No. 08-998

In The
Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 eliminate judicial discretion by requiring an above-median income debtor to pay to unsecured creditors the net result reported on Official Form 22C?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Jan Hamilton, Chapter 13 Trustee. The respondent is Stephanie Kay Lanning. The United States of America, United States Trustee, appeared Amicus Curiae in the appellate proceedings below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. Preface	2
II. Facts of the Case	4
III. The Appeal to the Bankruptcy Appellate Panel And the Tenth Circuit Court of Appeals	7
REASONS FOR ALLOWANCE OF THE WRIT	8
I. Review Is Warranted to Resolve the Conflict Between Circuits as to the Interpretation of 11 U.S.C. § 1325(b)(1)(B)	8
A. The Forward-Looking Approach	9
B. The Mechanical Approach	11
C. The Lack of Uniformity in Interpretation of 11 U.S.C. § 1325(b)(1)(B) Has Resulted in Myriad Approaches at the Bankruptcy Court and BAP Levels	12

TABLE OF CONTENTS – Continued

Page

II. Review Is Necessary Because the Tenth Circuit's Interpretation of 11 U.S.C. § 1325(b) Disregards the Plain Meaning of the Statute 16

A. The Bankruptcy Statutes Provide a Clear and Unequivocal Road Map..... 16

B. Courts Have Overextended the "Absurd Results" Language from *Lamie* to Stray from the Plain Language of 11 U.S.C. § 1325(b), and, as a Result, Review Is Necessary to Eliminate Judicial Grafting onto BAPCPA..... 20

C. What Little Legislative History Exists Supports the Mechanical Approach 25

CONCLUSION..... 29

APPENDIX .....App. 1

Opinion from the United States Court of Appeals for the Tenth Circuit, entered November 13, 2008 .....App. 1

Opinion from the United States Bankruptcy Appellate Panel from the Tenth Circuit as corrected January 9, 2008 .....App. 33

Memorandum and Opinion Sustaining Trustee's Objection to Confirmation of the United States Bankruptcy Court for the District of Kansas entered May 15, 2007 .....App. 54

TABLE OF CONTENTS – Continued

Page

Relevant Provisions of the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) ..... App. 83

Official Bankruptcy Form 22C ..... App. 97

TABLE OF AUTHORITIES

Page

CASES

In re Alexander, 344 B.R. 742 (Bankr. E.D.N.C. 2006) 11, 13, 14, 19, 27

In re Austin, 372 B.R. 668 (Bankr. D. Vt. 2007) 24

In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006) 14, 23

Cohen v. de la Cruz, 523 U.S. 213 (1998) 27, 28

In re Frederickson, 545 F.3d 652 (8th Cir. 2008) 4, 8, 9

In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis. 2006) 14, 24

In re Hanks, 362 B.R. 494 (Bankr. D. Utah 2007) ..... *passim*

In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006) 10, 18

In re Jass, 340 B.R. 411 (Bankr. D. Utah 2006) 12, 25

In re Kagenveama, 541 F.3d 868 (9th Cir. 2008) 9, 11, 12, 13

In re Kibbe, 361 B.R. 302 (1st Cir. BAP 2007) 13, 17

In re Kolb, 366 B.R. 802 (Bankr. S.D. Ohio 2007) 14

Lamie v. U.S. Trustee, 540 U.S. 526 (2004) 12, 20, 21, 24, 25

In re Lanning, 2007 WL 1451999 (Bankr. D. Kan. 2007), *affirmed* 7, 10, 21

TABLE OF AUTHORITIES – Continued

Page

In re Lanning, 380 B.R. 17 (10th Cir. BAP 2007), *affirmed* 14

In re Lanning, 545 F.3d 1269 (10th Cir. 2008) 9, 10

In re Mancl, 381 B.R. 537 (W.D. Wis. 2008) 14, 19

In re McGillis, 370 B.R. 720 (Bankr. W.D. Mich. 2007) 22

In re Meek, 370 B.R. 294 (Bankr. D. Idaho 2007) 13

In re Miller, 361 B.R. 224 (Bankr. N.D. Ala. 2007) 14, 19

In re Mullen, 369 B.R. 25 (Bankr. D. Or. 2007) 13

Negonsott v. Samuels, 507 U.S. 99 (1993) 11

In re Ott, 343 B.R. 264 (Bankr. D. Colo. 2006) 26

In re Pak, 378 B.R. 257 (9th Cir. BAP 2007), *abrogated by In re Kagenveama, supra* 13

In re Petro, 395 B.R. 369 (6th Cir. BAP 2008) 13

In re Rotunda, 349 B.R. 324 (Bankr. N.D.N.Y. 2006) 14

In re Simms, Slip Copy, 2008 WL 217174 (N.D.W.Va. 2008) 14

In re Skvorecz, 369 B.R. 638 (Bankr. D. Colo. 2007) 3

In re Shelor, Slip Copy, 2008 WL 4344894 (Bankr. M.D.N.C. 2008) 22

In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007) 13

TABLE OF AUTHORITIES – Continued

Page

In re Tranmer, 355 B.R. 234 (Bankr. D. Mont. 2006) 14

In re Tuss, 360 B.R. 684 (Bankr. D. Mont. 2007) 14

United States v. Granderson, 511 U.S. 39 (1994) 25

In re Zimmerman, 2007 WL 295452 (Bankr. N.D. Ohio 2007) 13

STATUTES

11 U.S.C. § 101(10A) ..... *passim*

11 U.S.C. § 109(h)(1) 26

11 U.S.C. § 521(b)(2) 26

11 U.S.C. § 707(b) 12

11 U.S.C. § 707(b)(2) 2, 10, 17

11 U.S.C. § 1129(a)(15)(B) 19, 20

11 U.S.C. § 1325(b) ..... *passim*

11 U.S.C. § 1325(b)(1) ..... *passim*

11 U.S.C. § 1325(b)(2) ..... *passim*

11 U.S.C. § 1325(b)(3) 17, 24

28 U.S.C. § 157(b)(1)(L) 7

28 U.S.C. § 158 7

28 U.S.C. § 1254 1

28 U.S.C. § 1291 7

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Bankr. P. 1007(b)(6) 2

Fed. R. Bankr. P. 8003 7

Fed. R. Bankr. P. 9009 3

OTHER AUTHORITIES

Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am.Bankr.Inst.L.Rev. 665 (2005) 27

Official Form 22C ..... *passim*

Official Form 61 2

Official Form 62 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Jan Hamilton, Chapter 13 Trustee, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-32) is reported at 545 F.3d 1269. The Bankruptcy Appellate Panel's opinion (App. 33-53) is reported at 380 B.R. 17. The Memorandum and Opinion of the Bankruptcy Court (App. 54-82) is not officially reported, but can be found at 2007 WL 1451999.

JURISDICTION

The judgment of the Court of Appeals was entered November 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 110-448, 11 U.S.C. §§ 101-1532, are set forth at App. 83-96.

STATEMENT OF THE CASE

I. Preface

The issue in controversy is how to calculate the amount an above-median income Chapter 13 debtor must pay her unsecured creditors under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Prior to the enactment of BAPCPA, a debtor was required to commit to her plan all of her "projected disposable income" to be received in the three-year period beginning with the first plan payment. The amount of disposable income was historically determined by an analysis of debtor's monthly income, as reflected on Schedule I (Official Form 61) minus debtor's monthly expenses as reflected on Schedule J (Official Form 62). In large part, the amount paid to debtor's unsecured creditors was determined by her current ability to pay.

Since BAPCPA became effective, a debtor must pay her "projected disposable income to be received in the applicable commitment period" *to her unsecured creditors* pursuant to 11 U.S.C. § 1325(b)(1)(B). A Chapter 13 debtor is also now required to complete a Statement of Current Monthly Income and Disposable Income Calculation (Official Form 22C). Fed. R. Bankr. P. 1007(b)(6). As noted by the Tenth Circuit, § 1325(b)(3) does not refer to Form 22C, but it does provide that expenses for above-median debtors must be calculated in accordance with 11 U.S.C. §§ 707(b)(2)(A) & (B), commonly referred to as the "means test." The means test requires the use of

national and local IRS standards in determining expenses and deductions. "Current monthly income" is determined in accordance with 11 U.S.C. § 101(10A)(A)(i). The Judicial Conference of the United States created Form B22C, *see* Fed. R. Bankr. P. 9009, and since passage of BAPCPA, above-median income Chapter 13 debtors use that form (now Official Form 22C) to determine income and expenses according to the means test. *See In re Skvorecz*, 369 B.R. 638, 642 (Bankr. D. Colo. 2007).

Form 22C starts its calculation with debtor's average monthly income over the six months prior to the bankruptcy filing pursuant to 11 U.S.C. 101(10A). From this "historical average" income figure, the form then instructs a debtor with income that is above the median income for the debtor's household size and geographic region, to deduct the appropriate statutory and IRS standard deductions to determine a net "Monthly Disposable Income Under § 1325(b)(2)."

The current controversy is whether these mechanical calculations determine the amount that a Chapter 13 debtor must pay to her unsecured creditors (the "mechanical" approach), or whether the court may consider a debtor's actual anticipated income over the life of the plan in determining the amount required to be paid to unsecured creditors (the "forward-looking" approach). An underlying issue is whether a debtor's "projected disposable income," a term not specifically defined in BAPCPA, differs from a debtor's "disposable income," a term that is defined in 11 U.S.C. § 1325(b)(2) and is incorporated into Form 22C.

The Trustee contends that with the implementation of BAPCPA, Congress fashioned a rigid, mechanical test to determine a debtor's projected disposable income. Judicial discretion has been statutorily eliminated. 11 U.S.C. § 1325(b)(1)(B) prohibits the confirmation of a plan, over the objection of the Trustee or an unsecured creditor, which proposes to pay less to unsecured creditors than the projected disposable income as calculated by Form 22C. This interpretation is consistent both with the plain language of the amendment and congressional intent. Additionally, the Trustee contends that "disposable income," as defined in § 1325(b)(2), is the same as "projected disposable income." The Trustee asserts that the various phrases employed by the courts below and others in the majority camp are judicial creations at odds with the clear language of the statute and apparent congressional intent.

The Court of Appeals for the Tenth Circuit affirmed the Bankruptcy Appellate Panel and Bankruptcy Court and rejected the Trustee's "mechanical" approach in favor of the "forward-looking" approach. Although there is a clear split in the circuits, the Tenth Circuit's decision is in the majority camp. *In re Frederickson*, 545 F.3d 652, 659-60 (8th Cir. 2008).

II. Facts of the Case

The facts of this case were largely stipulated to and are undisputed. Debtor Stephanie Lanning filed her Chapter 13 bankruptcy petition on October 16,

2006, together with her Schedules, Statement of Financial Affairs, Statement of Current Monthly Income and Disposable Income Calculation (Official Form 22C), and Chapter 13 Plan. On line 20 of her Form 22C, Debtor reported Current Monthly Income of $5,343.70, her average monthly income in the six months prior to filing. This income is annualized to $64,123.34. Debtor claims a household size of one, and the applicable median family income for purposes of determining whether Debtor is above or below median income is $36,631.00. Thus, Debtor is "above-median income" for her household size and geographic region. Because Debtor is "above-median", she completed the remainder of Form 22C, as the form directs, taking allowed statutory and IRS standard deductions, resulting in monthly disposable income of $1,114.96 on Line 58 of the form.

Debtor's Form 22C income figures differ from those on Debtor's bankruptcy Schedule I. Debtor reports actual current monthly income of $1,922.00 on Schedule I, which is annualized to $23,064, and is notably less than the applicable median income above. Additionally, Debtor's Schedule J indicates monthly expenses totaling $1,772.97, with resultant net excess monthly income per Debtor's Schedules (Schedule I minus Schedule J) of $149.03. Debtor's Chapter 13 Plan proposed a monthly plan payment of $144.00 per month for 36 months and to pay unsecured creditors "any funds not necessary to satisfy administrative expenses, secured claims and priority claims within the initial 36 months of this plan."

Debtor reported that the income reflected by Form 22C was inflated due to "buyout" payments that Debtor received from a previous employer during the six months prior to filing, which increased Debtor's monthly gross income to $11,990.03 for April of 2006 and $15,356.42 for May of 2006.

Debtor filed a Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does Not Determine Plan Payment on January 4, 2007. The Trustee filed a response in opposition to this motion on January 17, 2007. The Trustee also filed an Objection to Confirmation of Debtor's Plan. As part of his objection, the Trustee asserted that Debtor must pay to her unsecured creditors the net result of Form 22C and also that Debtor's plan must run 60 months, the appropriate "applicable commitment period" for a debtor with above-median income, rather than the proposed 36 months.

In its decision entered on May 15, 2007, the Bankruptcy Court sustained the Trustee's objection to confirmation as it related to the length of the plan and held that an above-median income case must run 60 months, unless the unsecured creditors are to be paid in full. However, the Bankruptcy Court overruled the remainder of the Trustee's objection and granted the Debtor's request to deviate from the Form 22C conclusion, finding that "the net income number obtained from Form B22C is the debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in

circumstances such that the numbers contained in that form are not commensurate with a fair projection of debtor's income in the future." *In re Lanning*, 2007 WL 1451999 at 2 (Bankr. D. Kan. 2007). The Bankruptcy Court had jurisdiction to decide the matter as an issue relating to confirmation pursuant to 28 U.S.C. § 157(b)(1)(L).

III. The Appeal to the Bankruptcy Appellate Panel and Tenth Circuit Court of Appeals.

The Trustee filed a Notice of Appeal and Petition requesting permission to directly appeal to the Tenth Circuit Court of Appeals on May 23, 2007. The appeal was docketed at the Bankruptcy Appellate Panel for the Tenth Circuit (the "BAP") on May 29, 2007. The Petition for direct appeal was denied by the Court of Appeals on September 5, 2007, and thus the appeal proceeded at the BAP. The BAP had jurisdiction over the matter pursuant to 28 U.S.C. § 158 and Fed. R. Bankr. P. 8003. The BAP affirmed the Bankruptcy Court's decision on December 13, 2007, and the BAP mandate was issued on December 27, 2007. The Trustee appealed the BAP decision to the Tenth Circuit Court of Appeals on January 2, 2008. The Court of Appeals had jurisdiction over the matter pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 158(d)(1). The Court of Appeals affirmed the decisions of the lower courts on November 13, 2008, and issued its mandate on December 8, 2008. The Debtor has not participated in the appeal. However, the

United States appeared Amicus Curiae at both the BAP and Court of Appeals level.

REASONS FOR ALLOWANCE OF THE WRIT

Whether a bankruptcy court may ignore the Form 22C result and, consequently, the plain language of 11 U.S.C. § 1325(b) by relying instead on the actual results of Schedule I, presents a question of nationwide importance. There is currently a clear circuit split on the issue. Moreover, this split appears district by district and, in some instances, even judge by judge within a single district or city. The most direct impact of this ruling is on the amount of money debtors will repay to creditors in Chapter 13. However, the effects of this decision will extend beyond the specific statutes at issue. The underpinnings of this ruling lie in the exercise of unwarranted judicial discretion that is at odds with both the clear language of the statute and apparent congressional intent.

I. Review Is Warranted to Resolve the Conflict Between Circuits as to the Interpretation of 11 U.S.C. § 1325(b)(1)(B).

In addition to the Tenth Circuit decision currently before the Court, two other circuit courts have ruled on the issue to date. The Eighth Circuit has ruled in favor of the "forward-looking" approach. *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008).

However, the Ninth Circuit has favored the "mechanical" approach asserted by the Trustee. *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008). *Kagenveama* conflicts directly with the Tenth Circuit and Eighth Circuit rulings.

A. The Forward-Looking Approach

In *Lanning*, the Tenth Circuit held that, "[A]s to the income side of the § 1325(b)(1)(B) inquiry, the starting point for calculating a Chapter 13 debtor's 'projected disposable income' is presumed to be the debtor's 'current monthly income,' as defined in 11 U.S.C. § 101(10A)(A)(i), subject to a showing of a substantial change in circumstances." *In re Lanning*, 545 F.3d 1269, 1282 (10th Cir. 2008). In *Frederickson*, the Eighth Circuit Court of Appeals also aligned with the majority in adopting what has been coined the forward-looking approach. The court explains:

> "[W]e adopt the view shared by many bankruptcy courts that a debtor's 'disposable income' calculation on Form 22C is a starting point for determining the debtor's 'projected disposable income,' but that the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J."

In re Frederickson, 545 F.3d at 659. It is important to note that *Lanning* is a more narrow decision than *Frederickson*. In *Lanning*, the Bankruptcy Court

ruled that an above-median income debtor is limited on the expense side of the projected disposable income calculation to those expenses allowed under 11 U.S.C. §§ 707(b)(2)(A) and (B). *In re Lanning*, 2007 WL 1451999 at 17 (Bankr. D. Kan. 2007). The expense portion of the Bankruptcy Court's decision was not appealed. The Tenth Circuit is also quite clear that it has ruled in this case only "as to the income side of the § 1325(b)(1)(B) inquiry." *In re Lanning*, 545 F.3d at 1282. *Frederickson* suggests that a debtor's actual expenses may also be considered. *In re Frederickson*, 545 F.3d at 659.

A crucial element to the forward-looking approach is the determination that "disposable income" as defined in § 1325(b)(2) must have a different definition than "projected disposable income" as utilized by § 1325(b)(1)(B). The Tenth Circuit indicated that "Congress must have intended 'projected disposable income' to be different than 'disposable income' when it chose to define only the latter term for purposes of § 1325(b)." *In re Lanning*, 545 F.3d at 1280, *citing In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006). These courts insist that one must look to the debtor's ability to pay over the life of the case to give effect to the words "projected" and "to be received" in § 1325(b)(1)(B), as not doing so would render the words superfluous. *In re Lanning*, 545 F.3d at 1280.

In adopting the forward-looking approach, the Tenth Circuit also approved the Bankruptcy Court's notion that the changes to § 1325(b)(1) now created a

"rebuttable presumption" as to the amount to be paid to unsecured creditors, although there is nothing in the statute or legislative history to support that proposition.

B. The Mechanical Approach

The other side of the split of authority is the Ninth Circuit Court of Appeals' decision in *Kagenveama*, *supra*. This decision represents the mechanical approach advocated by the Trustee, in that one simply applies the statute's mathematical formula, now embodied in Official Form 22C. In *Kagenveama*, the court cited this Court's decision in *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993), for the proposition that courts must give meaning to every clause and word of a statute. *In re Kagenveama*, 541 F.3d at 872. The *Kagenveama* court reasoned that "projected" is just a modifier of the defined term "disposable income," and in order to give meaning to every word of 1325(b)(1), "disposable income" as defined by 1325(b)(2) is "projected" out over the applicable commitment period. *Id.* Thus, "disposable income" and "projected disposable income" are part and parcel of the same concept and both require a simple mathematical formula. As cited by the *Kagenveama* court, "If 'disposable income' is not linked to 'projected disposable income' then it is just a floating definition with no apparent purpose." *Id., citing In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006).

The mechanical approach is also clearly in line with this Court's ruling in *Lamie v. United States Trustee,* 540 U.S. 526, 124 S.Ct. 1023 (2004). The language of § 1325(b)(1) is clear on its face. It would require a substantial ambiguity to permit the courts to essentially rewrite the statute. As this Court stated in *Lamie*, the fact that a statute is awkward, or even ungrammatical, does not make it ambiguous, so as to permit the court to resort to its legislative history in interpreting it. *Lamie v. United States Trustee*, 540 U.S. at 534.

Kagenveama also rejects the "presumptively correct" or "rebuttable presumption" concept, as such a presumption is not articulated anywhere in § 1325(b)(1). *In re Kagenveama*, 541 F.3d at 874. Further, since Congress included a presumption in 11 U.S.C. § 707(b) ("presumed abuse"), it is apparent that it knew how to create such a presumption but chose not to do so in § 1325(b)(1).

C. The Lack of Uniformity in Interpretation of 11 U.S.C. § 1325 (b)(1)(B) Has Resulted in Myriad Approaches at the Bankruptcy Court and BAP Levels.

The enormity of the problem created by these varying interpretations is particularly evident at the BAP and bankruptcy court levels. *In re Hanks,* 362 B.R. 494 (Bankr. D. Utah 2007) and *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) demonstrate this pointedly, when courts sitting in the same city,

reading the same statute, came to completely opposite conclusions, all the while each claiming its view was the "plain reading" view of the statute.

Many courts have ruled that Form 22C is merely a starting point. *In re Pak*, 378 B.R. 257, 268 (9th Cir. BAP 2007) *abrogated by In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) (" 'disposable income' as defined in § 1325(b)(2), is the starting point for determining 'projected disposable income,' subject to adjustment, based on evidence, to reflect reality going forward."), *see also*, *In re Petro*, 395 B.R. 369 (6th Cir. BAP 2008); *In re Kibbe,* 361 B.R. 302 (1st Cir. BAP 2007); *In re Slusher*, 359 B.R. 290 (Bankr. D. Nev. 2007); *In re Meek*, 370 B.R. 294 (Bankr. D. Idaho 2007); *In re Mullen*, 369 B.R. 25 (Bankr. D. Or. 2007); and *In re Zimmerman*, 2007 WL 295452 (Bankr. N.D. Ohio 2007). It is difficult to determine, from any of these decisions, what "starting point" means and how exactly the concept is to be applied.

In contrast, numerous cases in addition to *Kagenveama* support the Trustee's position that Form 22C is determinative of the return that must be paid to unsecured creditors for above-median debtors. *See In re Hanks,* 362 B.R. 494 (Bankr. D. Utah 2007) ("Form B22C is determinative of the return to general unsecured creditors for above-median debtors unless 'special circumstances' can be shown under § 707(b)(2)(B)"); *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006) ("in order to arrive at 'projected disposable income,' one simply takes the calculation mandated by § 1325(b)(2) and does the math");

In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006) ("it appears that Congress intended to adopt a specific test to be rigidly applied rather than a standard to be applied according to the facts and circumstances of the case."); *In re Simms*, Slip Copy, 2008 WL 217174 (N.D.W.Va. 2008) ("the Court concludes that when an objection is filed under § 1325(b), Form B22C is the method by which the Debtor's disposable income is to be determined – it is not to be determined by deducting Schedule J expenses from the net income stated on Schedule I"); *In re Mancl*, 381 B.R. 537, 541 (W.D. Wis. 2008) ("The only reasonable interpretation of the phrase 'projected disposable income' is properly calculated current monthly income projected forward for each month during the plan commitment period."). *See also*, *In re Kolb*, 366 B.R. 802 (Bankr. S.D. Ohio 2007) and *In re Miller*, 361 B.R. 224 (Bankr. N.D. Ala. 2007). In so ruling, courts have determined that a court's ability to determine the reasonableness of an above-median income debtor's expenses in calculating disposable income "has been curtailed by BAPCPA." *See In re Tuss*, 360 B.R. 684 (Bankr. D. Mont. 2007); *In re Tranmer*, 355 B.R. 234 (Bankr. D. Mont. 2006); *In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); and *In re Barr*, 341 B.R. 181 (Bankr. M.D.N.C. 2006). "Form B22C" and "Form 22C" are used herein interchangeably. Interim Form B22C became Official Form 22C when the official forms were adopted. *In re Lanning*, 380 B.R. 17, 20 (10th Cir. BAP 2007).

It is apparent that the split in the circuits on these issues is suggestive of the magnitude of the problem. The BAP and bankruptcy courts are in a state of disarray. On the one hand some courts simply apply the statute without permitting modification. On the other are varied approaches, all of which involve the substitution of judicial discretion for statutory mandate. Because of the split among the circuits and the starkly contrasting decisions at the BAP and bankruptcy court levels, this Court should resolve the question of whether 11 U.S.C. § 1325(b)(1) is to be interpreted strictly or whether considerable judicial discretion allows courts to circumvent congressional mandate because the results may sometimes not appear to be fair. To allow bankruptcy courts to create judicial exceptions to the statute essentially places us back to determining the confirmability of a debtor's plan on the basis of debtor's schedules.

The language used by these courts, however well intentioned, constitutes legislation by invention, rather than interpretation of the congressional mandates. This is in spite of the fact that the statute, however objectionable one may find it, is clear on its face. No one would deny that the mechanistic approach urged by Trustee might create harsh results, one way or the other. However, from the scant legislative history on BAPCPA, it is apparent that Congress was persuaded that trustees, the courts and attorneys should have less, not more, discretion.

II. Review Is Necessary Because the Tenth Circuit's Interpretation of 11 U.S.C. § 1325(b) Disregards the Plain Meaning of the Statute.

A. The Bankruptcy Statutes Provide a Clear and Unequivocal Road Map.

11 U.S.C. § 1325(b)(1)(B), provides, in material part:

> [I]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan – 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.

§ 1325(b)(2) additionally states:

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

> amounts reasonably necessary to be expended – (list of various deductions omitted.) (emphasis added).

"Current monthly income" or "CMI" is defined in 11 U.S.C. § 101(10A) as, "[t]he average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on . . . " (Generally the last day of the calendar month preceding the date of the filing of the bankruptcy petition, with certain exceptions not material to this case.)

11 U.S.C. § 1325(b)(2) makes debtor's "disposable income" dependent upon the debtor's "current monthly income." *In re Kibbe*, 361 B.R. 302, 307 (1st Cir. BAP 2007). Once the debtor's CMI is calculated, § 1325(b)(2) directs that certain expenses, those that are reasonably necessary for the maintenance and support of the debtor or debtor's dependents, must be deducted from the debtor's CMI. 11 U.S.C. § 1325(b)(3) clarifies that for an above-median debtor, the "amounts reasonably necessary to be expended under paragraph (2) *shall be determined* in accordance with subparagraphs (A) and (B) of section 707(b)(2)" (emphasis added). These expenses are, in large part, not a reflection of debtor's actual expenses, but rather standards issued by the Internal Revenue Service. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

The above-quoted statutes set forth a precise, unambiguous method for determining how a debtor's monthly "disposable income" is to be calculated. Thus, appropriate resolution of this case turns on whether or not the term "projected disposable income" under § 1325(b)(1)(B) differs (and if so, in what way) from the term "disposable income" as defined in § 1325(b)(2). Although the bankruptcy code defines "disposable income," it fails to provide a specific definition for "projected disposable income."

The mechanical camp suggests that the proper interpretation of "projected disposable income" requires the court to take the debtor's "disposable income" as determined by Form 22C, and project it forth over the applicable commitment. Those rulings that hold otherwise presume that the word "projected" requires the Court to consider the debtor's *actual* future income and expenses. *In re Hardacre*, 338 B.R. at 723 (finding that the language of § 1325(b)(1)(B) suggests congressional intent to refer to the income actually to be received by the debtor during the commitment period, rather than the pre-petition average income.) This is an unwarranted distinction and one not imposed by the bankruptcy code. The Court can give meaning to the term "projected" by "projecting forward" the Form 22C calculations without deviating from the mechanical test imposed by the language of § 1325(b)(1)(B) and (b)(2). This can be accomplished by merely multiplying the net "disposable income" figure as calculated on Form

22C by the applicable commitment period. *In re Hanks*, 362 B.R. at 499.

Courts ruling "projected disposable income" and "disposable income" are inherently different concepts do not consider that "disposable income" is specifically defined in the code, without reference to debtor's schedules. *See In re Alexander*, 344 B.R. at 749, also *In re Miller*, 361 B.R. at 235. The definition of disposable income is not to be ignored simply because the term is preceded by the modifier "projected." At least one court has found such an interpretation untenable, as noted in *In re Mancl*, 381 B.R. at 541:

> "To adopt the majority view, one must assume that Congress created the precise and objective current monthly income definition of § 101(10A), mandated that bankruptcy courts apply it to the § 1325(b) test, and then added the term "projected" to empower bankruptcy courts to ignore the § 101(10A) definition, substituting their own sense of fairness by applying the former process of analyzing and comparing schedules I and J."

The intent of Congress to view "projected disposable income" consistently with the definition of "disposable income" provided in § 1325(b)(2) is also evident when one turns to other code sections that reference the term, particularly 11 U.S.C. § 1129(a)(15)(B). That section states, in pertinent part:

> (15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan . . .
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer."

11 U.S.C. § 1129(a)(15)(B). It is clear here that the drafters intended "projected disposable income" to have a definition consistent with that given to "disposable income" in § 1325(b)(2). There is nothing, in the statute or otherwise, to suggest that Congress intended anything different when it referenced "projected disposable income" in the context of § 1325(b)(1)(B).

B. Courts Have Overextended the "Absurd Results" Language from *Lamie* to Stray from the Plain Language of 11 U.S.C. § 1325(b), and, as a Result, Review Is Necessary to Eliminate Judicial Grafting onto BAPCPA.

With each court contending that its interpretation faithfully adheres to the "plain meaning" of the statute, courts have introduced to the bankruptcy lexicon a host of new phrases that have now been

grafted onto BAPCPA. The courts below (and others) have relied upon the phrase "substantial changes in circumstances" to justify a departure from Form 22C. Other phrases, such as "presumptively correct" and "starting place" seem to have become de facto amendments to § 1325. However, 11 U.S.C. § 1325, in conjunction with Official Form 22C, leaves no room for such interpretations.

When a statute's language is plain, the sole function of the court is to enforce it according to its terms, except where doing so would lead to "absurd results." *Lamie v. U.S. Trustee*, 540 U.S. 526, 533, 124 S. Ct. 1023 (2004). "Absurd results" has become the escape hatch for any judge that wants to ignore the congressional mandate of § 1325. Many courts, including the bankruptcy court below, have determined that the results under the mechanical approach are "absurd," and therefore have deviated from the congressional mandate, which requires a debtor to pay her unsecured creditors her projected disposable income, without reference to exceptions if debtor feels this calculation does not accurately reflect her income. *In re Lanning*, 2007 WL 1451999 at 13. The phrase has taken on a life of its own, reducing congressional dictate to optional guidance that is followed only if the sitting judge favors the result. These are treacherous waters. Using "absurd results" as a North Star in bankruptcy cases could easily result in dozens of variations on the theme, as individual judges pick and choose á la carte what portions of the code they want to enforce.

The Trustee concedes that if the Debtor in this case is required to pay to unsecured creditors the disposable income calculation per Form 22C, she may be effectively denied relief under Chapter 13, in that it is likely impossible for the Debtor to propose a feasible plan. Although the results of this interpretation may at times be harsh, that does not necessarily mean the results are absurd. *In re Hanks,* 362 B.R. at 502 ("[A] harsh or even illogical result is not the same thing as an absurd result, and this Court must therefore interpret the statute according to its own terms."). *See also, In re McGillis*, 370 B.R. 720 (Bankr. W.D. Mich. 2007). Of course, the debtor always has control over the date of the filing of the petition, and, therefore, the precise days encompassed within the 6-month look back period. Further, a recent decision, *In re Shelor*, Slip Copy, 2008 WL 4344894 (Bankr. M.D.N.C. 2008), suggests that in § 101 (10A)(A)(ii), Congress cryptically provided a methodology for a debtor to avoid the sometimes harsh results of Form 22C. This provision essentially provides that instead of a look back period using the six months prior to filing, the debtor can have the court determine a different 6-month period by not filing Shedule I. This means that the 6-month look back period could be at any time up to confirmation, which may be a moving target. This approach would appear to soften the seeming harshness of the 101(10A)(A)(i), but would require the debtor to make an election at the time of filing in order to implement an alternative time frame.

Although the results of the mechanical approach would be unfortunate for the current debtor, the results may be more "debtor-friendly" in other cases. *See, e.g.*, *Kagenveama, supra*. Strict adherence to the disposable income calculation of Form 22C could result in an above-median income debtor having actual excess income that the debtor is not required to commit toward the payment of unsecured debts if debtor's actual income has increased above the pre-petition average. *See In re Barr*, 341 B.R. at 185.

Judge Brown of the District of Vermont analyzes the use of historical income in § 1325 and the role of the judiciary in its interpretation:

> "One may question the logic of relying upon historical data, and debate whether it yields a reliable prediction of the Debtors' ability to make plan payments, or constitutes the best formula for computing those payments. But such differences of opinion are based on the policy implications of the amended statute and do not make the statute ambiguous or the result absurd. There is no inherent flaw in calculating disposable income based upon an historical figure, or in using the result of that computation in a forward-looking projection of income through the commitment period . . . Congress declared that the historical income data from the six months prior to the filing of the bankruptcy petition is a more reliable indicator of a debtor's future financial situation than the income on the day the debtor filed for bankruptcy relief, and has directed courts to

> adjust their starting point for analyzing Chapter 13 plans accordingly. While this may constitute a dramatic change from pre-BAPCPA policy – and a point upon which reasonable minds may differ – it is well within the prerogative of our Legislative branch to make such changes. It is the role of the Judicial branch to carry them out."

In re Austin, 372 B.R. 668, 679 (Bankr. D. Vt. 2007).

Another court, finding that the projected disposable income for an above-median income debtor must be determined solely by Form 22C opined,

> "While this provision of the new statute does not perform as advertised, perhaps prompting trustees, unsecured creditors and even some bankruptcy judges to long for the "good old days" of reviewing Schedules I and J and determining whether private school, high speed internet access, and a pack-a-day habit were reasonable and necessary for the debtor's maintenance and support, the mandate of new § 1325(b)(3) is clear."

In re Guzman, 345 B.R. 640, 646 (Bankr. E.D. Wis. 2006).

For better or worse, Congress enacted BAPCPA, and it is within the discretion of Congress to fix it. The result supported by the courts below is in direct conflict with this Court's guidance in *Lamie*, in which the Court stated, "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically

enacted." There is no gap here. *Lamie* also says: "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *Lamie,* 540 U.S. at 542, citing *United States v. Granderson,* 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion).

C. What Little Legislative History Exists Supports the Mechanical Approach.

Even if it is appropriate to examine congressional history, it must be noted that the congressional record is almost nonexistent. *See In re Jass*, 340 B.R. 411, 416. It is because of the lack of a legislative record that courts on all sides of the issue contend their positions are consistent with congressional intent, with scant support for these claims.

In *Jass,* the court indicated that there was no congressional intent expressed to change the pre-BAPCPA practice of analyzing Schedules I and J to determine a debtor's disposable income, and thus, such an analysis remains proper. *In re Jass*, 340 B.R. at 416. The *Jass* court additionally held that, as in the present case, requiring the debtors to pay the disposable income amount resulting from Form 22C would render any plan the debtor proposes unfeasible, which is at odds with the code's overall policy of providing debtors with a "fresh start." *In re Jass*, 340 B.R. at 417. However, the *Hanks* court counters with alternative interpretations:

> "The court in *In re Ott* discussed the 'lens' through which Congress apparently viewed debtors in enacting the BAPCPA, the creditor-friendly nature of most of the BAPCPA's provisions, and Congress' perception of abuse and lack of personal financial accountability on the part of debtors in bankruptcy. Whether justified or not, the result of Congress' efforts was 'a law that is sometimes self-executing, inflexible, and unforgiving.' It is not at all clear that Congress did not actually intend to keep people out of bankruptcy altogether if possible or perhaps to push them into individual chapter 11 cases, nor is it clear that a 'fresh start' is still the overriding policy of the portions of the Bankruptcy Code at issue in this case. Perhaps the concept of current monthly income is an expression of Congress' intent that debtors should attempt to resolve their financial difficulties outside of bankruptcy for a period of time before filing. Indeed, this view would jibe with the new prepetition briefing requirement in § 109(h)(1) that contemplates meaningful credit counseling and the performance of budget analyses within six months of filing as well as the requirement in § 521(b)(2) that the debtor file a copy of any debt repayment plan developed during the prepetition counseling session."

In re Hanks, 362 B.R. at 500, discussing *In re Ott*, 343 B.R. 264 (Bankr. D. Colo. 2006).

Prior to implementation of BAPCPA, Chapter 13 Trustees quite vocally advised legislators that basing

the amount to be paid to unsecured creditors upon a formula of "current monthly income" minus deductions might not reflect a debtor's actual income, but despite these warnings, no changes were made. *In re Alexander*, 344 B.R. 742, 747 (Bankr. E.D.N.C. 2006) ("Chapter 13 Trustees recognized early on that this redefinition of disposable income meant some high-income debtors would pay less than they would have under the variant judicial tests and local legal culture that previously measured the chapter 13 disposable income. The chapter 13 trustees repeatedly made their concerns known to Congress, asking that CMI less deductions be a minimum, not the maximum, but no changes were made.") (quoting Marianne B. Culhane and Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?* 13 Am.Bankr.Inst.L.Rev. 665, 681 (2005)). In spite of the concerns raised and the warnings given by Chapter 13 Trustees, Congress chose to leave intact provisions BAPCPA that effectively discarded the Schedule I vs. J approach and substituted the mechanical approach. Given the plain language of the statute and the warnings that were given to Congress of the problems being created, the Trustee suggests that the courts have overstepped their bounds. If there are problems with the current statutory framework, the resolution must be legislative, and not judicial.

Of note, both the BAP and the Tenth Circuit quote from *Cohen v. de la Cruz,* 523 U.S. 213, 221 (1998), to support the proposition that the bankruptcy code should not be read to erode past

bankruptcy practice absent a clear indication that Congress intended such a departure. The Trustee suggests that if there was ever a statute drafted intended to change past practice, BAPCPA is it, and as a result, *Cohen* is not applicable to this case. If Congress had not intended change, why would it amend the statute? The changes made to the bankruptcy code by BAPCPA, clearly were intended to effect major changes to the way cases are administered. The changes were many, far-reaching and clearly intended to not only erode, but to alter the shoreline in an immediate and drastic manner.

As is evident from the over three years of debate following implementation of BAPCPA, the practical application of its provisions was apparently not of great congressional concern. Congress was perfectly aware that prior to BAPCPA, Courts had discretion to perform a case-by-case analysis, yet it chose to implement a standardized formula with the amendment. That standardized formula simply does not allow for case-by-case examination of the facts and circumstances of a particular debtor's financial affairs beyond that reflected in Form 22C. This Court should exercise its discretion in reviewing the courts below to assist all involved in the bankruptcy process in properly administering BAPCPA, in particular, 11 U.S.C. § 1325(b).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment below.

Respectfully submitted,

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