

No. 08-998

In the Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE, PETITIONER

v.

STEPHANIE KAY LANNING

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

ELENA KAGAN
*Solicitor General
Counsel of Record*

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

SARAH E. HARRINGTON
*Assistant to the Solicitor
General*

WILLIAM KANTER
EDWARD HIMMELFARB
*Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

RAMONA D. ELLIOTT
General Counsel
P. MATTHEW SUTKO
Associate General Counsel
DAVID I. GOLD
CATHERINE B. SEVCENKO
*Attorneys
Executive Office for United
States Trustees
Washington, D.C. 20530*

QUESTION PRESENTED

Under Section 1325(b)(1)(B) of Title 11 of the United States Code, when a trustee or unsecured creditor objects to the confirmation of a debtor's Chapter 13 plan, the bankruptcy court can confirm that plan if "all of the debtor's projected disposable income to be received" during the plan period "will be applied to make payments to unsecured creditors under the plan." The debtor's "disposable income" is calculated by examining her monthly expenses when the Chapter 13 petition was filed and her average monthly income during the six-month period before the petition was filed. The question presented is as follows:

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

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INTEREST OF THE UNITED STATES

The United States has a direct interest in the proper construction of Section 1325(b)(1)(B) of the Bankruptcy Code because United States Trustees—who are Department of Justice officials appointed by the Attorney General—supervise the administration of Chapter 13 cases and trustees, monitor Chapter 13 plans, and file comments with bankruptcy courts regarding such plans in connection with confirmation hearings pursuant to 11 U.S.C. 1324. See 28 U.S.C. 586(a)(3)(C); H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). Congress has provided that “[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding.” 11 U.S.C. 307. At the Court’s invitation,

the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Chapter 13 of the Bankruptcy Code provides for the adjustment of debts of an individual with regular income. 11 U.S.C. 1301 *et seq.* A debtor who files for bankruptcy under Chapter 13 retains possession of her assets, and she typically receives a discharge of her debts only after she pays her creditors under a plan confirmed by the bankruptcy court. 11 U.S.C. 1306(b), 1321 *et seq.*

If the trustee or an unsecured creditor objects to confirmation of a Chapter 13 debtor's plan, the court cannot confirm that 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.

11 U.S.C. 1325(b)(1)(A)-(B). Thus, the bankruptcy court may confirm a contested Chapter 13 plan only if the debtor commits either to pay her unsecured creditors in full or to apply all of her "projected disposable income" during the plan period to paying those creditors.

b. This case concerns the proper method for calculating a debtor's "projected disposable income" during the plan period. Neither Section 1325 nor any other

provision of the Bankruptcy Code defines the term “projected disposable income.” Section 1325 does, however, define the term “disposable income.” That definition was recently amended as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act), Pub. L. No. 109-8, 119 Stat. 23. Because petitioner’s arguments depend in large measure on that amendment, it is important to understand the statutory scheme both before and after BAPCPA’s enactment.

i. Before BAPCPA became effective in October 2005, Section 1325 defined “disposable income” as “income which is received by the debtor and which is not reasonably necessary to be expended” for the debtor’s “maintenance or support,” “charitable contributions,” or “business * * * expenditures.” 11 U.S.C. 1325(b)(2)(A)-(B) (2000). Then as now, a debtor listed her monthly income on Schedule I and her monthly expenditures on Schedule J. See Fed. R. Bankr. P. Official Form 6, Schedules I-J (2000). Thus, to calculate a debtor’s *current disposable income*, a bankruptcy court generally began with the monthly income listed on Schedule I and deducted any monthly expenditures listed on Schedule J that the court determined were reasonably necessary to support the debtor, to contribute to charity, or to operate the debtor’s business.

Then, to calculate the debtor’s *projected disposable income*, the court typically multiplied the debtor’s current disposable income by the number of months in her plan. See, e.g., *In re Killough*, 900 F.2d 61, 64 (5th Cir. 1990). In projecting disposable income, however, courts considered any changes to the debtor’s income or expenses that appeared likely to occur during the plan period. See, e.g., *In re Petro*, 395 B.R. 369, 377 (B.A.P.

6th Cir. 2008) (“Prior to BAPCPA the schedules were a starting point and courts gave meaning to the words ‘projected’ and ‘to be received’ by taking into account a debtor[’s] anticipated future income.”); *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W. Va. Jan. 23, 2008) (“Of course, under pre-BAPCPA law, bankruptcy courts sometimes deviated from the debtor’s income and expenses listed on Schedules I & J based on known increases or decreases in either income or expenses.”).

ii. In BAPCPA, Congress amended the definition of “disposable income.” Section 1325 now defines that term as “current monthly income received by the debtor * * * less amounts reasonably necessary to be expended” for certain items. 11 U.S.C. 1325(b)(2). “[C]urrent monthly income” is defined, in turn, as the debtor’s “average monthly income from all sources” during the six months preceding the filing. 11 U.S.C. 101(10A)(A)(i). Although a debtor is still required to file Schedules I and J, now she must also file Official Form 22C, on which she calculates her current monthly income as defined in Section 101(10A)(A)(i). See Fed. R. Bankr. P. Official Form 22C (2009); Pet. Supp. App. 1-8.¹ Thus, to calculate a debtor’s monthly income under BAPCPA, a court no longer focuses on a single month’s income at the time of filing; rather, it considers a historical average of the debtor’s income during the six-month period before commencement of the case.

In addition to changing the method of calculating all debtors’ monthly income, BAPCPA also changed the

¹ Form B22C was an interim form that subsequently became Official Form 22C. Pet. App. 39. Respondent completed Form B22C, *ibid.*, but the Forms are virtually identical and they are referred to interchangeably herein.

method of calculating some debtors' monthly expenses. If a debtor's current monthly income is below the median income of a comparably-sized household in her State, the debtor may claim the same types of general expenses—*i.e.*, “maintenance or support” obligations, “charitable contributions,” and “business * * * expenditures”—as she could before BAPCPA. 11 U.S.C. 1325(b)(2)(A)(i)-(ii) and (b)(2)(B). But if a debtor's current monthly income is above-median, she may claim only particular kinds of expenses in amounts specified under Section 707(b)(2) of the Bankruptcy Code. 11 U.S.C. 1325(b)(3)(A) (incorporating 11 U.S.C. 707(b)(2)).

Thus, BAPCPA amended the formulae for computing “disposable income” under Section 1325(b)(2) in two respects: it altered the manner in which a debtor's current income is determined, and it established a new method of calculating an above-median debtor's expenses. The Act did not, however, address the method a court should employ to calculate “projected disposable income” under Section 1325(b)(1)(B). See Pet. App. 50-51 (“BAPCPA linked ‘disposable income’ to Form B22C current monthly income, which is a historically based figure, but it left ‘projected disposable income,’ which had an established pre-BAPCPA treatment, alone.”). Accordingly, the specific question presented in this case is whether, in projecting disposable income, courts should consider anticipated changes to the debtor's financial circumstances, just as they did before BAPCPA.

2. Respondent is a single woman with no children who resides in Kansas. On October 16, 2006, she filed a Chapter 13 petition to address \$36,793.36 in unsecured debt. During the six-month period that preceded her filing, respondent received a one-time buyout from her

former employer that increased her monthly gross income to \$11,990.03 in April 2006 and \$15,356.42 in May 2006. When respondent averaged her monthly income for April through September 2006 on Form 22C, her current monthly income amounted to \$5,343.70. Because that figure placed her above the median income for a family of one in Kansas, she calculated her expenses in accordance with Section 707(b)(2) of the Bankruptcy Code. Respondent's monthly expenses totaled \$4,228.71, leaving her with monthly disposable income of \$1,114.98 on her Form 22C. Pet. App. 4-5.

As a result of the buyout payments respondent received, however, the "current monthly income" stated on her Form 22C was substantially greater than the monthly income that she could reasonably expect to earn during the plan period. On her Schedule I, she listed a monthly net income from new employment of \$1,922, which placed her considerably below the state median income level. On her Schedule J, she listed actual monthly expenses of \$1,772.97, leaving her with monthly disposable income of \$149.03. Based on that figure, respondent proposed a repayment plan of \$144 per month for 36 months, or a total of \$5,184. Pet. App. 4, 57.

Petitioner, the bankruptcy trustee, objected to confirmation of the plan. He argued that, because respondent's monthly disposable income on her Form 22C was \$1,114.98, the plan did not satisfy Section 1325(b)(1)(B)'s requirement that "all of the debtor's projected disposable income to be received" in the plan period must "be applied to make payments to unsecured creditors." Petitioner contended that respondent's "projected disposable income" during the plan period was simply her monthly "disposable income" (\$1,114.98) derived from the pre-plan figures, multiplied by the number of

months in her plan (36), for a total “projected disposable income” of \$40,139.28. Petitioner therefore proposed that the plan provide for monthly payments of \$756, which would have repaid respondent’s unsecured creditors in full over the life of the plan. Petitioner acknowledged, however, that respondent did not have the means to fund such a plan. Pet. App. 5-7.

3. a. Over petitioner’s objection, the bankruptcy court confirmed the plan essentially as proposed by respondent. Pet. App. 54-82.² The court reasoned that “Congress’ reference in § 1325(b)(1)(B) to *projected* disposable income *to be received* in the applicable commitment period would be superfluous if the historical average was the start and end of the equation.” *Id.* at 69. The court further explained that Section 1325(b)(1)(B) requires a “determination whether the debtor is committing all of his or her projected disposable income ‘as of the effective date of the plan,’” not as of the date of the petition. *Id.* at 70 (emphasis omitted). The court also concluded that petitioner’s approach would “lead[] to absurd results that are at odds with both congressional purpose and common sense” because it would prevent debtors whose “incomes drop[] significantly from their pre-petition monthly average * * * from ever being able to file a feasible and confirmable Chapter 13 repayment plan.” *Id.* at 70-71. The bankruptcy court therefore “agree[d] with the majority of courts, which have found that the term ‘projected’ is a forward-looking concept” that allows consideration of “any reasonably antic-

² The bankruptcy court ordered that respondent’s plan run for 60 months rather than the 36 months that respondent had proposed. Pet. App. 76-80. Respondent did not challenge that aspect of the bankruptcy court’s decision, see *id.* at 11-12 & n.4, and it is not at issue in this Court.

ipated changes in [disposable] income during the life of the proposed Chapter 13 plan.” *Id.* at 69.

b. The bankruptcy appellate panel affirmed. Pet. App. 33-53. After describing an existing split in authority on the question, *id.* at 44-50, the panel reasoned that, although “BAPCPA linked ‘disposable income’ to Form B22C current monthly income, which is a historically based figure, * * * it left ‘projected disposable income,’ which had an established pre-BAPCPA treatment, alone.” *Id.* at 50-51. Before BAPCPA’s enactment, the panel explained, if bankruptcy courts “had reason to believe that [a debtor’s] schedules did not accurately predict a debtor’s actual ability to pay, other evidence was also considered.” *Id.* at 51. The panel therefore concluded that, although BAPCPA had modified the formulae for calculating a debtor’s current disposable income, it had not “eliminate[d] the bankruptcy courts’ discretion” to consider anticipated changes to a debtor’s financial condition “where significant circumstances support doing so.” *Ibid.*

c. The court of appeals affirmed. Pet. App. 1-32. After likewise surveying the split in authority on the question, *id.* at 16-23, the court concluded that petitioner’s “mechanical approach”—multiplying a debtor’s current monthly “disposable income” by the number of months in her plan—is not consistent with the statutory text. *Id.* at 24-25. The court relied in particular on Section 1325(b)(1)(B)’s directive that, “as of the effective date of the plan,” all of the debtor’s projected disposable income “to be received” during the plan period “will be applied to make payments to unsecured creditors.” *Id.* at 25 (emphasis omitted). The court construed those three statutory phrases to “suggest[] consideration of the debtor’s actual financial circumstances as of the ef-

fective date of the plan.” *Ibid.* The court of appeals further concluded that the language of Form 22C and BAPCPA’s legislative history confirmed Congress’s intent that courts utilize a “forward-looking approach.” *Id.* at 28-29. The court finally noted that the mechanical approach would foreclose bankruptcy relief for debtors like respondent whose post-filing income decreases, while allowing debtors whose post-filing income increases to avoid paying creditors all that they are able. *Id.* at 31.

SUMMARY OF ARGUMENT

In crafting Chapter 13 of the Bankruptcy Code, Congress intended to create an orderly system that permits honest debtors to be released from crushing debt by repaying their creditors as much as they can afford over the life of the bankruptcy. That intent is apparent in Section 1325(b)(1)(B), which, upon objection by the trustee or a creditor, conditions the confirmation of a Chapter 13 plan on the bankruptcy court’s determination that the debtor will either repay her unsecured creditors in full or devote all of her “projected disposable income” to such repayment for the duration of the plan. Although Congress defined the term “disposable income” in Section 1325, it did not define the word “projected” or the entire phrase “projected disposable income.” The ordinary meaning of the word “projected,” however, indicates that Congress intended bankruptcy courts to consider the debtor’s actual financial circumstances and any changes to those circumstances that the court knows are likely to occur in the future, rather than relying only on financial data that may no longer reflect a debtor’s income and expenses.

This approach is also faithful to the remainder of Section 1325, which requires courts to project the disposable income that “will be received” by the debtor and “will be applied to make payments to unsecured creditors.” 11 U.S.C. 1325(b)(1)(B). Under petitioner’s mechanical view of the term “projected”—according to which a court must simply multiply a debtor’s “disposable income” by the number of months in her plan—debtors such as respondent must commit to paying money they will never receive and never apply to repay creditors. That is not a natural reading of the term “projected disposable income,” and it is inconsistent as well with the rest of Chapter 13, which evinces Congress’s intent that the implementation of a Chapter 13 plan be grounded in a debtor’s actual financial circumstances rather than tied to historical data that no longer reflect the debtor’s real-life situation.

Before Congress amended the Bankruptcy Code in 2005, bankruptcy courts used the disposable income derived from the information reported on a debtor’s Schedules I and J as the starting point for determining the debtor’s projected disposable income. If that figure accurately reflected the debtor’s financial situation at the time of confirmation and was likely to reflect the debtor’s financial situation over the life of the plan, a court would merely multiply the disposable income by the number of months in the plan. But when the debtor’s financial situation had changed between the time of filing and the time of confirmation, or when it was likely to change during the life of the plan, bankruptcy courts would take such changes into account in projecting the debtor’s disposable income. Nothing in BAPCPA suggests that Congress intended to alter that approach. Courts therefore should continue to “project[]” a debt-

or's disposable income using the same method they did before BAPCPA.

Petitioner acknowledges that his reading of the statute produces unfair results for some debtors who will be shut out of the bankruptcy system, and that it produces unfair results for some creditors who will receive little or no repayment from debtors who can afford to satisfy their obligations. Under the approach employed by the court of appeals, by contrast, neither debtors nor creditors fall prey to unfair and illogical results. Petitioner suggests that a debtor may avoid the harsh effects of the mechanical approach by strategically delaying the filing of a petition, dismissing a petition and then refile at a later date, ignoring the requirement that a debtor file a Schedule I, or attempting to file under Chapter 7 instead of under Chapter 13. This Court should not construe the term "projected disposable income" in a way that encourages gamesmanship, requires a debtor to risk his ability to enjoy the protections of bankruptcy, or otherwise undermines the intent of Congress.

ARGUMENT

IN PROJECTING A CHAPTER 13 DEBTOR'S DISPOSABLE INCOME UNDER SECTION 1325(b)(1)(B), COURTS SHOULD CONSIDER EVIDENCE INDICATING THAT THE DEBTOR'S FINANCIAL CIRCUMSTANCES HAVE CHANGED OR ARE LIKELY TO CHANGE DURING THE PLAN PERIOD

As this Court has long recognized, the twin goals at the core of the federal bankruptcy system are giving the honest but unfortunate debtor a fresh start and ensuring the maximum possible equitable distribution to creditors. See, e.g., *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549 (1915). Petitioner's reading of Section

1325(b)(1)(B) would frustrate both of those objectives. Some honest debtors in need of relief under Chapter 13 will be shut out of the system. And some creditors will be foreclosed from obtaining satisfaction of debts from debtors who can afford to repay them. The text of Section 1325(b)(1)(B), along with the structure, history, and purposes of that provision, indicates that a bankruptcy court's calculation of a debtor's "projected disposable income" should take into account evidence indicating that the debtor's income or expenses during the plan period are likely to be different from her pre-petition income or her expenses at the time of filing.

A. The Text Of Section 1325 Makes Clear That A Court Should Rely On A Debtor's Actual Financial Circumstances Rather Than Only On Historical Income Figures

1. Under Chapter 13 of the Bankruptcy Code, a debtor is required to submit a plan for repaying her unsecured creditors that is consistent with the requirements of 11 U.S.C. 1322. When either a creditor or the Chapter 13 trustee objects to such a plan, the bankruptcy court may confirm it only if the debtor either will repay all of her unsecured creditors in full or will devote all of her "projected disposable income" toward repayment of her creditors over the life of the plan. 11 U.S.C. 1325(b)(1)(B). Although Section 1325 defines the term "disposable income," it does not define the term "projected disposable income" or specify a method for calculating how a debtor's current "disposable income" should be "projected" into the future. The Court must therefore look to the common and ordinary meaning of the term "projected." See *Rousey v. Jacoway*, 544 U.S. 320, 330 (2005). That adjective is derived from the verb "project," which ordinarily means "[t]o calculate, esti-

mate, or predict (something in the future), based on present data or trends.” *In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006) (quoting *American Heritage College Dictionary* 1115 (4th ed. 2002)); see *Merriam-Webster Collegiate Dictionary* 993 (11th ed. 2005) (defining the verb “project” as “to plan, figure, or estimate for the future,” and the noun “projection” as “an estimate of future possibilities based on a current trend”); *The New Oxford American Dictionary* 1355 (2d ed. 2005) (defining the verb “project” as “[to] estimate or forecast (something) on the basis of present trends”).

Consistent with that usual understanding of the term “projected,” bankruptcy courts should determine a debtor’s “projected disposable income” by forecasting whether current trends are reasonably likely to continue—*i.e.*, whether a debtor can reasonably expect to receive the same income and incur the same expenses during the plan period as prior to the filing of her bankruptcy petition. See *In re Nowlin*, 576 F.3d 258, 263 (5th Cir. 2009) (“[W]e interpret the phrase ‘projected disposable income’ to embrace a forward-looking view grounded in the present via the statutory definition of ‘disposable income’ premised on historical data.”); 8 *Collier on Bankruptcy* ¶ 1325.08[5][a] at 1325-61 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) (*Collier*) (“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.”). Petitioner and his amicus contend (Pet. Br. 41; NACBA Am. Br. 17-18) that the bankruptcy court must calculate “projected disposable income” by simply multiplying the debtor’s historically-based “disposable income” by the number of months in the plan.

But “[t]he word ‘multiplied’ is quite different from the word ‘projected,’” *In re Kibbe*, 361 B.R. 302, 312 n.9 (B.A.P. 1st Cir. 2007), and other provisions of the Bankruptcy Code expressly require the mechanical calculation that petitioner advocates here. See, e.g., 11 U.S.C. 1325(b)(3) (providing that debtor’s current monthly income be “multiplied by 12” to determine whether debtor has above-median income).³ Congress’s decision to require projection rather than multiplication in Section 1325(b)(1)(B) indicates that it did not intend future disposable income to be mechanically derived from current disposable income.

Contrary to petitioner’s assertion (Pet. Br. 41), the court of appeals’ forward-looking approach does not leave Section 1325’s definition of “disposable income” with “no apparent purpose.” That definition continues to serve the same two important purposes that the prior definition of that term served before BAPCPA was enacted. First, it directs the bankruptcy court’s calculation of disposable income, now by further specifying the types of revenue that the debtor must treat as income, and the types of expenses that an above-median debtor may claim as reasonable and necessary. See Pet. App. 27. Although the process by which a debtor’s future income is “projected” may involve predictive judgments

³ See also 11 U.S.C. 1325(b)(4)(A)(ii) (providing that debtor’s current monthly income be “multiplied by 12” to determine whether debtor has above-median income); 11 U.S.C. 704(b)(2) (same); see also 11 U.S.C. 707(b)(2)(A)(i) (providing that debtor’s current monthly income be “multiplied by 60” to determine in part whether presumption of abuse applies); 11 U.S.C. 1322(d)(1)-(2) (providing that debtor’s current monthly income be “multiplied by 12” to determine length of plan); 11 U.S.C. 1326(b)(3)(B)(ii) (providing that certain payments be “multiplied by 5 percent” to determine trustee compensation).

rather than simple multiplication, those predictive judgments must focus on the types of revenue and expenses that are included in Section 1325's definition of "disposable income." By contrast, if the term "disposable income" were undefined, bankruptcy courts would need to determine which types of revenue and expenses should be considered. The statutory definition thus constrains the bankruptcy courts' discretion in calculating "projected disposable income," even though it does not reduce that calculation to a mathematical formula.

Second, as a practical matter, Section 1325's definition of "disposable income" will often control what a debtor must contribute to a Chapter 13 plan in order to receive confirmation. In many cases, a court may reasonably expect that a debtor's monthly income will be the same during the plan period as it was during the six months before she filed her petition, and that her expenses will be the same during the plan period as at the time of filing. In those cases, projecting the debtor's disposable income will require nothing more than multiplying her current disposable income by the number of months in her plan. But when the evidence indicates that the debtor's current income or expenses are likely to change during the plan period—or that they have already changed during the interval between the filing of the petition and the time of plan confirmation—"a debtor's 'disposable income' calculation on Form 22C is a starting point for determining the debtor's 'projected disposable income,'" and "the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances." *In re Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008), cert. denied, 129 S. Ct. 1630 (2009).

2. Petitioner contends (Pet. Br. 40) that the Court should “adopt a reading [of Section 1325] that does not treat statutory terms as mere surplusage.” Petitioner’s own construction of the term “projected disposable income,” however, would render much of Section 1325(b)(1)(B) meaningless. Section 1325(b)(1)(B) requires the bankruptcy court to ensure, upon objection by the trustee or a creditor, that all of a 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) (emphases added). By referring to “projected disposable income” that will “be received” and “be applied to make payments” during the plan period, Section 1325(b)(1)(B) “links ‘projected disposable income’ with the debtor’s income actually received during the plan, and indicates a forward-looking orientation of the phrase.” *In re Nowlin*, 576 F.3d at 263. Under petitioner’s mechanical interpretation of the term “projected,” however, the bankruptcy court is precluded from considering either the amount of income a debtor is actually likely to receive over the duration of her plan or the amount of such income she will be able to apply in that period to make payments to her creditors.

Application of petitioner’s interpretation to the facts of this case illustrates its inconsistency with the overall thrust of Section 1325(b)(1)(B). Under petitioner’s mechanical view, respondent’s “projected disposable income” is \$1,114.98 per month, even though petitioner concedes that respondent’s actual disposable income during the plan period will be only \$149.03 per month. See Pet. App. 4-6. Petitioner would make confirmation of the plan contingent on respondent’s commitment to pay \$756 per month, even though nearly \$607 of that

amount will never “be received” and thus will never “be applied to make payments” during the plan period. In short, petitioner’s proposed plan would require respondent to commit to repay creditors with income that she will never receive. That is not a natural reading of the statutory text.

Under Section 1325(b)(1)(B), a plan must also commit that, “as of the effective date of the plan,” all of the debtor’s projected disposable income will be applied to repayment of unsecured creditors. Because a Chapter 13 plan is not binding on the debtor and other parties until it is confirmed, 11 U.S.C. 1327(a), “the effective date of the plan” is the date on which the plan is confirmed by the bankruptcy court. The requirement that bankruptcy courts determine a debtor’s projected disposable income at the time of confirmation, which often occurs months after the time of filing, further indicates that Congress intended to allow for “consideration of evidence at the time of the plan’s confirmation that may alter the historical calculation of disposable income on Form 22C.” *In re Nowlin*, 576 F.3d at 263; see Pet. App. 25. By contrast, petitioner’s mechanical approach would preclude the bankruptcy court from considering not only changes in the debtor’s financial circumstances that are demonstrably likely to occur during the plan period, but even changes that have already occurred between the pre-filing period and the date the confirmation decision is made.

Section 1325 also provides that, as a condition of confirmation, a court must determine that “the debtor will be able to make all payments under the plan and to comply with the plan.” 11 U.S.C. 1325(a)(6); see pp. 26-28, *infra*. To make that determination, the court necessarily must assess the debtor’s likely future financial cir-

cumstances. There is no reason that Congress would require such a forward-looking inquiry in one subsection of Section 1325 and prohibit it in another.

3. Petitioner and his amicus observe (Pet. Br. 45-56; NACBA Am. Br. 19-20) that Section 1325(b)(3) (through the incorporation of Section 707(b)(2)(A)) expressly allows courts to adjust an above-median debtor's expenses upon a showing of special circumstances. They argue that Congress's failure expressly to authorize similar adjustments on the income side of the ledger reflects an intent to limit the courts' discretion in this regard, and that the court of appeals' decision disserves that congressional intent. That argument is misconceived.

Under Sections 1325(b)(3) and 707(b)(2)(A), a court's adjustment of an above-median-income debtor's expenses due to special circumstances takes place in the calculation of the debtor's "disposable income." The absence of any similar "special circumstances" exception to the statutory definition of "current monthly income," see 11 U.S.C. 101(10A)(A)(i), means that the court must use historical income data to calculate a debtor's "disposable income" under Section 1325(b)(2). The question in this case, however, is how a court should "project[]" a debtor's disposable income over the life of her bankruptcy plan so as to ensure that all of the income "to be received" in that time "will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. 1325(b)(1)(B). Sections 1325(b)(3) and 707(b)(2)(A) have no bearing on the proper resolution of that issue.

B. Other Provisions In Chapter 13 Of The Bankruptcy Code Confirm That Section 1325 Mandates A Forward-Looking Approach That Reflects A Debtor's Actual Financial Circumstances

The proper interpretation of particular statutory provisions turns not only on “the language itself [and] the specific context in which that language is used,” but also on “the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The broader statutory context confirms that Congress intended a Chapter 13 debtor’s plan to reflect the reality of her circumstances, even when those circumstances change over time. To that end, Congress included two provisions expressly permitting the modification of a debtor’s initial plan.

The first, 11 U.S.C. 1323, allows a debtor to modify her plan “at any time before confirmation.” A debtor may modify her proposed plan for many reasons, including to cure an objection that the trustee or a creditor has raised, to cure a post-petition arrearage in mortgage payments, or to accommodate “a change in circumstances making it impossible for the debtor to carry out the terms of the original, or prior, plan.” 8 *Collier* ¶ 1323.02, at 1323-2 to 1323-3. To be sure, a debtor’s pre-confirmation modification of her plan does not exempt her from complying with the requirements of Section 1325. But the flexibility built into the development of a confirmable Chapter 13 plan is evidence of Congress’s intent that such plans reflect a debtor’s actual ability to repay her creditors.

The second provision, 11 U.S.C. 1329, permits the debtor, trustee, or any unsecured creditor to seek modification of a Chapter 13 plan “[a]t any time after confirmation of the plan.” This provision, too, reflects Con-

gress's recognition that a debtor's financial circumstances may change in ways that will alter her ability to repay her creditors. Congress's decision to allow a debtor, creditor, or trustee to seek post-confirmation modification reflects Congress's understanding that changes in circumstances can either hamper a debtor's ability to comply with her plan or enhance her ability to satisfy her unsecured debts. Although Section 1329 does not govern the standards a bankruptcy court must employ in deciding whether to confirm a plan under Section 1325(b)(1)(B), it is further evidence that Congress expected the Chapter 13 system to operate in a realistic manner that takes account of a debtor's actual financial circumstances. If the bankruptcy court may modify a Chapter 13 plan *after* confirmation to take account of changes in a debtor's income or expenses, it would make little sense to preclude the court, in determining whether that plan should be confirmed, from taking account of changes in the debtor's financial circumstances that have occurred between the pre-filing period and the time of plan confirmation.⁴

⁴ Under Section 1327 of the Bankruptcy Code, "[t]he provisions of a confirmed plan bind the debtor and each creditor." 11 U.S.C. 1327(a). Some courts of appeals have held that, under Section 1327, the confirmation of a plan has a *res judicata* effect such that parties may not seek post-confirmation alteration of a plan to take into account circumstances known or reasonably foreseeable at the time of confirmation. See *In re Dorsey*, 505 F.3d 395, 398-399 (5th Cir. 2007); *In re Murphy*, 474 F.3d 143, 149-150 (4th Cir. 2007); but see *Barbosa v. Solomon*, 235 F.3d 31, 38-41 (1st Cir. 2000); *In re Witkowski*, 16 F.3d 739, 743-746 (7th Cir. 1994). Under that view of Section 1327, adoption of petitioner's rule would mean that parties affected by a Chapter 13 bankruptcy are *never* permitted to take into account changes in a debtor's financial circumstances that occur prior to confirmation but are not reflected in the six-

C. BAPCPA’s History And Purposes Confirm That Section 1325 Mandates A Forward-Looking Approach To The Calculation Of “Projected Disposable Income”

1. The legislative history that accompanied BAPCPA is not extensive, but the House Judiciary Report explains that BAPCPA “[was] intended 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) (*2005 House Report*). Although in this case petitioner’s mechanical approach would have required respondent to commit to make payments well in excess of the funds that would actually be available to her, in other cases that same approach would allow debtors to pay less than they could afford. See *In re Kagenveama*, 541 F.3d 868, 871 (9th Cir. 2008) (affirming confirmation of plan pursuant to which debtor would pay less than her actual future disposable income); see also *In re Turner*, 574 F.3d 349, 355-356 (7th Cir. 2009) (reversing plan that would allow debtor to deduct amount for expense he would not actually incur during plan). When a debtor’s pre-filing disposable income understates the resources that are likely to be available to her during the plan period (*e.g.*, because of a temporary decrease in income during the pre-filing period or an increase in expenses at the time of filing), mechanically extrapolating that net income figure into the future would deprive creditors of payments that the debtor would be able to make during the plan period. That result is inconsistent with Congress’s intent “that debtors pay the greatest amount within their capabilities. Nothing more; nothing less.” *In re Kibbe*, 361 B.R. at 314.

month look-back period utilized in the calculation of a debtor’s “disposable income.”

2. Before BAPCPA's enactment, bankruptcy courts "usually" multiplied a debtor's disposable income by the number of months in the plan to determine his projected disposable income, *e.g.*, *Anderson v. Satterlee*, 21 F.3d 355, 357 (9th Cir. 1994), but they departed from that mathematical calculation when necessary to take into account anticipated changes to a debtor's financial circumstances, see, *e.g.*, *In re Petro*, 395 B.R. 369, 377 (B.A.P. 6th Cir. 2008) ("Prior to BAPCPA the schedules were a starting point and courts gave meaning to the words 'projected' and 'to be received' by taking into account a debtor[']s anticipated future income.")⁵ Indeed, Schedules I and J, which courts used as the starting point for determining a debtor's disposable income, required (and continue to require) debtors to note when "any increase or decrease" in income or expense is "reasonably anticipated within the year following the filing" of the relevant schedule. Fed. R. Bankr. P. Official Form 6, Schedules I-J (2000).

Congress is presumed to be familiar with the backdrop against which it acts. See, *e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988); *Cannon v.*

⁵ See also, *e.g.*, *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W. Va. Jan. 23, 2008) ("Of course, under pre-BAPCPA law, bankruptcy courts sometimes deviated from the debtor's income and expenses listed on Schedules I & J based on known increases or decreases in either income or expenses."); *In re Richardson*, 283 B.R. 783, 799 (Bankr. D. Kan. 2002) ("Before a plan is confirmed, the debtor, the trustee, and the court must look to see what the plan offers in payments from projected disposable income that will predictably flow to the debtor. If income is foreseeable at confirmation, it is included within projected disposable income."); 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. Devs. J. 521, 552 (2009).

University of Chicago, 441 U.S. 677, 696-697 (1979). For that reason, this Court “will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.” *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990)). Although BAPCPA modified the formulae used to calculate a debtor’s “disposable income,” it did not address the manner in which the debtor’s income is “projected” into the future. See pp. 4-6, *supra*. Accordingly, bankruptcy courts should employ the same approach they employed prior to 2005 by starting with the disposable income figure from Form 22C and multiplying that by the number of months in a debtor’s plan—*unless* there is reason to believe that the debtor’s financial circumstances have changed or will change, in which case the court should project the debtor’s likely disposable income over the life of the plan. If Congress had intended to preclude bankruptcy courts from continuing to consider debtors’ likely future financial circumstances when determining projected disposable income, “one would expect Congress to have made unmistakably clear its intent.” *Cohen*, 523 U.S. at 222.

3. Petitioner contends that adopting his interpretation of the term “projected disposable income” will further Congress’s efforts to reduce bankruptcy courts’ discretion in determining debtors’ ability to repay their creditors. Petitioner bases his argument on statements from one member of Congress related to a bankruptcy reform bill that was introduced, but never enacted, five years before Congress passed BAPCPA. See Pet. Br. 28-29 (relying on statements of Senator Grassley, 146 Cong. Rec. S11,700 and S11,703 (daily ed. Dec. 7, 2000)).

Although the statement of one Senator about a bill that was never enacted is of dubious value in interpreting a federal statute, it is apparent from the 2005 amendments that Congress did intend to curtail the discretion of bankruptcy judges in certain respects. Prior to BAPCPA, individual judges had greater latitude to determine which sources of revenue to count as income and which expenses to consider reasonably necessary. In exercising that discretion, different judges sometimes employed different criteria, so that two debtors with identical financial circumstances might be required to pay different amounts to their creditors. For example, courts differed as to whether to treat property that is exempt under Section 522(c) of the Bankruptcy Code as income under the former version of Section 1325, see *In re Hunton*, 253 B.R. 580, 581-582 (Bankr. N.D. Ga. 2000) (collecting cases), and about whether to allow school tuition to be deducted as a reasonable expense, *In re Burgos*, 248 B.R. 446, 450 (Bankr. M.D. Fla. 2000) (collecting cases).

When Congress amended the Code in 2005, it curtailed that type of discretion by delineating the types of revenue that should be counted as “income” and the types of expenses that may be counted as reasonably necessary for above-median debtors. But Congress did not require courts to rely on a debtor’s historical financial data when that information does not accurately reflect the debtor’s likely resources during the period covered by her bankruptcy plan.⁶ Rather, Congress left

⁶ *E.g.*, *In re Turner*, 574 F.3d at 355 (“Since the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes them as possible, we cannot see the merit in throwing out undisputed information, bearing on how much the debt-

unchanged the term “projected disposable income,” which had previously been understood to allow consideration of a debtor’s likely financial circumstances during the plan period. Congress also left intact other features of the statutory scheme (*e.g.*, Section 1325(b)(1)(B)’s reference to income “to be received” during the plan period) that direct the bankruptcy court to consider the debtor’s actual ability to pay. See pp. 16-18, *supra*. Congress’s decision to preclude bankruptcy courts from exercising one form of discretion does not mean Congress wanted to preclude bankruptcy courts from exercising other forms of discretion, provided in separate, unamended statutory language.

For essentially the same reason, petitioner’s argument is not advanced by his assertion (Br. 34) that Chapter 13 trustees “warned” Congress that “strict use of the Form 22C formula would lead to anomalous results in some cases, namely that above median income debtors might pay less than they would prior to BAPCPA.” Here too, the change in the law to which petitioner refers has nothing to do with the manner in which disposable income is “projected.” Rather, petitioner again refers to BAPCPA’s establishment of new and more determinate formulae for calculating *current* disposable income (*i.e.*, disposable income during the six-month pre-filing period). Some Chapter 13 trustees appear to have expressed concern prior to BAPCPA’s enactment that the new formulae would often produce lower disposable-income figures for above-median debtors (and thus require such debtors to pay less to their creditors) than the prior, more discretionary regime.

or can afford to pay, that comes to light between the submission and approval of a plan of reorganization.”).

See *In re Alexander*, 344 B.R. 742, 746-747 (Bankr. E.D.N.C. 2006). Petitioner argues that Congress was aware of such concerns and nonetheless precluded judges from exercising discretion in calculating current disposable income. But once again, petitioner cites no evidence suggesting that Congress intended to preclude (or that Chapter 13 trustees generally understood BAPCPA to preclude) bankruptcy courts from considering likely changes in a debtor's financial circumstances in calculating *projected* disposable income.

D. Petitioner's Mechanical Approach To Determining A Debtor's Projected Disposable Income Would Undermine The Purposes Of The Chapter 13 Bankruptcy System

Petitioner's mechanical approach to projecting a debtor's disposable income would preclude some honest debtors from filing at all and would permit other debtors with relatively abundant resources to avoid repaying their creditors what they can afford. That is not what Congress intended in creating the Chapter 13 system or in amending it in 2005.

1. Under petitioner's approach, respondent would be required to commit to make payments of \$756 per month, leaving her with \$1166 per month for living expenses. Pet. App. 6, 44 & n.11. That amount is \$408 less than the standard deductions for housing, utilities, food, clothing, and household and personal care supplies—without even considering transportation, taxes, health care, and telecommunication expenses. Pet. App. 44 n.11. Because that approach would require respondent to commit to making payments that she cannot possibly afford, petitioner's plan is not confirmable. See 11 U.S.C. 1325(a)(6) (requiring as a condition of confir-

mation that “the debtor will be able to make all payments under the plan and to comply with the plan”).

Petitioner acknowledges (Br. 48) that his reading of Section 1325(b)(1)(B) “may effectively deny [respondent] Chapter 13 bankruptcy relief” because she cannot propose a confirmable plan. That consequence will not be unusual among Chapter 13 debtors, many of whom are in respondent’s situation. In fact, petitioner’s interpretation of Section 1325(b)(1)(B) often will deny bankruptcy protection to those who need it most: debtors whose financial situation has significantly deteriorated over the six months prior to filing. Pet. App. 71-72.

Many people seek bankruptcy protection after losing a source of income or incurring an unusual and onerous expense. Such events cause financial distress precisely because they are unexpected. Section 1325(b)(1)(B) does not require bankruptcy courts to treat such events either as if they did not happen (as in the case of a recently lost job) or as if they can be expected to recur in the future (as in the case of an exceptional expense of limited duration). Instead, Section 1325(b)(1)(B) requires judges to approve a repayment plan that reflects a debtor’s actual circumstances. As bankruptcy courts have recognized, “[b]ecause people are frequently forced to file for bankruptcy relief as a result of sudden life-altering events,” there are “numerous debtors who would be foreclosed from seeking bankruptcy protection” if their current net incomes were mechanically projected into the future, without any consideration of their actual financial circumstances. *In re Jass*, 340 B.R. at 417; see 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. Devs. J. 521, 546

(2009); cf. *In re Grady*, 343 B.R. 747, 752 (Bankr. N.D. Ga. 2006) (“Certainly the proponents of BAPCPA did not intend to close the bankruptcy court doors to debtors who voluntarily, and in good faith, seek to repay creditors with the funds they actually have on hand each month.”). That is not what Congress intended when it enacted BAPCPA.

In other Chapter 13 cases, adoption of petitioner’s mechanical approach would work unfairness to creditors. On petitioner’s reading of Section 1325(b)(1)(B), a debtor who had been unemployed for six months could file a Chapter 13 petition on the eve of obtaining a new job, commit to repaying little or nothing to unsecured creditors, and still obtain an eventual discharge of his pre-petition debts. See, e.g., *In re Arsenault*, 370 B.R. 845, 847 (Bankr. M.D. Fla. 2007) (debtor filed his Chapter 13 petition in October and did not include his yearly bonuses in the calculation of his current monthly income). Similarly, a debtor could claim a significant expense that he will not incur during the plan period. See, e.g., *In re Turner*, 574 F.3d at 355-356. That result is squarely at odds with one of BAPCPA’s core purposes: to deter abuse of the bankruptcy system by debtors with an actual ability to repay some or all of their debts.

Petitioner observes (Br. 50) that “the results of the mechanical approach are neither consistently harsh nor weighted for or against debtors,” noting that in some cases reliance on historical figures will produce “a more ‘debtor-friendly’ result.” But it is equally true that, under the court of appeals’ approach, consideration of likely changes in financial circumstances will require debtors to make higher payments in some cases and allow them to make lower payments in others. That the mechanical approach does not systematically advantage

or disadvantage debtors therefore provides no basis for preferring it to the court of appeals' analysis, which also does not systematically advantage or disadvantage debtors. Unlike petitioner's mechanical approach, however, the court of appeals' interpretation of the term "projected disposable income" furthers Congress' intent that every Chapter 13 debtor be required as a condition of plan confirmation to make payments at (*i.e.*, neither above nor below) the maximum level she can afford.

2. Petitioner observes (Pet. Br. 51) that "[t]he debtor * * * always has control over the date of the filing of the petition," and he suggests various means by which a debtor may evade the result that the mechanical approach would otherwise produce. See also NACBA Am. Br. 9. Petitioner further suggests (Pet. Br. 53) that a debtor in respondent's position may simply dismiss her case and re-file a new petition in order to avoid an unfavorable six-month look-back period. But the potential for debtors to manipulate the bankruptcy system through strategic filing is a further disadvantage of petitioner's approach, not a reason to adopt it. See *2005 House Report 5* (explaining that one of Congress's goals in enacting BAPCPA was to prevent the continued use of "loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse"). The various stratagems that petitioner suggests also run counter to the longstanding requirement that Chapter 13 plans be proposed "in good faith." 11 U.S.C. 1325(a)(7).⁷

⁷ Petitioner further suggests (Br. 53-54) that respondent could have filed a Chapter 7 liquidation rather than a Chapter 13 repayment plan. In enacting BAPCPA, however, Congress sought to increase the amount of money unsecured creditors will receive from the bankruptcy

In any event, petitioner is incorrect in suggesting that debtors whose actual income is less than the “current monthly income” calculated with reference to the pre-petition six-month period generally will be able to manipulate the system so that their “projected disposable income” reflects their current or anticipated reality. Experience has shown that the principal motivation for many Chapter 13 filers is protection from mortgage foreclosure. See, e.g., *In re Monson*, No. 09-20487, 2009 WL 4663864, at *2 (Bankr. D. Wyo. Dec. 7, 2009); *In re Snipes*, 314 B.R. 898, 902 (Bankr. S.D. Ga. 2004); *In re Boomgarden*, 780 F.2d 657, 658-659 (7th Cir. 1985); Pamela Smith Holleman & Lesley M. Varghese, *Bankruptcy and Mechanics’ Lien in Foreclosure: An Overview*, 91 Mass. L. Rev. 116, 117 (2008).⁸ A debtor facing the threat of foreclosure usually files a bankruptcy petition not only to cure the arrearages on her mortgage, but also to take advantage of the protection offered by the automatic stay provision in 11 U.S.C. 362. Such a debtor cannot wait several weeks or months before filing a petition without risking the loss of her home. Petitioner’s further suggestion that a debtor could simply dismiss and re-file her petition in order to change the court’s calculation of her “current monthly income” similarly ignores the circumstances confronted by debtors who are facing foreclosure. When a debtor behaves as petitioner suggests, she may forfeit protection of the

system by shifting more debtors from Chapter 7 into Chapter 13. 2005 House Report 2; *id.* at 12 .

⁸ See also John Eggum, *et al*, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 Utah L. Rev. 1123, 1126; Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 Ind. L.J. 1, 48 (1987).

automatic stay, again risking the loss of her home. See 11 U.S.C. 362(c)(3)(A).⁹

Finally, both petitioner and his amicus suggest (Pet. Br. 21-22, 51-52; NACBA Am. Br. 10, 20, 26) that a Chapter 13 debtor can evade the result mandated by the mechanical approach by deliberately failing to file a Schedule I statement of income and subsequently asking the court to set a different six-month look-back period for calculating the debtor's "current monthly income." See 11 U.S.C. 101(10A)(A)(ii) (providing that current monthly income may be calculated with reference to a six-month period ending on "the date on which current income is determined by the court * * * if the debtor does not file the schedule of current income required by 521(a)(1)(B)(ii)"). But the filing of a Schedule I is mandatory unless excused by the court, see 11 U.S.C. 521(a)(1)(B)(ii); *In re Shelor*, No. 08-80738C-13D, 2008 WL 4344894, at *2 (Bankr. M.D.N.C. Sept. 23, 2008), and a debtor's breach of that requirement may lead to dismissal of his petition, see 11 U.S.C. 521(i)(1); *In re Dunford*, 408 B.R. 489, 493 (Bankr. N.D. Ill. 2009); Fed. R. Bankr. P. 1007(c). The approach that petitioner and his amicus propose therefore would encourage debtors to disregard the requirements of the Bankruptcy Code, and to place their eligibility for bankruptcy relief at risk, simply to ensure that their repayment plans reflect their

⁹ In addition, Section 109(g) prohibits the filing of any type of bankruptcy by a debtor who has had a case pending within the preceding 180 days if the case was dismissed "for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case," or if the debtor had the prior case voluntarily dismissed "following the filing of a request for relief from the automatic stay."

actual ability to pay. Congress cannot reasonably be thought to have intended that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

	ELENA KAGAN <i>Solicitor General</i>
	TONY WEST <i>Assistant Attorney General</i>
RAMONA D. ELLIOTT <i>General Counsel</i>	MALCOLM L. STEWART <i>Deputy Solicitor General</i>
P. MATTHEW SUTKO <i>Associate General Counsel</i>	SARAH E. HARRINGTON <i>Assistant to the Solicitor General</i>
DAVID I. GOLD CATHERINE B. SEVCENKO <i>Attorneys</i> <i>Executive Office for United States Trustees</i>	WILLIAM KANTER EDWARD HIMMELFARB <i>Attorneys</i>

FEBRUARY 2010