No. 08-998

In the Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE, PETITIONER

v.

STEPHANIE KAY LANNING

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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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

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari.

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 remains in 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), 1321-1328.

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.

i. Before BAPCPA was enacted, 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 exercised discretion to consider 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 '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).[1] Although a debtor still files Schedules I and J, she also now files Official Form 22C, which requires her to calculate her current monthly income. See Fed. R. Bankr. P. Official Form 22C (2009); Pet. Supp. App. 1-8.[2] Thus, to calculate a debtor's monthly income under BAPCPA, a court no longer looks to a single month's income at the time of filing; rather, it looks to an 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 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.

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[1] A debtor is required to file a Schedule I listing her monthly income. See 11 U.S.C. 521(a)(1)(B)(ii). If the debtor complies with that requirement, her current monthly income is determined with reference to the six-month period preceding the filing. See 11 U.S.C. 101(10A)(A)(i). If the debtor does not file a Schedule I, in certain circumstances her current monthly income may be determined with reference to the six-month period preceding "the date on which current income is determined by the court." See 11 U.S.C. 101(10A)(A)(ii).

[2] 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.

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) both by altering the manner in which a debtor's current income is determined and by establishing a new method of calculating an above-median debtor's expenses. The Act did not, however, address the method for calculating "projected disposable income" under Section 1325(b)(1)(B). See Pet. App. 50 ("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 retain the discretion that they exercised before BAPCPA to consider anticipated changes to the debtor's financial circumstances.

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. That figure placed her above the median income for a family of one in Kansas, so she calculated her expenses in ac-

cordance 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 respondent's buyout, 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. 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.[3] 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 anticipated 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

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[3] 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.

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 "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 effective date of the plan." *Ibid.* The court of appeals further concluded that the language of Form 22C and BAPCPA's legislative history confirmed 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.

DISCUSSION

The text, structure, history, and purposes of Section 1325(b)(1)(B) indicate that in calculating "projected disposable income," the bankruptcy court may consider evidence indicating that the debtor's income or expenses during the plan period are likely to be different from her pre-petition income or expenses. Although the court of appeals correctly reached that conclusion, its decision deepens a pre-existing circuit conflict with the Ninth Circuit's decision in *In re Kagenveama*, 541 F.3d 868 (2008). This Court should grant the petition for a writ of certiorari to resolve the split among the circuits on this important and recurring legal issue.

A. In Projecting A Chapter 13 Debtor's Disposable Income, Courts May Consider Evidence Indicating That The Debtor's Financial Circumstances Are Likely To Change During The Plan Period

1. a. Section 1325 specifies a method for calculating a debtor's current "disposable income," but does not specify how that disposable income should be "projected" into the future. The Court therefore must 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, estimate, 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").

Congress's use of the term "projected" therefore indicates that it intended bankruptcy courts to forecast whether current trends would continue, *i.e.*, whether the debtor could reasonably expect to receive the same income, and incur the same expenses, during the plan period as prior to the filing of the 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."). The term "projected" in Section 1325(b)(1)(B) would be an odd choice of words if Congress intended nothing more than a rote mathematical calculation in which a debtor's current disposable income is multiplied by the number of months in the plan. "The 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 Congress expressly required multiplication elsewhere in Section 1325 and the rest of the Bankruptcy Code. 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).[4] That Congress re-

[4] See 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

quired 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. 19), the court of appeals' forward-looking approach does not ignore Section 1325's definition of "disposable income." That definition continues to serve the same two important purposes that the prior definition of that term served before BAPCPA was enacted. First, it specifies the types of revenue that the debtor must treat as income, and the types of expenses that the 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 rather than simple multiplication, those predictive judgments must focus on the types of revenue and expenses that are encompassed by 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 dictate what a debtor must contribute to a Chapter 13 plan in order to receive confirmation. In many cases, there is no reason to expect that the debtor's monthly income and expenses will be different during the plan period than they were

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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).

before the petition was filed. In those cases, projecting disposable income requires nothing more than multiplying a debtor's 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, "a debtor's 'disposable income' calculation on Form 22C is a starting point for determining 'projected disposable income,'" and "the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances." *In re Fredrickson*, 545 F.3d 642, 659 (8th Cir. 2008).

b. Interpreting the term "projected" to allow for consideration of changes in a debtor's financial circumstances also accords with the remainder of Section 1325(b)(1)(B). Section 1325(b)(1)(B) refers to "projected disposable income to be received in the applicable commitment period * * * [that] will be applied to make payments to unsecured creditors." The "applicable commitment period" is the plan period for repayment. 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.[5]

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[5] Chapter 12 contains an analogous provision setting forth the conditions for confirming a contested repayment plan. See 11 U.S.C. 1225. The relevant language of Section 1225 is identical: a plan can be confirmed if "as of the effective date of the plan * * * the plan provides that all of the debtor's projected disposable income to be received" during the plan period "will be applied to make payments." 11 U.S.C. 1225(b)(1)(B).

Petitioner argues that respondent's "projected disposable income" within the meaning of the statute 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 thus would make confirmation of the plan contingent on respondent's commitment to pay $756 per month for 36 months, even though nearly $607 of that amount will never "be received" and thus will never "be applied to make payments" during the plan period. See *In re Nowlin*, 576 F.3d at 263 ("If the debtor's income on Form 22C is artificially inflated * * * , a mechanical projection based on that number would include income the debtor may never receive."). 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), moreover, a plan must provide 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.[6]

2. a. The history and purposes of BAPCPA's amendments to Section 1325 reinforce the court of appeals' interpretation of the term "projected disposable income." Although the legislative history that accompanied BAPCPA is not extensive, 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). While 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 at 871 (affirming confirmation of plan pursuant to which debtor would pay less than her actual future disposable income). 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 tempo-

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[6] Section 1329 provides that "[a]t any time after confirmation of the plan * * * , the plan may be modified" for certain specified reasons upon request of the debtor, the trustee, or an unsecured creditor. 11 U.S.C. 1329(a). If the bankruptcy court may modify the 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 a 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.

rary decrease in income or increase in expenses during the pre-filing period), mechanically projecting that 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.

b. Before BAPCPA's enactment, bankruptcy courts routinely considered anticipated changes to a debtor's financial circumstances when calculating "projected disposable income." 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 '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."); Thomas J. Izzo, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 Emory Bankr. Dev. J. 521, 552 (2009) (Izzo).

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. *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. 4-5, *supra*. 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.

c. Petitioner asserts that "Chapter 13 [t]rustees quite vocally advised legislators" that BAPCPA's redefinition of disposable income "might not reflect a debtor's actual income." Pet. 26-27. But the change in the law to which petitioner refers has nothing to do with the manner in which disposable income is "projected." By establishing new formulae for calculating *current* disposable income (*i.e.*, disposable income during the six-month pre-filing period), BAPCPA limited bankruptcy courts' discretion to determine what types of revenue constitute income and what types of expenses are reasonable and necessary. Petitioner cites no evidence, however, 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.

3. 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. That amount is $408 less than the applicable standard deductions for housing, utilities, food, clothing, and household and personal care sup-

plies—without even considering transportation, taxes, health care, and telecommunication expenses. *Id.* at 44.[7] Because that approach would require respondent to commit to 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 confirmation that "the debtor will be able to make all payments under the plan and to comply with the plan"). Petitioner acknowledges that, on his reading of Section 1325(b)(1)(B), respondent "may be effectively denied relief under Chapter 13, in that it is likely impossible for [her] to propose a feasible plan." Pet. 22.

Petitioner observes that, although "the results of the mechanical approach would be unfortunate for the current debtor, the results may be more 'debtor-friendly' in other cases." Pet. 23. 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

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[7] Under petitioner's mechanical approach, respondent could have been required to commit to make payments of as much as $1,115 per month, leaving her with as little as $807 per month for living expenses. Pet. App. 44. That amount would be $767 less than the applicable standard deductions for housing, utilities, food, clothing, and household and personal care supplies. *Ibid.*

confirmation to make payments at (*i.e.*, neither above nor below) the maximum level she can afford.

Petitioner observes that "the debtor always has control over the date of the filing of the petition." Pet. 22. 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. 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). 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.

At the same time, 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 during the six months prior to filing, during the period between filing and confirmation, or both. Pet. App. 71-72. 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 incomes were mechanically projected into the future, without any consideration of their actual financial circumstances. *In re Jass*, 340 B.R. at 417; see Izzo at 546; 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."). Making the protections of the bankruptcy system unavailable to those whose financial situations may be most desperate is not what Congress intended in BAPCPA.

B. Review Is Warranted Because The Petition Presents An Important Question On Which The Circuits Are In Conflict

Whether, after BAPCPA, bankruptcy courts may consider anticipated changes to a debtor's future disposable income is an issue of critical importance to creditors, debtors, and trustees. BAPCPA is designed to channel many debtors from Chapter 7 into Chapter 13. See, *e.g.*, *In re Egebjerg*, 574 F.3d 1045, 1050 (9th Cir. 2009). The question presented here, which concerns the methodology used to determine how much a debtor must commit to repaying her unsecured creditors in order to secure confirmation of a contested plan, goes to the heart of bankruptcy courts' administration of Chapter 13. See Pet. 8 ("The most direct impact of this ruling is on the amount of money debtors will pay to creditors in Chapter 13.").

Although the court of appeals resolved that question correctly in this case, its decision deepens a pre-existing conflict among the circuits that warrants this Court's resolution. Consistent with the decision below, the Fifth and Eighth Circuits have held that in calculating the projected disposable income of a Chapter 13 debtor, bankruptcy courts may consider likely or reasonably certain changes to the debtor's financial circumstances

during the plan period. See *In re Nowlin*, 576 F.3d at 263; *In re Fredrickson*, 545 F.3d at 659. And the Seventh Circuit has held that bankruptcy courts may consider definite changes to the debtor's financial circumstances during the plan period. See *In re Turner*, 574 F.3d 349, 355-356 (2009). In contrast, the Ninth Circuit has held that bankruptcy courts may not consider any anticipated changes, no matter their likelihood, in calculating a Chapter 13 debtor's projected disposable income. See *In re Kagenveama*, 541 F.3d at 874-875. That conflict among the circuits is reflected in a score of decisions from bankruptcy courts and appellate panels. See Pet. 12-14; Pet. App. 66-69 & nn.18, 20. This case provides an appropriate opportunity for the Court to resolve that persistent split in authority.

Although respondent declined to participate before the court of appeals or to file a response to the petition for a writ of certiorari, she may choose to file a brief on the merits if the petition is granted. If respondent declines to participate, the Court could appoint counsel to serve as an amicus curiae in support of the judgment. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 532 U.S. 917, 917 (2001). Moreover, the government filed a brief as an amicus curiae in the court of appeals, and it anticipates doing so in this Court if the petition is granted. Because procedural mechanisms are available to ensure adversarial presentation of the issues, and because the question presented warrants resolution by this Court, respondent's lack of participation to date should not insulate the case from further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2009