No. 11-27

IN THE

Supreme Court of the United States

RICHARD L. BAUD AND MARLENE BAUD,
Petitioners,

v.

KRISPEN S. CARROLL, Chapter 13 Trustee in Bankruptcy for the Eastern District of Michigan,
Respondent.

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

BRIEF FOR RESPONDENT IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

The Bankruptcy Code provides that, if a Chapter 13 plan fails to provide for the full payment of unsecured claims, the bankruptcy court may not confirm the plan over the objection of the trustee or an unsecured creditor unless the plan "provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors." 11 U.S.C. § 1325(b)(1)(B) (2011). The courts of appeals agree that where an above-median-income debtor has positive disposable income, as calculated under section 1325(b)(2) and listed on Form 22C, the "applicable commitment period" is five years, and the debtor's Chapter 13 plan must run the entire five-year period. However, the courts of appeals disagree as to whether section 1325(b)(1)(B) requires the Chapter 13 plan of an above-median-income debtor to last the full five-year period where the debtor has negative or zero "disposable income."

The question presented is:

Whether section 1325(b)(1)(B) requires an above-median-income debtor with negative or zero "disposable income," as calculated by section 1325(b)(2) and listed on Form 22C, to remain in bankruptcy for a minimum duration equal to the applicable commitment period of five years

where the debtor's unsecured creditors will not be paid in full and the debtor's actual monthly net income as listed on Schedules I and J demonstrate that the debtor can make payments to unsecured creditors under a Chapter 13 plan.

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The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 634 F.3d 627. The opinion of the district court (Pet. App. 59a-80a) is reported at 415 B.R. 291. The order of the bankruptcy court confirming the debtor's Chapter 13 bankruptcy plan (App. 85a-87a) is not reported.

JURISDICTION

The court of appeals entered its judgment on February 4, 2011. On April 13, 2011, Justice Kagan extended the time to file a petition for certiorari to and including June 3, 2011. Pet. App. 93a. On May 22, Justice Kagan further extended the time to file a petition to and including July 1, 2011. Pet. App. 94a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") "to correct perceived abuses of the bankruptcy system." *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 721 (2011) (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329 (2010)). As this Court has recognized, Congress was particularly concerned with "ensur[ing] that debtors who *can* pay creditors *do* pay them." *Id.* (citing H.R. REP. NO. 109-31, pt. 1, p. 2 (2005) ("under BAPCPA,

'debtors [will] repay creditors the maximum they can afford'")) (emphases in original).

Before BAPCPA, the Bankruptcy Code required that if the Chapter 13 trustee or the holder of an allowed unsecured claim objected, the debtor's plan could not be confirmed unless it either (1) provided for the full payment of the unsecured claim, or (2) provided 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." 11 U.S.C. § 1325(b)(1) (2004). In other words, where unsecured creditors would not be paid in full, the plan could not be confirmed unless the debtor proposed to devote all of his or her "disposable income" to paying unsecured claims for at least three years. Prior to BAPCPA, the Code defined the term "disposable income" to mean "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor." *Id.* § 1325(b)(2)(A). In practice, the debtor's income and reasonably necessary expenses were determined based on the debtor's actual financial circumstances, and adjustments were made to account for foreseeable changes in a debtor's income or expenses. *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469 (2010).

BAPCPA changed the definition of "disposable income" to mean "*current monthly income* received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i) (2011) (emphasis added). In turn, the phrase "current monthly income" is now defined in new section 101(10A) of the Code, *id.* § 101(10A), and the phrase "amounts reasonable necessary to be expended" is defined in new section 1325(b)(3), *id.* § 1325(b)(3).

BAPCPA also replaced the "three-year period" in section 1325(b)(1) with the term "applicable commitment period." The term "applicable commitment period" is defined in new section 1325(b)(4) and may be either three or five years, depending on whether the debtor's currently monthly income is either above-median or below-median for the debtor's geographic area. *Id.* § 1325(b)(4). As amended, section 1325(b) provides in relevant part:

> **(b)(1)** If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the [debtor's Chapter 13] 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.

* * *

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

(A) subject to paragraph (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 [the applicable median income].

(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.

11 U.S.C. § 1325(b) (2011) (emphases added).[1]

As a result of these changes, where (as here) the debtor does not propose to pay all unsecured claims in full and an unsecured creditor or the trustee objects to the debtor's plan, the court's ability to confirm the plan turns on several specific determinations, including the minimum amount the debtor must pay to unsecured creditors (the debtor's "projected disposable income") and the duration of the plan (the "applicable commitment period"). Under the Code, these determinations require various calculations that proceed in several steps.

To begin with, the bankruptcy court must calculate the debtor's "current monthly income." This calculation is critical because, among other things, it determines whether the debtor is considered to have above-median-income. Whether the debtor has above-median-income in turn im-

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[1] A Chapter 13 plan may not provide for payments over a period that is longer than five years. *See* 11 U.S.C. § 1322(d) (2011). As a result, although section 1325(b)(4) provides that the applicable commitment period is "not less than 5 years" for above-median-income debtors, the applicable commitment period effectively *is* five years for such debtors because of the interplay between sections 1322(d) and 1325(b)(4).

pacts (1) the kinds of expenses the debtor may deduct from "current monthly income" to arrive at the debtor's "disposable income," and (2) the duration of the debtor's plan (the "applicable commitment period"). The debtor supplies the information necessary to determine "current monthly income," "disposable income," and the "applicable commitment period" on Form 22C.

Section 101(10A) defines the term "current monthly income" as the average gross monthly income that the debtor received during a six-month look-back period prior to the debtor's commencement of his or her bankruptcy case, excluding "benefits received under the Social Security Act" and certain other amounts not relevant here. 11 U.S.C. § 101(10A)(B) (2011). For debtors with "current monthly income" exceeding the applicable median family income for their geographic area, section 1325(b)(3) requires determining the "amounts reasonably necessary to be expended" in accordance with the "means test" provisions of section 707(b)(2). *Id.* § 1325(b)(3) (2011) ("Amounts reasonably necessary to be expended under 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 [the applicable state median]"); *Ransom*, 131 S. Ct. at 721-22 ("For a debtor whose income is above the median for his State, the means test identifies which expenses

qualify as 'amounts reasonably necessary to be expended.'").

Under the "means test" provisions of section 707(b), above-median-income debtors (such as petitioners here) must use certain standardized expenditure figures instead of their actual monthly living expenses when calculating the "amounts reasonably necessary to be expended." 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2011). Not all of the debtor's expenses, however, are standardized. In particular, the means test allows certain deductions for ongoing payments contractually due on secured and priority debts without regard to whether those payments are reasonably necessary. *See id.* § 707(b)(2)(A)(iii)-(iv) (2011). This permits deductions for greater-than-average costs for certain categories: for example, it permits petitioners in this case to deduct their entire monthly home mortgage payment even though it is higher than the median. Pet. App. 32a.

For plan confirmation purposes, the next step in the process is to calculate the debtor's "disposable income." This is done by taking the debtor's "current monthly income" and subtracting the "amounts reasonably necessary to be expended" (as well as any additional amounts excluded from disposable income by section

1325(b)(2) itself or some other provision of the Code).[2] 11 U.S.C. § 1325(b)(1)-(2) (2011). Determining the debtor's "disposable income," however, does not end the matter for plan confirmation purposes. As noted, the concept of "current monthly income" used to calculate the debtor's "disposable income" looks back in time by making use of the debtor's historic earnings information. As a result, "disposable income" may not reflect the debtor's actual financial situation at the time of confirmation of the plan. To correct for this, section 1325(b)(1) requires that, for confirmation purposes, the court must determine the debtor's "*projected* disposable income" to figure out the actual payments to be made to unsecured creditors. Specifically, in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), this Court concluded that in calculating the debtor's "projected disposable income," the bankruptcy court must take into account any "known or virtually certain changes" in the debtor's disposable income at the time of confirmation. *Id.* at 2478. The debtor's current and anticipated financial information is set forth on Schedules I and J.

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[2] Section 1322(f) excludes amounts required to repay certain retirement loans from "disposable income." 11 U.S.C. § 1322(f) (2011). The petitioners listed $480 per month in loan repayment obligations regarding retirement loans that were scheduled to be repaid 7 months from confirmation of the plan. Pet. App. 32a, 60a.

Finally, the court must determine the duration of the plan – the "applicable commitment period." As indicated above, section 1325(b)(4) provides that, unless the plan provides for the full payment of allowed unsecured claims over a shorter time frame, the "applicable commitment period" is three years for below-median-income debtors and not less than five years for above-median-income debtors. The calculation of the "applicable commitment period" is also worked out on Form 22C.

Petitioners in this case filed their Chapter 13 bankruptcy petition on September 26, 2008. Pet. App. 13a. In their filings, they included the required Schedules A through J, a Statement of Financial Affairs, a Master Mailing List, and a Form B22C Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income ("Form 22C").

The debtors' Form 22C lists "current monthly income" of $7,086.72, based on the look-back calculation discussed above. Pet. App. 13a. This results in an annualized income of $85,040.64, which exceeds the applicable median family income for a family of two in the State of Michigan by $33,162.64. Pet. App. 60a. Accordingly, the debtors are considered to be above-median-income debtors pursuant to section 1325(b)(4)(A)(ii)(I). Pet. App. 60a. In light of their status as above-median-income debtors, pe-

titioners properly indicated on their Form 22C that their "applicable commitment period" is five years. Pet. App. 60a.

As above-median-income debtors, section 1325(b)(3)(A) requires petitioners to calculate their expenses based on a largely predetermined set of expenses pursuant to section 707(b)(2)(A) & (B) and then to subtract those expenses from their current monthly income to arrive at their disposable income. That calculation results in a disposable income figure for petitioners of negative $1,203.55 for purposes of Form 22C. Pet. App. 13a.

Schedules I and J list the debtors' actual monthly income and expenses. Their Schedule I lists a monthly gross income of $9,115.63 and a monthly income of $5,348.73 after payroll deductions. Pet. App. 13a, 60a. Their Schedule J lists actual monthly expenses of $4,946.41. Pet. App. 13a. Subtracting total monthly expenses from total monthly net income leaves petitioners with $402.32 in actual monthly net income available to pay unsecured creditors. Pet. App. 13a.

On October 13, 2008, petitioners proposed a *three-year* Chapter 13 plan that did not provide for the full payment of unsecured claims. Pet. App. 13a, 60a. Instead, the plan provided for monthly payments in the amount of petitioners' monthly net income as calculated on Schedules I

and J ($402.32). Pet. App. 60a. The plan further provided for scheduled increases to this payment amount as certain anticipated changes to petitioners' circumstances came about, including the anticipated repayment of their retirement loan prior to the expiration of the term of their plan. Pet. App. 60a. Respondent objected to petitioners' proposed plan on the basis that section 1325(b)(4) requires above-median-income Chapter 13 debtors like petitioners to propose a Chapter 13 plan that lasts at least *five years* unless unsecured claims are paid in full. Pet. App. 14a.

On January 27, 2009, the Bankruptcy Court sustained respondent's objection. Pet. App. 61a. Petitioners were provided the opportunity to amend their Chapter 13 plan to comply with the Bankruptcy Court's ruling regarding their "applicable commitment period." Pet. App. 61a. They subsequently filed an amended Chapter 13 plan proposing a five-year plan length and also objected to their own amended Chapter 13 plan. Pet. App. 61a. The Bankruptcy Court entered its order confirming petitioners' amended Chapter 13 plan over their objection on February 14, 2009. Pet. App. 61a.

Petitioners appealed the confirmation order to the District Court for the Eastern District of Michigan, contending that the "applicable commitment period" is a flexible concept, not a fixed temporal requirement, and that above-median-income debtors who have zero or nega-

tive disposable income according to their Form 22C need not propose a five-year plan pursuant to section 1325(b)(4). The District Court agreed with the Bankruptcy Court's determination that the applicable commitment period is temporal in nature, but disagreed that above-median-income debtors who have negative disposable income based upon Form 22C must propose a five-year plan. Pet. App. 80a. Accordingly, the District Court reversed the Bankruptcy Court's confirmation order, and respondent appealed.

On further appeal, the Sixth Circuit affirmed in part and reversed in part. Pet. App. 4a. The Sixth Circuit agreed that the term "applicable commitment period" is temporal in nature and requires above-median-income debtors to propose five-year plans where they do not propose to pay their unsecured creditors in full. Pet. App. 3a-4a, 18a, 57a. It further held that the "applicable commitment period" applied regardless of whether a debtor has positive "projected disposable income." Pet. App. 49a, 57a-58a.

ARGUMENT

I. The Petition for a Writ of Certiorari Should Be Granted to Resolve a Three-Way Circuit Conflict on the Question Presented.

The Courts of Appeals for the Sixth, Eighth, Ninth, and Eleventh Circuits all agree that the term "applicable commitment period" in section 1325(b) is a temporal concept that requires a five-year plan length for above-median-income debtors where the debtors have positive "disposable income" as defined by section 1325(b)(2) and calculated on Form 22C. Pet. App. 18a, 31a.[3] Where the courts of appeals dis-

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[3] Some lower courts do not agree that the "applicable commitment period" is a temporal term, instead adopting the so-called "monetary approach" whereby the term "applicable commitment period" is construed as a mathematical concept that requires the debtor to multiply the debtor's "disposable income" by the statutory plan period (three or five years) to arrive at a number, and then provide for the payment of that number over a potentially shorter amount of time. *E.g., Dehart v. Lopatka (In re Lopatka)*, 400 B.R. 433, 436-40 (Bankr. M.D. Pa. 2009); *In re Williams*, 394 B.R. 550, 566-70 (Bankr. D. Colo. 2008). Of course, if the debtor's disposable income is zero or negative, this could mean a plan period of as little as one month. The multiplier approach is the one that petitioners advocate, Pet. 18-26, but is not one that has been adopted by any court of appeals, and is incorrect for the reasons discussed below. *See infra* pp. 20-32.

agree, generating a three-way circuit split, is whether above-median-income debtors (such as petitioners here) must propose five-year plans where they have zero or negative disposable income. Given the split of authority on the interpretation of section 1325(b), the confusion the circuit split has engendered, and the frequency with which the issue arises, this Court should grant the petition to resolve this conflict.

A. The Ninth Circuit's Negative "Disposable Income" Exception

While the Ninth Circuit has concluded generally that section 1325(b) requires above-median-income debtors to propose five-year plans, it nevertheless has held that this requirement is inapplicable where the debtor has listed a negative or zero figure for "disposable income" on Form 22C. *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 875 (9th Cir. 2008), *overruled in part on other grounds by Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). In reaching this conclusion, the Ninth Circuit rejected the argument that the plain meaning of the Bankruptcy Code requires above-median-income debtors to propose five-year Chapter 13 plans in all cases where they do not propose to pay unsecured creditors in full. *Id.* at 877. Instead, the Ninth Circuit reasoned that "the plain language of § 1325(b) links 'disposable income' to 'projected disposable income,'" and therefore, where there is no "disposable income" listed on

Form 22C, there is no "projected disposable income." *Id.* at 874. According to the Ninth Circuit, "only 'projected disposable income' is subject to the 'applicable commitment period' requirement [and] [a]ny money other than 'projected disposable income' that the debtor proposes to pay does not have to be paid out over the 'applicable commitment period.'" *Id.* at 876. Thus, under the Ninth Circuit's approach, petitioners would not be required to submit a five-year Chapter 13 plan because even though they are above-median-income debtors and can pay at least $402.32 per month toward the payment of their unsecured claims based on their Schedules I and J, they do not have positive income as calculated under the Ninth Circuit's test.

B. The Eighth Circuit's Positive "Projected Disposable Income" Approach

Like the Ninth Circuit, the Eighth Circuit has concluded that the "applicable commitment period" is a temporal concept, but has adopted an entirely different and conflicting approach from that taken by the Ninth Circuit to determine "whether an above-median Chapter 13 debtor's plan must extend for five years, i.e., the length of the 'applicable commitment period,' or whether a bankruptcy court can confirm a shorter plan period when the debtor has a negative 'disposable income' as defined in 11 U.S.C. § 1325(b)(2) (2011) and calculated on Form 22C." *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652,

654 (8th Cir. 2008). In *Frederickson*, the debtor's "disposable income" as defined in section 1325(b)(2) and calculated on his Form 22C was a negative amount. *Id.* "Nevertheless, [as the court explained,] the calculations on [the debtor's] Schedule I (current income) and Schedule J (current expenditures) indicate[d] that he ha[d] a monthly net income of $606." *Id.*

In conducting its analysis, the Eighth Circuit explicitly rejected the Ninth Circuit's determination that "the 'applicable commitment period' is not a temporal requirement if the debtor has no 'disposable income' as calculated on Form 22C, even if the debtor has disposable income as calculated on Schedules I and J." *Id.* at 657. The court noted the perverse result that such a reading would create, whereby a debtor "can have his proposed plan approved without making any payments to unsecured creditors and can close out his plan in a matter of months rather than staying in the system for the full 'applicable commitment period' of sixty months." *Id.* Accordingly, the Eighth Circuit drew a distinction between a debtor's "disposable income," which is calculated solely based on historical numbers and regional averages, and a debtor's "projected disposable income," which "necessarily contemplates a forward-looking number." *Id.* at 659.

The court then adopted a method that uses the debtor's "disposable income" calculation on

Form 22C as a starting point for determining the debtor's "projected disposable income" but then "take[s] into consideration changes that have occurred in the debtor's financial circumstances *as well as the debtor's actual income and expenses as reported on Schedules I and J*." *Id.* at 659 (emphasis added). The court supported its approach by explaining that it "realistically determines how much a debtor can afford to pay his creditors and maximizes the amount the debtor must pay to his unsecured creditors." *Id.* at 660. According to the court, "the object is not to select the right form, but to reach a reality-based determination of a debtor's capabilities to repay creditors." *Id.* (citation and internal quotation marks omitted).[4] Under the Eighth Circuit's approach, petitioners would be required to submit a five-year Chapter 13 plan because they are

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[4] While the decision below correctly noted that the Eighth Circuit's decision "declined to decide whether th[e] temporal requirement applies when the debtor has zero or negative projected disposable income," Pet. App. 16a (citing *Frederickson*, 545 F.3d at 660 & n.6), that is of no moment here because the relevant factual circumstances between *Frederickson* and this case are virtually identical. Both debtors had negative "disposable income" as listed on Form 22C but nevertheless positive actual current monthly income on their Schedules I and J. *See* Pet. App. 13a; *Frederickson*, 545 F.3d at 654. The difference between the decision below and the Eighth Circuit's decision is the method by which the courts arrived at the proper figure for "projected disposable income."

above-median-income debtors and have positive "projected disposable income" after taking into account their Schedules I and J of actual income and expenses.

C. The Eleventh Circuit's Bright-line "Above-Median-Income" Test

In contrast to the conflicting approaches taken by the Eighth and Ninth Circuits, the Eleventh Circuit has adopted yet another distinct approach – a clear, bright-line rule based on its plain reading of the Bankruptcy Code, concluding that the Code "mandate[s] that an above-median-income debtor [must] remain in bankruptcy for a minimum of five years, unless all unsecured creditors' claims are paid in full." *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 874 (11th Cir. 2010). In *Tennyson*, the debtor was an above-median-income debtor who listed a negative amount for "disposable income" on his Form 22C. *Id.* at 875. Based on its reading of section 1325(b), the court agreed with the trustee that the "'applicable commitment period' is a fixed five-year term, for above-median-income debtors, that can only be shortened if all unsecured debts are paid in full in the shorter time period." *Id.* at 876.

In conducting its analysis, the court explicitly rejected the debtor's argument that the term "applicable commitment period" be construed as a mathematical multiplier concept, *see*

supra note 3, and the court required a full five-year plan despite the existence of negative "disposable income" as calculated on Form 22C. *Tennyson*, 611 F.3d at 879. In addition to its conclusion that such a result was mandated by the plain text of the statute, the court was also motivated by the need to ensure that creditors have all five years of the "applicable commitment period" to propose modifications to the debtor's Chapter 13 plan if the debtor's circumstances change and the debtor can make increased payments. *Id.* Under the Eleventh Circuit's approach, petitioners would be required to submit a five-year Chapter 13 plan because they are above-median-income debtors regardless of whether they have either positive or negative "disposable income" or positive or negative "projected disposable income."

D. The Decision Below

The decision of the Sixth Circuit in this case essentially adopted the approach of the Eleventh Circuit regarding the necessary duration of petitioners' plan. In particular, the court below held that section 1325(b) requires a debtor who does not propose to pay unsecured claims in full to make payments for an "applicable commitment period" of five years even if the debtor has zero or negative "projected disposable income." Pet. App. 3a-4a. The Sixth Circuit's decision in this case thus conflicts irreconcilably with that of the Ninth Circuit in *Kagenveama*. Under

the Ninth Circuit's approach, petitioners would have been permitted to confirm their proposed three-year plan.

The decision below also departed from the approach taken by the Eighth Circuit with respect to the manner in which the debtor's "projected disposable income" is to be calculated. Pet. App. 34a, 37a. Nonetheless, because the court below sided with the Eleventh Circuit in concluding that above-median-income debtors must propose a five-year plan regardless of whether they have zero or negative disposable income or projected disposable income, the result is the same reached by the Eighth Circuit: petitioners have to propose a five-year plan. Given the hopeless and continuing confusion generated by the varied approaches taken to this question, this Court should grant certiorari to bring clarity to this issue.

II. The Decision Below Correctly Held That Petitioners Were Required to Propose a Five-Year Repayment Plan Instead of the Three-Year Repayment Plan They Originally Proposed.

The extensive and well-reasoned decision below correctly held that section 1325(b)(2) required petitioners to propose a five-year repayment plan instead of the three-year repayment plan they originally proposed.

A. The Plain Meaning of Section 1325(b)(4) Indicates That "Applicable Commitment Period" Is a Temporal Concept.

When interpreting a statute, courts must look first to the language of the provision itself. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). When the text is plain and does not lead to an absurd result, courts are to enforce the plain language. *Id.* Absent absurdity, courts will only depart from the plain text where the result is demonstrably at odds with the intent of the drafters. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

In this case, the term "applicable commitment period" in section 1325(b)(4) is clearly a temporal term specifying a fixed period for a plan's duration (either three or five years, depending on whether the debtor has above- or below-median income, except where the debtor proposes to pay all unsecured claims in full over a shorter period). The words "applicable" and "commitment" modify the noun "period," and as the court below recognized (agreeing with the Eleventh Circuit), "[t]he plain meaning of 'period' denotes a period of time or duration." Pet. App. 19a; *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 877 (11th Cir. 2010). In turn, the modifier "commitment" indicates that the debtor is obligated to serve the relevant duration. *Id.*

Moreover, the term "applicable" indicates that there are alternative "commitment periods" depending on whether the debtor is classified as an above-median-income debtor or a below-median-income debtor. *Id.*

Section 1325(b)(4) then clearly states that the "'applicable commitment period' . . . *shall* be" five years for an above-median-income debtor. It is well settled that Congress' use of the word "shall" indicates an imperative or required act. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless obligations"); *see also Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily the language of command."). It is undisputed in this case that petitioners are above-median-income debtors as indicated on their Form 22C. It is further undisputed that they do not propose to fully repay their unsecured creditors. Accordingly, the plain meaning of the statute directs that petitioners are obligated to propose a bankruptcy plan with an "applicable commitment period" of no less than five years. 11 U.S.C. § 1325(b)(4) (2011). Indeed, they appropriately indicated on their Form 22C that their "applicable commitment period" is five years in light of their status as above-median-income debtors. Pet. App. 60a.

Contrary to petitioners' assertion, interpreting the term "applicable commitment period"

as a temporal term rather than a multiplier would not render section 1322(d) superfluous. Sections 1322(d) and 1325(b)(4) are consistent with one another in that section 1322(d) provides the maximum duration for Chapter 13 bankruptcy plans while section 1325(b)(4) provides the minimum duration. Moreover, although the interplay between the provisions results in a five-year minimum and maximum plan duration for above-median-income debtors in most cases, section 1325(b)(4) specifically provides that the plan may be shorter if it provides for the full payment of unsecured claims. Each provision serves an independent function, and neither is superfluous. *See Tennyson*, 611 F.3d at 878.

Likewise, petitioners' suggestion that the interpretation of sections 1322 and 1325 adopted by the decision below renders section 1329(a)(2) superfluous is also unavailing. Pet. 21-22. Section 1329(a)(2), which provides for plan modifications including extending or reducing the time for plan payments, applies to both above- and below-median-income debtors. Unlike above-median-income debtors, below-median-income debtors are only required under sections 1325 and 1322 to propose a three-year plan. For them, there is a very real possibility that their three-year plan may need to be extended in light of changed circumstances.

Furthermore, section 1329(a)(2) could also apply to an above-median-income debtor where the debtor proposed to repay unsecured creditors in full in less than five years. For example, suppose an above-median-income debtor proposes to fully repay unsecured creditors in four years, but in year three, loses his job and seeks to modify his plan pursuant to section 1329 to reduce his plan payments given a substantial decrease in income. His new plan no longer repays unsecured claims in full, so it may have to be extended to the full five years under section 1329(a)(2).

In contrast, under petitioner's preferred interpretation (i.e., the term "applicable commitment period" serves only as a mathematical multiplier concept for section 1325(b)(1)), section 1325(b)(4)(B) *would* be rendered meaningless and superfluous. As the Eleventh Circuit noted, section 1325(b)(1)(A) already provides that the trustee and unsecured creditors may not object to a plan that provides for the full payment of unsecured claims. *Tennyson*, 611 F.3d at 878. As a result, section 1325(b)(4)(B)'s provision for a shorter "applicable commitment period" where unsecured claims are paid in full "is only necessary if the 'applicable commitment period' has a function independent of section 1325(b)(1)." *Id.* Indeed, that exception "is further evidence that Congress intended the 'applicable commitment

period' to be a temporal requirement independent of § 1325(b)(1)." *Id.*

Likewise, petitioners' suggestion that *Lanning* "never disputed the underlying premise of the analysis" that the bankruptcy court must multiply a number by the applicable commitment period to arrive at the amount of projected disposable income under the plan actually cuts against them. What petitioners misapprehend is that the means test explicitly uses the word "multiply" in that calculation. 11 U.S.C. § 707(b)(2)(A)(i) (2011). Critically, however, in section 1325(b)(1), the word "multiply" is not used, suggesting that Congress did not intend what petitioners suggest.

B. The Purpose of BAPCPA Supports a Temporal Interpretation of the Term "Applicable Commitment Period."

The purpose of BAPCPA further supports a temporal approach. *See Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 729 (2011) (noting "BAPCPA's *core purpose* of ensuring that debtors devote their full disposable income to repaying creditors.") (emphasis added). As the Court recognized, the goal of BAPCPA was "to ensure that debtors who *can* pay creditors *do* pay them." *Id.* at 721 (citing H.R. REP. NO. 109-31, pt. 1, at 2

(2005) (under BAPCPA, "debtors [will] repay creditors the maximum they can afford")).[5]

In addition to Congress' broad intent to ensure the maximization of debtor payouts to unsecured creditors, Congress also specifically addressed the amendments to section 1322(d) and 1325(b). In the section of the House Report examining those provisions, Congress included a heading entitled "Chapter 13 Plans To Have 5-Year Duration in Certain Cases." H.R. REP. NO. 109-31, at 79 (2005). Under that heading, the report explained that the relevant section "amends Bankruptcy Code sections 1322(d) and 1325(b) to specify that a chapter 13 plan may not provide for payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds." *Id.* That section further provides that "[t]he applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a shorter period." *Id.* As the Eleventh Circuit recognized, and the decision below agreed, this indicates "Congress' intent that the 'applicable commitment period' be construed

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[5] Petitioners suggest that the discussion in *Ransom* regarding BAPCPA's core purpose was limited to the means test, but that is an incorrect reading of *Ransom*, and contrary to BAPCPA's legislative history and relevant scholarly commentary.

as a temporal term, not a multiplier," *Tennyson*, 611 F.3d at 879; *see also* Pet. App. 48a n.20, and, further, that the relevant "applicable commitment period" in this case is properly five years, given that petitioners are above-median-income debtors.

In contrast, petitioners' interpretation would permit debtors with actual current monthly net income to confirm plans that make no payments to their unsecured creditors even though they are able to do so. As the decision below recognized, its plain reading of the statute avoids the "'senseless result[] that we do not think Congress intended' of 'deny[ing] creditors payments that the debtor could easily make' if additional disposable income were to become available after confirmation." Pet. App. 30a (quoting *Lanning*, 130 S. Ct. at 2475-76).

Petitioners attempt to shoehorn their preferred approach into BAPCPA's core purpose by claiming that permitting them to simply multiply their negative "disposable income" figure by the "applicable commitment period" will actually advantage unsecured creditors by permitting debtors to repay them more quickly than if they were to drag out the payments over a longer period of time. Pet. 26. There are several problems with this interpretation.

First, the practical reality of that approach in this case (and many others) is that unsecured creditors would get nothing. It is difficult to see how that offers unsecured creditors a benefit.

Second, petitioners' interpretation assumes their reading is correct. The only way the shorter plan duration suggested by petitioners would actually work to the benefit of creditors would be if the unsecured creditors were limited to recovery of a specific amount (*i.e.*, "projected disposable income" multiplied by the "applicable commitment period"). If a set amount is due the unsecured creditors, and the debtors are able to pay that amount sooner, then it would be beneficial to pay them sooner rather than later. But absent creditor consent, it does not work that way. Instead, Congress recognized that the amount the debtors can pay each month is the proper analysis. Once that monthly amount is determined, it is then applied each month to plan payments. Of course, petitioners and their unsecured creditors are free to negotiate a shorter plan period that actually provides quicker payments (they must only have a five-year plan if there is an objection). But obviously unsecured creditors have little incentive to waive their objections where the debtors propose to give them nothing.

C. The Decision Below Correctly Decided That the Temporal Requirement of the Applicable Commitment Period Applies to Debtors with Zero or Negative Projected Disposable Income as of the Date of Confirmation.

The decision below agreed with the decision of the Eleventh Circuit, which recognized that the text of section 1325(b)(4) does not state that the "applicable commitment period" exists solely for the section 1325(b)(1)(B) calculation and "it certainly does not state that the 'applicable commitment period' becomes inconsequential if disposable income is negative." *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 877-78 (11th Cir. 2010) (citing *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2575 (2009) ("[W]e will not attribute words to Congress that it has not written.")). The court below explained that "[u]nder the express language of § 1325(b)(4), the applicable commitment period does not depend on the amount of the debtor's projected disposable income." Pet. App. 44a. Rather, "the applicable commitment period depends on the current monthly income of the debtor and the debtor's spouse combined." Pet. App. 44a (citing *Tennyson*, 611 F.3d at 877).

Section 1325(b)(4) clearly states that the "applicable commitment period" "shall be three years, unless the debtor's current monthly income is above the applicable state median, in

which case it shall be not less than five years." Pet. App. 45a (citing 11 U.S.C. § 1325(b)(4)(A) (2011)). As the decision below recognized, "the express statutory language *strongly* suggests that" in order for a plan to be confirmed over objection "it must provide that all of the debtor's projected disposable income will be applied to make payments over a duration equal to the applicable commitment period and that this is the case whether the debtor has negative, zero or positive projected disposable income." Pet. App. 45a. Accordingly, the decision below concluded that "the better reading" of section 1325(b) "is that the temporal requirement of the applicable commitment period applies to debtors facing a confirmation objection even if they have zero or negative projected disposable income." Pet. App. 45a.

This result makes sense: even a $0 monthly five-year plan is preferable to petitioners' interpretation because it permits future modifications as the debtor's circumstances change. As the decision below recognized, "[s]ection 1329(a) provides that '[a]t any time after confirmation of the plan *but before the completion of payments under such plan*, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim[.]'" Pet. App. 49a-50a (emphasis in original) (quoting 11 U.S.C. § 1329(a) (2011)). If the debtor's circumstances change, the debtor can

seek modification of the terms of its confirmed plan to account for the changed circumstances. For example, if the debtor loses his job and his income decreases, he can seek to modify his plan to reduce the amount of plan payments. On the other hand, if the debtor's circumstances improve for the better, creditors can seek to adjust the plan payments so that the debtor pays more under the plan than scheduled at confirmation.

Section 1329(a) accordingly provides an important tool for creditors to maximize their recovery, but for it to work, there must still be a plan in place. The ability to modify plans post-confirmation was so important that Congress added section 521(f)(4)(B) as part of BAPCPA. 11 U.S.C. § 521(f)(4)(B) (2005). Section 521(f)(4)(B) requires Chapter 13 debtors to provide annual statements, after the case is confirmed and until it is closed, of their income and expenditures. Pet. App. 50a n.21. That provision was clearly intended to assist the trustee and unsecured creditors with determining whether the debtor's circumstances have changed in such a way that plan modification is appropriate. *See* Pet. App. 50a n.21. As the decision below recognized, the mere possibility that the debtor's circumstances could change in the future in such a way that unsecured creditors could propose a plan modification that would generate additional recovery means even a $0

monthly plan is far from "senseless." Pet. App. 54a n.22.

III. This Court Should Grant the Petition To Bring Clarity and Uniformity to this Recurring and Important Issue.

As noted by petitioners, much has been written on the issue presented, and many conflicting decisions have been rendered. Pet. 27. This is not surprising, considering the increasing volume of Chapter 13 cases. In truth, the number of Chapter 13 filings has increased every year since 2007. *Bankruptcy Filings Down From 2010 Levels*, http://www.uscourts.gov/News/NewsView/11-08-05/Bankruptcy_Filings_Down_From_2010_Levels.aspx?CntPageID=1 (last visited Oct. 21, 2011). Indeed, even though bankruptcy filings on the whole have dropped since 2010, the number of Chapter 13 bankruptcy proceedings has nevertheless continued climbing. *Id.* In light of the proliferation of Chapter 13 cases and the recurrence of this issue in case after case, the resolution of this issue by this Court is critical to the day-to-day activities of Chapter 13 Trustees like respondent.

Accordingly, respondent agrees with petitioners that this Court should grant the petition to resolve the conflict between the Sixth, Eighth, Ninth and Eleventh Circuits regarding the proper interpretation of section 1325(b) of the Bankruptcy Code.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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