No. 08-998

IN THE

Supreme Court of the United States

JAN HAMILTON,
CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In calculating a chapter 13 debtor's "projected disposable income," 11 U.S.C. § 1325(b)(1)(B), may the bankruptcy court account for the fact that the debtor's income or expenses during the plan period will vary substantially from those during the pre-filing period?

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STATEMENT OF THE CASE

Under chapter 13 of the Bankruptcy Code, the debtor's "projected" disposable income is allocated to repay her creditors under the terms of a court-confirmed plan. Respondent is a chapter 13 debtor. Shortly before declaring bankruptcy, she received a buyout payment from her employer that temporarily inflated her income by a significant amount. Because it was clear that respondent's income would be lower during the commitment period of her payment plan, the bankruptcy court held that respondent's "projected" disposable income was properly based on her actual expected income. The bankruptcy appellate panel and court of appeals affirmed.

I. BACKGROUND OF SECTION 1325(B) OF THE BANKRUPTCY CODE

1. Federal law recognizes two principal forms of individual bankruptcy. Chapter 7 provides for the liquidation of the debtor's non-exempt assets to pay creditors. 11 U.S.C. § 701 *et seq.*[1] By contrast, chapter 13 – frequently referred to as "wage earner" bankruptcy – permits a qualifying debtor to retain her assets and pay creditors, usually from ongoing income, generally over three or five years pursuant to the payment schedule established by the debtor's confirmed plan. § 1301 *et seq.*

A chapter 13 debtor must have regular income, § 109(e), have debts below a statutory ceiling, *id.*, and agree to a plan under which her unsecured creditors will receive as much as they would in a chapter 7 liquidation, § 1325(a)(4). The debtor's repayment obligations are specified in her confirmed plan. § 1325(b). After confirmation, the debtor, the trustee, or creditors may ask the bankruptcy court to modify the payments required by the plan. § 1329(a).

The hallmark of a confirmable chapter 13 plan is the statute's categorical feasibility requirement: the debtor must "be able to make all payments under the plan and comply with the plan." § 1325(a)(6).

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[1] Although most individuals file for bankruptcy under either chapter 7 or chapter 13, individual debtors may also file under chapter 11. 11 U.S.C. § 1101 *et seq.* In this brief, all statutory citations are to the current version of 11 U.S.C. unless otherwise indicated.

2. Congress has over time modified the measure of the debtor's repayment obligation under Section 1325 of chapter 13. Prior to 1984, Section 1325 vaguely provided that the debtor must propose a repayment plan in "good faith." 11 U.S.C. § 1325(a)(3) (Supp. IV 1980). That year, Congress introduced additional standards, including the right of the bankruptcy trustee and unsecured creditors to insist "that all of the debtor's *projected disposable income* to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356 (codified at 11 U.S.C. § 1325(b)(1)(A) (2000)) (emphasis added). Congress also specified that the debtor's projected disposable income would be determined "as of the effective date of the plan." § 1325(b)(1) (2000).

Although the 1984 version of Section 1325 did not define "projected," that term did not give rise to significant controversy. When a debtor's past income and expenses were expected to continue into the future, the court mechanically multiplied her disposable income by the life of the confirmation plan. *E.g.*, *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 357 (9th Cir. 1994). By contrast, when the debtor's future disposable income was going to vary significantly from the past, courts stated that those changes were to be incorporated into a debtor's "projected" disposable income. *E.g.*, *In re Richardson*, 283 B.R. 783, 799 (Bankr. D. Kan. 2002).

The 1984 version of Section 1325 defined the term "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended" for the maintenance and support of the debtor and dependents or for the operation of the debtor's business. 11 U.S.C. § 1325(b)(2) (2000). This itself was somewhat vague, however, because it left the terms "income" and "reasonably necessary" undefined, an omission that gave rise to significant disagreement. It was thus well recognized that "[w]ith regard to the reasonableness and necessity of particular expenses, there [wa]s an abundance of often conflicting case law," 1 John B. Butler, *The Bankruptcy Handbook* 12-143 (2004), and that the statute similarly "need[ed] a comprehensive definition of 'income' for purposes of the disposable income test in § 1325(b)," 2 Keith M. Lundin, *Chapter 13 Bankruptcy* 5-96 (2d ed. 1994).

The 1984 version of Section 1325 also did not specify a time period over which to determine the debtor's average income and reasonably necessary expenses. The official form promulgated by the Judicial Conference for reporting income (known as "Schedule I") called for the debtor to specify her "*current* monthly gross wages, salary, and commissions." *See* Commerce Clearing House, Inc., *Individual Bankruptcy: Your Rights, Responsibilities and Benefits* 88 (1992) (reproducing June 1990 version of Schedule I) (emphasis added); John Ventura, *The Bankruptcy Kit* 161 (3d ed. 2004) (Dec. 2003 version) (same). But that provided relatively little guidance. A leading handbook directed debtors who used a worksheet to calculate their monthly

income and expenses to "enter the amount you receive each pay period. If you don't receive the same amount each pay period, average the last 12," Robin Leonard, *Chapter 13 Bankruptcy: Repay Your Debts* 4/2 (6th ed. 2003); *id.* at 6/40, which for the ordinary wage-earning debtor (who is paid bi-weekly) is roughly the previous six months. *See, e.g.*, *Cadle Co. v. Leffingwell (In re Leffingwell)*, 279 B.R. 328, 342–43 (Bankr. M.D. Fla. 2002) (applying six-month average). But the practices of different judges in particular cases varied. *E.g.*, *In re Weiss*, 251 B.R. 453, 461–62 (Bankr. E.D. Pa. 2000) (considering average over four-year period).

3. In 2005, Congress further amended Section 1325 in the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. Congress left the provision's essential structure intact. It did not define "projected." It also left in place the requirements that projected disposable income be determined "as of the effective date of the plan," that the plan commit all of the "debtor's projected disposable income to be received" over the course of the plan, and that this income "be applied to make payments . . . under the plan." § 1325(b)(1). Likewise, Congress left in place the feasibility requirement of Section 1325(a)(6).

But Congress addressed the ambiguities relating to the term "disposable income," which it redefined. Congress replaced the term "income" in that definition with the phrase "current monthly income," § 1325(b), which it in turn defined as the debtor's "average monthly income from all sources that the debtor receives . . . during the [prior] 6-month

period," § 101(10A). Other provisions excluded certain categories from the definition of income. §§ 101(10A)(B), 1325(b)(2). For example, by excluding Social Security payments, the statute resolved the prior conflict over whether those payments constituted income for the purposes of Section 1325. *Compare In re Hagel*, 184 B.R. 793 (B.A.P. 9th Cir. 1995) (income), *with In re Brady*, 86 B.R. 616 (W.D. Mo. 1987) (not income).

Congress further provided that reasonably necessary expenses of so-called "above-median debtors" would generally be determined under standard schedules. § 1325(b)(3). For example, by limiting the recognition of tuition payments for those debtors to "$1,650 per year per child," § 707(b)(2)(A)(ii)(IV), the statute resolved the prior "split of authority . . . as to whether payment of school tuition is a reasonably necessary expense for a Chapter 13 debtor," *In re Burgos*, 248 B.R. 446, 450 (Bankr. M.D. Fla. 2000).

II. PROCEDURAL HISTORY OF THIS CASE

1. In October 2006, respondent Stephanie Lanning filed for chapter 13 bankruptcy to address approximately $37,000 in unsecured debt that she was unable to repay. J.A. 1. During the six-month look-back period that determined her "current monthly income," and in turn her "disposable income," *see* § 1325(b)(2), Lanning had held three different jobs. In April and May, Lanning was employed at Payless ShoeSource, at an annual salary of approximately $50,000. Her income then dropped dramatically to an annual average of less than

$10,000 as she held only a low-paying, part-time job at JoAnn's Fabric until late August. She was then promoted, and her income rose, although only to roughly $32,000 a year.

Although Lanning's salary income dropped significantly during that period, her average monthly income was greatly inflated by an extraordinary, non-recurring payment. When her job at Payless ended, she received a buyout, paid in two parts (in April and May), of at least $10,000.

Lanning's "current monthly income," § 101(10A) – the monthly average of all her income, including both her salary and the buyout, *ibid.* – was $5344. J.A. 83. Her "reasonably necessary" expenses, § 1325(b)(3) (incorporating § 707(b)(2)) – determined principally under an IRS schedule, because her "current monthly income" qualified her as an above-median debtor – totaled $4229. J.A. 83. Her "disposable income," § 1325(b)(2) – the net of those two figures – was accordingly $1115 per month.[2]

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[2] Lanning's statutorily defined "reasonably necessary" expenses (set forth on her Form 22C, *see* J.A. 77, 79–84) were dramatically higher than her actual expenses (stated on her Schedule J, *see* J.A. 66, 66–68) for two principal reasons. First, Form 22C at the time recognized greater expenses for debtors with higher income. *See* U.S. Trustee Program, *IRS National Standards for Allowable Living Expenses: Cases Filed Between October 1, 2006, and January 31, 2007, Inclusive*, *available at* www.justice.gov/ust/eo/bapcpa/20061001/bci_data/national_expense_standards.htm. That is no longer true; the current standards grant the same expense allocations regardless of the household's income. *See* U.S. Trustee Program, *IRS National*

2. In determining how to "project[]" the "disposable income" that Lanning would "receive[] in the applicable commitment period," § 1325(b)(1), the bankruptcy court faced a choice between the so-called "mechanical" and "forward looking" approaches to interpreting Section 1325(b). Under the mechanical approach, the court's only role in every case, whatever the circumstances, is to multiply the debtor's statutorily defined "disposable income" (here, $1115) by the number of months in the plan (here, sixty). *See, e.g.*, *In re Vidal*, 418 B.R. 135 (Bankr. M.D. Pa. 2009); *In re Byrn*, 410 B.R. 642 (Bankr. D. Mont. 2008). By that measure, Lanning's projected disposable income would be $66,900 over five years.[3]

Standards for Allowable Living Expenses: Cases Filed On and After November 1, 2009, *available at* http://www.justice.gov/ust/eo/bapcpa/20091101/bci_data/national_expense_standards.htm. Se-cond, Form 22C (unlike Schedule J) defines taxes and payroll deductions as expenses. *Compare* J.A. 65 *with* J.A 81.

Lanning's Form 22C also apparently contains two immaterial errors relating to her expenses. First, it mistakenly relies on payment schedules applicable in October 2005 rather than October 2006. *See* U.S. Trustee Program, *IRS National Standards for Allowable Living Expenses: Cases Filed Between October 17, 2005, and February 12, 2006, Inclusive*, *available at* http://www.justice.gov/ust/eo/bapcpa/20051017/bci_data/national_expense_standards.htm. Second, it miscalculates her "Total Expenses Allowed" in Line 38. J.A. 81.

[3] Lanning did not appeal the bankruptcy court's determination that she was subject to the sixty-month commitment period applicable to an "above-median debtor," § 1325(b)(4)(A)(ii), J.A. 107, 112–13, and that issue is not before this Court.

Because Lanning's repayment obligations under the plan would be capped at her debt of approximately $37,000, she would be required under the mechanical approach to pay that total amount in monthly installments of $756 over the course of the sixty-month commitment period. J.A. 108. But because Lanning could not "make" those "payments under the plan" as required by chapter 13's feasibility requirement, § 1325(a)(6) – given that she would not actually have nearly that much disposable income available to make payments – the application of that approach would render her unable to confirm a plan and consequently ineligible for chapter 13 relief. *Accord* Pet. for Cert. 22 (trustee's acknowledgment that Lanning would be ineligible).

Agreeing instead with the great weight of authority, the bankruptcy court adopted the "forward-looking approach," under which a court faced with a debtor whose six-month look-back period is known to be materially unrepresentative of the debtor's future disposable income – whether higher or lower – considers the debtor's actual expected income and expenses. Pet. App. 54–82. The bankruptcy court understood the term "projected" to be "a forward-looking concept," which "not only allows, but requires," a court to account for "anticipated changes." *Id.* 69. The court thus held that a debtor's "projected" disposable income should be computed by multiplying the debtor's "disposable income" by the number of months in the plan, *unless* "the debtor can show that there has been a substantial change in circumstances." *Id.* 56.

In this case, it is undisputed that the six-month look-back period that governs the determination of Lanning's "current monthly income," §1325(b)(2), is not representative of her future income because of the significant, non-recurring buyout she received from Payless. *See supra* at 7. As of the date of her bankruptcy, Lanning's actual salary was only roughly $32,000 a year – $2700 a month, J.A. 64 – and the bankruptcy court recognized that she would therefore have only $144 per month available to pay creditors. Pet. App. 57; *see also supra* at 7-8 n.2 (explaining the disparity in the calculation of Lanning's expenses). Applying the forward-looking approach, the bankruptcy court approved a confirmation plan requiring Lanning to pay her creditors that amount each month for sixty months. Pet. App. 80.

3. The trustee appealed to the bankruptcy appellate panel, which affirmed. Pet. App. 33–53. The court recognized that under the pre-BAPCPA version of Section 1325 – which had also used the debtor's "projected" disposable income to determine her repayment obligation – courts had not in every case relied "solely on a mathematical formula," but had instead accounted for known changes in income and expenses that were presented by specific cases. *Id.* 51. Because BAPCPA modified the term "disposable income" without purporting to change the meaning of "projected," the court reasoned that the statute did not alter that settled practice. *Ibid.*

4. The trustee appealed once again, and the Tenth Circuit affirmed. Pet. App. 1–32. The court of appeals concluded that only the forward-looking approach is consistent with the text of Section

1325(b), which requires that "as of the effective date of the plan," "projected disposable income to be received" "will be applied to make payments." *Id.* 24. The mechanical approach advocated by the trustee would fix the debtor's projected disposable income without regard to its computation on the plan's effective date; would rely on a determination of income that actually would not "be received"; and would call for "payments" that the debtor could never actually make. *Id.* 25–27.

5. The trustee sought certiorari. This Court invited the Solicitor General to file a brief expressing the views of the United States. 129 S. Ct. 2820 (2009). The government recommended that the Court grant review and affirm. The Solicitor General reasoned that although BAPCPA changed the definition of "disposable income," its failure to modify the settled interpretation of "projected" indicated Congress's determination to allow courts to continue to make judgments based upon facts known or reasonably certain at the time of confirmation. Cert. Br. of U.S. 15–16. The government also noted that the mechanical interpretation would deny bankruptcy protection to "those whose financial situations may be most desperate," a result not intended by Congress. *Id.* 19.

6. While the case was pending on appeal, respondent received a financial settlement from a subsequent employer. Pursuant to the power to modify the terms of the plan post-confirmation, respondent was required not only to continue her payments under the plan, but also to apply $10,000 of the settlement to pay her creditors. *See* App., *infra.*

SUMMARY OF THE ARGUMENT

The lower courts properly calculated Lanning's "projected" disposable income. It is common ground that the term "projected" means "[t]o calculate, estimate, or predict (something in the future), based on present data and trends." *American Heritage College Dictionary* 1115 (4th ed. 2002). Some projections – for example, how many times a coin toss will produce "heads" – require simple multiplication. But others – such as the rate of inflation or unemployment – account for circumstances that will change in the future. A debtor's "projected" disposable income falls into the latter category: it most naturally is understood as taking into account substantial differences that the bankruptcy court determines will arise in the debtor's future income and expenses. Here, it makes no sense to determine Lanning's "projected" disposable income without accounting for the fact that the non-recurring buyout she received from Payless ShoeSource had temporarily inflated her income by a substantial amount.

Furthermore, statutes must be read as a whole, and the remainder of chapter 13, including other language in Section 1325(b) itself, confirms that the lower courts properly applied the "forward-looking approach." Perhaps most important, in conflict with the statutory mandate that courts confirm only feasible plans, *see* § 1325(a)(6), the mechanical approach in many cases (including this one) calls for a payment schedule with which the debtor cannot comply. Relatedly, the statute specifies that projected disposable income will "be received" during

the debtor's "commitment period," § 1325(b)(1)(B), but the mechanical approach regularly attributes to the debtor income that she will never receive.

The mechanical approach is no more supportable with respect to cases in which the debtor's income increases (for example, as a result of a new job) just prior to confirmation. In that circumstance, mere multiplication of the average "disposable income" received by the debtor over the prior six months may produce a confirmed plan that significantly understates her ability to repay her creditors. That result would be directly contrary to Congress's determination "to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005).

The trustee fails to articulate a coherent understanding of how Congress intended the statute to function. Instead, he advocates that debtors use at least four statutory provisions to attempt to evade the illogical consequences of the mechanical approach. That argument is at bottom a concession that Congress did *not* intend for the debtor's projected disposable income to be determined by a mechanical extrapolation from the prior six months' experience. The same conclusion follows from Section 1329, under which bankruptcy courts regularly modify payment plans in light of post-confirmation events. There is no reason to attribute to Congress the illogical conclusion that courts should account for a change in a debtor's income or expenses that occurs the day after confirmation but are categorically forbidden from doing so if by coincidence

the same change happens to occur just the day before.

Settled practice confirms that Congress intended bankruptcy courts to apply the forward-looking approach. Prior to BAPCPA, courts consistently interpreted the term "projected" in Section 1325 to require consideration of changed circumstances. In BAPCPA, Congress left the term "projected" undefined and did not otherwise alter the basic structure of the statute. This case is accordingly controlled by the principle that this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990).

The trustee's contrary arguments are not persuasive. Although Congress did intend BAPCPA's amendment of Section 1325(b) to limit bankruptcy courts' discretion, that statutory change was unrelated to the question presented by this case. Congress resolved the prior disagreement among the federal courts over how to treat certain categories of income and expenses. BAPCPA also specified that the debtor's "*current*" income should be determined on the basis of a six-month average. Both of those changes involved revisions to the definition of "disposable income." But as noted, Congress tellingly did not overturn the forward-looking approach that the bankruptcy courts had consistently applied in determining the debtor's "*projected*" disposable income.

ARGUMENT

Upon objection by the trustee or an unsecured creditor, the bankruptcy court must determine whether a chapter 13 debtor's proposed plan will commit her projected disposable income during the plan period to repay her creditors. § 1325(b). The debtor's "projected" disposable income is her "disposable income" multiplied by the number of months in the commitment period, except in the unusual case in which known or virtually certain differences in the debtor's income and/or expenses will cause a substantial difference in her disposable income during the commitment period. That determination is constrained by the categories of income and expenses Congress identified as relevant to determine a debtor's "disposable income." *Ibid.* *See In re Nowlin*, 576 F.3d 258, 266 (5th Cir. 2009); 5 *Collier on Bankruptcy* ¶ 1325.08 (15th ed. rev. 1996); *accord In re Schyma*, 68 B.R. 52 (Bankr. D. Minn. 1985) (refusing to account for *de minimis* changes). In this case, because the trustee concedes that chapter 13's feasibility requirement would *forbid* the bankruptcy court from confirming a plan that failed to account for the fact that the non-recurring buyout Lanning received from Payless substantially inflated her "current monthly income," the lower courts properly calculated her "projected" disposable income.

I. ONLY THE FORWARD-LOOKING APPROACH CAN BE RECONCILED WITH THE TEXT, STRUCTURE, AND PURPOSE OF THE GOVERNING PROVISIONS OF THE BANKRUPTCY CODE.

A. Respondent's Construction Properly Determines The Debtor's Disposable Income That Is "Projected . . . To Be Received In The Applicable Commitment Period" As It Exists "As of the Effective Date Of The Plan."

1. Under Section 1325, a debtor's obligation to repay her creditors is measured by her "projected" disposable income, which is "to be received in the applicable commitment period." § 1325(b)(1)(B). The statute does not define "projected." The ordinary meaning of that term, with which the trustee agrees, Pet. Br. 40, is "[t]o calculate, estimate, or predict (something in the future), based on present data or trends." *American Heritage College Dictionary* 1115 (4th ed. 2002) (quoted in *In re Nowlin*, 576 F.3d 258, 263 (5th Cir. 2009)). *See also* Cert. Br. of U.S. 9–10 (citing *The New Oxford American Dictionary* 1355 (2d ed. 2005) ("[to] estimate or forecast (something) on the basis of present trends"); *Merriam-Webster Collegiate Dictionary* 993 (11th ed. 2005) ("to plan, figure, or estimate for the future")); *Oxford English Dictionary Online* (rev. 2009), www.oed.com ("predicted; calculated or forecast on the basis of current trends or data").[4]

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[4] *Amicus* National Association of Consumer Bankruptcy Attorneys would define "projected" as "thrown or as if thrown or

The appropriate means to "project" a given measure into the future will vary with the context. Certain circumstances may require mere arithmetic. Take, for example, coin flips. The best "projection" of how many flips will produce "heads" is entirely mechanical – fifty percent – no matter whether the projection is 100, 1000, or 100,000 flips into the future.

But not everything is a coin toss. Projections of subjects that are less uniformly static must account for known changed circumstances. Take a projection of inflation, which would likely start from the premise that recent rates – say, the average over the previous six months – would continue into the future. But the projection would also account for inputs such as governmental policy – for example, a new, expansionary policy by the Federal Reserve that would add money to the economy and cause the rate of inflation to rise.

Another example is unemployment. If the U.S. economy lost 60,000 jobs over the previous six months, an accurate computation of "projected job losses" would not merely mechanically extrapolate from those losses to a total of 600,000 job losses over the following sixty months. Instead, the projection

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cast forward." NACBA Br. 18. But that use of the term relates to physical objects, resulting in a "projectile." The *Oxford English Dictionary* thus includes "to throw, cast, or shoot forwards" in its category of definitions of "project" that "relat[e] to physical operations." *Oxford English Dictionary Online* (rev. 2009), www.oed.com.

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would account for foreseen changes in economic growth, government policies, and other factors such as seasonal unemployment. *See, e.g.*, Bureau of Labor Statistics, *The U.S. Economy to 2018: From Recession to Recovery*, *available at* http://www.bls.gov/opub/mlr/2009/11/art2full.pdf (projecting GDP, unemployment, and deficits by accounting for anticipated events such as the end of the war in Iraq and future growth in health care costs).[5]

So too with the determination of a debtor's "projected" disposable income. The "present *data*," *American Heritage College Dictionary*, at 1115 (emphasis added), that underlies the projection is not only the computation of her "disposable income," § 1325(b), but also other known information that may collectively demonstrate that her recent income and expenses will not continue mechanically into the future. A bankruptcy court thus cannot accurately "estimate" or "predict" a debtor's disposable income during the commitment period, *ibid.*, if it deems

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[5] *See also, e.g.*, Office of Management and Budget, *Mid-Session Review, Budget of the U.S. Government* 6, 21, *available at* http://www.whitehouse.gov/omb/assets/fy2010_msr/10msr.pdf ("[T]he deficit for 2010 and beyond is projected to be higher than projected in May largely because of the revised economic forecast"; "projected" 2010-2019 Medicaid expenditures are higher in light of "faster growth in wages and hospital prices."); Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2009 to 2019* 1, *available at* www.cbo.gov/ftpdocs/99xx/doc9957/01-07-Outlook.pdf ("CBO projects that the deficit this year will total $1.2 trillion, or 8.3 percent of GDP. Enactment of an economic stimulus package would add to that deficit.")

changed circumstances irrelevant as a matter of law. As the Collier treatise explains: "A projection for the future would seem to be something that could be quite different than an average of monthly income in the past. To the extent that courts give any meaning to the word 'projected,' and courts are supposed to give meaning to every word in a statute, they may have to disregard the debtor's prior income if circumstances have changed." 8 *Collier on Bankruptcy* ¶ 1325.08 (15th ed. rev. 2009).

This case is a perfect illustration. It blinks reality to say that Lanning's disposable income could properly be "projected" merely by multiplying her average disposable income over the prior six months. The non-recurring buyout she received from Payless ShoeSource had dramatically inflated her recent income. Conversely, the job that she held as of the date of confirmation provided her with greater salary income than she had averaged over the prior six months. When the bankruptcy court accounted for both of those material differences, it recognized that in reality her "projected" disposable income was merely $144 per month, roughly one-eighth the $1115 amount that was produced by applying the "mechanical" approach preferred by the trustee. Pet. App. 57.

At bottom, the trustee reads the word "projected" out of Section 1325. If Congress had intended to adopt the "mechanical approach" it more naturally would have provided, for example, that "throughout the confirmation period the debtor will pay creditors her disposable income." The provision has no need for the word "projected" under the trustee's approach.

Alternatively, Congress would have used a different term – "multiplied" – to require such an exclusively mathematical extrapolation from a specified figure. It did so both prior to and in BAPCPA. For example, in this very case, the bankruptcy court deemed Lanning to be an above-median debtor because the current monthly income of her household "multiplied by 12" exceeded a specified amount. §§ 1325(b)(3), 1325(b)(4). If Congress in Section 1325 had intended to require in every case nothing more than a rote calculation of a multiple of the debtor's "disposable income," it would more naturally have directed bankruptcy courts to "multiply" that figure by the number of months in the commitment period. The *amicus* brief of the National Association of Consumer Bankruptcy Attorneys advocating the mechanical approach implicitly concedes as much, noting that its reading "equates 'projected disposable income' with 'disposable income' 'projected' (or multiplied) over the plan period." NACBA Br. 17.[6]

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[6] In addition to the example in the text, section 507(a)(5)(b)(i) of the Bankruptcy Code, which predates BAPCPA, uses the term "multiplied" to calculate the maximum amount of a priority claim for employee benefit plans. BAPCPA subsequently used the term "multiplied" in four other provisions. §§ 704(b)(2), 707(b), 1322(d)(2) (computations requiring that current monthly income be "multiplied by 12"), & 1326(b)(3)(ii) (requiring that monthly payments not exceed a certain amount "multiplied by 5 percent").

In addition to § 1325(b), the Bankruptcy Code calls for disposable income to be "projected" in §§ 1129(a)(15)(B), 1222(a)(4), 1225(b)(1)(B), 1225(b)(1)(C), and 1322(a)(4). There is little authority on the meaning of "projected" under these

2. The conclusion that Congress intended the term "projected" to account for known changes is reinforced by the remainder of Section 1325(b)(1), which of course must be read as a whole. Congress specified that the debtor's "projected disposable income" is that which is "to be received" during her "commitment period." § 1325(b)(1)(B). But a mechanical multiplication of the debtor's previous "disposable income" would fail to assess accurately what income the debtor will actually receive during that period, in cases of changed circumstances. "If the debtor's income on Form 22C is artificially inflated (being in reality much lower when the plan is confirmed due to a lost job, for example), a mechanical projection based on that number would include income the debtor may never receive." *Nowlin*, 576 F.3d at 263.

Further, Congress directed the bankruptcy court to assess the debtor's projected disposable income at a particular time: "as of the effective date of the plan," § 1325(b)(1), which is the date on which the plan is confirmed and becomes binding, § 1327(a). By contrast, Congress elsewhere directed the bankruptcy court to make determinations as of the "date of the filing" of the plan. *E.g.*, § 1326(a)(1) (requiring the debtor to begin making payments "not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier"). Although the trustee is correct that "the effective date can be as

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provisions. None sheds light on the question presented here or otherwise suggests Congress's intention to adopt a mechanical approach.

soon as two months after filing," Pet. Br. 43–44, the relevant point is that Congress specified that the debtor's projected disposable income should *not* be determined as soon as she makes her bankruptcy filing. Section 1325(b) instead by its terms accounts for "evidence at the time of the plan's confirmation that may alter [her] historical calculation of disposable income." *Nowlin*, 576 F.3d at 263.

The trustee argues to the contrary that "there is nothing illogical or superfluous in language requiring that, as of the effective date of the plan, the plan provide that all of the resulting mathematical calculation (*i.e.,* projected disposable income) to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors." Pet. Br. 42–43 (citing *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio 2009)). But that misstates how the mechanical approach functions. A mechanical calculation of Lanning's projected disposable income – $1115 per month – will not in reality "be received [by her] in the applicable commitment period," because Lanning actually has only $144 a month in disposable income. For the same reason, the trustee's proposed payment to creditors – $756 per month – cannot "be applied to make payments." In any event, at bottom, the trustee cannot explain why Congress directed that disposable income should be projected "as of the effective date of the plan" if it instead intended that the bankruptcy court make a mechanical calculation based on information as it *previously* stood on the filing date.

3. Another provision of chapter 13 also contradicts the trustee's premise that Congress

intended the debtor's disposable income to be determined through a rigid calculation based exclusively on the six months immediately preceding the petition date. Section 1329 freely permits the bankruptcy court to address "circumstances that were unforeseen at the time of confirmation" by "modify[ing] the chapter 13 plan in response to prevailing conditions." 8 *Collier on Bankruptcy* ¶ 1329.01 (15th ed. rev. 2009). In this very case, Lanning received a settlement from a post-confirmation employer, $10,000 of which was allocated to distribution to her unsecured creditors. App. A, *infra*; *see also, e.g.*, *In re Baxter*, 374 B.R. 292 (Bankr. M.D. Al. 2007) (proceeds from a post-confirmation settlement warranted modification of plan under Section 1329). Conversely, a bankruptcy court may reduce the debtor's repayment obligations if, for example, she loses her job post-confirmation. *See, e.g.*, *In re Holley*, 138 B.R. 201, 202 (Bankr. S.D. Ohio 1992). Given that express power, the trustee's position reduces to the proposition that Congress intended strictly to forbid bankruptcy judges from considering any changes to the debtor's income and expenses that become apparent immediately prior to confirmation, but freely to permit those courts to consider indistinguishable developments that by coincidence happen to immediately follow confirmation. That makes no sense.[7]

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[7] Courts are divided over whether Section 1329 permits a bankruptcy court to modify the debtor's plan post-confirmation based on information available prior to confirmation, such as a pre-confirmation change in income. *Compare, e.g.*, *Ledford v. Brown,* 219 B.R. 191, 195 (B.A.P. 6th Cir. 1998) (permitted), *with, e.g.*, *In re Nelson*, 189 B.R. 748, 751 (Bankr. D. Minn.

4. Petitioner errs in contending that the forward-looking approach inappropriately "reads into the statute a presumption" that is "pure judicial invention." Pet. Br. 56. Courts regularly adopt presumptions to effectuate statutory standards that do not provide fine detail on how they should be implemented. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (right under federal statute is presumptively enforceable under 42 U.S.C. § 1983); *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988) (public information is presumptively relied upon by investors under SEC Rule 10b-5); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (presumption of purposeful discrimination that may arise in Title VII actions). Here, the text of Section 1325 is best understood as indicating Congress's determination that bankruptcy courts should begin from the premise that a debtor's "disposable income" will continue into the future, subject – through the word "projected" – to circumstances in which known or virtually certain differences in the debtor's income

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1995) (forbidden). But even if permissible, such a post-confirmation modification would not substitute for the requirements of Section 1325 because changes under Section 1329 need not comply with Section 1325's requirement that the debtor pay all her disposable income to creditors. *See* 8 *Collier on Bankruptcy* ¶ 1329.04[2] (15th ed. rev. 2009); *see, e.g.*, *Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005). Applying Section 1329 to modify a plan on the basis of information that was available prior to confirmation would also further illustrate that Congress did not intend to fix the debtor's repayment obligation based on her disposable income in the six-month look-back period.

and/or expenses will cause a substantial difference in her disposable income during the commitment period.

Finally, there is no merit to the trustee's related contention that the forward-looking approach renders "the definition of 'disposable income'" a "'floating definition with no apparent purpose.'" Pet. Br. 41 (citations omitted). In fact, the definition of "disposable income" is always the starting point for determining the debtor's "projected" disposable income. In many cases, it will also be the end. When, as is often true, the case does not involve clearly changed circumstances, the bankruptcy judge need only multiply the debtor's "disposable income" by the commitment period. Further, even in those cases in which substantial changes are known or anticipated, the definition of "disposable income" continues to control the allowable categories of income and expenses. For example, a judge cannot include foster care payments in the income calculation, § 1325(b)(2), or refuse to consider expenses required to assist a disabled household member, § 707(b)(2)(A)(ii)(II). But within the categories permitted by the statute, a "court may consider reasonably certain future events" when projecting the debtor's income and expenses. *Nowlin*, 576 F.3d at 267.

B. The Mechanical Approach Gives Rise To Significant Anomalies That Contravene The Structure Of Chapter 13 And That Congress Could Not Have Intended.

The lower courts correctly recognized that only the forward-looking approach can be reconciled with

the basic structure of chapter 13, which calls for "a reality-based determination of a debtor's capabilities to repay creditors." *In re Frederickson*, 545 F.3d 652, 660 (internal citations omitted). For debtors who meet the statutory eligibility criteria, *see* §§ 109(e), 109(g), 109(h), chapter 13 both permits confirmation only if the debtor will "be able to make all payments under the plan and comply with the plan," § 1325(a)(6), and furthermore anticipates that an eligible debtor's projected disposable income will "be applied to make payments to unsecured creditors under the plan," § 1325(b)(1)(B).

The requirement that the debtor's plan be feasible in light of her actual economic circumstances is a defining feature of chapter 13. Congress specifically enacted chapter 13 in response to the recurring phenomenon, under the predecessor Chapter XIII of the Bankruptcy Act of 1898, of debtors proposing unrealistic compositions that they could not feasibly perform. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong. 160, at 12 (1973) ("1973 Commission Report") ("A considerable number of plans are proposed and confirmed, contemplating full payment over a three-year span, that are predestined to fail. Thus the mortality rate of Chapter XIII plans is high."). The 1977 House Report that led to the 1978 Bankruptcy Reform Act thus explained that "[t]he purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop *and perform under* a plan for the repayment of his debts over an extended period." H.R. Rep. No. 595, 95th Cong. 124, at 118 (1977) (emphasis added).

The mechanical approach cannot be reconciled with the basic structure of chapter 13 because it fails to provide for confirmed plans that reflect the debtor's actual ability to repay her creditors.[8]

1. Only the forward-looking approach properly accounts for debtors whose disposable income will be materially lower subsequent to the six-month look-back period.

The statutory structure demonstrates that Congress did not intend to impose the mechanical approach, because under that construction of Section 1325, many eligible chapter 13 debtors who suffer reduced incomes would be barred from relief. This is a recurring phenomenon. Studies indicate that bankruptcy filings are regularly triggered by unexpected, financially disruptive events that cause a loss in income. *See, e.g.*, Showel, *supra*, at 425.

Because in such a case the mechanical approach would forbid the bankruptcy court from

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[8] Commentators have thus correctly recognized that the forward-looking approach is the only realistic means of effectuating the purposes of chapter 13. *See, e.g.*, Thomas J. Izzo, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 Emory Bankr. Dev. J. 521 (2009); Matthew Showel, *Calculating Projected Disposable Income of an Above-Median Chapter 13 Debtor*, 21 Loyola Consumer L. Rev. 407 (2009); Chelsey W. Tulis, *Get Real: Reframing the Debate Over How to Calculate Projected Disposable Income in § 1325(b)*, 83 Am. Bankr. L.J. 345, 351 (2009).

"consider[ing] the changed circumstances and adjust[ing] the projection of income accordingly," it would deem the debtor "responsible for remitting income that does not exist." *Nowlin*, 576 F.3d at 263. In this case, for example, the trustee demands that Lanning do the impossible: make payments on the basis of income the trustee admits she will not receive. The trustee would require Lanning to pay her creditors $756 per month, J.A. 108, notwithstanding that such an inflated figure could not actually "be applied to make payments," § 1325(b)(1), because her disposable income during the "commitment period" would only total $144 per month, Pet. App. 57, 80. Because Lanning could not make the payments that the trustee would require, the bankruptcy court would be forbidden from approving her chapter 13 plan, notwithstanding that she is an eligible chapter 13 debtor. The trustee thus rightly "concedes that if [Lanning] is required to pay to unsecured creditors the disposable income calculation [under the mechanical approach], she may be effectively denied relief under chapter 13, in that it is likely impossible for the Debtor to propose a feasible plan." Pet. for Cert. 22 (emphasis added).[9]

Indeed, under the mechanical approach, Lanning might be precluded from bankruptcy relief

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[9] The trustee presses his reading of Section 1325 notwithstanding that, if Lanning suffered a loss of income the day *after* confirmation, the bankruptcy court indisputably would be free to account for that development under Section 1329. *See supra* at 23; *see, e.g.*, *In re Holley*, 138 B.R. 201, 202 (Bankr. S.D. Ohio 1992) (unexpected job loss after confirmation justifies modification of a plan).

altogether, given that her "current monthly income" calculation would trigger the presumption of abuse barring chapter 7 relief. *See* § 707(b)(2). But even if chapter 7 relief were available, shunting her to that alternative would be contrary to Congress's determination that "the rate of repayment to creditors would increase as more debtors were shifted into chapter 13 . . . as opposed to chapter 7." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 12 (2005). *See also id.* at 46 ("Most significant for creditors are provisions that are expected to shift some debtors from chapter 7 to chapter 13 bankruptcy proceedings and provisions that would expand the types of debts that would be nondischargeable."); 151 Cong. Rec. S1820, 1820 (Sen. Sessions) ("In some States, under 5 percent of the debtors go into chapter 13. That number ought to come up . . . ."); 151 Cong. Rec. S2306, 2315 (Sen. Feingold) ("[T]he bill's overriding purpose – the argument that we have heard over and over on the floor in the past week and a half – is to get more people to file for bankruptcy under chapter 13, which will require them to pay some of their debts over a 3- or 5-year period before getting a discharge of their remaining debts.").

At bottom, requiring debtors to propose plans based on income the bankruptcy court can reliably "project" they will not receive would effectively reintroduce the very problem Congress sought to overcome when it enacted chapter 13 in 1978: the imposition of infeasible payment plans. All the available evidence demonstrates that Congress did not intend such an odd result. BAPCPA was not intended to "deny anyone access to bankruptcy relief," but instead merely "requires those who have

the means to repay their debts" to do so. 151 Cong. Rec. S1726, S1788 (2005) (Sen. Hatch).

2. The mechanical approach implausibly reduces the repayment obligations of debtors who will have materially higher incomes subsequent to the six-month look-back period.

The results of the mechanical approach are no less anomalous with respect to debtors whose disposable incomes *increase* towards the end of the six-month look-back period. In such cases, the trustee's interpretation of Section 1325 would undermine BAPCPA's core purpose of ensuring that debtors fulfill their obligations to their creditors to the maximum extent possible.

In cases in which the debtor's average "current monthly income" during the six-month look-back period is lower than her actual income on the date of confirmation – for example, when the debtor secures a new, higher-paying job immediately before declaring bankruptcy – the mechanical approach excludes that higher income from the debtor's "projected" disposable income. *See In re Kagenveama*, 541 F.3d 868, 878 (9th Cir. 2008) (Bea, J., concurring in part and dissenting in part).

An example with estimated figures illustrates the point. Imagine a debtor who is unemployed and forced into bankruptcy as a result. In the month prior to filing, she secures a job with a salary of $40,000 per year. Her "current monthly income" (which would account for the unemployment payments she received prior to her new job),

§ 1325(b)(1), would likely be roughly $1000 per month. That might leave her with $50 per month in "disposable income." Under the mechanical approach, her "projected" disposable income over the entire length of a three-year commitment period would be only $1800.

The forward-looking approach, by contrast, looks to reality and requires the debtor to repay what she is genuinely able. In the hypothetical, as of the date of confirmation, a realistic assessment would recognize that the debtor actually had monthly income from her new job of roughly $3300, and disposable income of perhaps $700. Over a three-year confirmation plan, she would be required to pay $25,200, dramatically more than under the mechanical approach. Given Congress's determination in BAPCPA "to ensure that debtors repay creditors the maximum they can afford," H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005), it is much more reasonable to conclude that Congress intended that result.[10]

More troublingly, the trustee's interpretation would be an open invitation to abuse. The mechanical approach facilitates a debtor's strategic

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[10] Indeed, the prospect that many debtors will have higher incomes at the time of confirmation, but would prefer not to commit that income to repay their creditors, may explain why the National Association of Consumer Bankruptcy Attorneys – an organization of debtors' lawyers – has filed an *amicus* brief supporting the trustee's advocacy of the mechanical approach, NACBA Br. 16–17, and, alternatively, seeking to limit the categories of "income" that may be considered in any projection of the debtor's disposable income, *id.* at 36–39.

decision to time her bankruptcy filing to exclude periods of higher income from her statutorily prescribed "current monthly income," in order to minimize the amount she would repay her creditors under Section 1325(b)(1).

3. The trustee's suggested means of evasion do not support application of the mechanical approach.

The trustee attempts to play down these anomalous results by asserting that the debtor may invoke a number of statutory provisions to avoid them:

- The debtor may delay her bankruptcy filing, shifting the six-month look-back period to a later period of time, Pet. Br. 51;
- The debtor may seek leave to delay the filing of her Schedule I and ask the court to fix a different six-month look-back period pursuant to Section 101(10A)(A)(ii), Pet. Br. 52;
- The debtor may voluntarily dismiss her chapter 13 petition and refile it, Pet. Br. 53; and
- The debtor may convert her case to chapter 7 and, subject to the need to overcome the "presumption of abuse," assert that "special circumstances" authorize the filing, Pet. Br. 53–54.

The trustee's argument is flawed root and branch. At bottom, it is a concession that Congress did not intend chapter 13 to function as the

mechanical approach presumes: with the debtor's "projected" disposable income defined exclusively by reference to her six-month look-back period. The trustee embraces the proposition that these four mechanisms would instead facilitate bankruptcy courts' consideration of changed circumstances.

Further, the trustee's suggestion that this Court *encourage* manipulation of the bankruptcy system is in the teeth of Congress's determination to do precisely the opposite. *See* H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 5 (2005) ("[A] factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and – sometimes – even encourage opportunistic personal filings and abuse."); *e.g.*, § 362(c)(3) (limiting the protections of the automatic stay for debtors who have filed successive petitions). Provisions that the trustee describes as a mechanism to permit the bankruptcy court to account for a decrease in the debtor's income – for example, strategically securing a different six-month look-back period – would thus permit manipulation by an *increased*-income debtor who sought to insulate his disposable income from the obligation to repay his creditors.

There is furthermore significant doubt about whether the trustee's suggested means of evasion are in fact broadly available. For instance, a prospective debtor who delays filing a bankruptcy petition exposes herself to allegations of fraud and dishonesty that could lead to dismissal of her case. *See, e.g.*, *Neufeld v. Freeman*, 794 F.2d 149, 153 (4th Cir. 1986). In addition, if a debtor is aware that she will

have to file for bankruptcy yet delays her filing, any credit card debt she assumes in the interim might become exempt from discharge to the extent she does not reveal her intent to file. *See* § 523(a)(2).[11]

C. Respondent's Construction Of Section 1325(b) Is Confirmed By The Settled Interpretation Of The Statute Prior To BAPCPA's Enactment.

Congress first introduced the concept of "projected disposable income" into Section 1325(b) in the 1984 version of the statute, which defined "disposable income" but not "projected." That structure remained unchanged in BAPCPA, which modified the definition of "disposable income" but left "projected" untouched. The natural inference, particularly strong in the complex context of bankruptcy law, is that Congress intended to preserve the pre-BAPCPA interpretation of "projected." This Court has thus often said that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (quoted in *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); *Lamie v. U.S. Trustee*, 540 U.S. 526, 539 (2004); *Travelers Cas. and Surety Co. of Am. v. Pac. Gas and Elec. Co.*, 549 U.S. 443, 454 (2007)). The

[11] In addition, as a practical matter, the timing of a bankruptcy filing is frequently urgent and not susceptible of delay, as debtors facing, for example, imminent foreclosure or a car repossession require the protection of the Code's automatic stay. *See* § 362.

lower courts correctly recognized that their adoption of the forward-looking approach is supported by pre-BAPCPA practice.

Prior to BAPCPA, projected disposable income was "a forward looking concept, requiring bankruptcy courts to 'project' the debtor's income into the future." Keith M. Lundin & Henry E. Hildebrand, *Section by Section Analysis of Chapter 13 After BAPCPA* 31 (2005). Though the question arose infrequently, *see In re Kolb*, 366 B.R. 802, 817 n.20 (Bankr. S.D. Ohio 2007), it was settled that the bankruptcy court in "projecting" the debtor's disposable income should account for known changes in circumstances. The then-current Collier treatise, for example, stated that courts should account for those changes in income "which can be clearly foreseen," 5 *Collier on Bankruptcy* ¶ 1325.08[4][a] (15th ed. rev. 1996), and bankruptcy courts consistently relied upon that guidance.[12] *See also Norton Bankruptcy Law & Practice* § 75.10 (1992) (deviations from present monthly income and expenditures are permitted in cases reflecting "extraordinary circumstances").

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[12] *See, e.g.*, *In re Crompton*, 73 B.R. 800, 808 (Bankr. E.D. Pa. 1987) ("Collier suggests that . . . the court should focus upon the present monthly income and expenditures of the Debtor and, unless extraordinary circumstances are present, project these over the life of the Plan. We shall follow this common-sense advice . . . .") (citation omitted); *In re James*, 260 B.R. 498, 514 (Bankr. D. Idaho 2001) (quoting the Collier formulation with approval); *In re McGovern*, 278 B.R. 888, 895 (Bankr. S.D. Fla. 2002) (quoting same, with emphasis on "clearly").

The rule was that, "[i]f income is foreseeable at confirmation, it is included within projected disposable income." *In re Richardson*, 283 B.R. 783, 799 (Bankr. D. Kan. 2002). Bankruptcy courts thus would not permit "hopeless speculation," *In re Crompton*, 73 B.R. 800, 808 (Bankr. E.D. Pa. 1987), but would account for changes that were "subject to some showing of projectability," *In re Heath*, 182 B.R. 557, 559 (B.A.P. 9th Cir. 1995); *see also In re Bass*, 267 B.R. 812, 817 (Bankr. S.D. Ohio 2001). More recent rulings have confirmed that prior practice.[13]

The trustee makes a passing attempt to dispute the pre-BAPCPA practice, arguing that some courts had held that a "debtor's 'projected disposable income' was a 36-month multiplier of her monthly income." Pet. Br. 36. But none of those cases involved a known or clearly foreseeable change in circumstances. *See In re Killough*, 900 F.2d 61 (5th

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[13] *E.g.*, *In re Brady*, 361 B.R. 765, 769 (Bankr. D.N.J. 2007) (Before BAPCPA, disposable income "would be projected forward by multiplying it times the number of months in the debtors' plan, with flexibility to accommodate for 'virtually certain' changes."); *see also Nowlin*, 576 F.3d at 265 n.9; *In re Kibbe*, 361 B.R. 302, 307 n.5 (B.A.P. 1st Cir. 2007); *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W. Va. Jan. 23, 2008); *In re Jass*, 340 B.R. 411, 417 (Bankr. D. Utah 2006). The single bankruptcy judge who stated the contrary view – that "[u]ntil BAPCPA became effective in 2005, 'projected disposable income' was determined by mathematically projecting a debtor's 'disposable income' over the number of months in the applicable commitment period" – notably cited no pre-BAPCPA authority for that proposition and acknowledged the contrary understanding of the Fifth Circuit. *In re Boyd*, 414 B.R. 223, 229 (Bankr. N.D. Ohio 2009).

Cir. 1990) (holding that, although the debtor had a history of earning overtime pay, such earnings were not sufficiently certain to be "projected" as part of her disposable income); *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir. 1994) (holding that the trustee could not require debtor to guarantee in advance the payment of all actual disposable income over the life of the bankruptcy plan); *In re Solomon*, 67 F.3d 1128 (4th Cir. 1995) (holding that, when the debtor was not required to and did not intend to draw income from his individual retirement account, income from that account could not be "projected"). The Fifth and Ninth Circuits followed Collier in stating that projection was "*usually*" accomplished by multiplication, *Killough*, 900 F.2d at 64 (emphasis added); *Anderson*, 21 F.2d at 357 (same), and notably cited with approval the section of Collier stating that courts should account for clearly foreseeable changes in income, *ibid.* The Fourth Circuit endorsed and echoed the holding of the Ninth Circuit. *In re Solomon*, 67 F.3d at 1132.[14]

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[14] Thus, when pre-BAPCPA courts were unwilling to account for changes in income and expenses, that was because the changes were too uncertain to be reliably projected. For example, when asked to project salary raises that a debtor might receive, a court would often respond that, "[e]arnings above and beyond the amount scheduled are too speculative at this point as to be regarded as 'projected' income. Since there are no changes in income which can be clearly foreseen, the Court must simply multiply the debtor's current disposable income by 36 in order to determine his 'projected' income." *In re Krull*, 54 B.R. 375, 378 (Bankr. D. Kan. 1985); *see also In re Easley*, 72 B.R. 948, 949 (Bankr. M.D. Tenn. 1987) (Lundin, B.J.) ("The plan does not commit future pay increases, but there

Nor is there merit to the trustee's reliance on pre-BAPCPA decisions holding that Section 1325 required a debtor to pay her "actual [disposable] income, over the life of the plan, as opposed to what one might estimate at the time of confirmation." Pet. Br. 36. In these cases, a minority of bankruptcy courts broadly required a debtor to pay her *actual*, rather than her *projected*, disposable income over the life of her confirmed plan, whatever that amount turned out to be. For example, these courts would allow trustees to require debtors to sign a "Best Efforts Certification," committing the debtor to pay any disposable income that she received in addition to what had been projected at the time of her confirmation hearing. These courts interpreted "projected" in Section 1325 either to be meaningless or to mean "periodically re-calculated."

That reading of Section 1325 was unsound. It was a minority position that was rejected by the only circuit to squarely consider it: the Ninth Circuit forbade such certifications, *Anderson*, 21 F.3d at 356–57, and other jurisdictions followed suit, *e.g.*, *In re Bass*, 267 B.R. at 818. It was also widely disparaged in the scholarly treatises. *E.g.*, 5 *Collier on Bankruptcy* ¶ 1325.08[4][a] (15th ed. rev. 1996). One

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was no evidence that raises are likely."). Courts similarly found that increases in the billable hours of a law firm partner, *In re James*, 260 B.R. 498, 515 (Bankr. D. Idaho 2001), and proceeds from a small-time dairy operation, *In re Schyma*, 68 B.R. 52, 63 (Bankr. D. Minn. 1985), were too uncertain to be reliably projected. *See also, e.g.*, *Norton Bankruptcy Law & Practice* § 75.10 (1992) ("many courts have refused to 'project' raises, bonuses or overtime absent evidence that the future changes in income are certain").

treatise noted that "[i]ncluding future changes in income quickly becomes an administrative nightmare" because "[t]he Chapter 13 trustee would have to periodically review every pending Chapter 13 case" to determine whether disposable income should be adjusted. 2 Keith M. Lundin, *Chapter 13 Bankruptcy* 5-35 (2d ed. 1994).[15]

In sum, given that Congress in BAPCPA conspicuously did not alter the meaning of "projected," the most reasonable conclusion is that it did not intend to depart from the prior, "forward looking" construction of Section 1325.

II. PETITIONER'S ATTEMPTS TO DEFEND THE MECHANICAL APPROACH AS CONSISTENT WITH THE BANKRUPTCY CODE FAIL.

A. Petitioner's Reliance On BAPCPA's Changed Definition Of "Disposable Income" Is Misguided.

1. Petitioner principally contends that Congress compelled bankruptcy courts to use the mechanical approach when it changed the definition of "disposable income" in BAPCPA. The statute

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[15] Although the trustee cites three appellate cases, two of them did not concern the requirements of § 1325(b), but only interpreted the requirements of the particular plans to which those debtors had agreed. *See In re Midkiff*, 342 F.3d 1194, 1202 (10th Cir. 2003); *In re Freeman*, 86 F.3d 478, 481 (6th Cir. 1996). The third case arose instead under chapter 12, and itself recognized that its ruling was contrary to the statutory text. *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994).

redefined "disposable income" as "current monthly income," minus "reasonably necessary" expenses. § 1325(b)(2). BAPCPA's definition of "current monthly income," in turn, specified categories of recognized income. § 101(10A)(B). BAPCPA also provided detailed guidance about the types and amounts of "reasonably necessary" expenses for above-median debtors. § 1325(b)(3) (incorporating § 707(b)(2)).

Preliminarily, the most salient point, of course, is that Congress did not define the term "projected" but instead tellingly left the pre-BAPCPA application of the forward-looking approach unaltered. *See* Part I.C, *supra*. The trustee nonetheless argues that the detailed provisions which Congress did adopt demonstrate Congress's determination to reduce the discretion of bankruptcy judges. That is true, but not in a sense that supports imposition of the mechanical approach to interpreting "projected." Congress was instead clarifying the meaning of the term it redefined – "disposable income" – in order to resolve the prior inconsistencies in courts' interpretation of that particular term.

Before BAPCPA, Section 1325(b) had vaguely defined "disposable income" as the difference between the debtor's income and "amounts reasonably necessary to be expended" for the support of the debtor and her dependents and the operation of the debtor's business. The ambiguity of that definition gave rise to disputes and inconsistent results. BAPCPA reduced judges' "discretion" and produced uniformity by more specifically identifying the

categories of relevant income and permissible expenditures.

BAPCPA thus provided guidance regarding several categories of income. For example, the statute resolved the conflict over whether to include Social Security benefits as income. *See supra* at 6. *See also, e.g.*, §1325(b)(2) (child support payments not included in calculation of "disposable income").

With respect to expenses, BAPCPA eliminated, for example, the division over the treatment of tuition. *See supra* at 6. *See also*, *e.g.*, § 707(b)(2)(ii)(V) (method for calculating home energy costs). More broadly, BAPCPA's specificity reduces the necessity for individual bankruptcy judges to decide "difficult questions of lifestyle and philosophy" that previously were bound up in the inquiry into "reasonably necessary" expenses, *Norton Bankruptcy Law & Practice* § 75.10 (1992), such as whether debtors should be allowed expenses for recreation. *See also* Keith M. Lundin, 2 *Chapter 13 Bankruptcy* 5-102 (2d ed. 1994) ("Determining reasonably necessary expenses drags the bankruptcy court into approving or disapproving of the debtor's lifestyle.").[16]

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[16] *Compare, e.g.*, *In re Messenger*, 178 B.R. 145, 147 (Bankr. N.D. Ohio 1995) (allowing $125 monthly recreation allocation), *with In re McCormack*, 159 B.R. 491, 496 (Bankr. N.D. Ohio 1993) (recommending elimination of $113 recreation allocation). Courts made judgments about everything from tobacco expenses, *see, e.g.*, *In re Woodman*, 287 B.R. 589, 597 (Bankr. D. Me. 2003) ($240 monthly tobacco habit was a reasonable expense), to tithing, *see, e.g.*, *Waguespack v. Rodriguez*, 220 B.R.

The conclusion that Congress intended to reduce judges' discretion in recognizing categories of income and expenses is apparent not only from what Congress actually did – changing the definition of "disposable income" while *not* adding a definition of "projected" – but also from the legislative history. In early debates, supporters argued that uniform standards under Section 1325 would prevent "case-by-case" determinations in which "reasonable" expenses were "bound only by the limits of the debtor's imagination or the discretion of the judge," 145 Cong. Rec. H2655, H2721 (1999) (Rep. Bryant), whereas the pre-BAPCPA regime allowed "a wealthy person [to] be subject to one standard for living expenses while the working man or woman [was] subjected to another one," *id.* at 2664 (Rep. Menendez). *See also id.* at 2721 (1999) (Rep. Royce) (citing an example in which, under the previous system, a judge might allow a family "$600 entertainment and the $270 cell phone calls per month" after bankruptcy).

2. The trustee's contrary position is not supported by BAPCPA's definition of "current monthly income" as the debtor's "average monthly income from all sources that the debtor receives . . . during the [prior] 6-month period," § 101(10A). The trustee suggests that, by fixing a particular historical period as determinative of the debtor's "current" income, Congress implicitly intended to forbid the bankruptcy court from accounting for clearly

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31 (W.D. La. 1998) (amount tithed to church included in debtor's gross income).

foreseeable changes in the future in determining "projected" disposable income. Pet. Br. 52. The trustee misapprehends both the statutory text and its structure.

In specifying a six-month look-back period, Congress merely resolved an ambiguity in the pre-2005 version of chapter 13, which had failed to specify the relevant period for determining the debtor's current income. Many debtors experience *some* ordinary variability in their incomes; one month will not precisely match another. But the relevant bankruptcy form at the time only vaguely called for the debtor to report her "average income" and "current wages." Some available guidance suggested that debtors with non-uniform income should use a six-month average, but the practice of bankruptcy judges was inconsistent. *See supra* at 4-5; *see also, e.g.*, John H. Williamson, *The Attorney's Handbook on Consumer Bankruptcy and Chapter 13*, at 141 (26th ed. 2003) ("If the debtor's income varies seasonally, a realistic average should be used if feasible.").

The provision of BAPCPA on which the trustee relies merely adopted the term "current" from the then-current bankruptcy form and codified the suggested six-month period for determining an average. The text speaks for itself: the six-month look-back period specifies how to determine the debtor's "current" income. Congress thus decided, quite reasonably, that the most reliable estimation of the present could be achieved by looking at several months of available data.

The look-back period notably does not speak to the question presented by this case, which is how to determine the disposable income that the debtor will receive during the subsequent duration of the commitment period. Indeed, there is a stark linguistic contrast between the debtor's "*current*" monthly income and her "*projected*" disposable income. The trustee's position might have force if Congress in BAPCPA had not only adopted the six-month look-back period but also *deleted* the term "projected," but it instead left unaltered bankruptcy courts' consistent practice of considering known changes in calculating the debtor's "projected" disposable income. *See* Part II.C, *supra*.

3. Nor is there merit to the trustee's final textual argument that Section 1325(b)(2)'s definition of "disposable income" as determined by the debtor's six-month look-back period actually extends to the entire phrase "projected disposable income." *See* Pet. Br. 38–39. Petitioner notes that Section 1129(a)(15) refers to "the projected disposable income of the debtor (as defined in section 1325(b)(2))." Pet. Br. 39. Contrary to the trustee's submission, the cross-reference in Section 1129 is simply ambiguous: it does not specify whether it is directing the reader to Section 1325(b)(2) for a definition of "disposable income," "projected disposable income," or even simply "debtor." But that ambiguity is easily resolved by the text of Section 1325(b)(2) itself. That provision by its terms includes *only* a definition of "disposable income," not "projected disposable income." As the Collier treatise explains, "'Disposable income' is a concept borrowed from chapter 13. Indeed, section 1129(a)(15) itself refers

to section 1325(b)(2) for a definition of the concept . . . Section 1129(a)(15)(B) specifically provides that 'disposable income of the debtor' is used 'as defined in section 1325(b)(2).'" 7 *Collier on Bankruptcy* ¶ 1129.02 (16th ed. 2009).

Petitioner himself seemingly recognizes as much when he notes that "projected disposable income" "has never been specifically defined" in the statute. Pet. Br. 17. Further, not even the trustee actually believes that "Congress considered § 1325(b)(2) to define 'projected disposable income,'" *contra* Pet. Br. 39, because even the mechanical approach requires taking the further step of multiplying the debtor's "disposable income" by the number of months in the plan.

B. Petitioner's Reading Of The Legislative History Of BAPCPA Is Misguided.

Petitioner maintains that "the legislative history of this statute is conclusive" in establishing that Congress intended courts to apply the mechanical approach. Pet. Br. 24. In fact, as discussed above, that construction of Section 1325 contradicts both of the overriding goals that are most prominently stated in BAPCPA's legislative history. The trustee's reading would require many reduced-income debtors to pay more than they can afford, and indeed would disentitle eligible debtors such as Lanning from chapter 13 relief. *See* Part I.B.1, *supra*. Conversely, when the debtor's income increases, the trustee's reading will fail to require debtors to pay to creditors disposable income that they will in fact receive. *See* Part I.B.2, *supra*.

Petitioner ignores the animating purposes of BAPCPA and relies instead on isolated statements by Senator Charles Grassley five years before the statute's enactment. *See* Pet. Br. 28–29. Petitioner places undue weight on the views of a single member of Congress, particularly given that the statements in question do not purport to address the precise question at issue here. Further, it is uncertain what view the Senator would have had on this question. Senator Grassley seemingly rejected a reading of BAPCPA that would take a rigid view of the debtor's income. *See* 146 Cong. Rec. S11683, S11703 (2000) ("As with the means test, adjustments are also permitted to income or expenses based on the 'special circumstances' provisions of the means test."). Notably, this statement immediately precedes Senator Grassley's statement (on which petitioner heavily relies) suggesting that he expected the debtor's monthly income to be multiplied by the duration of the plan. *Ibid.*

Nor is there merit to petitioner's assertion that Congress in adopting the definition of "disposable income" implicitly rejected the objections of chapter 13 trustees that "above median income debtors might pay less than they would prior to BAPCPA." Pet. Br. 34. Petitioner gives no reason to believe that Congress considered this objection in any detail. Petitioner's argument traces to a single email from one chapter 13 trustee cited in a law review article. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am. Bankr. Inst. L. Rev. 665, 682 n.85 (2005). Even that email does not speak to the question presented here. The trustees were

concerned with the computation of the debtor's "disposable income," which is the same under either the mechanical or forward-looking approaches. *Ibid* (trustees had urged Congress to make "current monthly income," less expenses, a floor for a debtor's "disposable income"). The trustees seemingly raised no issue with regard to the method of "projection," a silence that in fact strongly suggests that they understood that BAPCPA would not disturb the prior, settled application of the forward-looking approach. *See* Part I.C, *supra*.[17]

C. Petitioner Errs In Contending That Congress Compelled Bankruptcy Courts To Use The Mechanical Approach By Excluding The Chapter 7 Means Test With Respect To Income From Section 1325.

The trustee finally contends that the mechanical approach is inferentially supported by the fact that Congress in BAPCPA did not permit bankruptcy courts to consider "special circumstances" in computing the debtor's "current monthly income." *See* Pet. Br. 46. But that proves nothing material. The concept of "special circumstances" does not

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[17] Senator Russell Feingold proposed an amendment to the bill that would have allowed adjustments for a debtor whose actual future income would deviate from her statutorily defined "current monthly income." 151 Cong. Rec. S2306, S2315 (2005). Petitioner correctly does not rely on this proposed amendment, which was never brought to a vote. There is no evidence that Congress failed to consider the amendment based on a determination to adopt a mechanical interpretation of "projected" disposable income.

supplant the settled prior meaning of "projected," which BAPCPA did not modify, and which is the mechanism through which courts have long accounted for changed circumstances in the debtor's income and expenses that were known prior to confirmation.

The trustee responds that Congress *did* permit the court to consider "special circumstances" in determining the debtor's "reasonably necessary" expenses. *See* § 1325(b)(3) (incorporating § 707(b)(2)(B)). But that is easily explained as well. For above-median debtors, BAPCPA introduced a relatively rigid structure of recognized expenses. § 707(b)(2); *accord* Pet. Br. 19–20. The "special circumstances" provision permits debtors to justify departures from those categories in individual cases in order to lower the calculation of their "disposable income." The Collier treatise thus notes that

> special circumstances could be. . . the moving expenses, security deposit, and other costs that would be incurred if the debtor moved to a lower rent apartment. There are many other possibilities, such as high commuting costs, the increased price of gas, expenses for business use of a car over and above normal use, the additional housing cost necessary to live near an appropriate school for a special needs child, costs of a separate household and commuting necessitated by employment, married debtors' need to maintain two separate households, security costs in dangerous neighborhoods or the cost of infant formula and diapers.

6 *Collier on Bankruptcy* ¶ 707.05[2][d] (15th ed. rev. 2009).

There is accordingly no anomaly in the fact that, with respect to expenses, Congress both permitted debtors to claim "special circumstances" and also called for a debtor's disposable income (including her expenses) to be "projected." A "special circumstance" addresses the atypicality of the debtor's present situation, *see In re Briscoe*, 374 B.R. 1, 18 n.19 (Bankr. D.D.C. 2007), such as when the debtor suffers from "a serious medical condition" requiring costly treatment. § 707(b)(2)(B)(i). The "projection" of the debtor's disposable income addresses a change in the debtor's circumstances. For example, the debtor may have begun treatment for her illness immediately prior to confirmation, and the costs of that treatment may therefore not yet be reflected in her monthly expenses. Without "special circumstances," a debtor could never account for the extraordinary cost of her medical treatment. And without "projected," a debtor could only account for the costs of such treatment to the extent that they were already reflected in her average monthly expenses.

With regard to income, on the other hand, there would be no separate, analogous role for "special circumstances," because the term "projected" fully accounts for situations in which a debtor's "current monthly income" is a poor predictor of her future income. In light of that redundancy, Congress naturally did not include "special circumstances" for income in Section 1325. And so it is that "[i]n the case of expenses, but not in the case of income, it was

necessary for § 1325(b)(3) to incorporate § 707(b)(2)(B) in the calculation of disposable income for an above-income median income debtor." *In re Briscoe*, 374 B.R. at 18 n.19.[18]

[18] The question presented by this case does not affect either the valuation of a chapter 13 debtor's existing assets or her obligation to contribute that value to repay creditors. For example, if at the time she declared bankruptcy, Lanning's buyout from Payless were on deposit in her bank account, the choice between the forward-looking and mechanical approaches would not affect the determination of whether those funds were an asset of the estate. § 1306(a) (incorporating § 541, which in turn broadly defines the debtor's property to include all her property, subject to specified exceptions); *see also* § 1325(a)(4) (providing that creditors in a chapter 13 proceeding receive "not less than the amount" they would have received had it been liquidated); § 726 (providing for the distribution of an estate's property to creditors in a chapter 7 proceeding).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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January 27, 2010

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

Stephanie Kay Lanning
Debtor Case No. 06-41037-13

ORDER ALLOWING MOTION TO APPROVE EMPLOYMENT SETTLEMENT, TO RATIFY EMPLOYMENT OF COUNSEL AND FOR ADDITIONAL ATTORNEY FEES

It now comes before this Court the Debtor's Motion to Approve Employment Settlement, to Ratify Employment of Counsel and for Additional Attorney Fees filed herein on June 11, 2008.

WHEREUPON, the Court finds that the Trustee's Objection has been resolved and no other response thereto has been filed.

WHEREUPON, the Court further finds that the Debtor has settled an employment case.

WHEREUPON, the Court further finds that Kristi Kingston of Bratcher Gockel & Kingston L.C. has represented her in these proceedings.

WHEREUPON, the Court further finds that the employment of Kristi Kingston and the payment to her law firm are hereby ratified.

WHEREUPON, the Court further finds that there has been a settlement and the terms of the

settlement are confidential (a copy of the settlement was provided to the Trustee).

WHEREUPON, the Court further finds that all parties have agreed the Debtor shall place 1/3 of the Debtor's portion of the settlement in an interest bearing account for payment of taxes. The remaining balance of the Debtor's portion is to be split 50/50 between the Debtor and the estate.

WHEREUPON, the Court further finds that the Debtor shall be permitted to pay additional attorney fees in the amount of $150.00 in full through the Plan.

WHEREUPON, the Debtor's Motion to Approve Employment Settlement, to Ratify Employment of Counsel and for Additional Attorney Fees should be and is hereby permitted as filed with payments to be $144.00 per month.

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11 U.S.C. § 101. Definitions

(10A) The term "current monthly income" –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –

> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

11 U.S.C. § 1325. Confirmation of plan

(b)

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –

(A)

(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 575 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than –

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 575 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.