No. 09-907

In The Supreme Court of the United States

JASON M. RANSOM, PETITIONER,

v.

MBNA AMERICA BANK, N.A.

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

BRIEF FOR RESPONDENT

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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.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption. MBNA America Bank, N.A. is now known as FIA Card Services, N.A.

CORPORATE DISCLOSURE STATEMENT

MBNA America Bank, N.A., now known as FIA Card Services, N.A., is a wholly owned subsidiary of NB Holdings Corporation, which is a wholly owned subsidiary of Bank of America Corporation, which is publicly traded. No publicly traded corporation owns ten percent or more of the stock of Bank of America Corporation.

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INTRODUCTION

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") to prevent abuse of bankruptcy relief. The primary statutory goal of BAPCPA's so-called means test was to ensure that debtors who can repay some of their debts be required to do so before receiving a discharge. The means test presumes that debtors whose disposable income exceeds a certain amount cannot use Chapter 7; instead it attempts to channel them into Chapter 13. BAPCPA also uses its definition of disposable income to require Chapter 13 debtors to repay creditors the maximum amount that they can afford, permitting them to retain only those amounts for expenses that are "reasonably necessary."

Petitioner contends that BAPCPA permits him to reduce his Chapter 13 payment plan amount—and thereby keep from his creditors—$471 per month for a car payment that he does not have. Even though petitioner owns his car free and clear, he argues that he is entitled to a deduction for vehicle ownership expense based upon the Internal Revenue Service's Local Standards.

A deduction for such "phantom" car payments is not supported by the text of the statute. BAPCPA permits debtors to deduct as monthly expenses only "applicable" expense amounts under the IRS National and Local Standards. The IRS vehicle ownership

expense amount is not "applicable" to a debtor who has no car loan or lease payment at all. Moreover, by permitting debtors to retain amounts to pay nonexistent expenses, petitioner's reading would contravene the central purpose of BAPCPA's means test: maximizing repayment of debt by debtors who have the ability to repay.

The judgment should be affirmed.

STATEMENT OF THE CASE

A. Statutory Framework

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, to address concerns that debtors with steady incomes, who could in fact repay a substantial portion of their unsecured debts (usually credit card debt), were seeking discharge of their debts under Chapter 7. Congress sought to have such debtors instead repay a portion of their debts. H.R. Rep. No. 109-31, pt. 1, at 2, 5 (2005).

To accomplish this goal, Congress sought to channel more debtors into Chapter 13 bankruptcy proceedings. BAPCPA also sought to ensure that Chapter 13 debtors were paying their unsecured creditors as much as they could afford, *i.e.*, all of their "projected disposable income." To this end, BAPCPA imposed additional clarity to ensure that debtors were spending only reasonable amounts on permitted items. This case involves BAPCPA's new definition of

a debtor's "disposable income" as well as the concept of "projected" disposable income.

1. The Bankruptcy Code before enactment of BAPCPA

a. Before BAPCPA's enactment, many debtors were inappropriately invoking the discharge provisions of Chapter 7. Under Chapter 7 (then and now), debtors' nonexempt assets are liquidated and used to pay claims, and debtors receive a complete discharge of most debts. 6 *Collier on Bankruptcy* ¶ 700.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). Debtors, however, may retain assets that are exempt under federal or state law. Debtors select whether to apply the federal or state exemptions (unless their State has opted out of the federal exemptions). 11 U.S.C. § 522. Many States' exemption laws are quite generous. 4 *Collier on Bankruptcy* ¶ 522.01. Accordingly, before BAPCPA, many debtors were opting to receive immediate, unconditional discharges through Chapter 7 rather than to pay down debts over time through Chapter 13. H.R. Rep. No. 109-31, pt. 1, at 5 & n.18.

Moreover, the Bankruptcy Code did not give courts the tools to stop debtors with the ability to repay from pursuing Chapter 7. The Code permitted the bankruptcy court to dismiss a Chapter 7 case involving an individual debtor with primarily consumer debts "if it finds that the granting of relief would be a substantial abuse of the provisions of this

chapter." 11 U.S.C. § 707(b) (2004). But there were obstacles to a court's use of this power. For example, the Code created a presumption that a debtor petitioning under Chapter 7 was entitled to relief. *See id.* § 707(b) (2004) ("There shall be a presumption in favor of granting the relief requested by the debtor."). Moreover, courts generally applied the "substantial abuse" standard through a "totality of the circumstances" test. Under this test, the ability to repay creditors out of future disposable income was a significant factor. But some courts held that the ability to repay was not dispositive and did not alone mandate dismissal of a Chapter 7 case. *See Stewart v. U.S. Trustee* (*In re Stewart*), 175 F.3d 796, 809 (10th Cir. 1999); *First USA v. Lamanna* (*In re Lamanna*), 153 F.3d 1, 4-5 (1st Cir. 1998); *Green v. Staples* (*In re Green*), 934 F.2d 568, 572 (4th Cir. 1991).

In addition, only the court or the United States Trustee could raise an allegation of substantial abuse; creditors and Chapter 7 trustees lacked standing to seek dismissal for substantial abuse. 11 U.S.C. § 707(b) (2004) (allegation could be brought by "the court, on its own motion[,] or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest").

These circumstances meant that many persons with steady incomes were able to discharge all of their unsecured debts through Chapter 7, even though they had the ability to repay.

b. In contrast to Chapter 7, Chapter 13 of the Bankruptcy Code allows unsecured debts to be paid out of future earnings, rather than being limited to nonexempt property of the estate.

Chapter 13 requires debtors to repay unsecured creditors at least as much through a Chapter 13 plan as the creditors would have received through a hypothetical Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4). Creditors cannot be worse off, and are usually better off, when a debtor uses Chapter 13. But because Chapter 13 relief is purely voluntary on the part of the debtor, courts cannot force debtors into a repayment plan. Before BAPCPA's enactment, Congress tried to make Chapter 13 more attractive by, for example, providing a broader discharge. 8 *Collier on Bankruptcy* ¶ 1328.02[2][b].

In addition, before BAPCPA's enactment, Chapter 13 provided that if the trustee or an unsecured creditor objected to confirmation of the debtor's proposed plan, the court could not confirm the plan unless, *inter alia*, "the plan provide[d] that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan [would] be applied to make payments under the plan." *Id.* § 1325(b)(1)(B) (2004).

In practice, however, Chapter 13 lacked clarity as to how much of a debtor's income should be used to pay unsecured creditors. "Disposable income" was defined broadly as "income which is received by the

debtor and which is not reasonably necessary to be expended" for (1) "the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions * * * to a qualified religious or charitable entity or organization" and (2) "if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business." *Id.* § 1325(b)(2) (2004). Requiring bankruptcy judges to determine what expenses were reasonably necessary led to wide-ranging, often inconsistent results. *In re Slusher*, 359 B.R. 290, 294 (Bankr. D. Nev. 2007).

2. BAPCPA's amendments to Sections 707 and 1325 of the Bankruptcy Code

BAPCPA sought to introduce more clarity into the calculation of the "disposable income" of debtors with monthly incomes that exceed the median income for comparably sized households in their States ("above-median debtors").

This disposable-income calculation plays two important roles. First, in Chapter 13, disposable income is used to calculate the minimum amount that an above-median debtor must dedicate to repaying unsecured creditors in the debtor's proposed Chapter 13 plan. And second, it is used in the means test that BAPCPA added to Chapter 7, which determines a debtor's presumptive ineligibility for Chapter 7 relief.

a. As amended, Chapter 13 still requires as a prerequisite to plan confirmation that "all of the

debtor's projected disposable income to be received in the applicable commitment period * * * be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B). For above-median debtors, Section 1325 now requires that the commitment period be five years, unless the plan provides for payment in full of all unsecured claims over a shorter period. *Id.* § 1325(b)(4)(A)(ii), (B).

"Disposable income" is defined under Chapter 13 as "current monthly income received by the debtor * * * less amounts reasonably necessary to be expended" (1) "for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation," (2) "for charitable contributions," and (3) "if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business." *Id.* § 1325(b)(2). "Current monthly income" is defined as "the average monthly income from all sources that the debtor receives" during the six-month period before filing the bankruptcy petition. *Id.* § 101(10A)(A).

For above-median debtors, "[a]mounts reasonably necessary to be expended," other than charitable contributions, are calculated "in accordance with" Section 707(b)(2)(A) and (B). *Id.* § 1325(b)(3).

In turn, Section 707(b)(2)(A) provides for three categories of expenses: (1) the debtor's "monthly expenses," *id.* § 707(b)(2)(A)(ii); (2) the debtor's "average monthly payments on account of secured debts,"

id. § 707(b)(2)(A)(iii); and (3) the debtor's "expenses for payment of all priority claims," *id.* § 707(b)(2)(A)(iv).

The primary issue in this case is the first category, the debtor's "monthly expenses." Calculation of the debtor's "monthly expenses" starts with determining "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards * * * issued by the Internal Revenue Service for the area in which the debtor resides." *Id.* § 707(b)(2)(A)(ii)(I). The debtor also is entitled to deduct "actual monthly expenses for the categories specified as Other Necessary Expenses" by the IRS. *Ibid.* The Standards "as in effect on the date of the order for relief" govern. *Ibid.*; *see id.* § 301(b) ("The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.").

BAPCPA then provides for potential deviations from those Standards. Upon showing reasonable necessity, the debtor may receive additional allowances for food and clothing of up to five percent of the applicable Standards amounts, *id.* § 707(b)(2)(A)(ii)(I), as well as for housing and utilities based on excessive energy costs, *id.* § 707 (b)(2)(A)(ii)(V). "In addition," the debtor's "monthly expenses" include reasonably necessary expenses for (1) maintaining the debtor's safety from family violence, (2) care and support of elderly, chronically ill, or disabled family members, (3) administering a

Chapter 13 plan, and (4) education of dependent children. *Id.* § 707(b)(2)(A)(ii)(I)-(IV).

The second and third categories of amounts reasonably necessary to be expended are calculated as follows. The "average monthly payments on account of secured debts" is calculated as the sum of "the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition," plus "any additional payments to secured creditors necessary for the debtor * * * to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts," with the sum "divided by 60." *Id.* § 707(b)(2)(A)(iii).

The "expenses for payment of all priority claims" is "the total amount of all debts entitled to priority, divided by 60." *Id.* § 707(b)(2)(A)(iv). Priority claims include claims for domestic support obligations, bankruptcy administrative expenses, wages for the debtor's business, and certain back taxes. *Id.* § 507(a).

b. The three categories of amounts reasonably necessary to be expended are also relevant to Chapter 7.

BAPCPA repealed the presumption that a Chapter 7 debtor is entitled to relief. BAPCPA instead provides a means test for above-median debtors. If the debtor's "disposable income" is more than a

certain threshold, "the court shall presume abuse exists." *Id.* § 707(b)(2)(A)(i).[1] Upon a finding of abuse, the court may now either dismiss the case or, with the debtor's consent, convert it to a Chapter 13 case. *Id.* § 707(b)(1). And now, not only the court or the United States Trustee, but also the Chapter 7 trustee and any party in interest, may move to dismiss a Chapter 7 case for abuse. *Ibid.*

3. The IRS National and Local Standards

As noted, Section 707(b)(2)(A)(ii)(I) refers to the "the National Standards and Local Standards * * * issued by the Internal Revenue Service." 11 U.S.C. § 707(b)(2)(A)(ii)(I). The IRS established the Standards for use in calculating taxpayers' ability to pay delinquent taxes. *See* App., *infra*, 1a (IRS, *Collection Financial Standards* (2006), http://web.archive.org/web/20060705012657/www.irs.gov/individuals/article/0,,id=96543,00.html).[2]

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[1] That threshold, as adjusted by the Judicial Conference of the United States, *see* 11 U.S.C. § 104(a), is currently the lesser of: (1) 25% of the debtor's non-priority unsecured claims, or $7,025, whichever is greater, or (2) $11,725. 11 U.S.C. § 707(b)(2)(A)(i); 75 Fed. Reg. 8747, 8749 (Feb. 25, 2010).

[2] Because petitioner filed his bankruptcy petition on July 5, 2006, Pet. App. 3, 16-17, this brief (unless otherwise noted) refers to the IRS Standards as of the date of his filing. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I); *Id.* § 301(b). The relevant 2006 Standards are attached as an appendix to this brief at App., *infra*, 1a-12a. Relevant excerpts of the Internal Revenue Manual are also attached at App., *infra*, 13a-27a.

The National Standards contain five categories of expenses: (1) food, (2) housekeeping supplies, (3) apparel and services, (4) personal care products and services, and (5) miscellaneous. App., *infra*, 1a. The Collection Financial Standards provide that "[t]axpayers are allowed the total National Standards amount for their family size and income level, without questioning amounts actually spent." App., *infra*, 1a.

The Local Standards cover two categories of expenses: (1) housing and utilities and (2) transportation. App., *infra*, 2a. The "Allowable Living Expenses for Transportation" are broken down into "Ownership Costs" and "Operating Costs & Public Transportation." App., *infra*, 5a-12a (IRS, *Allowable Living Expenses for Transportation* (2006), http://web.archive.org/web/20060710043245/www.irs.gov/businesses/small/article/0,,id=104623,00.html). Ownership costs cover "monthly loan or lease payments." App., *infra*, 2a. At the time that petitioner filed his bankruptcy petition, the maximum ownership allowance for a "First Car" was $471 and for a "Second Car" was $332. App., *infra*, 5a.

The IRS's Collection Financial Standards expressly state that a taxpayer is not allowed an allocation for ownership expenses unless he in fact has a car payment: "If a taxpayer has no car payment, or no car, only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense." App., *infra*, 3a. The Collection Financial Standards further provide that the

Local Standards are the "[m]aximum allowances" for these categories. App., *infra*, 1a. "Unlike the National Standards, the taxpayer is allowed the amount actually spent or the standard, whichever is less." App., *infra*, 1a.

The IRS's *Financial Analysis Handbook* of the Internal Revenue Manual, which is separate from its Collection Financial Standards, contains similar guidance. *See* App., *infra*, 16a, 20a, §§ 5.15.1.7 ¶ 4.B & 5.15.1.9 ¶ 1.B (IRS, *Internal Revenue Manual* (2006), http://web.archive.org/web/20060710164645/www.irs.gov/irm/part5/ch15s01.html).

4. Official Forms 22A and 22C

In 2005, pursuant to the recommendation of the Advisory Committee on Rules of Bankruptcy Procedure, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States adopted two official forms for use in performing the disposable-income calculation. Official Form 22A is used in Chapter 7 cases to determine the debtor's current monthly income and perform the means-test calculation. Official Form 22C is used in Chapter 13 cases, such as this one, to calculate the debtor's current monthly income and disposable income and to determine the applicable commitment period for the Chapter 13 plan.

Lines 28 and 29 of Official Form 22C pertain to calculating the permissible transportation ownership/lease expenses under the Local Standards.

Line 28 instructs the debtor to "[c]heck the number of vehicles for which you claim an ownership/lease expense," and it provides the options of "1" and "2 or more." J.A. 49. If the debtor claims one vehicle, the form instructs the debtor as follows: (1) "Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car"; (2) "enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle I, as stated in Line 47"; and (3) "subtract Line b from Line a" but "[d]o not enter an amount less than zero." J.A. 49 (emphasis omitted). The result is the claimed ownership transportation deduction for the vehicle and is entered on Line 28. If the debtor checks "2 or more," the debtor repeats the process for the second vehicle and enters the result on Line 29.

The debtor enters the average monthly payments on account of secured debts on Line 47 of Form 22C. J.A. 52. On the form, as stated above, the average monthly payments for debts secured by a claimed vehicle are deducted from the Local Standards transportation ownership allowances in Lines 28 and 29. These same instructions appear on Form 22A's relevant transportation ownership/lease expense lines.

Forms 22A and 22C leave open the question whether a vehicle qualifies for an IRS Local Standards transportation ownership expense deduction. They simply instruct the debtor to identify the number of vehicles for which such an expense is "*claim[ed]*." J.A. 49 (emphasis added). Indeed, since 2007, the Advisory Committee notes to the forms

have stated: "The forms take no position on the question of whether the debtor must actually be making payments on a vehicle in order to claim the ownership/lease allowance." Report of Advisory Committee on Rules of Bankruptcy Procedure, *2005-2008 Committee Note, Forms 22A, 22B, & 22C* at 12 (Jan. 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1208/B_22_CN_cum120108.pdf.

B. Proceedings Below

1. Petitioner is the type of above-median debtor about whom Congress was concerned when it enacted BAPCPA. As of 2006, petitioner was single with no dependents; he earned an annual salary of $51,000 and had been steadily employed with the same employer for over five years; he had health insurance through his employer and no large medical expenses; and he was paying approximately 25 percent of his income for his mortgage and property taxes. But he also had accumulated over $82,000 in credit card debt over the course of four years, including $32,896.73 owed to respondent MBNA. Pet. App. 3; J.A. 41.[3]

Petitioner filed for bankruptcy relief under Chapter 13 on July 5, 2006. Pet. App. 3, 16-17. Among the assets listed was a 2004 Toyota Camry valued at $14,000. Pet. App. 3; J.A. 38. He reported

[3] At that time, the median income for a household of one in Nevada was $38,506. Pet. App. 17 n.3.

that he made no car payments and owned the car free and clear. Pet. App. 3; J.A. 42, 44.

Despite having no car payment of any kind, petitioner claimed on line 28 of Form 22C a monthly transportation ownership expense of $471, the amount at that time from the IRS Standards. Pet. App. 3; J.A. 49. Petitioner's monthly income was $4,248.56. His total claimed deductions were $4,038.01, yielding a monthly "disposable income" of $210.55. Pet. App. 3; J.A. 53.

In his proposed Chapter 13 plan, petitioner proposed a payment schedule of $500 per month for 60 months, totaling $30,000. Only $20,000 of that total would go toward his credit card debt; the remaining $10,000 would go to pay for attorney and trustee compensation. Pet. App. 3; J.A. 55-56. That would have left unpaid over $60,000 in credit card debt.

Had petitioner not claimed a transportation ownership expense, he would have had an additional $471 per month in disposable income, for a total of $681.55, or $40,893 over 60 months. Had that entire additional amount been devoted toward plan payments, then the 60-month plan would have further reduced his credit card debts by an additional $10,893.

2. The Chapter 13 Trustee objected to confirmation of petitioner's plan on three separate grounds, including that petitioner sought an ownership expense for a vehicle that is paid in full. J.A. 60.

Respondent MBNA likewise objected to confirmation of the plan on the ground that if a debtor owns a vehicle but "does not actually have a car payment on it, the Debtor should not be allowed the ownership deduction for the automobile." J.A. 67. Respondent asserted that petitioner's disposable income should have been $681.55 per month ($210.55 in reported disposable income plus $471, the amount of the claimed transportation ownership deduction) and that the plan therefore could not be confirmed under 11 U.S.C. § 1325(b)(1)(B), (b)(2)(A). Pet. App. 4; J.A. 71.

3. The bankruptcy court denied confirmation of petitioner's Chapter 13 plan because, contrary to the statutory requirement, the plan did not devote petitioner's entire disposable income to paying his creditors. Pet. App. 36-48. Relying on its earlier decision in *In re Slusher*, 359 B.R. at 305-310, the bankruptcy court concluded that petitioner "may only deduct a vehicle ownership expense if he is currently making loan or lease payments on that vehicle." Pet. App. 41.

4. The Bankruptcy Appellate Panel affirmed. Pet. App. 15-35. That court acknowledged conflicting authority, Pet. App. 23-29, but found persuasive the rationale of those courts that had disallowed the deduction, Pet. App. 30. The court observed that "Congress has deemed the expense of owning a car to be a basic expense that debtors can deduct" in calculating disposable income. Pet. App. 31. But "what is important is the payments that debtors actually make, not how many cars they own, because the payments

that debtors make are what actually affect their ability to make payments to their creditors." Pet. App. 31-32.

The Bankruptcy Appellate Panel based its conclusion on the "statutory language, plainly read." Pet. App. 30 n.18. The court held that an ownership expense is not an "*applicable* monthly expense amount[ ]," and therefore may not be deducted, unless the debtor "in fact has such an [ownership] expense." Pet. App. 32. The court further relied on the "ordinary, common meaning of 'applicable,'" which is "capable of or suitable for being applied," to conclude that an ownership expense allowance is not capable of being applied to a debtor who has no lease or loan payments on a vehicle. Pet. App. 32 (quoting *Merriam-Webster's Collegiate Dictionary* 60 (11th ed. 2005)). To hold otherwise would "read[ ] 'applicable' right out of the Bankruptcy Code." Pet. App. 33.

5. The court of appeals affirmed. Pet. App. 1-14. Like the Bankruptcy Appellate Panel, the court based its holding on the plain language of the statute, concluding that the provision "does not allow a debtor to deduct an 'ownership cost' * * * that the debtor does not have." Pet. App. 11.

The court of appeals reasoned that "[a]n 'ownership cost' is not an 'expense'—either actual or applicable—if it does not exist, period." Pet. App. 11. The court observed that it would be "[i]ronic" to "diminish payments to unsecured creditors in this context on

the basis of a fictitious expense not incurred by a debtor." Pet. App. 11.

SUMMARY OF ARGUMENT

I.

The plain text of BAPCPA does not permit a debtor without a car payment to deduct phantom transportation ownership expenses from current monthly income when calculating disposable income.

A.

BAPCPA permits above-median debtors to deduct from current monthly income "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards * * * for the area in which the debtor resides." 11 U.S.C. § 707(b)(2)(A)(ii)(I).

1. Under the plain and ordinary meaning of "applicable"—which means "capable of being applied," "having relevance," and "fit, suitable, or right to be applied"—a debtor with no car payment has no applicable transportation ownership expense. Where the debtor has no car payment, there is no ownership expense amount from the IRS Standards that is relevant, suitable, or capable of being applied to the debtor. The conclusion that simply owning a car does not automatically entitle a debtor to a deduction for the ownership expense amount is buttressed by the

fact that the Standards distinguish "Ownership Costs" from "Operating Costs."

2. The fact that Section 707(b)(2)(A)(ii)(I) uses both the term "applicable" when referring to the National and Local Standards and "actual" when referring to other expenses does not support petitioner. At most, the use of different words suggests that Congress meant for the terms to have different meanings. But requiring that a debtor in fact have a car payment for the transportation ownership expense amount to be "applicable" to him does not result in "actual" and "applicable" having the same meaning. The amount of the deduction for "applicable" expenses under the National and Local Standards often will not be the actual amount incurred by the debtor.

3. Petitioner's reading of "applicable" finds no support in the provision in Section 707(b)(2) that states that, "[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts." *Id.* § 707(b)(2)(A)(ii)(I). Petitioner suggests that this provision means that the calculation of monthly expenses by reference to the National and Local Standards must be performed without regard to whether the debtor in fact has such an expense. But the fact that monthly expenses "shall not include any payments for debts" does not mean that they should include nonexistent expenses for which there are no payments of any kind.

In any event, the Court need not decide in this case how a debtor who actually is making car payments on a debt should calculate his deduction. Here, petitioner is not making secured car payments, car lease payments, or car payments of any kind. As such, the Standard for ownership expenses under subparagraph (ii) is simply not applicable.

B.

The plain meaning of the term "applicable" is bolstered by the statute's incorporation of the "National Standards and Local Standards" issued by the IRS.

1. In petitioner's view, the Standards regarding transportation ownership consist exclusively of the table that provides amounts based on the number of cars. But 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.

The statute's reference to IRS's Standards is better read as referring to the IRS's Collection Financial Standards, which are concise guidelines (separate from the Internal Revenue Manual) into which the table is incorporated. Since BAPCPA's enactment, the Collection Financial Standards have provided that if the debtor has no car payment, the debtor is not entitled to the ownership costs portion of the transportation Standards.

2. Moreover, although the Court need not look to the Internal Revenue Manual to resolve this case, the statute implicitly refers to it and approves of its use. Like the Collection Financial Standards, the Internal Revenue Manual consistently has provided that the applicable ownership expense amount for a debtor with no car payment is zero. Moreover, the legislative history is replete with references to the Internal Revenue Manual's guidelines on how to implement the Standards.

3. Petitioner's argument that he may have ownership expenses apart from car payments—*e.g.*, for insurance, licensing fees, taxes, depreciation, and vehicle replacement—is incorrect. Under the Standards, insurance and licensing fees are vehicle operating costs, not ownership costs. Taxes are not ownership costs but rather are included in the IRS's Other Expenses category. Depreciation is not an out-of-pocket cost with which the Bankruptcy Code is concerned; rather, it is a decline in the car's value.

Nor are "replacement costs" applicable ownership expenses, as petitioner contends. There is no indication that Congress sought to ensure that debtors with a paid-off vehicle could save for the purchase of a new vehicle during the Chapter 13 commitment period; rather, Congress wanted existing unsecured debts to be paid down as much as possible. If necessary after confirmation, the debtor may move to modify the plan payments under Section 1329.

C.

1. Permitting phantom car payments to be deducted in calculating disposable income would contravene Congress's primary purpose in enacting BAPCPA: to ensure that debtors who are able to repay some of their unsecured debts actually repay as much as they can afford before receiving a discharge. Contrary to that purpose, petitioner's interpretation would deny unsecured creditors $28,260 ($471 per month over 60 months) that is not necessary for the debtor's maintenance and support. Where a debtor already owns a car outright, it would make no sense, and would conflict with Congress's stated intent, to permit the debtor to withhold from unsecured creditors amounts to make nonexistent car payments.

2. Petitioner's interpretation also should be rejected because it would convert what the IRS has always considered a ceiling on expenses into a floor. There is no evidence that Congress, in entitling a debtor to "applicable" Standards expense amounts, meant to convert those amounts from maximums to minimums. Worse still, those minimums would be available only to above-median debtors, whereas below-median debtors would be limited to their actual expenses.

D.

Petitioner's reliance on the Official Bankruptcy Forms is misplaced. Contrary to his argument, Official Form 22C did not require him to deduct an

ownership expense for the car he owns free and clear. Rather, the form instructed him to deduct an ownership expense for each vehicle for which he "claim[s]" such an expense. The form takes no position on whether a debtor must actually be making a payment on a vehicle to claim the ownership allowance.

Even if the form did support petitioner's interpretation, it would be contrary to the text of the Bankruptcy Code and would thus be invalid.

II.

In the alternative, even if the Court were to deem a nonexistent transportation ownership expense "applicable" to the debtor, the judgment should be affirmed because the nonexistent expense should not be deducted from petitioner's "projected" disposable income. *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). If petitioner is allowed to deduct from his disposable income $471 for a nonexistent car payment, then here, just as in *Lanning,* a mechanical calculation of "disposable income" would not accurately reflect his net "income to be received" during the plan period. *Id.* at 2474. And, because petitioner's disposable income in fact will be substantially higher, "the mechanical approach would deny creditors payments that the debtor could easily make." *Id.* at 2476. As in *Lanning*, there is no reason to believe that Congress intended such a "senseless result[ ]." *Id.* at 2475-2476.

III.

Petitioner is mistaken in contending that, unless he can deduct the transportation ownership expense, he will not be able to file a confirmable Chapter 13 plan. He asserts that he can afford only to pay the $504 per month in net income calculated on his Schedule J, rather than the $682 per month that would result from adding the $471 ownership expense to the net income calculated on his Form 22C. Even if this Court would review such a factbound question, that is not a reason to grant him a fictitious expense allowance; rather, petitioner must reduce his expenditures.

In any event, petitioner's schedules and form reflect sufficient disposable income to fund a confirmable plan. One reason petitioner's bottom line number for his net monthly income on Schedule J differs from his disposable income on his Form 22C is that petitioner answered identical questions differently. Had he answered them consistently, his Schedule J would have indicated that he has sufficient net income to repay more of his unsecured debts. Petitioner should not be permitted to retain an additional $471 for a car payment expense that he does not have.

ARGUMENT

The text of the Bankruptcy Code precludes debtors from deducting phantom car payments from current monthly income when calculating their disposable income available to pay creditors. That is

the beginning and the end of the inquiry. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Moreover, both the purpose and legislative history of the relevant Bankruptcy Code provisions confirm the plain meaning of the provision.

I. THE BANKRUPTCY CODE DOES NOT PERMIT PHANTOM TRANSPORTATION OWNERSHIP EXPENSES TO BE DEDUCTED WHEN CALCULATING DISPOSABLE INCOME

A. Under BAPCPA's Plain Text, A Debtor Is Not Entitled To A Deduction For Transportation Ownership Expenses When He Owes No Car Payment

BAPCPA allows an above-median debtor, such as petitioner, to withhold from unsecured creditors his reasonably necessary expenses, including "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards * * * for the area in which the debtor resides." 11 U.S.C. § 707(b)(2)(A)(ii)(I). As the court of appeals correctly held, under the plain and ordinary meaning of the word "applicable," when a debtor has no car payment, there is no transportation ownership expense amount specified in the IRS Standards that is "applicable" to that debtor. Accordingly, such a debtor cannot look to the IRS Standards to claim an ownership expense amount for transportation ownership.

1. Under the ordinary meaning of "applicable," the transportation ownership expense amount is not applicable to a debtor who has no such expense

It is a "fundamental canon of statutory construction" that "unless otherwise defined, words [of a statute] will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010) ("When terms used in a statute are undefined, we give them their ordinary meaning." (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995))). This Court has often used dictionaries as a useful guide in determining a statutory term's plain and ordinary meaning. *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 228-229 (1993); *Chapman v. United States*, 500 U.S. 453, 462 (1991).

"Applicable" means "capable of being applied," "having relevance," and "fit, suitable, or right to be applied." *Webster's Third New International Dictionary of the English Language Unabridged* 105 (1993); *see also Oxford English Dictionary* 575 (2d ed. (reprint with corrections) 1991) (defining "applicable" as "[c]apable of being applied or put to use"; "having reference to"). Indeed, the court below observed that, "'[a]pplicable,' in its ordinary sense, means 'capable of or suitable for being applied.'" Pet. App. 12 (quoting *Merriam-Webster's Collegiate Dictionary* 60 (11th ed. 2005)).

Where the debtor has no car payment, there is no relevant, suitable, or appropriate expense amount that is capable of being applied to the debtor. There is thus no "applicable" transportation ownership expense "under the National Standards and Local Standards." As the court of appeals put it: "An 'ownership cost' is not an 'expense'—either actual or applicable—if it does not exist, period." Pet. App. 11.

Petitioner's error is to start with the assumption that because he owns a vehicle, there must be some amount of ownership costs from the Standards that is "applicable" to him, and that it is simply a matter of selecting the amount based on his geographic region and number of cars owned. *See* Pet. Br. 51. But nothing in the text of the statute compels that conclusion. Indeed, such a reading would be contrary to the function of "applicable," which is to quantify "[a]mounts reasonably necessary to be expended" by the debtor that are thus not available for creditors. 11 U.S.C. § 1325(b)(3). Where the debtor owns his vehicle outright, in no sense is it reasonably necessary to expend money for car payments on that vehicle. Rather, as the courts below concluded, "what is important is the payments that debtors actually make, not how many cars they own, because the payments that debtors make are what actually affect their ability to make payments to their creditors." Pet. App. 11 (quoting Pet. App. 31-32).

The conclusion that merely owning a car does not automatically entitle a debtor to an ownership expense deduction is buttressed by the fact that the

Standards distinguish "Ownership Costs" from "Operating Costs." App., *infra*, 2a. If petitioner's reading were correct, there would be no need for the Standards to provide separately for those different types of costs, because any car owner would be entitled to both. The statute, however, permits petitioner to deduct only the amounts under the Standards that are "applicable" to him. 11 U.S.C. § 707(b)(2)(A)(ii)(I). Under the plain meaning of that text, the operating costs are the only transportation costs applicable to him.

2. The statute's use of both "applicable" and "actual" does not support petitioner's interpretation

Petitioner emphasizes the fact that Section 707(b)(2)(A)(ii)(I) uses the term "applicable" expense amounts when referring to the National and Local Standards and "actual" expenses when referring to other expenses. Pet. Br. 24, 26, 36-38. Petitioner suggests that he therefore need not actually have any ownership expense for the Standards ownership expense amount to be applicable to him. That is incorrect.

At most, the use of those different words suggests that Congress meant for the terms to have different meanings. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983). But requiring that a debtor in fact have a car payment for the transportation ownership expense to be "applicable" to him does not result in

"actual" and "applicable" having the same meaning. Rather, the relevant expense amount is calculated differently depending on whether the statute calls for the "debtor's actual monthly expenses" or "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards." 11 U.S.C. § 707(b)(2)(A)(ii)(I).

Thus, the amount of the deduction for "applicable" expenses under the National and Local Standards often will not be the actual amount incurred by the debtor. For example, under the National Standards, which cover expenses such as food and clothing, the debtor is permitted the full amount of the applicable deduction listed in the table even if his actual expenses are lower, and he is limited to that amount even if his actual expenses are higher. *See* App., *infra*, 1a ("Taxpayers are allowed the total National Standards amount for their family size and income level, without questioning amounts actually spent.").

By contrast, Congress used "actual" to refer to other expenses, including "the categories specified as Other Necessary Expenses" by the IRS, 11 U.S.C. § 707(b)(2)(A)(ii)(I), because there are no Standards amounts for such expenses. *See* App., *infra*, 21a-27a, § 5.15.1.10; *see also* Pet. Br. App. 22 ("The IRS does not set out specific dollar allowances for 'Other Necessary Expenses.' "). The allowable expense amount for such expenses is thus the actual amount of the debtor's expense. But Congress's use of "actual" expenses in those circumstances in no way suggests

that it intended "applicable" expense amounts to include expenses that a debtor does not in fact incur at all.

3. The "[n]otwithstanding" clause does not aid petitioner

In support of his position that a debtor may take the Standards ownership deduction without in fact having a car payment, petitioner points to the following provision: "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts." 11 U.S.C. § 707(b)(2)(A)(ii)(I). Petitioner repeatedly invokes this provision, *see* Pet. Br. 27-28, 44-45, as if it provides that the calculation of monthly expenses by reference to the National and Local Standards must be performed without regard to whether the debtor in fact has such an expense.

But that does not follow: the fact that monthly expenses "shall not include any payments for debts" does not mean that they should include nonexistent expenses for which there are no payments of any kind. The "notwithstanding" clause is one of exclusion; it indicates payments that shall not be accounted for under clause (ii). It says nothing about what is *included* within the clause. And it certainly does not say that the absence of any payments whatsoever entitles a debtor to deduct the expense amounts in the Standards.

In any event, the Court need not decide how deductions should be calculated if a debtor is actually making car payments on a debt. When, as here, the debtor is not making secured car payments, car lease payments, or car payments of any kind, the ownership expense amount under the Standards is not applicable to the debtor.

B. The Statutory Text Incorporates The Collection Financial Standards, Which Confirm That A Debtor Has No "Applicable" Expense Amount When He Has No Car Payment

The plain meaning of the term "applicable" is bolstered by the statute's incorporation of the "National Standards and Local Standards" issued by the IRS. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

1. The Collection Financial Standards are incorporated by the statute in their entirety

a. In petitioner's view, the Standards regarding transportation ownership consist exclusively of the table that provides amounts based on the number of cars. Pet. Br. 51. But the table itself does not specify whether the number of cars refers to the number of cars owned or the number of cars for which the debtor has ownership expenses (i.e., car payments). The header in the table itself is simply labeled "First Car"

and "Second Car" without any further clarification. App., *infra*, 5a.

It therefore is not possible to follow the approach that petitioner urges—simply to look to the table alone, without also considering the accompanying instructions and guidelines. Indeed, the table alone, without some guidance as to how to read it, is meaningless.

b. The statute's reference to the IRS Standards is better read as referring to the IRS's Collection Financial Standards. The Collection Financial Standards are concise guidelines—separate from the Internal Revenue Manual—of which the tables are a part. *See* App., *infra*, 1a-4a. The Collection Financial Standards include guidelines that instruct how to use the tables and what the amounts listed in the tables mean. They plainly instruct: "If a taxpayer has no car payment, * * * only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense." App., *infra*, 3a. Contrary to the claim of petitioner's amicus, at the time of BAPCPA's enactment, the IRS's Collection Financial Standards included that same statement. IRS, *Collection Financial Standards* (2005), http://web.archive.org/web/20050425003844/www.irs.gov/individuals/article/0,,id=96543,00.html.[4]

[4] The appendix to the brief of Amicus Curiae National Association of Consumer Bankruptcy Attorneys includes only

(Continued on following page)

That Congress intended recourse to these instructions is bolstered by the language of the statute. Section 707(b)(2)(A)(ii)(I) provides that the applicable expense amounts are the "amounts specified *under* the National Standards and Local Standards," not the amounts specified "in" the standards. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). In context, the use of the word "under" indicates that the tables are to be used in conjunction with the Collection Financial Standards as a whole, rather than blindly looking to the amounts listed "in" the tables. *See Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("The word 'under' has many dictionary definitions and must draw its meaning from its context.").

Indeed, the current version of the tables for transportation expenses includes surrounding text that is essentially identical to the longstanding text of the Collection Financial Standards. Thus, on the IRS's website, the tables for transportation expenses are now accompanied by the following text: "[i]f a taxpayer has a car, but no car payment, only the operating costs portion of the transportation standard is used to figure the allowable transportation expense." IRS, *Local Standards: Transportation* (2010) ("2010 *Local Standards: Transportation*"), http://www.irs.gov/businesses/small/article/0,,id=104623,00.html.

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the transportation tables from 2005, not the entire 2005 Collection Financial Standards.

c. It makes no difference that the IRS does not normally have authority to issue regulations in the bankruptcy arena or that the IRS could amend the Standards at any time. Congress expressly incorporated the Standards when it enacted BAPCPA, without revoking the IRS's authority to continue making alterations. Indeed, Congress expressly recognized in BAPCPA the IRS's authority to amend them. *See* BAPCPA § 103(a), 119 Stat. at 25 ("It is the sense of Congress that the Secretary of the Treasury has the authority to alter the Internal Revenue Service standards established to set guidelines for repayment plans as needed to accommodate their use under section 707(b) of title 11, United States Code.").

Moreover, contrary to petitioner's assertion, the IRS's "[d]isclaimer" that the "Collection Financial Standards are intended for use in calculating repayment of delinquent taxes," Pet. Br. 21 (quoting 2010 Collection Financial Standards) does not demonstrate that the IRS's guidance is not to be used in the disposable income calculation. It is the statute that governs, and the statute expressly provides that the debtor's monthly expenses "shall be" calculated by "the applicable monthly expense amounts specified under the National Standards and Local Standards * * * issued by the Internal Revenue Service." 11 U.S.C. § 707(b)(2)(A)(ii)(I). In any event, the IRS's website directs readers to the website of the U.S. Trustee Program for expense information for use in bankruptcy calculations. IRS, *Collection Financial Standards* (2010), http://www.irs.gov/individuals/article/

0,,id=96543,00.html. And that website, like the IRS's, provides that "[i]f a taxpayer has a car, but no car payment, only the operating costs portion of the transportation standard is used to figure the allowable transportation expense." U.S. Trustee Program, *Means Testing* (2010), *available at* http://www.justice.gov/ust/eo/bapcpa/20100315/meanstesting.htm (last updated May 21, 2010).

2. The Internal Revenue Manual, relied on implicitly by the statute and expressly by the legislative history, confirms that a debtor without a car payment has no applicable ownership expense amount

Although the Court need not look to the Internal Revenue Manual to resolve this case, the statute implicitly refers to it and approves of its use. The Manual confirms that the transportation ownership expense is not applicable in the absence of a car payment.

a. In the very same sentence referring to the National and Local Standards, Section 707(b)(2)(A)(ii) refers to "the categories specified as Other Necessary Expenses issued by the Internal Revenue Service." 11 U.S.C. § 707(b)(2)(A)(ii)(I). Those Other Expenses categories are found *only* within the Internal Revenue Manual, App., *infra*, 21a-27a, § 5.15.1.10, immediately after the Manual's discussion of the National and Local Standards, App., *infra*, 18a-20a, §§ 5.15.1.8 & 5.15.1.9.

And the legislative history is replete with references to the *Financial Analysis Handbook*, which is Chapter 15 of the Internal Revenue Manual. *See, e.g.*, H.R. Rep. No. 109-31, pt. 1, at 13-14 & nn.62-66; *id.* at 557 nn.85-87 (dissenting views); H.R. Rep. No. 107-3, pt. 1, at 9 (2001). For example, the House committee report accompanying S. 256, which was enacted into law as BAPCPA, explains that the "debtor's monthly expenses * * * must be the applicable monthly amounts set forth in the Internal Revenue Service *Financial Analysis Handbook* as Necessary Expenses under the National and Local Standards categories." H.R. Rep. No. 109-31, pt. 1, at 13-14 (italics added) (footnotes omitted); *see also* H.R. Rep. No. 107-3, pt. 1, at 9 (same).

And since before enactment of BAPCPA, the Internal Revenue Manual has provided that the applicable ownership expense amount for a debtor with no car payment is zero. "If the taxpayer has no car payment * * * [t]he taxpayer is only allowed the operating cost or the cost of [public] transportation." IRS, *Internal Revenue Manual* § 5.15.1.9 ¶ 1.B Note (2005) ("2005 *Internal Revenue Manual*"), http://web.archive.org/web/0050519011410/http://www.irs.gov/irm/part5/ch14s01.html; *see also* App., *infra*, 3a (2006). Similarly, at the time of BAPCPA's enactment, the Internal Revenue Manual also stated: "If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense." 2005 *Internal*

Revenue Manual, supra, § 5.15.1.7 ¶ 4.B; *see also* App., *infra*, 16a, § 5.15.1.7 ¶ 4.B (2006).

b. Nevertheless, petitioner contends that the lack of any reference to the Internal Revenue Manual in the text of Section 707(b)(2)(A) indicates that Congress intended the National and Local Standards to be used in isolation, divorced from the Manual. Pet. Br. 48-49. In support, petitioner points out that earlier, unenacted bills expressly referred to the *Financial Analysis Handbook* in the Manual.

As an initial matter, little significance should be attached to the "unexplained disappearance" of those words from unenacted bills. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). As this Court has explained, "'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *Ibid.* (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)).

In any event, petitioner's argument fails to explain where the "Other Necessary Expenses" are to be found other than in the Internal Revenue Manual. Referring to the Manual in applying Section 707(b)(2)(A) is thus necessary, if implicit. And that is confirmed by the committee report's repeated citation to and quotation of the Internal Revenue Manual's guidelines when discussing how the Local and National Standards were to be implemented.

3. Car payments are the only "ownership costs" under the Standards

Despite that he has no car payment of any kind, petitioner nevertheless contends that a transportation ownership deduction is applicable to him because "there are vehicle ownership costs in addition to debt payments." Pet. Br. 51. In particular, petitioner asserts that he pays (or could pay) insurance, licensing fees, and taxes; that the car will depreciate in value; and that he will someday have to pay to replace the car. Pet. Br. 52. But none of these is a vehicle ownership cost. Some are addressed under other provisions of the Standards, and some are not "expenses" at all.

a. Under the Standards, insurance and licensing fees are vehicle operating costs, not ownership costs. The Collection Financial Standards provide that "ownership costs" represent "nationwide figures for monthly loan or lease payments." App., *infra*, 2a; App., *infra,* 3a (noting that the Standards were revised on February 1, 2006, to "base automobile ownership/leasing costs on the five-year average of new and used car financing data compiled by the Federal Reserve Board of Governors"). Indeed, the current Local Standards for Transportation expressly provide that "operating costs include maintenance, repairs, insurance, fuel, registrations, licenses, inspections, parking and tolls." 2010 *Local Standards: Transportation*, *supra*.

The Internal Revenue Manual confirms this distinction between ownership and operating costs. When petitioner filed his bankruptcy petition, the Internal Revenue Manual identified the costs included in transportation as "[v]ehicle insurance, vehicle payment (lease or purchase), maintenance, fuel, state and local registration, required inspection, parking fees, tolls, driver's license, public transportation." App., *infra*, 20a, § 5.15.1.9 ¶ 1.B. The Internal Revenue Manual consistently has explained—at the time Congress enacted BAPCPA, at the time petitioner filed his petition, and today—that only the "figures for loan or lease payments" were "referred to as ownership cost" and that "operating cost" captures the remainder of vehicle-related expenses. App., *infra*, 16a, § 5.15.1.7 ¶ 4.B; *see also* 2005 *Internal Revenue Manual, supra*, § 5.15.1.7 ¶ 4.B; IRS, *Internal Revenue Manual* § 5.15.1.7 ¶ 4.B (2010), http://www.irs.gov/irm/part5/irm_05-015-001.html.

b. Taxes are neither ownership costs nor operating costs. The Collection Financial Standards for transportation states that it "[d]oes not include personal property taxes." App., *infra*, 6a. Rather, as the Internal Revenue Manual explains, taxes are included in the "Other Expenses" category, for which there are no standard amounts because the actual expense amounts may be deducted so long as deemed necessary. *See* App., *infra*, 27a, § 5.15.1.10.

c. Depreciation is not a cost. Rather, depreciation is a decline in the value of the debtor's car. *See*

Black's Law Dictionary 473 (8th ed. 2004) (depreciation is a "decline in an asset's value because of use, wear, or obsolescence"). Depreciation affects only the book value (i.e., resale value) of the car; it results in no out-of-pocket expense for the debtor, nor does it diminish the disposable income that the debtor has available to repay his creditors. Chapter 13 is concerned only with out-of-pocket costs and ignores non-cash costs such as depreciation; nothing in BAPCPA indicates that Congress intended to depart from that approach. *In re Coffin*, 396 B.R. 804, 809 (Bankr. D. Me. 2008) ("Chapter 13 budgeting traditionally takes no account of such non-cash 'costs.' * * * BAPCPA did not alter confirmation standards so fundamentally (and so adversely to creditors' interests) that they *must* now be taken into account."), appeal pending, No. 08-90 (B.A.P. 1st Cir.); *see also Babin v. Wilson (In re Wilson)*, 383 B.R. 729, 734 (B.A.P. 8th Cir. 2008) ("it is only the *payments* that affect the debtor's ability to repay his creditors").

d. Petitioner argues that "[r]eplacement costs" are applicable ownership costs, contending that "the ownership cost deduction takes into account the expenses incurred by debtors to replace their vehicles." Pet. Br. 52.[5] That argument is flawed for at least two reasons.

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[5] This argument also has been proposed by treatises and commentators on which petitioner relies. *See* Pet. Br. 39 (quoting Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 257-258 (2005); 6 *Collier on Bankruptcy*,

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First, petitioner points to nothing indicating congressional concern that debtors with a paid-off vehicle be able to purchase a new one during their Chapter 13 plan commitment period. *See In re Devilliers*, 358 B.R. 849, 864 (Bankr. E.D. La. 2007) ("The deduction is not * * * an invitation for a debtor to 'save' for the ultimate replacement of an existing vehicle."). Rather, Congress's primary concern was ensuring that existing unsecured debts be paid down as much as the debtor can afford. *See* pp. 1-3, *supra*; pp. 42-43, *infra*.

Second, 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. 11 U.S.C. § 1329; *In re Cole*, 371 B.R. 454, 459 (Bankr. W.D. Wash. 2007) ("A debtor with an older car who is in * * * Chapter 13 retains the ability to move for plan modification to fund the purchase of a new car if needed."); *see also* David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 AM. BANKR. L.J. 585, 640 (2009) ("Perhaps the most common motive for modification concerns car trouble after confirmation.").

¶ 707.05(2)(c)(i)). But to the extent that such commentary conflicts with the statute, the statute prevails. *Schwab v. Reilly*, 130 S. Ct. 2652, 2660 n.5 (2010) ("treatise excerpts[ ] and policy considerations * * * must be read in light of the Bankruptcy Code provisions that govern this case, and must yield to those provisions in the event of conflict").

C. Permitting A Debtor To Reduce His Disposable Income Amount Based On A Nonexistent Transportation Ownership Expense Would Contravene BAPCPA's Central Purpose

Petitioner's interpretation would contravene Congress's primary purpose in enacting BAPCPA: to prevent abuse by ensuring that debtors repay as much as they can afford to their creditors. And it would transform intended caps on applicable expenses into minimums. Petitioner's interpretation thus should be rejected.

1. Permitting deductions for phantom car payments would defeat the congressional purpose of having debtors repay as much debt as they can afford

Congress's central objective in enacting BAPCPA was to ensure that debtors who can repay some of their unsecured debts actually do repay as much as they can afford before receiving a discharge. H.R. Rep. No. 109-31, pt. 1, at 2 ("The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism * * *, which is intended to ensure that debtors repay creditors the maximum they can afford."); *see also* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005). As the act's title—Bankruptcy Abuse Prevention and Consumer Protection Act—demonstrates, Congress perceived

the pre-BAPCPA bankruptcy system as permitting excessive abuse. This abuse stemmed from "the fact that some bankruptcy debtors [were] able to repay a significant portion of their debts," but instead were filing for Chapter 7 relief. H.R. Rep. No. 109-31, pt. 1, at 5. Congress acted to "restor[e] personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 109-31, pt. 1, at 2. Thus, as petitioner acknowledges, "BAPCPA seeks to have debtors pay the full sum they are capable of paying toward their unsecured debt." Pet. Br. 57.

Petitioner's interpretation of "applicable" would contravene that central purpose. Petitioner's approach would deny unsecured creditors $28,260 ($471 per month over 60 months), even though that money is not necessary for the debtor's maintenance and support. *See Hamilton*, 130 S. Ct. at 2475-2476 (rejecting interpretation that "would produce senseless results that we do not think Congress intended" by "deny[ing] creditors payments that the debtor could easily make"); *see also* Pet. Br. 60 ("This unfortunate result—denying creditors payments that the debtor is capable of making—is hardly the objective of the BAPCPA legislation."). BAPCPA does protect debtors' ability to continue to own vehicles that they need for transportation. But when the debtor already owns the car outright, and therefore has no car payments, it makes no sense to permit the debtor to retain for himself vehicle ownership expenses. As the court of appeals observed: "Ironic it would be indeed

to diminish payments to unsecured creditors in this context on the basis of a fictitious expense not incurred by a debtor." Pet. App. 11.

Petitioner argues that the court of appeals' interpretation would defeat Congress's intent by favoring secured debt and "amount[ing] to an incentive to retain secured debt as a way to lower disposable income in bankruptcy." Pet. Br. 55-56. But secured debt virtually always takes precedence over unsecured debt. 4 *Collier on Bankruptcy* ¶ 506.02. And, in appropriate circumstances, the requirement that a Chapter 13 plan be proposed in good faith will provide courts authority to police such schemes. *See* 11 U.S.C. § 1325(a)(3).

Moreover, permitting phantom car payments to be deducted from monthly income in the disposable-income calculation would give debtors perverse incentives. Under petitioner's theory, a debtor could spend a few hundred dollars on a junkyard car immediately before filing a petition, and then reap an additional $471 per month during the Chapter 13 plan (or even possibly pass the means test to be eligible for Chapter 7 relief). *See Fokkena v. Hartwick*, 373 B.R. 645, 652 (Bankr. D. Minn. 2007) ("debtors who own two unusable cars rusting in their back yard would be entitled to the windfall benefit of both ownership and operating expense deductions although they, in fact, incur no expenses by owning the vehicles"); *In re Howell*, 366 B.R. 153, 157 (Bankr. D. Kan. 2007) ("Allowing debtors to deduct from their disposable income a fictional ownership

allowance would give debtors with unencumbered vehicles a windfall at the expense of their unsecured creditors."). While these efforts, if detected, would reflect the absence of good faith that is necessary to propose a confirmable plan, *see* 11 U.S.C. § 1325(a)(3), such conduct is not always detected.

The court of appeals' interpretation avoids this result. And it does not create the anomalies that have been ascribed to it. Some courts and commentators have criticized the supposed anomaly of forbidding a deduction for phantom car payments to debtors who own their cars outright, while allowing a deduction over 60 months for debtors who have only a few car payments remaining. *See, e.g.*, *Ross-Tousey v. Neary (In re Ross-Tousey)*, 549 F.3d 1148, 1161 (7th Cir. 2008); Wedoff, 79 AM. BANKR. L.J. at 258. That criticism is unfounded after *Hamilton v. Lanning*. The scheduled ending of car payments during the plan's commitment period would be a "change[ ] in the debtor's * * * expenses that [is] known or virtually certain at the time of confirmation." *Hamilton*, 130 S. Ct. at 2478. As such, the bankruptcy court may take that into account in calculating projected disposable income. *Ibid.*

2. Petitioner's interpretation would turn intended maximums into minimums

Petitioner's interpretation of Section 707(b)(2)(A)(ii) would turn the Local Standards on their head. At the time of BAPCPA's enactment and since, the IRS has

viewed the Local Standards as caps on a taxpayer's actual expenses: "the taxpayer is allowed the amount actually spent or the standard, whichever is less." App., *infra*, 1a. But petitioner would turn those ceilings on expenses into floors. Under petitioner's interpretation, a debtor with a car would be permitted to deduct *at least* $471 in monthly expenses, even if he has no car payment at all or if his car payment is much smaller. This is because, under petitioner's view, every debtor with a car may deduct the full ownership expense under Section 707(b)(2)(A)(ii)(I). Petitioner cites no reason to believe that when Congress incorporated the Local Standards into the Bankruptcy Code, it intended to transform them from maximums to minimums.

Worse still, these minimums would be available only to above-median debtors, because the statutory disposable-income calculation applies only to them. Below-median debtors would continue to be restricted to deducting the reasonably necessary amounts they in fact incur. 11 U.S.C. § 1325(b)(2). Such a result would be at odds with Congress's purpose.

D. The Official Bankruptcy Forms Do Not Take A View On Which Standards Are "Applicable" To A Person Who Has No Transportation Ownership Expense, And Even If They Did, They Are Not Binding

Petitioner asserts that Official Bankruptcy Form 22C instructed him to deduct the Local Standards

transportation ownership amount from his current monthly income and that under Rule 1007(b)(6) of the Federal Rules of Bankruptcy Procedure, he had "no discretion" to deviate from that form. Pet. Br. 34.

That argument is wrong for two reasons. First, Form 22C did not require petitioner to claim an ownership expense for the car he owns free and clear. Rather, the form instructed him: "Check the number of vehicles for which you *claim* an ownership/lease expense." J.A. 49 (emphasis added). It was petitioner's choice, not the form's instruction, to claim an ownership expense for his car even though he had no such expense. Indeed, the Advisory Committee Notes to the forms now expressly state that "[t]he forms take no position on the question of whether the debtor must actually be making payments on a vehicle in order to claim the ownership/lease allowance." Report of Advisory Committee on the Rules of Bankruptcy Procedure, *2005-2008 Committee Note, Forms 22A, 22B, & 22C* at 12 (Jan. 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1208/B_22_CN_cum120108.pdf.[6]

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[6] The Committee Notes included in the Appendix to petitioner's brief (Pet. Br. App. 16-31) do not include this comment because they are the 2005 notes from the Committee's original promulgation of interim forms. *See* Pet. Br. App. 14-15 (describing interim Official Forms and comments adopted in October 2005). In 2007, in response to public comments on the forms as well as developing case law, the Advisory Committee amended the notes to clarify that the forms are silent as to whether a transportation ownership expense amount may be claimed in

(Continued on following page)

Second, even if the forms did support petitioner's interpretation, they would conflict with the Bankruptcy Code and thus be invalid. To the extent that the forms are inconsistent with substantive provisions of the bankruptcy statutes, they have no force. *See Schwab v. Reilly*, 130 S. Ct. 2652, 2660 n.5 (2010) (bankruptcy "forms [and] rules * * * must be read in light of the Bankruptcy Code provisions that govern this case, and must yield to those provisions in the event of conflict"); *see also* 28 U.S.C. § 2072(b) (rules prescribing forms of pleadings in bankruptcy cases "shall not abridge, enlarge, or modify any substantive right").

Indeed, in a congressional hearing following promulgation of the draft forms, but before the Advisory Committee Note was added, Senator Charles Grassley, a member of the Senate subcommittee charged with oversight of the implementation of BAPCPA, expressed concern on this very point. The Senator observed: "[T]he federal courts produced a bankruptcy form that is supposed to measure repayment ability. But it's my understanding that this form actually directs consumers to claim deductions for expenses a debtor may not even have. That

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the absence of an actual ownership expense. *See* Report of Advisory Committee on Bankruptcy Rules, *2005-2007 Committee Note, Forms 22A, 22B, & 22C* at 4 (May 2007), *available at* p. 319 of http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2007.pdf.

certainly wasn't the intent of the law. The form legitimizes gaming of the law, reduces the integrity of the system, and ultimately undermines the reforms we were trying to accomplish." *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. 126 (2006) (statement of Sen. Charles Grassley).

II. IN THE ALTERNATIVE, PHANTOM TRANSPORTATION OWNERSHIP EXPENSES SHOULD NOT BE COUNTED WHEN PROJECTING FUTURE DISPOSABLE INCOME

Even if this Court were to hold that debtors with no car payment may nevertheless deduct from "disposable income" the transportation ownership expense amount from the Standards, the judgment below should be affirmed. Under this Court's decision in *Hamilton v. Lanning*, calculating "disposable income" does not resolve the separate question of what constitutes a debtor's "*projected* disposable income." And it is projected disposable income, as of the date on which the plan is confirmed, that is to be paid to unsecured creditors during the applicable commitment period. 11 U.S.C. § 1325(b)(1)(B).[7]

[7] This argument falls within the scope of the question presented, which addresses "calculating the debtor's 'projected disposable income,'" not just a debtor's "disposable income."

(Continued on following page)

In *Hamilton v. Lanning*, this Court adopted the "forward-looking approach" to determining projected disposable income, in which a court may "take into account other known or virtually certain information about the debtor's future income or expenses." 130 S. Ct. at 2475. Under that approach, the certain fact that petitioner will not actually be paying any vehicle ownership expense should be taken into account.

If petitioner is allowed to deduct from his disposable income $471 for a nonexistent car payment, then here, just as in *Lanning,* a mechanical calculation of "disposable income" would not accurately reflect his net "income to be received" during the plan period. *Id.* at 2474. And, because petitioner's disposable income in fact will be substantially higher, "the mechanical approach would deny creditors payments that the debtor could easily make." *Id.* at 2476. As in *Lanning*, there is no reason to believe that Congress intended such a "senseless result[ ]." *Id.* at 2475-2476.

To be sure, in *Lanning*, the debtor's income had changed between the look-back period used to calculate her "disposable income" and the time she filed for bankruptcy. *Id.* at 2470. But, contrary to petitioner's

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Pet. i. In the court of appeals, respondent contended that the term "projected" was relevant to the correct resolution of the question, Resp. C.A. Br. 12-13; in this Court, respondent raised this argument as an alternative ground in its brief in opposition, Br. in Opp. 3-4. And petitioner has briefed the issue. Pet. Br. 57-61.

claim, Pet. Br. 58, that is a distinction without a difference. The important point is that "projected" disposable income should attempt to accurately reflect, on a forward-looking basis, the net income available during the plan period. Here, it is "known or virtually certain" that petitioner will have no car payment going forward.

Accordingly, even if the ownership amount in the Standards is deemed applicable to petitioner, that amount should be excluded from his "projected disposable income," and the judgment should be affirmed on that alternative ground.

III. PETITIONER IS MISTAKEN IN CLAIMING THAT HE CANNOT SUBMIT A CONFIRMABLE CHAPTER 13 PLAN BECAUSE HE LACKS SUFFICIENT INCOME TO PAY ALL OF HIS DISPOSABLE INCOME TO CREDITORS

Petitioner suggests that the court of appeals' interpretation would contravene Congress's objectives because it would preclude him from filing a confirmable Chapter 13 plan and would therefore result in fewer payments to unsecured creditors. Pet. Br. 56. In particular, based on his Schedules I and J, he claims that he has only $504.15 net monthly income available to pay creditors. He therefore claims that he cannot pay $681.55—the total amount of his disposable income on Form 22C when the transportation vehicle ownership expense amount is not deducted.

This Court did not grant review to consider such a fact-specific inquiry. Even if the Court were to review it, the answer is not to grant petitioner a fictitious expense deduction that will artificially reduce his disposable income, but rather for petitioner to reduce his expenditures.

In any event, petitioner's schedules and form reflect sufficient disposable income to fund a confirmable plan. One reason petitioner's bottom line number for his net monthly income on Schedule J differs from his disposable income on his Form 22C is that petitioner answered identical questions differently. If all the discrepancies were corrected to bring his Schedules I and J into alignment with his Form 22C, petitioner's Schedules I and J would have shown an additional $492.06 in net income,[8] for a total of $996.21 in net monthly income.

When that amount is adjusted to take into account the expense amounts petitioner is allowed

[8] Petitioner claimed to make $115.90 less per month on Schedule I than he did on Form 22C. J.A. 43 (line 3), 45 (line 2). He claimed to spend $247.50 a month on a 401(k) and $20.00 on stock purchases on Schedule I, but did not make a similar claim on his Form 22C. J.A. 43 (line 4d), 53 (line 55). And he claimed to spend $150.00 more a month for health insurance on Schedules I and J than he did on his Form 22C. J.A. 43 (line 4b), 44 (line 11c), 51 (line 39). By contrast, he claimed to pay $41.34 less per month in taxes on Schedule I than on Form 22C. J.A. 43 (line 4a), 50 (line 30). That totals to $492.06 more net income than petitioner reported on his Form 22C—$533.40 in additional actual income and lower actual expenses listed on Form 22C minus $41.34 in higher actual expenses listed on Form 22C.

under the National and Local Standards that are not at issue in this case, petitioner is entitled to retain $264.66 more per month than his real expenses reflected in his Schedules I and J.[9] Subtracting that amount (and $50.00 for administrative expenses related to the bankruptcy, J.A. 53 (line 50)) from his net monthly income of $996.21 brings petitioner's disposable income to $681.55.

That is the amount respondent claims petitioner should have been making available to his unsecured creditors. Petitioner should not be able to deduct $471.00 from that amount for a car payment expense that he does not have.

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[9] Petitioner claimed $425.00 a month in food, clothing, household supplies, personal care and miscellaneous on Schedule J, but on Form 22C he was entitled to deduct, due to the Standards, an expense of $703.00 a month for those categories. J.A. 44 (lines 4, 5, 6, 7, and 9); U.S. Trustee Program, *IRS National Standards for Allowable Living Expenses* (Feb. 13, 2006 to Sept. 30, 2006), http://www.justice.gov/ust/eo/bapcpa/20060213/bci_data/national_expense_standards.htm. Likewise he identified for the transportation *operating* cost $263.86 a month, but was entitled to deduct $338.00 a month. J.A. 44 (lines 8 and 11d); Pet. Br. App. 7. On the other hand, petitioner identified $380.48 in housing and utilities (other than the mortgage payment itself), yet the Standards permitted him to deduct only $293.00. J.A. 44 (lines 2, 3, and 11a); U.S. Trustee Program, *Bankruptcy Allowable Living Expenses, Local Housing & Utilities Standards*, (Feb. 13, 2006 to Sept. 30, 2006), http://www.justice.gov/ust/eo/bapcpa/20060213/bci_data/housing_charts/irs_housing_charts_NV.htm.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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AUGUST 6, 2010

Collection Financial Standards (2006)

APPENDIX A

[LOGO] Internal Revenue Service
United States Department of the Treasury

Collection Financial Standards

General

Collection Financial Standards are used to help determine a taxpayer's ability to pay a delinquent tax liability.

Allowances for food, clothing and other items, known as the National Standards, apply nationwide except for Alaska and Hawaii, which have their own tables. Taxpayers are allowed the total National Standards amount for their family size and income level, without questioning amounts actually spent.

Maximum allowances for housing and utilities and transportation, known as the Local Standards, vary by location. Unlike the National Standards, the taxpayer is allowed the amount actually spent or the standard, whichever is less.

Food, Clothing and Other Items

National Standards for reasonable amounts have been established for five necessary expenses: food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous.

All standards except miscellaneous are derived from the Bureau of Labor Statistics (BLS) Consumer

Expenditure Survey (CES). The miscellaneous standard has been established by the IRS.

Alaska and Hawaii

Due to their unique geographic circumstances and higher cost of living, separate standards for food, clothing and other items have been established for Alaska and Hawaii.

Housing and Utilities

The housing and utilities standards are derived from Census and BLS data, and are provided by state down to the county level.

Transportation

The transportation standards consist of nationwide figures for monthly loan or lease payments referred to as ownership costs, and additional amounts for monthly operating costs broken down by Census Region and Metropolitan Statistical Area (MSA). Public transportation is included under operating costs. A conversion chart has been provided with the standards which shows which IRS districts fall under each Census Region, as well as the counties included in each MSA. The ownership cost portion of the transportation standard, although it applies nationwide, is still considered part of the Local Standards.

The ownership costs provide maximum allowances for the lease or purchase of up to two automobiles if allowed as a necessary expense. The operating costs are derived from BLS data.

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, or no car, only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense.

Recent Revisions

The Local Standards for housing and utilities and transportation were revised on 02/01/06 to:

- add family size to the housing and utilities allowances (two or less, three, and four or more);
- base automobile ownership/leasing costs on the five-year average of new and used car financing data compiled by the Federal Reserve Board of Governors; and,
- reflect updated information from the Bureau of Labor Statistics.
- Housing and Utility Standards have been established in 2006 for U.S. Territories

The revised Local Standards for housing and utilities and transportation are effective for financial analysis conducted on or after January 1, 2006.

Allowable Living Expenses for Transportation (2006)

APPENDIX B

[LOGO] Internal Revenue Service
United States Department of the Treasury

Allowable Living Expenses for Transportation

Disclaimer*: IRS Allowable Expenses are intended for use in calculating repayment of delinquent taxes. Expense information for use in bankruptcy calculations can be found on the website for the U.S. Trustee Program.*

Collection Financial Standards
Financial Analysis – Local Standards: Transportation*

Ownership Costs

	First Car	Second Car
National	$471	$332

Operating Costs & Public Transportation Costs

Region	No Car	One Car	Two Cars
Northeast Region	$238	$311	$393
Boston	$267	$300	$382
New York	$313	$402	$484
Philadelphia	$245	$304	$386
Pittsburgh	$167	$274	$357
Midwest Region	$199	$275	$358
Chicago	$264	$327	$410
Cincinnati	$227	$260	$343
Cleveland	$204	$280	$362
Detroit	$320	$390	$473

Kansas City	$252	$296	$379
Milwaukee	$214	$254	$336
Minneapolis – St. Paul	$284	$333	$416
St. Louis	$207	$264	$346
South Region	$203	$260	$343
Atlanta	$291	$238	$320
Baltimore	$233	$271	$353
Dallas – Ft. Worth	$317	$348	$430
Houston	$287	$338	$420
Miami	$292	$348	$431
Tampa	$264	$253	$336
Washington, D.C.	$299	$350	$433
West Region	$252	$338	$420
Anchorage	$319	$341	$423
Denver	$312	$338	$420
Honolulu	$300	$328	$410
Los Angeles	$284	$426	$508
Phoenix	$275	$351	$433
Portland	$194	$297	$379
San Diego	$322	$382	$464
San Francisco	$325	$401	$484
Seattle	$267	$329	$412

* Does not include personal property taxes. (effective February 1, 2006)

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 GA:*	Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, 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

* * *

Internal Revenue Manual (2006) (Excerpts)

APPENDIX C

[LOGO] Internal Revenue Service
United States Department of the Treasury

Part 5. Collecting Process

Chapter 15. Financial Analysis

Section 1. Financial Analysis Handbook

5.15.1 Financial Analysis Handbook

- 5.15.1.23 Retirement or Profit Sharing Plans
- 5.15.1.24 Furniture, Fixtures, and Personal Effects
- 5.15.1.25 Motor Vehicles, Aircraft and Vessels
- 5.15.1.26 Real Estate
- 5.15.1.27 Mortgage and Real Estate Loans
- 5.15.1.28 Accounts and Notes Receivable
- 5.15.1.29 Inventory
- 5.15.1.30 Machinery and Equipment
- 5.15.1.31 Tax-Exempt Securities
- 5.15.1.32 Loans to Shareholders
- 5.15.1.33 Intangible Assets
- 5.15.1.34 Cash Flow Analysis
- 5.15.1.35 Making the Collection Decision
- 5.15.1.36 Business Entity and Collection
- Exhibit 5.15.1-1 Questions and Answers to Assist in Financial Analysis (Reference: 5.15.1.3)
- Exhibit 5.15.1-2 Financial Analysis: On-Line Access to the Allowable Expense Tables (Reference 5.15.1)

* * *

5.15.1.7 (05-01-2004)
Allowable Expense Overview

1. Allowable expenses include those expenses that meet the necessary expense test. *The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income.* The expenses

must be reasonable. The total necessary expenses establish the minimum a taxpayer and family needs to live.

2. There are three types of necessary expenses:
   - National Standards
   - Local Standards
   - Other Expenses
3. National Standards: These establish standards for reasonable amounts for five necessary expenses. Four of them come from the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey: food, housekeeping supplies, apparel and services, and personal care products and services. The fifth category, miscellaneous, is a discretionary amount established by the Service. It is $100 for one person and $25 for each additional person in the taxpayer's household.

   Note:

   All five standards are included in one total national standard expense.
4. Local Standards: These establish standards for two necessary expenses: housing and transportation. Taxpayers will be allowed the local standard or the amount actually paid, whichever is less.

   A. Housing – Standards are established for each county within a state. When deciding if a deviation is appropriate, consider the cost of moving to a new

residence; the increased cost of transportation to work and school that will result from moving to lower-cost housing and the tax consequences. The tax consequence is the difference between the benefit the taxpayer currently derives from the interest and property tax deductions on Schedule A to the benefit the taxpayer would derive without the same or adjusted expense.

B. Transportation – The transportation standards consist of nationwide figures for loan or lease payments referred to as ownership cost, and additional amounts for operating costs broken down by Census Region and Metropolitan Statistical Area. Operating costs were derived from BLS data. 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. Under ownership costs, separate caps are provided for the first car and second car. If the taxpayer does not own a car a standard public transportation amount is allowed.

5. Other – Other expenses may be allowed if they meet the necessary expense test. The

amount allowed must be reasonable considering the taxpayer's individual facts and circumstances.

6. Conditional expenses. These expenses do not meet the necessary expenses test. However, they are allowable if the tax liability, including projected accruals, can be fully paid within five years.

7. National local [sic] expense standards are guidelines. If it is determined a standard amount is inadequate to provide for a specific taxpayer's basic living expenses, allow a deviation. Require the taxpayer to provide reasonable substantiation and document the case file.

8. Generally, the total number of persons allowed for national standard expenses should be the same as those allowed as dependents on the taxpayer's current year income tax return. Verify exemptions claimed on taxpayer's income tax return meet the dependency requirements of the IRC. There may be reasonable exceptions. Fully document the reasons for any exceptions. For example, foster children or children for whom adoption is pending.

9. A deviation from the local standard is not allowed merely because it is inconvenient for the taxpayer to dispose of valued assets.

10. Revenue officers should consider the length of the payments. Although it may be appropriate to allow for payments made on the

secured debts that meet the necessary expense test, if the debt will be fully repaid in one year only allow those payments for one year.

5.15.1.8 (05-01-2004)
National Standards

1. National standards include the following expenses:

   A. Apparel and services. Includes shoes and clothing, laundry and dry cleaning, and shoe repair.

   B. Food. Includes all meals, home and away.

   C. Housekeeping supplies. Includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies.

   D. Personal care products and services. Includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances.

E. Miscellaneous. A discretionary allowance of $100 for one person and $25 for each additional person in a taxpayer's family.

2. Allow taxpayers the total national standard amount for their income level.

   Example: *The taxpayer's expenses are: housekeeping supplies – $150, clothing – $150, food – $600, miscellaneous – $400 (Total Expenses – $1,300). The taxpayer is allowed the national standard of $1,100.*

3. A taxpayer that claims more than the total allowed by the national standards must substantiate and justify each separate expense of the total national standard amounts.

   Example: *A taxpayer may claim a higher food expense than allowed. Justification would be based on prescribed or required dietary needs.*

5.15.1.9 (05-01-2004)
Local Standards

1. Local standards include the following expenses:

   A. Housing and Utilities. The utilities include gas, electricity, water, fuel, oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and telephone. Housing expenses include: mortgage or rent, property taxes, interest, parking, necessary maintenance and

repair, homeowner's or renter's insurance, homeowner dues and condominium fees. Usually, this is considered necessary only for the place of residence. Any other housing expenses should be allowed only if, based on a taxpayer's individual facts and circumstances, disallowance will cause the taxpayer economic hardship.

B. Transportation. Vehicle insurance, vehicle payment (lease or purchase), maintenance, fuel, state and local registration, required inspection, parking fees, tolls, driver's license, public transportation. Transportation costs not required to produce income or ensure the health and welfare of the family are not considered necessary. Consider availability of public transportation if car payments (purchase or lease) will prevent the tax liability from being paid in part or full. Public transportation costs could be an option if it does not significantly increase commuting time and inconvenience the taxpayer.

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.

5.15.1.10 (05-01-2004)
Other Expenses

1. Other expenses may be considered if they meet the necessary expense test – they must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income. This is determined based on the facts and circumstances of each case.

2. If other expenses are determined to be necessary and, therefore allowable, document the reasons for the decision in your history.

3. The amount allowed for necessary or conditional expenses depends on the taxpayer's ability to full pay the liability within five years and on the taxpayer's individual facts and circumstances. If the liability can be paid within 5 years, it may be appropriate to allow the taxpayer the excessive necessary and conditional expenses. If the taxpayer cannot pay within 5 years, it may be appropriate to allow the taxpayer the excessive necessary and conditional expenses for up to one year in order to modify or eliminate the expense. *(See IRM 5.14, Installment Agreements)*

Expense Item	Expense is Necessary if:	Notes/Tips
Accounting and legal fees.	Representation before the Service is needed or meets the necessary expense tests.	Disallow any other accounting or legal fees. Disallow costs

	Amount must be reasonable.	not related to solving current liability.
Charitable contributions *(Donations to tax exempt organizations)*	If it is a condition of employment or meets the necessary expense tests. Example: A minister is required to tithe according to his employment contract.	Disallow any other charitable contributions that are not considered necessary. Example: Review the employment contract.
Child Care *(Baby-sitting, day care, nursery and preschool)*	It meets the necessary expense test. Only reasonable amounts are allowed.	Cost of child care can vary greatly. Do not allow unusually large child care expense if more reasonable alternatives are available. Consider the age of the child and if both parents work.
Court-Ordered Payments *(Alimony child support, including orders made by the state, and other court ordered payments)*	If court ordered and being paid, they are allowable. If payments are not being made, do not allow the expense. Child support payments for natural children or legally adopted dependents may be allowed.	Review the court order.

Dependent Care (*For the care of the elderly, invalid, or handicapped.*)	If there is no alternative to the taxpayer paying the expense.	
Education	It is required for a physically or mentally challenged child and no public education providing similar services is available. Also allowed only for the taxpayer and only if required as condition of employment.	**Example**: An attorney must take so many education credits each year or they will not be accredited and could eventually lose their license to practice before the State Bar. A teacher could lose their position or in some States their pay is commensurate with their education credits.

Health Care	Required for the health and welfare of the family. Elective surgery would not be allowed such as plastic surgery or elective dental work. The taxpayer must provide proof of excessive out of pocket medical expenses.	To determine monthly expenses, the total out of pocket expenses would be divided by 12. The Schedule A may also be used to determine the yearly expense. Ensure that the amount used is out of pocket after insurance claims are paid. Substantiate that payments are being made.
Involuntary Deductions	If it is a requirement of the job; i.e. union dues, uniforms, work shoes.	To determine monthly expenses, the total out of pocket expenses would be divided by 12.
Life Insurance	If it is a term policy on the life of the taxpayer only.	If there are whole life policies, these should be reviewed as an asset for borrowing against or liquidating. Life insurance used as an investment is not a necessary expense.

Secured or legally perfected debts	If it meets the necessary expense test.	Taxpayer must substantiate that the payments are being made.
Unsecured Debts	If the taxpayer substantiates and justifies the expense, the minimum payment may be allowed. The necessary expense test of health and welfare and/or production of income must be met. Except for payments required for the production of income, payments on unsecured debts will not be allowed if the tax liability, including projected accruals, can be paid in full within 90 days.	Examples of unsecured debts which may be necessary expenses include: Payments required for the production of income such as payments to suppliers and payments on lines of credit needed for business and payment of debts incurred in order to pay a federal tax liability.

Taxes	It is for current federal, FICA, Medicare, state and local taxes.	Current taxes are allowed regardless of whether the taxpayer made them in the past or not. Delinquent state and local taxes are allowable depending on the priority of the FTL and/ or Service agreement with the state and local taxing agencies.
Optional Telephones and Telephone Services *(Cell phone, pager, Call waiting, caller identification or long distance)*	It must meet the necessary expense test.	
Student Loans	If it is secured by the federal government and only for the taxpayer's education.	Taxpayer must substantiate that the payments are being made.
Internet Provider/ E-mail	If it meets the necessary expense test – generally for production of income.	

Repayment of loans made for payment of Federal Taxes	If the loan is secured by the taxpayer's assets when those assets are of reasonable value and are necessary to provide for the health and welfare of the family.	

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