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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF PETITIONER URGING REVERSAL

TARA TWOMEY
NATIONAL ASSOCIATION OF
CONSUMER BANKRUPTCY
ATTORNEYS
1501 The Alameda
San Jose, CA 95126

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL, LLP
1325 G St. NW
Suite 500
Washington, D.C. 20005
(202) 652-4511

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may allow an ownership cost deduction for vehicles only if the debtor is actually making payments on the vehicles.

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INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,800 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 seeks 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 has participated as *amicus* in numerous cases, including *Hamilton v. Lanning*, No. 08-998 (U.S. June 7, 2010), *Schwab v. Reilly*, No. 08-538 (U.S. June 17, 2010), and *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

NACBA and its membership have a vital interest in the resolution of the question presented, because the proper interpretation of the means test is of vital interest to consumer debtors. NACBA member attorneys represent individuals in a large portion of all consumer debtor cases filed. Through its

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

educational and representational functions, NACBA seeks to ensure the predictability of bankruptcy relief for both consumer bankruptcy debtors and the consumer bankruptcy bar.

SUMMARY OF ARGUMENT

As part of its 2005 revision of the Bankruptcy Code, Congress added a new "means test" for consumer bankruptcies. This new test functions to determine whether chapter 7 cases filed by higher income debtors are presumed to be abusive under Section 707(b), 11 U.S.C. § 707(b). The test is also used for purposes of determining the amount of "projected disposable income" available to be paid over the course of a chapter 13 plan, particularly for expenses of debtors with above median income. It replaces a case-by-case analysis of the debtor's ability to pay with a simplified, more objective computation.

The "means test" computation depends largely on the use of standardized expense amounts for food, clothing, housing and transportation, instead of an individualized analysis of the reasonableness of a particular debtor household's expenditures. According to the words of the statute, a debtor's expense allowances "shall be" the "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." 11 U.S.C. § 707(b)(2)(A)(ii)(I).

By moving from a regime of case-by-case determinations of reasonableness to a more uniform approach, Congress relieved the bankruptcy courts of the difficulty of adjudicating highly individualized disputes about debtors' lifestyle decisions. It also moved the focus from the reasonableness of particular expenses for above-median-income debtors to an aggregated standard budget that is presumed to represent a reasonable total level of spending for different size households in particular geographic regions of the country.

As is often the case with statutory schemes that involve standardized approaches to minimize transaction costs, application of the "means test" computation to a particular debtor household can, occasionally, produce disputes about the perceived fairness of the test when a particular debtor's actual expenditures depart from the standardized assumptions. As with all conflicting interpretations of the Bankruptcy Code, however, resolution of such disputes must begin and end with a determination of the statutory language and what Congress intended.

The question presented by this case concerns one disputed step in the "means test" calculation, namely, whether above-median-income chapter 13 debtors who own vehicles they use for transportation may take the ownership expense deduction under the means test, regardless of whether they are obligated for debt payments on the vehicle at the moment they file their bankruptcy petition. The proper answer to this question is "Yes," for several reasons.

First and foremost, the plain meaning of the statutory language enacted by Congress demonstrates that all above-median-income chapter 13 debtors with cars are entitled to an ownership deduction, even if they are not actually making payments on their vehicles. That is the view taken by the leading COLLIER ON BANKRUPTCY treatise and other authorities. For purposes of computing the amount of monthly payments required to be paid by a higher income chapter 13 debtor, Section 707(b)(2) establishes a formula that uses standardized expense allowances for several categories of household expenses, including transportation, rather than the debtor's actual expenses. The statute treats "applicable monthly expense amounts" in a categorical fashion based on a debtor's geographic location and number of vehicles, rather than making such expense amounts available only on condition of a vehicle-related debt.

Congress did not premise the applicability of the National and Local Standards on the nature or amount of debtors' actual expenses. Rather, Congress dealt with loan payments in a completely separate section of the means test, 11 U.S.C. § 707(b)(2)(A)(iii). This Court has warned against judicial interpretations that add words to provisions of the Bankruptcy Code that Congress specifically did not include. That warning is particularly salient here, given that an earlier version of BAPCPA — which was rejected in the final legislation that was enacted — included the very language that the Respondent would have this Court insert into the statute.

Moreover, the objective interpretation advanced here is completely consistent with a rational policy choice made by Congress. To hold otherwise would create perverse incentives penalizing thrifty debtors who continue to drive cars they have paid off, while encouraging debtors contemplating chapter 13 to finance the purchase of a new car.

The judgment below should be reversed.

ARGUMENT

The provision at issue, 11 U.S.C. § 707(b)(2), was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protections Act of 2005 ("BAPCPA"). This new section of the Code, commonly referred to as the "means test," represented the "heart of BAPCPA's consumer bankruptcy reform." H.R. Rep. No. 109-31, pt. 1 at 2 (2005), 2005 U.S. Code Cong. & Admin. News 88, 89 ("House Report"). The test — which is applicable only in the case of debtors with income in excess of the median income in their state, *see* § 707(b)(7)(A) —is used to determine whether a chapter 7 filing is presumptively abusive. § 707(b)(2)(A)(i) ("the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii) and (iv)" is above listed dollar thresholds).

The means test is incorporated into chapter 13 by 11 U.S.C. § 1325(b), which governs the extent to which a chapter 13 plan must provide for the claims of unsecured creditors. Under that provision an objecting creditor or trustee can force a chapter 13 debtor to pay all of his or her "projected disposable income" to the chapter 13 trustee over a period of three to five years. Under the BAPCPA amendments to this section for debtors whose income exceeds the applicable median family income, *see* 11 U.S.C. § 1325(b)(3), "disposable income" is defined as being the debtor's "current monthly income" less "amounts reasonably necessary to be expended," as "determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)." 11 U.S.C. § 1325(b)(2). Petitioner's income is above median. For chapter 13 debtors at or below median income, means test expenses do not apply.

This case involves a dispute over what "amounts reasonably necessary to be expended" should have been used by the bankruptcy court to calculate Petitioner's "disposable income" with regard to the monthly transportation expenses attributed to his 2004 Toyota Camry, which he owned in full. Under the plain language of the statute, as well as its legislative history and relevant policy considerations, an above-median-income debtor should be allowed a deduction for the ownership costs of a vehicle regardless of whether the debtor is still making loan or lease payments.

A. The Plain Language of the Statute Demonstrates That Petitioner Is Entitled To An Ownership Deduction.

"The starting point in discerning congressional intent" underlying a provision of the Bankruptcy Code is always "the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

Section 707(b)(2) provides in pertinent part:

> The debtor's monthly expenses ***shall be*** the debtor's applicable ***monthly expense amounts specified under the National Standards and Local Standards*, *and*** the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue

> Service for the area in which the debtor resides . . .

11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added).

The "applicable" standards referenced in the statute, including the applicable standards for transportation expenses, are located in the Financial Analysis Handbook of the IRS's Internal Revenue Manual ("IRM"), which the IRS uses in determining a taxpayer's ability to pay a delinquent tax liability. *See* http://www.irs.gov/irm/part5/ch15s01.html. House Report at 13-14. The standards themselves are located at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html.

The plain language of the statute demonstrates that Congress decided to use the IRS standards on transportation expenses, not the debtor's actual expenses, as the appropriate figure to be used in the means test for transportation expenses.

First, Congress was very much aware of the difference between using the IRS published standards and "actual monthly expenses." The statute explicitly distinguishes between "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards," on the one hand, and "the debtor's ***actual*** monthly expenses" (emphasis added), on the other. The statute specifies the use of the latter with regard to "the categories specified as Other Necessary

Expenses issued by the Internal Revenue Service for the area in which the debtor resides."[2]

Thus, the statute draws a clear distinction between ***actual*** expenses and the ***applicable*** amounts specified under the IRS published statements. Congress used "applicable" to mean something other than "actual." If the Court is to give effect to all the words of the statute, the term "applicable monthly expense amounts" cannot mean the same thing as "actual monthly expenses." Under the statute, a debtor's "actual monthly expenses" are relevant only with regard to the IRS's "Other Necessary Expenses;" they are not relevant to deductions taken under the National and Local Standards, including the transportation ownership deduction.

Certainly, Congress knew how to say "actual" when it meant to refer to "actual" expenses. In fact, when Congress intended to condition a deduction on a debtor's actual expenditure or showing of need, it did so. For example, Section 707(b)(2)(A)(ii) uses the following phrases to describe the nature of various other deductions: "debtor's reasonably necessary expenses incurred," § 707(b)(2)(A)(ii)(I) (Family Violence Prevention and Services Act expenses); "expenses paid by the debtor that are reasonable and necessary," § 707(b)(2)(A)(ii)(II) (expenses for elderly,

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[2] The Other Necessary Expense category includes expenses such as legal and accounting fees, charitable donations, childcare and education. IRM Section 5.15.1.10, available at http://www.irs.gov/irm/part5/ch15s01.html#d0e216108. The following line of § 707(b)(2)(ii)(I) directs the bankruptcy court also to allow for "reasonably necessary health insurance, disability insurance and health savings account expenses."

chronically ill or disabled immediate family members); "reasonable and necessary [expenses]," § 707(b)(2)(A)(ii)(I) (additional allowances for food and clothing up to 5%); and "actual expenses [that are] are reasonable and necessary," § 707(b)(2)(A)(ii)(V) (additional home energy costs).

The language of these provisions shows that when Congress intended to condition a deduction on a debtor's actual expenditure or a showing of need, it did so. The absence of this type of language with regard to the National and Local Standards — again, the statute refers only to the "debtor's applicable monthly expense amounts specified under the National Standards and Local Standards" — suggests that courts should not require more of the debtor other than to show that the "amount specified" under the Local Standard be applicable by virtue of the debtor's geography and number of vehicles.

This reading of Section 707(b)(2)(A)(ii)(I) is "mandated by the grammatical structure of the statute." *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989). The category of "applicable monthly expense amounts specified under the National Standards and Local Standards" is separated by a comma and the conjunctive "and" from the category of "Other Necessary Expenses," thereby emphasizing the separate and independent treatment of the two categories. The wording of the statute specifically differentiates between "applicable" and "actual" monthly expenses and therefore, "applicable" expenses are all those that could possibly apply regardless of whether such expenses are "actual."

The grammatical structure of Section 707(b)(2)(A)(ii)(I) parallels that of the provision construed in *Ron Pair*, and the same reasoning is applicable. *See* 489 U.S. at 241-42 (in interpreting § 506(a) of the Bankruptcy Code, "[t]he phrase 'interest on such claim' is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words 'and any.' As a result, the phrase 'interest on such claim' stands independent of the language that follows.").

There is another reason that the statute should be interpreted as requiring the application of IRS standards on transportation expenses: the contrary interpretation (tying a transportation expense to the existence of a loan or lease payment) would create tension with another portion of the same statutory section. 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. Otherwise, if Congress had not so intended, there would be little reason for this limitation.[3]

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[3] The limitation against including loan payments was likely included because the means test allows separately for a deduction for monthly payments on secured debts and leases. § 707(b)(2)(A)(iii). The means test excludes debt payments other than secured debt payments but allows an expense for vehicle ownership independent of whether there is a debt payment.

Our statutory interpretation is shared by an influential bankruptcy treatise as well:

> The better view is that, because the language refers to deducting the "amounts specified" in the standards, and not actual expenses, the ownership allowance specified in the standards is the minimum amount to be deducted for the expense of car ownership, rather than the remaining car payments on a vehicle, if any . . . .

6 COLLIER ON BANKRUPTCY ¶ 707.05[2][c], at p. 707-43 (15th ed. Rev. 2009). The treatise continues:

> [T]he better reasoned decisions considering this issue have permitted debtors to deduct the amounts specified for the transportation ownership expense allowance even if they do not have an obligation to make car loan payments or are intending to surrender the vehicle.

Id. at p. 707-44. Bankruptcy Judge Eugene R. Wedoff has reached the same conclusion:

> [T]here is a question of whether an ownership expense may be claimed by a debtor who owns a car free of any lien. . . . [S]ince the means test treats the Local Standards not as caps but as fixed allowances, it is more reasonable to permit a debtor to claim the Local Standards ownership expense based on the number of vehicles the debtor owns or leases, rather than on the number for which the debtor makes payments.

Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 257-58 (2005).

For all these reasons, Section 707(b)(2)(A)(ii)(I) should be interpreted as requiring the use of the IRS standards on transportation expenses, not the debtor's actual expenses.

B. The Contrary Reading of the Statutory Text Is Unsupportable.

The Ninth Circuit's judgment below would condition the Ownership Expense component of the transportation standards on whether the particular debtor had an existing loan or lease payment on the vehicle at the time of filing a bankruptcy petition. This alternative reading of the statute has no merit.

First, the Ninth Circuit suggested that the ownership cost deduction is "applicable" (within the meaning of the statute) only if the debtor is in fact incurring such an expense in the form of a loan or lease payment on that vehicle. But such a suggestion is misplaced. The Ninth Circuit construed Section 707(b)(2)(A)(ii)(I) as though it provided that the debtor's monthly expenses would be the monthly expense amounts specified under the IRS standards, "only if the debtor is actually incurring such expenses," or perhaps "only if the IRS standards are equal to or lower than the debtor's actual expenses." But the statute does not contain any such language or qualifications. The statute does not provide that "applicable" means that a debtor actually is making a loan or lease payment, and the Ninth Circuit's approach would require adding words to the text of the statute, in violation of basic principles of statutory construction. *See CSX Transp., Inc. v.*

Georgia State Bd. of Equalization, 552 U.S. 9, 29 (2007) (rejecting statutory interpretation that "depends upon the addition of words to a statutory provision") (internal quotation marks and citation omitted); *Patterson v. Shumate*, 504 U.S. 753, 758-59 (1992) (refusing to limit phrase "applicable nonbankruptcy law" to state law, on the ground that it would require adding limiting language to statute).

Furthermore, "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, modify nor restrict the debtor's actual monthly expenses.

Thus, Section 707(b)(2)(A)(ii)(I) is best interpreted to mean that the Local Standard vehicle ownership deduction is "applicable" to the debtor by virtue of his or her geographic region and number of cars, regardless of whether that deduction is an actual expense. The IRS standards on transportation expenses are presented in chart form and vary according to number of vehicles owned, geographical region, and whether the debtor resides in a metropolitan statistical area (MSA).[4] These factors determine precisely what transportation expense amount is "applicable" to a debtor's particular circumstances. Hence, in using the word "applicable" (rather than the phrase "if applicable")

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[4] *See* http://www.irs.gov/businesses/small/article/0,,id=104623,00.htm.

in Section 707(b)(2)(A)(ii)(I), Congress directed bankruptcy courts to determine (based on a particular debtor's place of residence and number of cars) which of the Standard deductions was "applicable" to a particular debtor, in light of that debtor's location and number of vehicles. Congress did not direct bankruptcy courts to inquire as to a debtor's ***actual*** transportation expenses.

The Ninth Circuit noted (but did not rely upon in its decision) the IRS Collection Financial Standards, which are used in calculating repayment of delinquent taxes, *see* IRS Collection Financial Standards (March 1, 2009), and the IRS Internal Revenue Manual ("IRM"), which the IRS uses in determining a taxpayer's ability to pay a delinquent tax liability.[5] The IRS tables recognize two components of transportation expenses connected to the ownership of motor vehicles: an "Ownership Expense" and an "Operating Expense" keyed to different regions of the nation.[6] The IRS Collection Financial Standards with respect to Allowable Living Expenses for Transportation currently provide:

> If a taxpayer has a car payment, the allowable ownership cost added to the allowable operating cost equals the allowable transportation expense. If a taxpayer has a

[5] The portion of the current Internal Revenue Service Manual, Financial Analysis Handbook discussing transportation cost deductions can be found at: http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1005.

[6] http://www.irs.gov/individuals/article/0,,id=96543,00. html.

> car, but no car payment, only the operating costs portion of the transportation standard is used to figure the allowable transportation expense. In both of these cases, the taxpayer is allowed the amount actually spent, or the standard, whichever is less.

When Congress enacted the BAPCPA in 2005, and when this bankruptcy case was filed, the then-extant version of IRS Collection Financial Standards (which are reprinted in relevant part in the Appendix to this brief) did not contain this language. In fact, the 2005 version of the standards did not address the issue of whether the transportation ownership expense should be limited to taxpayers who actually make car payments.[7]

The IRS commentary does not control the proper interpretation of Section 707(b)(2)(A)(ii)(I) in this case, for several reasons. First, the IRS is not an administrative agency that administers the Bankruptcy Code, so there is no basis for a court to defer to its administrative expertise.

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[7] To be sure, section 5.15.1.7 of the IRS Manual (05-01-2004) provided as follows: "If a taxpayer has a car payment, the allowable ownership cost added to the allowable operating cost equals the allowable transportation expense. If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense." Another section stated: "Note: If the taxpayer has no car payment, or no car, question how the taxpayer travels to and from work, grocer, medical care, etc. The taxpayer is only allowed the operating cost or the cost of transportation." But the Financial Standards did not contain these comments.

Next, Section 707(b)(2)(A)(ii)(I) does not incorporate the IRM or the IRS commentary into the Bankruptcy Code. Rather, the statutory language adopts only the IRS transportation standards and does not mention the IRM or the "Financial Analysis" sections of the IRM. If Congress had intended to incorporate the entire IRS methodology, and not merely the transportation standards, it would have said so directly. Instead, according to subparagraph (A) of Section 707(b)(2), the expense deduction to be used in the calculation "shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, . . . issued by the Internal Revenue Service." Therefore, it would be error to rewrite the statute by incorporating not only the IRS's "National Standards and Local Standards" for the applicable categories of expenses and geographic areas, but also all of the IRS commentary and methodologies that IRS has attached to those standards.

There is a good reason that Section 707(b)(2)(A)(ii)(I) incorporates only the expense standards and not the entire IRM: the IRM has a completely different purpose from that of the Code. The pertinent portion of the IRM governs the repayment of delinquent taxes, not the computation of the means test or the calculation of the debtor's "projected disposable income" during the plan period. The IRS itself has discretion to depart from the standards, based on the facts and circumstances on the individual taxpayer[8] – which demonstrates that

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[8] For example, the IRM provides: "National and local expense standards are guidelines. If it is determined a standard amount is inadequate to provide for a specific

Section 707(b)(2)(A)(ii)(I), meant to establish an objective test, does not adopt the IRM or the IRS commentary.

Indeed, to incorporate the entire IRS commentary into Section 707(b)(2)(A)(ii)(I) would delegate to the IRS the power to make (and change) the Bankruptcy Code itself. The IRS could create qualifications never enacted by Congress. For example, the IRS could decide administratively that a debtor owing a car loan should not be allowed a transportation expense for an automobile if he or she should be able to take public transportation instead. The IRS could seek to review the "necessity" of a car in circumstances where it believes a debtor could do without one. The IRS could decide whether certain classes of cars are ineligible for transportation expenses. If the approach of the IRS commentary were adopted, there would be no logical stopping point to vesting the IRS with the authority to alter bankruptcy law.

The IRS itself disavows any intent to have the financial standards from the IRM apply in any context other than tax collection and specifically disclaims any intent to have the IRM apply in the context of bankruptcy expense calculations:

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taxpayer's basic living expenses, allow a deviation. Require the taxpayer to provide reasonable substantiation and document the case file." IRM, Section 5.15.1.7.5 (available at http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1012).

"A taxpayer who claims more than the total allowed by the national standards must provide documentation to substantiate and justify as necessary those expenses that exceed the total national standard amounts." IRM, Section 5.15.1.8.3 (available at http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1012).

> 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 Program.[9]

Thus, the intent of the IRS – the administrative body that formulated the IRM – supports a refusal to incorporate the IRM or other IRS commentary into the means test for determination of disposable income. The IRS's view is consistent with the intent of Congress.

C. The Legislative History Demonstrates That The Petitioner Is Entitled To A Deduction.

The legislative history supports our construction of Section 707(b)(2)(A)(ii)(I) as well. The legislative history establishes that Congress was aware that the IRS standards were not the same as a debtor's actual expenses and that Congress did not intend to limit the bankruptcy means test expense deductions to the debtor's actual expenses. Instead, Congress adopted a uniform and readily applied formula that creates an objective test.

Congress squarely confronted the question of whether to use a debtor's actual expenses in the means test calculation, or whether to use IRS standards that might differ markedly from the

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[9] Available at http://www.irs.gov/individuals/article/0,,id=96543,00.html.

debtor's actual situation. During the markup of H.R. 833 (the House legislation which ultimately became BAPCA), Rep. Henry J. Hyde, chairman of the House Judiciary Committee, and a central figure in the enactment of BAPCA, sought to replace the means test's IRS expense standards with "a reasonably necessary expense standard."[10] Rep. Hyde explained that "a reasonably necessary standard provided more flexibility for the court's determination of a debtor's expenses" than the IRS expense standards allowed.[11]

The House Judiciary Committee ultimately rejected Rep. Hyde's proposed approach and retained the IRS expense standards as part of the means test. In the words of the members of the House Judiciary Committee who opposed the bill that eventually became law, "[t]he bill . . . makes substantial changes to chapter 13 by substituting the IRS expense standards to calculate disposable income . . . [T]he formula remains inflexible and divorced from the debtor's actual circumstances." Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H. Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. 553 (2005), reprinted in 2005 U.S. Code Cong. & Admin. News 88.

Even after the House mark-up of H.R. 833, Rep. Hyde continued to press for the deletion of the IRS expense standards and the enactment of a more

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[10] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 523 (2005).

[11] *Id.* at 524 n.222.

flexible approach. During floor debate, Rep. Hyde criticized the expense standards as "rigid and inflexible."[12] The Majority Leader defended them as "clear, defined standards."[13] The Clinton Administration released a statement warning that the House bill "would limit access to Chapter 7 to debtors who meet an inflexible and arbitrary means test. . . . H.R. 833 simply takes IRS expense standards, which were not developed for bankruptcy purposes, and applies them rigidly to determine ability to repay in bankruptcy."[14] The House shrugged off the criticism and enacted the bill, and the Senate followed suit.

As one commentator has remarked, the rejection "of a chairman's position on legislation considered by his or her own committee by members of his or her own political party is highly unusual."[15] The decision to adopt the IRS expense standards rather than the debtor's actual expenses, in other words, was not lightly made, and this Court should not undo the congressional judgment after the fact. Congress chose a bright-line approach that did not vary according the debtor's actual expenses.

There is further relevant legislative history as well. An earlier draft of the means test component

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[12] 145 Cong. Rec. H2718 (daily ed. May 5, 1999).

[13] *Id.* at H2719.

[14] Executive Office of the President – Office of Management and Budget, Statement of Administration Policy – H.R. 833 – Bankruptcy Reform Act of 1999, at 1 (May 5, 1999), available at http://clinton2nara.gov/OMB/legislative/sap/HR833-h.html, reprinted in Jensen, 79 AM. BANKR. L.J. at 526.

[15] Jensen, 79 AM. BANKR. L.J. at 524.

of BAPCA required 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 language referencing expense allowances under "the applicable monthly expense amounts specified under the National and Local Standards." § 707(b)(2)(A)(ii)(I). This change evidences Congress' intent that bankruptcy courts not be bound by the IRS commentary contained in the IRM and confirms that courts should look only to the IRS standards tables, which were incorporated into the statute. This Court has recognized that the legislative history of a prior bill that was not enacted can be useful to interpret language in a bill that was ultimately enacted. *See e.g., Dawson Chemical Co. v. Rohm & Haas Co.,* 448 U.S. 176, 204 (1980); *United States v. Enmons,* 410 U.S. 396, 404 (1973); *Transcontinental & Western Air, Inc. v. Civil Aeronautics Bd.,* 336 U.S. 601, 606 (1949).[16]

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[16] Respondent may point to language in the House Report broadly stating that the bill contains "an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 109-31, pt.1 at 2 (2005), reprinted in 2005 U.S. Code Cong. & Admin. News 88, 89. But this comment 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. In fact, the comment supports our position. It demonstrates why Congress adopted an objective test -- to limit courts'

D. Policy Considerations Militate In Favor Of Petitioner.

BAPCA moved bankruptcy courts from a system of case-by-case determinations of reasonableness to a more uniform approach, based on standardized deductions listed in IRS tables. It also sought to avoid disputes about the reasonableness of particular expenses and instead create an aggregated standard budget that is presumed to represent a reasonable total level of spending for different size households in particular geographic regions of the country. Thus, "[t]he 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 (15th ed. Rev. 2009).

The statutory interpretation advanced here is entirely consistent with that congressional purpose. The transaction costs saved by reliance on standardized, uniform tables more than compensate for any perceived unfairness in allowing debtors to take an Ownership Expense for used cars they own free and clear when deciding how much disposable income they have available to pay their unsecured creditors.[17] Every objective test creates questions of

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perceived discretion in letting debtors pay less than they can afford as determined by expense standards Congress itself incorporated into the Code.

[17] The Ninth Circuit's construction is subject to the same criticism of line-drawing inherent in any objective test. To the extent that the statute were interpreted to mean that the

line-drawing and perceived fairness, and the issues with respect to transportation under the Financial Standards also extend to food, medical care, and other matters.[18]

There is nothing irrational about a statutory scheme that allows an Ownership Expense even when a debtor does not have a vehicle payment at the snapshot of time the bankruptcy petition is filed. The statute creates an objective test, based on a reasonable transportation allowance, to be applied at the outset of what is likely to be a 60-month bankruptcy process for consumer debtors under chapter 13. 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 is commenced. After all, those

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"applicable monthly expense amount" need not be limited to the precise amount of a debtor's vehicle payment – but only that such a payment must in fact exist before the vehicle-ownership expense becomes "applicable" – the same criticism of unfairness would apply. That is, such an approach would permit a debtor with a modest lease or loan payment (or a few remaining payments) to claim the much larger, entire categorical amount for his or her geographic region under the IRS Standards.

[18] For example, debtors receive a national allowance for food even if they incur no actual food expenses because they live with relatives. *See* http://www.irs.gov/businesses/small/article/0,,id=104627,00.htmlDebtors also receive an Out-of-Pocket Health Care allowance of $60 per month per household member ($144 for taxpayers 65 and older) even if they do not have any actual health care expenses or if their expenses are less than the allowance. They are also allowed a deduction for any actual health care expenses above the standard allowance.

expenses may change over the duration of the bankruptcy case.[19]

For example, a debtor's vehicle-related costs can be significant, over and above what he or she might expend towards a loan or lease payment. Some of those expenses are included in the "Operating Expense" component of the IRS transportation standards, but not all. According to the IRM, the Operating Expense standard includes insurance, registration fees, fuel, parking and tolls, and only "normal maintenance." IRM § 5.19.1.4.3.4. It does not include depreciation or major repairs. For debtors driving older vehicles, recognition of these items as components of their Ownership Expense is entirely sensible.[20] Given the purpose of the means test in a chapter 13 case — determining the monthly

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[19] The statute's formula, which ultimately looks to a total of allowed expenses, also allows debtors budget flexibility to scrimp on one category of expenses in order to pay more on others. For example, in NACBA's experience, debtors often scrimp on some allowed expenses (such as food or car ownership) to be able to send children to religious schools, despite the small allowance in the statute for children's educational expenses. If the means test had been intended to permit eliminating or limiting allowances based on actual expenses, it would not have looked to the total of allowed expenses, but instead stated that the debtor's disposable income is computed using an expense-by-expense comparison of the debtor's actual expenses and the allowances.

[20] Automotive reliability studies show, for example, that the average 2000 vehicle is 2.5 to 5 times more likely than a 2005 vehicle to need major repairs to the engine, cooling system, air conditioning and suspension. Consumer Reports, Used Car Buying Kit, Reliability History (Average Problem Rates) available at http://www.consumerrreports.org/cro/cars/ratings/reliability-histories-406/index.htm.

amount that a debtor has available in excess of necessary expenses over the course of a five-year plan — consideration of a factor for depreciation and major repairs is entirely appropriate.[21]

Indeed, it is the contrary interpretation of the statute that would produce an odd policy result. If only debtors with car payments were allowed the Ownership Expense, then debtors driving older, fully paid vehicles would be encouraged to finance the purchase of a new car, or to encumber an old car with new debt, just prior to filing a bankruptcy petition, in order to be sure of having the resources to provide for reliable transportation over the course of a plan of up to five years. Certainly, none of the core purposes of bankruptcy would be served by encouraging the creation of new debt and penalizing more thrifty debtors. It makes little sense to deny an ownership deduction to a frugal debtor who, although he has fully paid for his used car, finds himself in need of bankruptcy relief, while allowing the deduction to a less thrifty debtor who has acquired a late-model car by incurring a large secured debt. As one treatise has observed:

> Moreover, the concept of an ownership allowance should encompass both debtors who borrow money to purchase their cards and those who save money to purchase their cars. Borrowers who have saved money to purchase their current vehicles and are saving to replace them should be treated the

[21] Although the IRS manual provides an additional $200 for an older car for extra operating expenses, that additional allowance is nowhere in the standards, and some chapter 13 trustees have opposed it when debtors have sought it.

> 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 (15th ed. Rev. 2009).

In addition, a debtor who owns an old car outright at filing likely will need to buy a new one before completion of a five-year chapter 13 plan. To recognize this eventual expense through the use of a monthly, standard Ownership Expense is completely consistent with the purposes of bankruptcy. *See* Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 258 (2005) ("This approach reflects 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), and it avoids arbitrary distinctions between debtors who have only a few car payments left at the time of their bankruptcy filing and those who finished making their car payments just before the filing.").

E. The Decision in *Lanning* Supports Petitioner.

This Court's recent decision in *Hamilton v. Lanning*, No. 08-998 (June 7, 2010), is consistent with our interpretation of Section 707(b)(2)(A)(ii)(I) as well. *Lanning* concerned the interpretation of the phrase "projected disposable income" in a section of chapter 13. 11 U.S.C. § 1325(b)(1). *Lanning* held that, when a bankruptcy court calculates a chapter 13 debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.

There is an important difference between *Lanning* and this case. *Lanning* concerned the interpretation of the word "projected" in Section 1325(b)(1), rather than any of the language in Section 707(b)(2)(A)(ii)(I). Nevertheless, to the extent *Lanning* is relevant here, it supports Petitioner rather than Respondent.

Lanning eschewed a case-by-case determination of future disposable income and stressed that a court has discretion to depart from past patterns of income only when a future event is known or virtually certain. This Court emphasized "the important role that the statutory formula for calculating 'disposable income' plays under the forward-looking approach."

> [A] court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expense.

Slip op. at 12-13.

Lanning thus underscored the importance of predictability and ease of administration of bankruptcy proceedings. In this case, any interpretation of Section 707(b)(2)(A)(ii)(I) that would involve the debtor's actual expenses would entail numerous individual variations and case-by-case inquiries that would defeat the purpose of the means test.

Further, although *Lanning* adopted a forward-looking approach to Section 1325(b)(1), that approach is entirely consistent with the statutory interpretation we urge. For example, in *In re Washburn*, 579 F.3d 934, 940-42 (CA8 2009), the Eighth Circuit explained that it was adopting Petitioner's interpretation of Section 707(b)(2)(A)(ii)(I), even though in *In re Frederickson,* 545 F.3d 652 (CA8 2008), *cert. denied,* 129 S.Ct. 1630 (2009), the Eighth Circuit had previously adopted a forward-looking approach to defining "projected disposable income" under Section 1325(b)(1). The Eighth Circuit's reasoning illustrates that Petitioner's statutory construction in this case is completely consistent with the rule articulated in *Lanning.*

CONCLUSION

The judgment below should be reserved.

Respectfully submitted,

TARA TWOMEY
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS
1501 The Alameda
San Jose, CA 95126

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL, LLP
1325 G St. NW
Suite 500
Washington, D.C. 20005
(202) 652-4511

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APPENDIX

Internal Revenue Service IRS.gov

DEPARTMENT OF THE TREASURY

Allowable Living Expenses for Transportation

Collection Financial Standards
Financial Analysis - Local Standards: Transportation *

Ownership Costs			
National		**First Car**	**Second Car**
		$475	$338
Operating Costs & Public Transportation Costs			
Region	**No Car**	**One Car**	**Two Cars**
Northeast Region	$230	$298	$393
New York	$302	$384	$479
Philadelphia	$236	$298	$392
Boston	$259	$284	$380
Pittsburgh	$161	$286	$380
Midwest Region	$194	$251	$345
Chicago	$257	$329	$422
Detroit	$312	$376	$469
Milwaukee	$212	$247	$341
Minneapolis-St. Paul	$276	$303	$397
Cleveland	$198	$293	$387
Cincinnati	$222	$272	$365
St. Louis	$203	$287	$383
Kansas City	$246	$291	$384
South Region	$197	$242	$336
Washington, D.C.	$289	$313	$407
Baltimore	$225	$240	$334
Atlanta	$283	$258	$351
Miami	$284	$344	$439
Tampa	$255	$265	$359
Dallas-Ft. Worth	$309	$332	$425
Houston	$281	$367	$462
West Region	$246	$305	$399
Los Angeles	$275	$353	$448
San Francisco	$317	$373	$466
San Diego	$311	$318	$415
Portland	$189	$246	$339

Seattle	$258	$335	$427
Honolulu	$295	$314	$409
Anchorage	$312	$336	$431
Phoenix	$273	$326	$420
Denver	$302	$351	$442

* Does not include personal property taxes. (effective January 1, 2005)

For Use with Allowable Transportation Expenses Table

The Operating Costs and Public Transportation Costs sections of the Transportation Standards are provided by Census Region and Metropolitan Statistical Area (MSA). The following table lists the states that comprise each Census Region. Once the taxpayer's Census Region has been ascertained, to determine if an MSA standard is applicable, use the definitions below to see if the taxpayer lives within an MSA (MSAs are defined by county and city, where applicable). If the taxpayer does not reside in an MSA, use the regional standard.

Northeast Census Region

Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, New York, New Jersey

MSA	COUNTIES	
New York	*in NY:*	Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester
	in NJ:	Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, Warren
	in CT:	Fairfield, Litchfield, Middlesex, New Haven
	in PA:	Pike
Philadelphia	*in PA:*	Bucks, Chester, Delaware, Montgomery, Philadelphia
	in NJ:	Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Salem
	in DE:	New Castle
	in MD:	Cecil
Boston	*in MA:*	Bristol, Essex, Hampden, Middlesex, Norfolk, Plymouth, Suffolk, Worcester
	in NH:	Hillsborough, Merrimack, Rockingham, Strafford
	in CT:	Windham
	in ME:	York
Pittsburgh	*in PA:*	Allegheny, Beaver, Butler, Fayette, Washington, Westmoreland

Midwest Census Region

North Dakota, South Dakota, Nebraska, Kansas, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Minnesota, Iowa

MSA		COUNTIES (unless otherwise specified)
Chicago	*in IL:*	Cook, DeKalb, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, McHenry, Will
	in IN:	Lake, Porter
	in WI:	Kenosha
Detroit	*in MI:*	Genesee, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, Wayne
Milwaukee	*in WI:*	Milwaukee, Ozaukee, Racine, Washington, Waukesha
Minneapolis-St. Paul	*in MN:*	Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, Wright
	in WI:	Pierce, St. Croix
Cleveland	*in OH:*	Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, Summit
Cincinnati	*in OH:*	Brown, Butler, Clermont, Hamilton, Warren
	in KY:	Boone, Campbell, Gallatin, Grant, Kenton, Pendleton
	in IN:	Dearborn, Ohio
St. Louis	*in MO:*	Crawford, Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, St. Louis city
	in IL:	Clinton, Jersey, Madison, Monroe, St.Clair
Kansas City	*in MO:*	Cass, Clay, Clinton, Jackson, Lafayette, Platte, Ray
	in KS:	Johnson, Leavenworth, Miami, Wyandotte

South Census Region

Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, West Virginia, Virginia, Maryland, District of Columbia, Delaware, North Carolina, South Carolina, Georgia, Florida, Alabama

MSA		COUNTIES (unless otherwise specified)
Washington, D.C.	*in DC:*	District of Columbia
	in MD:	Calvert, Charles, Frederick, Montgomery, Prince George's, Washington
	in VA:	Arlington, Clarke, Culpepper, Fairfax, Fauquier, King George, Loudoun, Prince William, Spotsylvania, Stafford, Warren, Alexandria city, Fairfax city, Falls Church city, Fredericksburg city, Manassas city, Manassas Park city
	in WV:	Berkeley, Jefferson
Baltimore	*in MD:*	Anne Arundel, Baltimore, Carroll, Harford, Howard, Queen Anne's, Baltimore city
Atlanta	*in*	Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb,

	GA:	Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, Walton
Miami	*in FL:*	Broward, Miami-Dade
Tampa	*in FL:*	Hernando, Hillsborough, Pasco, Pinellas
Dallas-Ft. Worth	*in TX:*	Collin, Dallas, Denton, Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, Tarrant
Houston	*in TX:*	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, Waller

West Census Region:

New Mexico, Arizona, Colorado, Wyoming, Montana, Nevada, Utah, Washington, Oregon, Idaho, California, Alaska, Hawaii

MSA	COUNTIES (unless otherwise specified)	
Los Angeles	*in CA:*	Los Angeles, Orange, Riverside, San Bernadino, Ventura
San Francisco	*in CA:*	Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma
San Diego	*in CA:*	San Diego
Portland	*in OR:*	Clackamas, Columbia, Marion, Multnomah, Polk, Washington, Yamhill
	in WA:	Clark
Seattle	*in WA:*	Island, King, Kitsap, Pierce, Snohomish, Thurston
Honolulu	*in HI:*	Honolulu
Anchorage	*in AK:*	Anchorage borough
Phoenix	*in AZ:*	Maricopa, Pinal
Denver	*in CO:*	Adams, Arapahoe, Boulder, Denver, Douglas, Jefferson, Weld