Petitioner,

v.

MBNA AMERICA BANK, N.A.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent and the Government take different positions in this case. The Government[1] accepts a key premise of Petitioner's argument. The Government agrees that, "by incorporating the 'expense amounts specified under the National Standards and Local Standards,' Congress obviated the need for an individualized determination of all the debtor's actual expenses." U.S. Br. 26. Further, the Government acknowledges that the statute "is better read to allow a debtor with a car loan or lease payment to deduct the standardized amount even when it is greater than his actual payment." U.S. Br. 20. Thus, in the Government's view, a debtor with any auto loan or lease payment at all (whether $100 or $400 per month) is entitled to a deduction of $496, based on the amount specified in the current version of the IRS Local Standards chart.[2]

In advancing this argument, the Government departs from Respondent's position (Respondent Br. 12, 45-46) and from the IRS commentary to the Local Standard for transportation.[3] However, the Govern-

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[1] The United States is hardly a disinterested amicus in this case. U.S. Trustees bring virtually all motions to dismiss cases under 11 U.S.C. § 707(b), and in many cases object to debtors' claims that they are entitled to a transportation ownership allowance in the absence of car payments. Thus, the position of the United States in this case is the litigation position of U.S. Trustees.

[2] http://www.irs.gov/businesses/small/article/0,,id=104623,00.html.

[3] "The taxpayer is allowed the amount actually spent, or the standard, whichever is less." http://www.irs.gov/businesses/small/article/0,,id=104623,00.html.

ment does not agree with Petitioner that a debtor who has saved enough to purchase a car outright, with no loan payment, is entitled to the standardized amount specified in the IRS chart. The Government would grant the standardized ownership deduction only to a debtor with actual loan or lease payments. U.S. Br. 26.[4]

This Court should reject the statutory interpretations of both the Government and Respondent. The text and structure of the Bankruptcy Code demonstrate that a chapter 13 above-median-income debtor who owns an automobile may deduct vehicle ownership expenses whether or not he or she has vehicle loan or lease payments. The various statutory interpretations proffered by the Government and Respondent would create an inconsistency between the treatment of automobile ownership expenses and other expenses (including food, clothing, apparel, and out-of-pocket medical care) under the same statutory language.

Moreover, the interpretations of the Government and Respondent would frustrate the statutory purpose. As the Government properly recognizes, the statutory scheme created by Congress has the virtue of minimizing transaction costs and subjective judicial variations by using standardized, uniform tables rather than requiring costly investigation and fact-finding into each debtor's individual circumstances. The scheme also allows debtors

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[4] Ultimately, both the United States and Respondent contend that the Court need not decide the proper deduction for a debtor with vehicle loan or lease payments of less than the standardized amounts. U.S. Br. 21; Respondent's Br. 20, 31.

budget flexibility to scrimp on one category of expenses in order to pay more on others. For example, debtors often cut back on some allowed expenses (such as food or car ownership) in order to be able to save enough to send their children to private religious schools, or to pay rent higher than the IRS housing allowances in order to avoid neighborhoods they consider unsafe.

Respondent seeks to create a "heads-the-creditor-wins, tails-the-debtor-loses" system in which the IRS Standards act as a cap on debtor deductions, but where debtors with lower actual expenses are denied the amounts specified in the IRS Standards. When the IRS applies its standards for tax-collection purposes, it affords itself discretion to depart upwards or downwards, based on the facts and circumstances on the individual taxpayer.[5] Respondent wants the standards adjusted in one direction only – downwards. Thus, while its amicus Brunstad proposes that under the IRS Manual debtors with older cars should receive an additional $200 in operating expenses (beyond the amount specified in the IRS tables, Brunstad Br. 16), Respondent does not endorse this proposal. Respondent's proposal is fundamentally unfair and runs counter to the statute.

Respondent's statutory interpretation would also discourage debtors from choosing to file under chapter 13, which Respondent acknowledges Congress sought to promote. Respondent's Br. 5.

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[5] Internal Revenue Manual §§ 5.15.1.7.5, 15.15.1.8.3 (available at http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1012).

Respondent's position would penalize thrifty debtors who rely on savings or defer replacing their old cars and reward those who purchase cars by borrowing and incurring debt – flying in the face of the pro-saving lesson of credit counseling, which Congress also sought to encourage in the 2005 bankruptcy amendments.

In addition, Respondent's approach would impose substantial real-world harm on debtors. Respondent concedes that many debtors, after filing for bankruptcy, will need to purchase or replace a vehicle – to obtain or maintain employment and care for their families. Respondent's Br. 41 (noting that need for a car is "[p]erhaps the most common motive for modification" of chapter 13 bankruptcy plans) (citation and internal quotation marks omitted). Under Respondent's test, a debtor with no car payments on the date of bankruptcy will be unable to claim an ownership expense deduction, even if he or she subsequently purchases a vehicle. Respondent's blithe answer is that, "if the need for a new car arises, the debtor may move to modify the plan to reduce the plan payments to permit purchase of a new vehicle." *Id.* Respondent's answer is relevant only to chapter 13. In section 707(b) dismissal proceedings, which the decision in this case will likely control as well (U.S. Br. 3 n.1), no after-the-fact plan modification is possible. The bankruptcy court will have already dismissed the case. Hence, Respondent's statutory interpretation is no answer in chapter 7 cases – a further reason to reject it.

The judgment below should be reversed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE SUPPORTS PETITIONER'S INTERPRETATION.

Three circuits have adopted Petitioner's interpretation of the statutory text. *See Tate v. Bolen*, 571 F.3d 423 (5th Cir. 2009); *Ross-Tousey v. Neary*, 549 F.3d 1148 (7th Cir. 2008); *eCast Settlement Corp. v. Washburn*, 579 F.3d 934 (8th Cir. 2009).[6]

A. The Text Distinguishes Between "Applicable" Expenses "Specified Under" IRS Standards And "Actual Expenses."

Section 707(b)(2) provides that "[t]he debtor's monthly expenses shall be the debtor's ***applicable*** monthly expense amounts ***specified under*** the National Standards and Local Standards . . . issued by Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief." 11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). With respect to "the categories specified as Other Necessary Expenses issued by the Internal Revenue Service" (such as legal and accounting fees, child-care expenses, and education expenses), the relevant monthly expenses are "the debtor's ***actual*** monthly expenses." *Id.* (emphasis added).

[6] The Government refers to the overruled district court decision in *Ross-Tousey*, in which the U.S. Trustee was a litigant. U.S. Br. 19, 28.

The statute thus draws a distinction between (i) "applicable monthly expense amounts specified under the National Standards and Local Standards" and (ii) "the debtor's actual monthly expenses" for "Other Necessary Expenses." Even Respondent, noting the terms "applicable" and "actual," acknowledges that "the use of different words suggests that Congress meant for the terms to have different meanings." Respondent's Br. 19.

"[A]mounts specified" under the Standards means the ***specific amounts*** of expenses to which a debtor is entitled. Neither Respondent nor the Government contests the argument in Petitioner's Opening Brief that the use of the term "specified" in Section 707(b)(2) indicates reference to a list of delineated amounts. Pet. Br. 26 (citing *Webster's New World Dictionary of the American Language: College Edition* (1958)). Amounts "specified" are, by definition, amounts listed and settled, and available for reference.

The IRS tables of National Standards and Local Standards cross-referenced in the statute specify certain expense amounts not only for transportation, but also for food, clothing, housekeeping supplies, personal care products, and out-of-pocket health care.[7] Determining what expense amounts are

[7] The National and Local Standards for transportation are available at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html. The National Standards for food, clothing, housekeeping supplies, and personal care products are available at http://www.irs.gov/businesses/small/article/0,,id=104627,00.html. The National Standards for out-of-pocket health care expenses are available at http://www.irs.gov/businesses/small/article/0,,id=173385,00.html.

"applicable" to a particular debtor does not require a court to consider a debtor's "actual" expenditures, but rather requires the court to consult the IRS tables to determine the expense amounts "specified under" the relevant Standard.

The various IRS tables specify different standardized expense amounts according to certain factors, such as where a debtor lives, the size of the debtor's household, the debtor's age, and other variables, depending on the particular chart involved. For example, a debtor with two cars living in a three-person household in Los Angeles would receive a monthly national transportation ownership expense of $992 and a monthly local transportation operating expense of $566. The same debtor would receive standardized monthly national expense allowances of $626 for food, $61 for housekeeping supplies, $209 for apparel and services, and $59 for personal care products and services. The debtor would also receive a standardized monthly allowance of $60 on a per-person basis for out-of-pocket medical care costs (for persons under 65), or $144 per person (for those ages 65 and older). Each of these amounts may be high for some debtors and low for others, but the net effect is to create an overall budget that allows debtors flexibility to economize on one category of expenses in order to pay more on others.

When Congress wished courts to consider "actual expenses," it said so explicitly. For example, Section 707(b)(2) refers to the "actual expenses paid by the debtor that are reasonable and necessary" for the care and support of elderly, chronically ill or disabled immediate family members, § 707(b)(2)(A)(ii)(II), and other "actual" expenses. *See* § 707(b)(2)(A)(ii)(III), (IV). Congress well understood the difference between "applicable" expenses specified in the IRS tables, and "actual" expenses.

With respect to transportation and other expenses addressed by the National Standards and Local Standards, the statute does not say that the monthly expenses shall be ***either*** the amounts specified under the IRS Standards, ***or*** the actual amounts, whichever is less. Nor does the statute provide that "monthly expenses are the debtor's applicable monthly expenses, not to exceed the amounts specified under the National Standards and Local Standards."

Congress could have drafted the statute in any of these ways, but it did not do so. The plain language and structure of the statute thus demonstrate that a debtor is entitled to the "applicable" automobile ownership cost deduction for a vehicle, as specified under the IRS standards, even if he or she is not actually making loan or lease payments on it. *See* Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 256 (2005); 6 COLLIER ON BANKRUPTCY ¶ 707.05[2][c], at p. 707-43 (15th ed. Rev. 2009).

B. The Opposing Arguments Fail To Consider The Treatment Of Non-Transportation Expenses.

The Government insists that "[a] deduction for a particular type of expense is not 'applicable' if the debtor will not pay that expense during the plan period." U.S. Br. 7. But this argument contradicts the Government's own position that a debtor with a car payment of (say) $200 is entitled to the full ownership deduction (currently $496), even though the debtor will not be paying the full $496. U.S. Br. 20.

Moreover, the Government conflates the terms "actual" and "applicable." To be sure, an expense will not be an "actual" expense if it the debtor will not pay it during the plan period. But a standardized expense allowance may well be "applicable" to a debtor under an IRS chart, by virtue of his or her geographical location, size of household, and so on, regardless of whether it is "actually" incurred.

The statute does not use the locution "if applicable"; that is, the statute does not say that a debtor is entitled to an expense "if applicable" or "if actually incurred." Rather, the statute says that a debtor is entitled to the "applicable monthly expense amounts specified under the National Standards and Local Standards." Determining which expense amounts are "applicable" requires a court to consult the IRS tables, not to inquire as to a debtor's "actual" expenses. This interpretation gives complete meaning to the definition to the word "applicable," i.e., "capable of being applied," "having relevance," and "fit, suitable, or right to be applied." Respondent's Br. 18.

Further, the issue raised by this case – whether a deduction for a certain kind of expense can be "applicable" to a debtor if he or she will not actually pay that expense during the plan period – is not unique to transportation. The "National Standards and Local Standards" to which Section 707(b)(2) refers specify not only transportation ownership expenses but also monthly amounts for food, clothing, and other categories. All of the arguments of Respondent and the Government in this case (involving transportation expenses) are equally applicable to food, clothing, housekeeping supplies, personal care products, and out-of-pocket medical care expenses.

Yet there is no dispute that, based on the very same statutory language at issue in the case at bar, a debtor is entitled to claim the specified amounts as allowed expenses for food, clothing, medical care, and other expenses, regardless of whether he or she incurs any actual costs in those categories (because, for example, she lives with relatives). As explained by Bankruptcy Judge Eugene R. Wedoff:

> The IRM [Internal Revenue Manual] makes it clear that the total applicable expense allowance of the National Standards is to be given to each taxpayer, regardless of the taxpayer's actual expenditures in any of the individual National Standards categories or the taxpayer's actual total expenditures in the combined categories. Thus, even hypothetical taxpayers living in a Garden of Eden, with cost-free satisfaction of all their basic needs, would still be allowed a deduction from income in the total amount set out in the National Standards.

79 AM. BANKR. L.J. at 255. Respondent acknowledges that "[t]he amount of deduction for 'applicable' expenses under the National and Local Standards often will not be the actual amount incurred by the debtor." Respondent's Br. 19; *see also id*. at 29. Respondent quotes the Collection

Financial Standards: "[t]axpayers are allowed the total National Standards amount for their family size and income level, without questioning amounts actually spent." Respondent's Br. 11. In addition, a debtor with no car is allowed a public transportation expense of $182 even if he or she lives in a location where there is no public transportation, relies on a borrowed car or rides from friends, or incurs no actual public transportation expenses for other reasons: "Taxpayers with no vehicle are allowed the standard amount monthly, per household, without questioning the amount actually spent."[8]

Neither Respondent nor the Government explains why car ownership should be singled out for disparate treatment, or why the same statutory language of Section 707(b)(2) should mean one thing in the context of autos and another thing with respect to food, clothing, or other types of expenses. Respondent seeks to defend a scheme in which debtors are entitled to standardized expense amounts under the "National Standards" of food, housekeeping supplies, apparel, and personal care products and services, but not under the Local Standards for transportation. Respondent's Br. 11-12. But there is no textual basis for that distinction. Section 707(b)(2) refers to "applicable monthly expense amounts specified under the National Standards and Local Standards." The statute does not discriminate between the two or suggest that the types of expenses are to be treated differently. All of the arguments raised by Respondent and the Government pertain equally to the expense

[8] http://www.irs.gov/businesses/small/article/0,,id= 104623,00. html.

allowances regarding food, clothing, medical care, and other categories.

C. The Opposing Interpretation Would Create A Conflict Between Two Parts Of The Same Statute.

There is a further indication that Petitioner's statutory interpretation is correct. Two sentences after the opening reference to National and Local Standards, Section 707(b)(2)(A)(ii)(I) contains additional language: "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts." This provision further indicates that Congress intended to allow an ownership expense even when a debtor has no debt payment on a vehicle. Petitioner has explained the simple manner in which the transportation ownership deduction and the "Notwithstanding" clause work together. Petitioner's Br. 21, 27-28, 44-45.

In contrast, both Respondent and the Government struggle to reconcile their statutory construction with the "Notwithstanding" clause. Both insist that it is a rule of "exclusion," not "inclusion." Respondent's Br. 30; U.S. Br. 21-22. But if the transportation ownership deduction were measured by lease and loan payments, as Respondent contends, then the ***inclusion*** of the deduction in the first part of Section 707(b)(2) would be at odds with the ***exclusion*** of debt payments in the latter part of the same subsection. The exclusion of "payment for debts" indicates that Congress intended the "applicable monthly expense amounts specified under the National Standards and Local

Standards" to be determined by the standardized amounts set forth in the IRS tables, not by the debtor's actual payments for auto-related debts. Other portions of Section 707(b)(2) deal with debt payments. *E.g.*, 11 U.S.C. § 707(b)(2)(A)(iv).

The Government ultimately admits that, under its view, "[t]here is some uncertainty about how the 'notwithstanding' sentence operates in this context" of a vehicle loan payment, but it insists that the "debate is far afield." U.S. Br. 23 n.5. To the contrary: the fact that Respondent and the Government cannot offer a satisfactory interpretation of language two sentences away from the operative part of the very statutory provision under review confirms that their proffered construction has no merit.

D. The Opposing Textual Arguments Are Flawed.

Respondent and the Government make a series of other flawed arguments regarding the statutory text. First, they note that the IRS Local Standards for transportation provide separate deductions for vehicle ownership and vehicle operating expenses, and they maintain that such "distinct treatment of ownership and operating expenses would be superfluous if every debtor with a vehicle could claim both deductions." U.S. Br. 8; *see also* Respondent's Br. 18-19. But the reason for the distinct treatment has nothing to do with the statutory interpretations proffered by Respondent and the Government. The ownership and operating allowances are separate because the ownership expense allowance is established as a single national figure that does not vary by geographic region. The operating expense, in contrast, is set by the IRS on a regional basis, reflecting differences in insurance, tax, and other costs.

Next, the Government contends that "Congress used the word 'applicable' to require a threshold finding that an action or procedure is justified based on the individual debtor's specific circumstances." U.S. Br. 8. But that argument ignores the grammar of Section 707(b)(2). "Applicable" is an adjective that modifies the "amounts specified" in the Standards. It does not modify the phrase "debtor's monthly expenses," which appears at the beginning of Section 707(b)(2)(A)(ii)(I). The adjective "applicable" functions to narrow the reference to "amounts specified"; it does not refer to or modify the debtor's expenses. Hence, the determination of the "applicable" amounts focuses on the amounts specified in the IRS tables, not on the debtor's individual circumstances. That is true not only with respect to the transportation expense allowance, but also with respect to food, clothing, and the other expenses previously discussed.[9]

II. RESPONDENT'S RELIANCE ON IRS COMMENTARY IS MISPLACED.

Respondent urges this Court to consult not simply the IRS tables to which Section 707(b)(2) refers, but also to consult the accompanying IRS commentary in the IRS Collection Financial

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[9] Petitioner's statutory interpretation also meets the Government's test: a debtor must make an initial threshold showing that he or she is the owner of a car.

Standards and even the Internal Revenue Manual, which is an entirely separate document to which the statute does not refer at all. Respondent's Br. 20-21. However, the Government does not accept the view of the IRS commentary to the Local Standard for car ownership, and neither should this Court.

There are additional reasons that the IRS commentary does not control the proper interpretation of Section 707(b)(2). First, as neither the Government nor Respondent disputes, the IRS does not administer the Bankruptcy Code. Respondent's Br. 34. Neither the Government nor Respondent contends that the IRS is entitled to *Chevron* deference or any other form of legal deference. As Respondent acknowledges, "[i]t is the statute that governs." *Id.* at 34.

Next, the statute does not incorporate the IRS commentary or the Internal Revenue Manual into the Bankruptcy Code. Rather, the statutory language adopts only the "applicable monthly expense amounts specified under the National Standards and Local Standards." If Congress had intended to incorporate the entire IRS methodology, and not merely the Financial Standards, it would have said so directly. The use of the word "under" (Respondent's Br. 33) hardly means that Congress meant to incorporate the entirety of the IRS commentary. And Respondent's claim that the statute "implicitly refers to" the IRS Manual (Respondent's Br. 21), or that the Manual was cited in the legislative history (such as the dissenting views of a committee report, *id.* at 36), betrays the degree to which Respondent's argument has departed from the statutory text. The statute makes no reference to the Manual, either explicitly or implicitly, and contains no suggestion that Congress intended to delegate to the IRS the lawmaking power to decide how to administer the applicable monthly expense amounts – i.e., whether they were to be treated as standardized deductions, floors, or ceilings in light of a debtor's actual expenses.

Respondent contends that "it is not possible simply to look to the table alone because the table, without some guidance as to how to read it, is meaningless." Respondent's Br. 20. That suggestion is incorrect. It ***is*** possible to consult the table alone and to use the "amounts specified" as standardized deductions.

There is a good reason that the statute incorporates only the expense amounts and not the IRS commentary or Manual: the IRS has developed the commentary and Manual for its own tax-collection purposes, not for purposes of administering the Bankruptcy Code. The Government acknowledges that "the IRS uses the National and Local Standards" "[i]n connection with its own tax-collection efforts," "to help determine a taxpayer's ability to pay a delinquent tax liability." U.S. Br. 4 n.2 (internal quotation marks and citation omitted). The IRS retains the discretion to adjust its standards upwards or downwards based on the circumstances of the individual taxpayer. *See* n.5, *supra*. And the IRS disavows any intent to have the financial standards from the IRM apply in any context other than tax collection.[10]

III. RESPONDENT'S LEGISLATIVE HISTORY AND POLICY ARGUMENTS HAVE NO MERIT.

Respondent relies heavily on its perceived ability to discern what "Congress wanted," Respondent's Br. 21, as though Congress were a monolithic entity with a single intent. Respondent insists that "Congress wanted existing unsecured debts to be paid down as much as possible." *Id*. This argument is foreclosed by the statutory text and is flawed on its own terms.

Both Respondent and the Government recognize that debtors are entitled to claim the specified amounts in the IRS tables as allowed expenses for food, clothing, medical care, and other expenses, regardless of whether they incur any actual costs in those categories. Such a recognition is inconsistent with any suggestion that Congress had in mind a single statutory purpose to favor creditors over debtors in every instance.

Further, the Government recognizes that Congress sought to create an objective test and "obviate[] the need for an individualized

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[10] "Disclaimer: IRS Collection Financial Standards are intended for use in calculating repayment of delinquent taxes. These Standards are effective on March 1, 2010 for purposes of federal tax administration only. Expense information for use in bankruptcy calculations can be found on the website for the U.S. Trustee." http://www.irs.gov/individuals/article/0,,id=96543,00. html.

determination of all the debtor's actual expenses." U.S. Br. 26. Even Respondent observes that Congress "sought to introduce more clarity into the calculation of the 'disposable income'" of above-median debtors governed by the chapter 7 means test. Respondent's Br. 6. Previously, "[r]equiring bankruptcy judges to determine what expenses were reasonably necessary led to wide-ranging, often inconsistent results." *Id.*

Every objective test creates questions of line-drawing and perceived fairness, but Congress chose to use "the amounts specified" under the National and Local Standards as a means of relieving bankruptcy courts from the burden of engaging in individualized analyses of the reasonableness of particular debtors' expenditures. "The provisions of section 707(b)(2) create a bright line test to determine whether a debtor's chapter 7 case is to be presumed abusive for purposes of section 707(b)." 6 COLLIER ON BANKRUPTCY ¶ 707.05[2][a], at 707-40. Respondent would return the bankruptcy system to the pre-2005 practices by focusing on debtors' actual expenses.

Respondent suggests its position is necessary to address bankruptcy abuse, but that is not so. The Department of Justice has found, based on a RAND Corporation study, that the IRS Standards in the means test impact only a very small proportion of bankruptcy filers.[11] Only 8 percent of chapter 7

[11] U.S. Department Of Justice, Executive Office Of The U.S. Trustees, Report To Congress: Impact Of The Utilization Of Internal Revenue Standards On Debtors And The Court 3 (2007), available at http://www.usdoj.gov/ust/eo/public_affairs/reports_studies/docs/Rpt_to_Congress_on_IRS_Standards.pdf.

filers are even governed by the means test, and fewer than 1% of chapter 7 debtors are presumed to be abusive.[12] Claims of rampant bankruptcy abuse are fiction.

Respondent's statutory interpretation would discourage debtors from availing themselves of chapter 13, even though Respondent acknowledges that creditors "are usually better off, when a debtor uses Chapter 13" and "Congress tried to make Chapter 13 more attractive" to debtors. Respondent's Br. 5. Chapter 13 relief is purely voluntary on the part of a debtor, and a bankruptcy court cannot require a debtor to propose a chapter 13 repayment plan. *Id.* Only a tiny percentage of chapter 13 debtors are forced into that chapter by the chapter 7 means test; the vast majority of the

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Other studies agree. *See* Clifford J. White III, *Making Bankruptcy Reform Work: A Progress Report in Year 2*, 16 AM. BANKR. INST. J. 16 (June 2007) (reporting on data from October 2005 to March 2007):

- "[o]f chapter 7 debtors, 7.9 percent have income above the applicable state median income";
- only 9.5 percent of above-median-income debtors in chapter 7 were presumed abusive, meaning over 90 percent were not (that is, they passed the means test);
- U.S. Trustees decided not to file motions to dismiss in about twenty percent of chapter 7 presumed-abuse cases (presumably because there was a good case for rebuttal).

[12] Respondent implies that, upon a finding of abuse, a court is required either to dismiss a chapter 7 case or to convert it to a chapter 13 case. Respondent's Br. 10. That implication is not correct. The court "may" dismiss or convert. 11 U.S.C. § 707(b). A court also has discretion not to do either in such circumstances.

above-median chapter 13 debtors choose chapter 13 voluntarily. *See* n.11, *supra.*

Respondent's statutory interpretation would frustrate the congressional purpose of encouraging chapter 13, by making it comparatively less attractive for debtors and requiring more onerous repayment schedules. The failure rate in chapter 13 cases is already approximately two-thirds.[13] Respondent's approach would overburden already-stretched chapter 13 debtors and discourage debtors from voluntarily selecting chapter 13 in the first place, ultimately to the detriment of creditors overall.

The legislative history to which Respondent points (Respondent's Br. 42-43) is general and cannot be taken to mean that every dispute regarding the interpretation of the means testing provisions must be resolved in favor of creditors. *See In re Quick*, 371 B.R. 459, 463 n.10 (B.A.P. 10th Cir. 2007) ("Specifically, we do not agree that BAPCPA amendments that appear to benefit creditors must be interpreted in such a way as to benefit only creditors. In fact, many of the supposedly 'pro-creditor' amendments appear reflective of the normal give and take of the legislative process.").

Such an argument disregards the fact that many parts of the bill were the products of compromise. An earlier draft of the means test required

[13] Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 505 & n.70 (2006) ("The overall discharge rate for the debtors in the seven districts covered by the Project was exactly the oft-repeated statistic of one-third.").

calculation of "projected monthly net income," which provided for expense allowances "as determined under the Internal Revenue Service financial analysis for expenses in effect as of the date of the order for relief." H.R. Rep. 105-540 (May 18, 1998), H.R. 3150, 105th Cong. (1998). In the version that Congress passed in 2005, the reference to the IRS "financial analysis" was removed and replaced with the current language – evidencing an intent that bankruptcy courts not be bound by the IRS commentary.

Respondent and the Government suggest that Petitioner's statutory interpretation would unfairly benefit above-median-income debtors. Respondent's Br. 22. But the same allegedly "unfair" benefit arises with respect to food, clothing, medical care, and other expenses – not merely transportation. Indeed, the effect is part and parcel of a statutory scheme that allows these debtors budget flexibility to economize on one category of expenses in order to pay more on others, instead of the scheme for below-median income debtors, under which the court can take into account debtors' individual needs.

Respondent claims that Petitioner's interpret-tation "would give debtors perverse incentives." Respondent's Br. 44. The opposite is true. Respondent's position would penalize thrifty debtors who rely on savings or wait longer to replace an old car and reward those who purchase a new car by borrowing and incurring debt. Ironically, these practices are inconsistent with the central lessons of the credit counseling that Congress sought to promote in the 2005 amendments, which require credit counseling and assistance in budgeting before bankruptcy and financial education during bankruptcy. *See* 11 U.S.C. §§ 109(h), 727(a)(12), 1328(g). It makes little sense to give debtors an incentive to favor incurring additional debt over savings:

> Borrowers who have saved money to purchase their current vehicles and are saving to replace them should be treated the same as those who are making loan payments. Certainly, ***the Bankruptcy Code should not encourage debtors to borrow, rather than save, to purchase cars***.

6 COLLIER ON BANKRUPTCY ¶ 707.05[2][c], at 707-45 (emphasis added). The ownership expense standard simply recognizes that, whether a debtor borrows or saves money to buy a car, cars are not free. It is difficult to believe Congress intended that a debtor who had saved to buy her aging car would, if she filed bankruptcy due to medical expenses, be put into a position where she would be forced to go into debt to replace it.[14]

Respondent contends that depreciation is not an allowable expense. Respondent's Br. 39-42. Respondent misses the point. The issue is not the nature of depreciation. Rather, a debtor who owns an old car outright at filing likely will need to buy a

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[14] In fact, if a debtor's car is worth more than the relatively low amount that can be exempted in most states, 11 U.S.C. § 1325(a)(4) requires the debtor, in effect, to repurchase the nonexempt interest in the car by paying into the plan the present value of the amount in excess of the exemptions. *See* COLLIER ON BANKRUPTCY ¶ 1325.05.

new one before completion of a five-year chapter 13 plan. Indeed, a debtor may need to buy a car immediately, having been unable to do so before bankruptcy because of other debts. Granting an ownership allowance recognizes "the reality that a car for which the debtor no longer makes payments may soon need to be replaced (so that the debtor will actually have ownership expenses) . . . ." Wedoff, 79 AM. BANKR. L.J. at 258.

The same reasoning applies where a debtor's car payments might end midway through a repayment plan. There would be no reason to bump up a debtor's payment schedule in such circumstances, because the statutory scheme creates an objective test, based on a reasonable transportation allowance, to be applied at the outset of what is usually a 60-month bankruptcy process for chapter 13 debtors. Given the inherent uncertainties of predicting a debtor's expenses several years into the future, it was entirely sensible for Congress to design a system that did not depend on the particular mix of a debtor's actual vehicle expenses at the time the case was commenced.

IV. THIS COURT'S DECISION IN *LANNING* DOES NOT PROVIDE A REASON TO AFFIRM THE JUDGMENT BELOW.

Both Respondent and the Government ask this Court to hold that, even if a debtor without vehicle loan or lease payments is entitled to a transportation ownership deduction under Section 707(b)(2), no such deduction would be appropriate in calculating a chapter 13 debtor's "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B). Respondent's Br.

49-51; U.S. Br. 30-32. In other words, they ask this Court to affirm the Ninth Circuit's judgment on the basis of the recent decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). This Court should refuse that request.

First, the Ninth Circuit did not have the opportunity to examine the implications of *Lanning* for this case, and this Court would have to do so in the first instance, without the benefit of the views of the lower court. This Court may wish to defer the matter to the Ninth Circuit on remand.

Lanning concerned the interpretation of the phrase "***projected*** disposable income" in 11 U.S.C. § 1325(b)(1) (emphasis added). The means test at issue here involves a determination of the debtor's "monthly expenses" under Section 707(b)(2). As recognized by the Eighth Circuit in *Washburn*, 579 F.3d at 941-42 (and by other courts), the forward-looking approach to Section 1325(b)(1) adopted in *Lanning* is entirely consistent with Petitioner's statutory interpretation. A debtor's monthly expenses should be calculated on the basis of standardized expenses in the IRS tables, which contemplate a forward-looking number based on average vehicle ownership costs that a debtor can expect to pay over a lengthy period of time.

If anything, *Lanning* supports Petitioner here by underscoring the importance of predictability and ease of administration of bankruptcy cases. *Lanning* stressed that "only in unusual cases" would a court adjust a debtor's projected disposable income. 130 S. Ct. at 2475. Respondent seeks to do so in every case involving car ownership in the absence of lease or loan payments. The adjustments to income approved in *Lanning* should be reserved for truly "exceptional" cases, *id.* at 2471, and should not be allowed to re-create the system of individualized expense adjudications that Congress deliberately rejected in 2005.

Should this Court address *Lanning* at all, it may wish to reiterate that adjustments to projected disposable income are permissible only for events "that are known or virtually certain at the time of confirmation," 130 S. Ct. at 2478, and it can leave for another day (and further percolation in the lower courts) the question of whether the requisite certainty is present when addressing questions of vehicle ownership expenses.[15]

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[15] Respondent and the Government compare Petitioner's calculations on Schedules I and J with his computation of disposable income on Form 22C. Respondent's Br. 51-53; U.S. Br. 29. However, this Court did not grant review of the factbound question of the proper calculation of Petitioner's monthly disposable income. This Court need not resolve the question in order to reverse the Ninth Circuit's judgment in this case, and in the event it affirms, this Court should make clear that it is not addressing all elements of the proper computation of Petitioner's monthly disposable income in the case at bar.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit Court of Appeals and remand the case for further proceedings.

Respectfully submitted,

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