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IN THE SUPREME COURT OF THE UNITED STATES

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JAN HAMILTON, CHAPTER 13 TRUSTEE, :  
Petitioner :  
v. : No. 08-998  
STEPHANIE KAY LANNING :  
- - - - - x

Washington, D.C.  
Monday, March 22, 2010

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:03 a.m.

APPEARANCES:

JAN HAMILTON, ESQ., Topeka, Kansas; on behalf of  
Petitioner.  
THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf  
of Respondent.  
SARAH HARRINGTON, ESQ., Assistant to the Solicitor  
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behalf of United States, as amicus curiae,  
supporting Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-998, Hamilton, the Chapter 13 Trustee, v. Lanning.

Mr. Hamilton.

ORAL ARGUMENT OF JAN HAMILTON

ON BEHALF OF THE PETITIONER

MR. HAMILTON: Mr. Chief Justice, and may it please the Court:

The Tenth Circuit and Stephanie Lanning were wrong in ignoring the new Chapter 13 means test contained in the 2005 amendments to the Bankruptcy Code. The amendments to the 2005 Bankruptcy Code were intended to reduce judicial discretion by inserting a formula rather than the judicial discretion that had previously been accorded to judges and to the litigants.

Stephanie Lanning fell afoul of the means test because during the first 2 months of a 6-month lookback period, which I will explain in a moment, she had more income than what she had in the rest of the 6-month lookback period. That income was from a buyout from her former employer, Payless, and distorted what her income appeared to be during that 6-month period of time. Because of that, the amount which the means test

1 showed that she would be required to pay to her  
2 creditors was more than she could actually pay.

3 JUSTICE GINSBURG: Which means -- which  
4 means what? What is the consequence of that? You  
5 concede that on the strict application of the 6 months  
6 she -- her income is much too high for her possibly to  
7 pay the creditors. So what happens to her?

8 MR. HAMILTON: What happens to her and what  
9 could have happened to her may be two different  
10 propositions, Justice Ginsburg. In the first place,  
11 there are two parts to that 6-month lookback period,  
12 which are found in 101(10A) of the United States  
13 Bankruptcy Code -- and the statutes, by the way here,  
14 are found at pages 83 through 96 of the petition  
15 appendix.

16 101(10A) has a first part which defines the  
17 6-month lookback period as being 6 months prior to the  
18 filing of the date of the petition -- actually, the end  
19 of the month prior to the filing of the petition.  
20 Congress's thought was, it seems, that that would be  
21 more representative of what an individual's actual  
22 income would be.

23 There is a second part to that 6-month  
24 lookback period which says essentially that the debtor  
25 can move that 6-month lookback period by not filing

1 certain papers with the court.

2 JUSTICE GINSBURG: That's -- can you explain  
3 that? It seems very odd. It says she can do that if  
4 she doesn't do what the statute requires her to do. I  
5 mean, she's supposed to file that schedule. She's  
6 required, the statute says, to file it. But she gets an  
7 advantage if she doesn't do what she's instructed to do?

8 MR. HAMILTON: The part of the statute that  
9 you are referring to is under 523, and it essentially  
10 says that debtor shall file -- 521, excuse me -- shall  
11 file certain schedules and that would include the income  
12 and expense schedules, Schedule I and Schedule J. And  
13 certainly the court has the ability, under that statute,  
14 to extend the time or to excuse the performance of a  
15 debtor in that regard. So there's nothing incongruous  
16 about that wording in the statute.

17 JUSTICE SOTOMAYOR: What do you -- what do  
18 you do with the contention that the court is bounded by  
19 other requirements such as the timing of the meeting of  
20 creditors and the plan confirmation, that that binds the  
21 district court from resetting it?

22 MR. HAMILTON: Certainly all of those time  
23 frames can be moved, Justice Sotomayor. There is --  
24 again, the actual timing of the confirmation hearing in  
25 a Chapter 13 case may be fluid, although there are

1 certain time limits for the first meeting of creditors  
2 and for when the first -- when the confirmation hearing  
3 is held. They can be extended, just as the confirmation  
4 hearing would be in a Chapter 12 or in a Chapter 11  
5 case.

6           So the idea is the second part of 101(10A)  
7 allows the debtor to say: Your Honor, my 6-month time  
8 frame immediately prior to the filing of the bankruptcy  
9 petition is not representative of my income; I would  
10 like to have that time frame moved. And that time frame  
11 would appear to be moveable up to the confirmation  
12 hearing.

13           JUSTICE GINSBURG: Moveable to where? What  
14 -- what would be -- you say -- this time period, the  
15 statutory -- the 6-month lookback, she has these 2  
16 extraordinary months. So now she's going to say:  
17 Court, please change the period. Change it to what?  
18 Anything she wants?

19           MR. HAMILTON: No, Your Honor. That would  
20 be up to the court. It would be discretionary with the  
21 court, as the language suggests in the second part of  
22 101(10A).

23           JUSTICE ALITO: But isn't it the case that  
24 before the 2005 amendments, bankruptcy courts were  
25 recognized as having discretion in calculating projected

1 disposable income to take into account changes in the  
2 debtor's income after the filing of the plan, and  
3 shouldn't we presume that -- that Congress intended to  
4 continue essentially the same regime, unless Congress  
5 provided some clear indication that they wanted to  
6 depart from it?

7 MR. HAMILTON: Certainly prior to the 2005  
8 amendments, your assessment is correct. The court had  
9 the discretion to be able to assess the debtor's  
10 situation, use its discretion to determine what income  
11 and expenses should be calculated in determining whether  
12 or not a debtor was paying his or her best efforts under  
13 1325(b)(1).

14 Here, there is a clear formula. And if you  
15 read these -- there are three, three key statutes that  
16 form a triangle in order to give me the conclusion that  
17 I make and that I suggest to Your Honor. And that is,  
18 we start with 1325(b)(1), which is the statute that  
19 brings into play the disposable income and projected  
20 disposable income requirements. "Disposable income" is  
21 now defined as "current monthly income."

22 JUSTICE ALITO: It is odd that Congress  
23 provided this very detailed formula and -- and that they  
24 would provide such a detailed formula and then say: But  
25 the bankruptcy court can modify that based on a

1 projection.

2 But still we have the word "projection" --  
3 "projected." And your interpretation leads to very  
4 strange, really absurd results; isn't that true? And  
5 you have to devise some really elaborate escape  
6 strategies in order to allow a debtor to avoid those  
7 very strange results.

8 MR. HAMILTON: Respectfully, Justice Alito,  
9 I don't any agree with the assessment that -- of what  
10 you just stated. Essentially, this formula allows the  
11 bankruptcy court to move that 6-month period of time,  
12 not to ignore the formula. The formula's there.

13 The formula defines "current monthly  
14 income." From the current monthly income then is  
15 subtracted reasonable and necessary expenses. And  
16 formerly, under the old law, the '78 code, those  
17 reasonable and necessary expenses contained a few  
18 specifics, but largely it was up to the court to  
19 determine them.

20 JUSTICE ALITO: But you say that that can be  
21 done only if the debtor fails to file a form that the  
22 debtor is required to file; isn't that right?

23 MR. HAMILTON: In -- under 101(10A), the  
24 second part, yes. But I think there are -- there are  
25 some other -- other avenues for the debtor that are



1 statutory.

2 JUSTICE ALITO: What do you do with the  
3 situation in which the change that is projected to occur  
4 and in fact may be almost certain to occur is one that  
5 causes an increase in the debtor's income? Let's say  
6 the debtor was unemployed through almost all of the  
7 lookback period and then just before the filing of the  
8 plan gets a job with a good salary. You would say that  
9 the -- if you just look at the lookback period, the  
10 debtor would be required to pay practically nothing.

11 MR. HAMILTON: No, Your Honor, I would not  
12 agree with that.

13 JUSTICE ALITO: What is a creditor to do in  
14 that situation?

15 MR. HAMILTON: Well, there -- there are a  
16 couple of avenues. There is a new statutory provision  
17 under 1325(a)(7) that says the plan must be filed in  
18 good faith and -- I'm sorry, the petition must be filed  
19 in good faith. 1325(a)(3) provides that the petition  
20 must be filed in good faith. So we still have the good  
21 faith analysis that the debtor's actions may be  
22 subjected to even after the plan is filed. And that  
23 would be as trustee the avenue that I would approach is  
24 that, even though the schedule formula may have been  
25 complied with, that if there had been a drastic increase

1 in income post-petition, then that -- that should need  
2 to be accounted for.

3 JUSTICE SOTOMAYOR: Counsel, why -- what  
4 commends going through all these machinations, all of  
5 these alternative ways of avoiding absurd results?  
6 Isn't the answer simply that we just narrow the  
7 circumstances in which a court can deviate from the  
8 statutory formula?

9 I mean, it's not -- even before this change,  
10 it wasn't that the district courts could at whim change  
11 the projected income. They have to have a clear ground  
12 to do so. Why is that inadequate to protect the  
13 interests that Congress had in creating this new formula  
14 for income and expenses?

15 MR. HAMILTON: My answer, Justice Sotomayor,  
16 is that Congress provided the formula, and it's not up  
17 to the courts, I suggest, to modify that formula. Part  
18 of the --

19 JUSTICE SOTOMAYOR: There was a formula  
20 before. It was somewhat ambiguous, and that's what led  
21 to the more defined terms for income and expense. But  
22 that says nothing about changing the court's power to  
23 act in a situation where the formula's clearly not going  
24 to work. That was the standard before.

25 MR. HAMILTON: Two points, Justice

1 Sotomayor. One is that there was no formula before.  
2 There was some general guidance that was given in the  
3 statute. It's much like the proposition of good faith.  
4 Good faith is almost incapable of definition, yet every  
5 circuit in the United States has a laundry list of  
6 factors that are taken into account for good faith.

7 Here, reasonable and necessary expenses  
8 under the old law had a few suggestions as to what  
9 needed to be involved with them. Now we have a portion  
10 of another part of the triangle, which is under 707(b).

11 JUSTICE KENNEDY: But in a sense that cuts  
12 against you. As I was -- when I was reading your  
13 opening brief, it seemed to me the tone was, well, if  
14 you accept the Respondent's position Congress did  
15 nothing at all. Well, they did do something very  
16 important. They had a formula for disposable income.  
17 The question is, does that formula apply to projected?  
18 Can that formula be modified altered or projected for  
19 projected? So it's not as if Congress did nothing or  
20 it's not as if the amendment accomplishes nothing even  
21 under the Respondent's view. It accomplished something  
22 very important.

23 MR. HAMILTON: My answer, Justice Kennedy,  
24 is that the definition of the word, quote, "projected,"  
25 end of quote, has -- there's never has been one in the

1 code. That was a term that was in the 1978 code and is  
2 carried over into the present code.

3 How it was applied is vastly different. The  
4 dispute under the prior law was over whether or not the  
5 court could take into account changes in circumstances  
6 which were likely to occur post-confirmation. And so we  
7 had cases like the Anderson v. Satterlee case out of the  
8 Ninth Circuit and the Midkiff case out of the Tenth  
9 Circuit that disagreed as to how that ought to be  
10 applied.

11 In the Anderson v. Satterlee case the  
12 Chapter 13 trustee requested that the debtor sign  
13 essentially a pledge that they would devote their excess  
14 income to the plan, and the Anderson court said: Wait a  
15 minute; there is another statute at issue here and that  
16 is 1329. 1329 allows for the modification of the plan  
17 after the plan has been confirmed. Prior to the  
18 confirmation of the plan, the debtor still has the  
19 ability -- and this ties in with some of the comments  
20 made by Justice Alito -- the debtor still has the  
21 ability to amend the plan under 1323.

22 So all of these statutes need to be read  
23 together to show what the result is. Now the question  
24 is not whether or not changes should be taken into  
25 account for post-confirmation that may be likely to

1 occur, but whether or not the court may deviate from the  
2 statute where Congress has said this is how we want you  
3 to determine current monthly income, therefore  
4 disposable income and consequently projected disposable  
5 income.

6 JUSTICE GINSBURG: But you already told us  
7 that there could be a deviation through this  
8 101(10A)(ii). And why, if that was all that needed to  
9 be done, did the trustee recommend, did the trustee say,  
10 bankruptcy judge, let's move the period, let's use this  
11 provision and we will get another period that doesn't  
12 have those 2 months with the extraordinary income?

13 MR. HAMILTON: No, Justice Ginsburg, and the  
14 reason is, is that that privilege is accorded only to  
15 the debtor to move that 6-month period. Neither the  
16 unsecured creditors nor the trustee have the ability to  
17 request that that 6-month period be moved.

18 JUSTICE GINSBURG: Well, it could have been  
19 suggested to the debtor: You can accomplish what you  
20 want by using this provision.

21 MR. HAMILTON: The record is silent as to  
22 whether or not that occurred.

23 JUSTICE KENNEDY: What -- where can you move  
24 it? I don't really -- this is the same line of inquiry  
25 as Justice Ginsburg. What's the -- what has to be the

1 ending date if you move the -- you can't move it any --  
2 much beyond the date of what, the hearing?

3 MR. HAMILTON: It would be up to  
4 confirmation, but the confirmation hearing could be  
5 continued as the court saw fit.

6 CHIEF JUSTICE ROBERTS: The review of the  
7 determination or the request to move the period is -- is  
8 what? Up to the total discretion of the -- of the  
9 judge?

10 MR. HAMILTON: It appears to be so under the  
11 statute, Chief Justice Roberts.

12 CHIEF JUSTICE ROBERTS: So your objection to  
13 the fact that the judge has more discretion with respect  
14 to defining "projected disposable" -- you don't mind the  
15 discretion on the other side.

16 MR. HAMILTON: No, Your Honor, I don't  
17 believe the discretion is not in determining the income,  
18 only in determining the time period.

19 CHIEF JUSTICE ROBERTS: Right, but the only  
20 purpose of moving the time period is to change the  
21 income.

22 MR. HAMILTON: That's true. And there are  
23 other options that the debtor had available in addition  
24 to that, that we have referred to as the four options,  
25 which would be the debtor could have here just delayed

1 filing the case for a couple of months and these  
2 problems would not have occurred.

3 JUSTICE SCALIA: There is another discretion  
4 that you don't seem to object to. You say that one --  
5 one way the debtor can get out of the bind that he's put  
6 in by the fixing of the confirmed plan is simply to move  
7 for a revision of the confirmed plan.

8 MR. HAMILTON: Absolutely, Justice Scalia.

9 JUSTICE SCALIA: What constrains the judge  
10 in allowing or not allowing the revision? Doesn't he  
11 have the same kind of discretion with regard to the  
12 revision that you're objecting to with regard to his  
13 establishing the payments?

14 MR. HAMILTON: Justice Scalia, I don't think  
15 so. 1329 has been subject to quite a bit of litigation,  
16 but the argument that we make in our reply brief is that  
17 it would be simply necessary to plug in and plug out  
18 whatever the change in circumstance is.

19 So the debtor would be able to say, my  
20 wife's income is now gone, so we want to take that out  
21 of the formula.

22 JUSTICE SCALIA: But that's the same thing  
23 that's being argued here, that -- that you start with  
24 the fixed calculation based on the 6 months before and  
25 then you have to show that there were some extraordinary

1 circumstances that justify a change. I don't see that  
2 there's any difference.

3 MR. HAMILTON: There may not be, except that  
4 there is a statutory requirement as to how that is  
5 accomplished and that's where the 101(10A)(ii) comes  
6 into play. It's not so much that there is a problem  
7 with --

8 JUSTICE SCALIA: What your case comes down  
9 to is the bankruptcy court can do this, but it has to do  
10 it by simply revising the plan, not by establishing the  
11 plan initially but by revising it.

12 MR. HAMILTON: Not necessarily, Your Honor.  
13 That certainly is one way.

14 JUSTICE SCALIA: Maybe?

15 MR. HAMILTON: It may be, yes. It depends  
16 on the facts of the case.

17 CHIEF JUSTICE ROBERTS: Well, that's a good  
18 answer, isn't it, because your point would be the  
19 statute does not allow that exercise of discretion with  
20 respect to projected disposable income, but it does in  
21 the other areas.

22 MR. HAMILTON: Well, again I respectfully  
23 disagree, Chief Justice Roberts. 1329 --

24 JUSTICE SCALIA: That was a friendly  
25 question.



1 MR. HAMILTON: I'm sorry? I'm sorry, I  
2 didn't hear.

3 CHIEF JUSTICE ROBERTS: No, my -- my point  
4 and what I thought your point would be is that the fact  
5 that there is exercise of discretion in two different  
6 areas is not the problem. The problem is that in one  
7 area the discretion is specifically permitted and in the  
8 other area, projected disposable income, it's not.

9 MR. HAMILTON: I agree.

10 (Laughter. )

11 JUSTICE ALITO: But can the -- can the plan  
12 be modified based on -- can the plan be modified based  
13 on something that was known before the plan was  
14 confirmed?

15 MR. HAMILTON: That depends on which  
16 jurisdiction one would be in, Justice Alito. The most  
17 current example --

18 JUSTICE ALITO: Well, if it can't, then how  
19 is this modification remedy going to work?

20 MR. HAMILTON: I think it should be. For  
21 example, a good example of this would be debtor is  
22 expected 2 years from now to no longer have to repay a  
23 401(k) loan. And so one view would be that you ought to  
24 take that into account as of that date and figure those  
25 calculations, which becomes extremely unwieldy. You are

1 guessing at that point. The debtor may say: Well, I  
2 may be losing that, but I don't know what my actual  
3 circumstances are going to be 2 years from now. Chapter  
4 13 is a fluid process.

5 JUSTICE ALITO: Your argument is that the  
6 Court has to confirm a plan that is really not  
7 confirmable because the debtor can't possibly make the  
8 payments under the plan, but then can turn around  
9 immediately and modify the plan so that it does call for  
10 payments to be made.

11 MR. HAMILTON: No, Your Honor. That is not  
12 my argument.

13 JUSTICE ALITO: Well, I thought that --  
14 explain it, then?

15 MR. HAMILTON: Well, what we are saying is  
16 that this plan cannot be confirmed as it stands because  
17 the debtor would have to be able to make those payments  
18 and the debtor obviously is not capable of making those  
19 payments. But it's because she chose the wrong options.  
20 If she had chosen the --

21 JUSTICE GINSBURG: But let me just stop you  
22 there, because then the answer you gave to the Chief and  
23 to Justice Scalia doesn't fit. Chief -- you can not --  
24 the bankruptcy judge is not going to confirm the plan  
25 was she has to pay over \$1,000 a month, because she

1 could never do that. So you are not going to get that  
2 confirmed plan which could be amended later.

3 MR. HAMILTON: Well, I agreed with that. I  
4 may have misunderstood the question that I was asked.  
5 But what I'm saying is that the statute needs to be  
6 followed and if the debtor had followed the statutes  
7 here then the debtor likely could have obtained a  
8 confirmed plan by moving that 6-month time frame.

9 JUSTICE GINSBURG: Well, what in addition to  
10 -- you brought up the 101 solution that she doesn't do  
11 what the statute tells her to do, so she's able to move  
12 it if the judge agrees. And you said she has other  
13 options.

14 MR. HAMILTON: Yes. Well, the other options  
15 -- and I referred to them as the four options and the  
16 101(10A)(ii) is one of those options. As I said, she  
17 could have delayed filing the case. There is nothing in  
18 the schedules that would indicate that she was filing  
19 this bankruptcy under exigent circumstances. There is  
20 no foreclosure, there is no repossession, there's no  
21 garnishment, there's no lawsuit. So delay would have  
22 been a possible, and a debtor is always able to  
23 determine the date of the filing of the petition.

24 The second thing that she could have done is  
25 file a Chapter 7, and this is the anomaly between

1 Chapter 13 and Chapter 7, is that she would have  
2 qualified in all likelihood for a discharge under  
3 Chapter 7 because she would have met the special  
4 circumstances test in 707(b).

5 JUSTICE GINSBURG: But then the creditors  
6 would have been a lot worse off, would they not have  
7 been?

8 MR. HAMILTON: That's very possible, but  
9 it's a formula that Congress thought to place into  
10 effect and it's not --

11 JUSTICE GINSBURG: Well, why would -- why  
12 would the trustee be urging the possibility that it  
13 would be okay for her to file under Chapter 7, in which  
14 case the unsecured creditors would get very little, but  
15 it's not okay for her to use chapter 13 with a plan that  
16 would give the unsecured creditors substantial payments?

17 MR. HAMILTON: Here, Justice Ginsburg, the  
18 reason is plain and simple, and that was I sought to  
19 enforce the rule of law in order to have the courts  
20 determine how the rules were supposed to be interpreted.  
21 By my view, it seemed like that had she followed the  
22 rules maybe she would have gotten there, but the way she  
23 did it she can't. It's kind of like driving a car. You  
24 can't expect that a the car is going to perform well if  
25 you don't turn the engine on.

1 JUSTICE SCALIA: Can I --

2 MR. HAMILTON: And here she didn't turn the  
3 engine on.

4 JUSTICE SCALIA: Can I come back to  
5 Justice Ginsburg's question about whether there would  
6 ever be the opportunity to adjust the confirmed plan?  
7 Because as you say, the plan here would not have been  
8 confirmed, but that -- that isn't the case always. I  
9 mean, in many cases a plan would be confirmed because  
10 the -- the bankrupt could -- could barely make the  
11 payments that it requires; and then when it -- it is  
12 clear that, because of the extraordinary event in the  
13 preceding 6 months, the bankrupt is -- is not going to  
14 have that -- that amount of money, there would be the  
15 opportunity to adjust.

16 MR. HAMILTON: Maybe not -- I'm sorry.

17 JUSTICE SCALIA: In other words, is your  
18 response to Justice Ginsburg "always," that it will  
19 always be the case that where there would be an  
20 adjustment under this theory, there would not have been  
21 a confirmation in the first place?

22 MR. HAMILTON: If the plan is not  
23 confirmable by an analysis of Schedules I and J, which  
24 are the income and expenses statutes, I am not going to  
25 recommend confirmation, and nor do I think any trustee

1 would. Any events that are in the equation before the  
2 date of confirmation would likely be then subject to  
3 1327, the res judicata provisions of chapter 13. So if  
4 the plan is confirmed, say in Stephanie Lanning's case,  
5 with these facts known, then she would not be able to  
6 come in afterwards and ask for the court to modify under  
7 1329 because that's part of the confirmation order.

8           The other options that were available -- we  
9 discussed briefly the ability to file this as a Chapter  
10 7. She also could have converted this case to a Chapter  
11 7 post-petition with the same result, or she could have  
12 dismissed this case and refiled.

13           JUSTICE GINSBURG: Isn't that -- wouldn't  
14 that amount to just a -- a waste of everybody's time, to  
15 dismiss it and then refile it, and then she gets a time  
16 period that doesn't -- why -- why not just drop out  
17 those 2 months that are not representative of her  
18 income?

19           MR. HAMILTON: Because, Justice Ginsburg,  
20 the statute does not permit that. It's not within the  
21 formula, and that's the question: Is the formula  
22 binding or is it not binding? If it is binding then  
23 this -- obviously. Congress intended a more rule-bound  
24 statute. It got that. It was obvious that it intended  
25 to reduce judicial discretion, and the statute seems to

1 accomplish that.

2 JUSTICE GINSBURG: But the thing is -- but  
3 you have explained, your number one solution for her is  
4 this 101 route, which is -- gives lots of discretion in  
5 the court.

6 MR. HAMILTON: Only in moving the 6-month  
7 period, Justice Ginsburg.

8 JUSTICE GINSBURG: Yes.

9 MR. HAMILTON: That would be the only  
10 discretion that the statute would appear to accord to  
11 the court.

12 CHIEF JUSTICE ROBERTS: Where is that, by  
13 the way, the provision that allows it to move the  
14 6-month period?

15 MR. HAMILTON: It's in 101(10A) and it  
16 provides that the term "current monthly income" means  
17 the average monthly income from all sources that the  
18 debtor receives, or in a joint case the debtor and the  
19 debtor's spouse receive, without regard to whether such  
20 income is taxable income derived during the 6-month  
21 period ending on -- and then we come to subsections (i),  
22 little (i) -- or (ii). And those are -- that's the  
23 disjuncture; it's the 6-month period prior or some other  
24 time frame, and the language is important.

25 JUSTICE ALITO: What do you say about cases

1 in which moving the 6-month period can't solve the  
2 problem? For example, if the debtor had good income for  
3 many years going back, but then slight -- shortly before  
4 the filing of the plan loses his or her job, and there  
5 is no prospect that the debtor is going to get another  
6 job? Or it could be the converse, has very low income  
7 for a long period and then right before gets a job. So  
8 you are not going to be able to cure those problems by  
9 moving the 6-month period. What do you do then?

10 MR. HAMILTON: Well, Justice Alito, I think  
11 I would tie in 1323 with respect to the first  
12 proposition, and that is if the debtor's circumstances  
13 have markedly changed, then the debtor has the ability  
14 to file an amended plan; and that amended plan could ask  
15 the court to move that time frame forward to a  
16 confirmation hearing that would take into account the  
17 drop in income.

18 With respect to the second part of your  
19 proposition, and that is an increase in income, then I  
20 as Chapter 13 trustee would have the ability to object  
21 to it on the basis of -- of good faith under either  
22 1325(a)(3) or 1325(a)(7), either the plan or the filing  
23 of the case itself. And those -- the filing of the  
24 1325(a)(3) was the primary way in which all of these  
25 disputes were resolved before the 1984 amendments which



1 brought in subsection (b) to 1325 which introduced the  
2 concept of disposable income.

3 JUSTICE SOTOMAYOR: How do you file an  
4 amended plan and have the court restart the clock, when  
5 101(10A) says only if the debtor has not filed a  
6 schedule of current income? If there's been a plan  
7 confirmed or a plan proposed, then the income schedule  
8 had to have been filed.

9 MR. HAMILTON: Those are --

10 JUSTICE SOTOMAYOR: You don't do one without  
11 the other.

12 MR. HAMILTON: Those are two different  
13 propositions, Your Honor. One is if the plan is  
14 confirmed and one if it is not confirmed. If it is not  
15 confirmed, then you are correct; at some point the  
16 trustee and the court are going to want to see a  
17 Schedule I and J to see what the actual income and  
18 expenses are. If the plan has already been confirmed,  
19 then the ability to change the plan has to be done under  
20 1329, which is --

21 JUSTICE SOTOMAYOR: Forget about 1329. I'm  
22 going to the situation where the plan has been proposed,  
23 let's say. The courts -- if a schedule of income has  
24 been filed, then it's without any jurisdiction to change  
25 the 6-month lookback period, correct?

1 MR. HAMILTON: I don't agree with the word  
2 "jurisdiction," Justice Sotomayor.

3 JUSTICE SOTOMAYOR: Well, it can't under  
4 101(10A).

5 MR. HAMILTON: The debtor would certainly  
6 have the ability to ask the court to be excused from  
7 that requirement given a change in circumstances. But  
8 again it would be the formula that would be honored,  
9 rather than the court substituting judicial discretion.

10 If there --

11 JUSTICE SCALIA: Can I ask -- yes, there is  
12 one more question.

13 MR. HAMILTON: Okay.

14 JUSTICE SCALIA: Can I ask whether 1323,  
15 which you have now invoked, does not provide the same  
16 kind of discretion to the court that you are objecting  
17 to?

18 What -- what standards are there for  
19 granting or not granting modification of the plan? Is  
20 it pretty much up to the judge?

21 MR. HAMILTON: No. I believe again the  
22 court is bound, Justice Scalia, by the 101(10A) formula.  
23 It's obvious that Congress intended the formula. It  
24 would not make much sense to read the statute to have  
25 some other formula.

1 JUSTICE SCALIA: Well, then -- then -- okay.  
2 You are between a rock and a hard place. Either 1323  
3 gets you out of that formula, which is what you've said,  
4 it's one way out, or it isn't. Which is it?

5 MR. HAMILTON: I haven't said that it gets  
6 me out of the formula. It gets me out of the time frame  
7 issue, because certainly the statute doesn't take into  
8 specific account what happens if the debtor loses a job,  
9 say, post-petition? Obviously -- example, husband loses  
10 the job at Goodyear after the bankruptcy petition is  
11 filed. And I think 1323 is broad enough to allow an  
12 amendment which would involve only moving the time  
13 frame.

14 JUSTICE SCALIA: Okay. So any -- any  
15 amendment has to relate to a period --

16 MR. HAMILTON: I believe so, Justice Scalia.

17 JUSTICE SCALIA: -- subsequent to the  
18 filing.

19 MR. HAMILTON: If there are no other  
20 questions I would like to reserve the remainder of my  
21 time, Chief Justice Roberts.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Goldstein.

24 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

25 ON BEHALF OF THE RESPONDENT

1 MR. GOLDSTEIN: Mr. Chief Justice, and may  
2 it please the Court:

3 The Court, I think, has the parties'  
4 arguments very well in hand. I think the -- the one  
5 point that I can hopefully address, and it is I think  
6 the hardest part of our case, is to address the issue  
7 that Justice Alito raised, and that is, is there an  
8 anomaly in the fact that in BAPCPA Congress added the  
9 6-month period, which would suggest perhaps that  
10 Congress was trying to lock in a particular period that  
11 we would look at.

12 And the answer to that question is no, and I  
13 want to take you to the relevant statutory provisions.  
14 Everything is going to be in the cert petition. I am  
15 going to start in the petition appendix at 91, which is  
16 1325, which is the operative provision here. And  
17 1325(b)(1) tells us that if the trustee or a creditor  
18 objects, then as of the effective date of the plan it's  
19 only going to be confirmed in subsection (b), which is  
20 the third full paragraph on page 91 is going to control.

21 The plan has to provide that all of the  
22 debtor's projected disposable income to be received in  
23 the applicable commitment period beginning on the date  
24 the first payment is due under the plan will be applied  
25 to make payments to unsecured creditors under the plan.

1                   And the thing to note first about that  
2 provision is that it, too, sets a timetable. It's not  
3 just projected disposable income, but it's projected  
4 disposable income of a very particular type, to be  
5 received in the applicable commitment period. So unless  
6 there is something particularly strange about the  
7 definition of "disposable income," Congress specified a  
8 period that the income is going to be measured in, and  
9 that's over the course of the plan; the word "projected"  
10 tells us to get a realistic estimation of what that  
11 amount of money's going to be.

12                   Now, my friend makes the point that  
13 disposable income after BAPCPA is a defined term; the  
14 definition comes in the next paragraph; it's subsection  
15 (2), 1325(b)(2). For purposes of this subsection the  
16 term "disposable income" means current monthly income  
17 received by the debtor subject to some deductions and  
18 then the expenses. So then we have to go to the  
19 definition of "current monthly income." Current monthly  
20 income is in 101; it's at page 83.

21                   That's where we get the 6-month period. And  
22 it tells us that current monthly income is the average  
23 monthly income from all sources, so it's very  
24 encompassing, without regard to whether such income is  
25 taxable income derived during the 6-month period.

1           So, my friend's argument is that, well,  
2 Congress said 6 months. The answer to that point is a  
3 couple fold. First, as was suggested in the first  
4 half-hour, Congress was addressing a very specific  
5 problem there. Before BAPCPA courts didn't know what  
6 the -- didn't agree on what the baseline was for  
7 determining someone's income.

8           Some courts would say, all right, you are a  
9 Chapter 13 debtor, right away I'm going to look at the  
10 latest month. Some courts said 6 months. We have a  
11 court in our brief that said 4 years. So, we have to  
12 have a starting point to project from.

13           But the second point is that this term  
14 "current monthly income" isn't principally a Chapter 13  
15 term at all. So, my friend's argument is that Congress  
16 stuck this 6-month period into Chapter 13, so it would  
17 be very anomalous if we could just -- in effect, he says  
18 we are throwing it out, we are giving the district  
19 judges discretion. It's not quite right.

20           The place to look is in section 707, which  
21 is two pages later. 707 is a Chapter 7 provision. And  
22 my friend started out by saying the problem with our  
23 position is that we were not following the Chapter 7  
24 means test. That's the key. This term is really a --  
25 borrowed from Chapter 7. So 707(b)(2)(A)(i) is at the

1 beginning of page 85 of the appendix.

2 And, so, we are in a Chapter 7 case here.

3 And this is the means test. It tells us that: "In  
4 considering under paragraph 1," so we are trying to  
5 figure out if there is a presumption of abuse under  
6 Chapter 7 -- "whether the granting of relief would be an  
7 abuse of the provisions of this chapter, the court shall  
8 presume abuse exists if the debtor's current monthly  
9 income, reduced by the amounts determined under clauses  
10 2, 3, and 4" -- those are expense clauses -- "and  
11 multiplied by 60 is not less than" a certain amount.

12 So what happened is Congress in BAPCPA  
13 created this presumption of abuse in Chapter 7 and it  
14 then borrowed that concept, as my friend pointed out, in  
15 Chapter 13. So that 6-month period has real force and  
16 effect in the Bankruptcy Code in Chapter 7. So it's not  
17 like Congress in Chapter 13 fixed the 6-month period,  
18 which would give -- have a sort of a gravitational pull.  
19 You wouldn't want to throw that out too lightly.

20 Justice Sotomayor, I do agree that we ought  
21 to be pretty -- we ought to stick to it. It indicates  
22 Congress is concerned with the 6-month period. But it's  
23 not like Congress added to Chapter 13 this 6-month  
24 concept. It added it to Chapter 7, where it's in full  
25 force and effect.

1                   Can I make one other point about that  
2 language, just to repeat it again? That the courts  
3 are --

4                   JUSTICE SCALIA: You -- you -- you have lost  
5 me.

6                   MR. GOLDSTEIN: Okay.

7                   JUSTICE SCALIA: Where is the 6-month --

8                   MR. GOLDSTEIN: Sure. It's back. We have  
9 to go back two pages.

10                  JUSTICE SCALIA: No, I got -- I got it  
11 there.

12                  MR. GOLDSTEIN: Okay. Sure. I'm sorry.  
13 The term is "current monthly income." So we are in  
14 Chapter 7, so four lines down". "The court shall  
15 presume abuse exists if the debtor's current monthly  
16 income" -- that's the 6 months, current monthly income.  
17 That's the 6-month period of income.

18                  JUSTICE SCALIA: I -- I -- I see. I see.

19                  MR. GOLDSTEIN: See, that's mostly where it  
20 matters. Then Congress borrowed it in Chapter 13. But  
21 it didn't get rid of, as was pointed out before, the  
22 term -- "projected"; it didn't get rid of the period,  
23 the commitment period.

24                  But I do want to point out something very  
25 particular about this language. Here's the phrase:



1 "Current monthly income, reduced by the amounts  
2 determined under clauses 2, 3, and 4" -- those are  
3 expenses -- "and multiplied by 60." That's what my  
4 friend says the phrase "projected disposable income to  
5 be received over the applicable commitment period" is.

6 Our point is that if Congress intended that  
7 mechanical formulation, it would have used the exact  
8 words that I have just read from you in Chapter 7,  
9 because that's mechanical.

10 JUSTICE KENNEDY: Without the word  
11 "projected"?

12 MR. GOLDSTEIN: I'm sorry?

13 JUSTICE KENNEDY: Without the word  
14 "projected"?

15 MR. GOLDSTEIN: That's exactly. They used  
16 "multiplied." And Congress did that several times in  
17 BAPCPA and before BAPCPA. When Congress wanted, look,  
18 we are going to have a mathematical formula, it used a  
19 mathematical formula.

20 CHIEF JUSTICE ROBERTS: Why don't you follow  
21 his suggestion and just move the 6-month period, because  
22 the statute specifically grants that authority to the  
23 judge?

24 MR. GOLDSTEIN: Sure. Let me make a few  
25 points about that, sir. So I'll again read the language

1 again. So we are on 83. It says that -- little (ii) is  
2 going to be -- it's going to be "6 months ending on the  
3 date on which current income is determined by the court  
4 for purposes of this title if the debtor does not file  
5 the schedule of current income."

6 A couple OF points about that.  
7 Justice Alito, you were right, this is a one-way pro-  
8 debtor ratchet, right. The creditor and the trustee, if  
9 the debtor a month before confirmation gets a new job or  
10 their expenses go down -- let's say you had a car, but  
11 you know that the car payments are going to be done.  
12 Under the trustee's view, then you still get to count  
13 the car payments which are totally pretend, or if you  
14 got a much higher paying job.

15 In fact, in this case she did get a higher  
16 paying job. Towards the end of the period, she got a  
17 raise. And we say that has to be counted, too. We have  
18 to have a debtor and creditor-neutral provision. In a  
19 statute that's designed to make sure the debtor pays a  
20 much as possible to her creditors, it's very strange to  
21 put this entirely in the debtor's hands.

22 JUSTICE ALITO: Can I ask you this. There  
23 seems to be at least a subtle difference between your  
24 position and the government's position. You say that  
25 the projected disposable income will be different from

1 the disposable income calculated during the lookback  
2 period when it is known or virtually certain that there  
3 will be differences in income or expenses. And the  
4 government says that there is a difference when  
5 something is likely to occur in the future.

6 Where do you -- where do you get from the  
7 statute your known or virtually certain differences?

8 MR. GOLDSTEIN: The contrast between 1325  
9 and 1329. What I tried to do in my brief, and I have  
10 laid it out at the beginning of the argument section.  
11 That's where we try to articulate our rule. What we  
12 have done is we have looked at the cases. As you  
13 pointed out, this is pre-BAPCPA practice. Courts have  
14 set a pretty high bar, both in terms of the level of  
15 certainty and the degree of deviation.

16 And courts have said -- I will give you an  
17 example that will illustrate the difference perhaps.  
18 You have times when someone expects to get a raise.  
19 They don't know that they are going to get it, or they  
20 expect to get a promotion. And courts will say, even if  
21 that's pretty likely, until you have actually got it we  
22 are not going to count it for purposes of 1325(b); come  
23 back under 1329.

24 And we point out in our merits brief that in  
25 fact, it's not quite on point, but she got a settlement

1 post-confirmation here, and under 1329 that money was  
2 applied.

3           So, Justice Scalia, there are  
4 post-confirmation events, but if you know ahead of  
5 time -- and this case is a perfect example, it -- we  
6 know she is not going to get another buyout from Payless  
7 Shoe Stores. When it's known or virtually certain, we  
8 think that is sufficient -- akin to Justice Sotomayor's  
9 point about, you know, making it hard.

10           Let me make one other point. I wanted to  
11 finish off my answer to the Chief Justice about 101.  
12 This provision has taken on greater significance in the  
13 oral argument and the reply brief of the Petitioner. I  
14 did want to point out to the Court a provision that is  
15 not reproduced in the parties' briefs, but if the Court  
16 were to go this route it would want to be aware of, and  
17 that's 521(i).

18           And 521(i) tells us that you do have to file  
19 the forms at the beginning or you have to file them  
20 within 45 days, but upon request of the debtor made  
21 within 45 days after the date of filing the petition,  
22 the court may allow the debtor an additional period of  
23 not to exceed 45 days. So it does seem to constrain the  
24 power of the bankruptcy court to shift this period all  
25 around.

1                   So, I have made two points. One is it's a  
2 one-way ratchet for the debtor; second, it's not  
3 unlimited.

4                   The third is it just doesn't make any sense.  
5 Why would Congress design a system that would have all  
6 of these machinations. If we agree that Congress  
7 wants -- it seems my friend and I agree that Congress  
8 believes that she shouldn't have to make the payments  
9 that would be required under the trustee's reading of  
10 "projected disposable income." The question is how we  
11 get there. The trustee's answer is that you are  
12 required by the text; I'm sorry, Congress took this  
13 option away.

14                   And I think that, as I have explained, the  
15 term "projected disposable income to be received in the  
16 applicable commitment period" really is not language  
17 that you would ordinarily construe to ignore changes  
18 that --

19                   CHIEF JUSTICE ROBERTS: Well, I think -- I  
20 think that's exactly right when you look at term  
21 "projected disposable income."

22                   MR. GOLDSTEIN: Yes.

23                   CHIEF JUSTICE ROBERTS: But if you look as  
24 "disposable income" --

25                   MR. GOLDSTEIN: Yes.

1 CHIEF JUSTICE ROBERTS: -- as a defined term  
2 and then add "projected," I think it's a different --  
3 different -- different argument, different kettle of  
4 fish. I mean, because particularly in a statute  
5 intended to restrict discretion, it's a way to do it.  
6 You look at it in the abstract, "projected disposable  
7 income," it doesn't achieve that objective.

8 MR. GOLDSTEIN: And that is exactly,  
9 Mr. Chief Justice, why I started with the definition of  
10 "current monthly income in the 6-month period." I agree  
11 that it is an important point. It is their strongest  
12 argument.

13 My only point is that I have explained, I  
14 think, why Congress put the 6-month period in for  
15 purposes of Chapter 7 and also to have the starting  
16 point. If I -- to give you an example, take inflation.  
17 If we were to define inflation as the amount in the rise  
18 in prices over the previous 6 months, if Congress did  
19 that in a statute and then told us to look at projected  
20 inflation, we would still not ignore things that will  
21 tell us that there are going to be -- there has been an  
22 oil price spike or an increase in health care costs. It  
23 would take a pretty firm, firm period that told us to  
24 only look into the past and not look into the future,  
25 particularly when the whole point of the statute is to

1 make sure that the money goes into the creditor's hands  
2 that the debtor is able to pay.

3 On the point of discretion, I should also  
4 say BAPCPA as a whole was intended to reduce discretion.  
5 And, so, it's kind of odd to say that the answer to our  
6 position is to turn to all of these other discretionary  
7 provisions --

8 CHIEF JUSTICE ROBERTS: What if you -- you  
9 wanted to achieve your friend's result and you had a  
10 definition of disposable income, and you wanted the  
11 court to -- you don't want to say project that forward,  
12 what -- what word would be more natural than saying  
13 projected?

14 MR. GOLDSTEIN: I -- I -- I would use the  
15 language that Congress did in 707. Remember, the  
16 current monthly income reduced by the amounts determined  
17 under clauses 2, 3, and 4 and multiplied by 60.

18 CHIEF JUSTICE ROBERTS: No, that's altering  
19 disposable income -- the definition of disposable  
20 income. I'm asking isn't the most natural word to  
21 achieve your friend's result to use projected. What  
22 other word would you say when you say this is the period  
23 you look at and you want to take it forward?

24 MR. GOLDSTEIN: Multiply. And Congress did  
25 that a bunch of times. Projected -- if we try to

1 project something, we try and make the -- and everybody  
2 agrees on the definition, so really, it's not an unusual  
3 term. It is: You make your best estimate of the future  
4 based on the data you have now. My friend is right.  
5 One piece of data we have now is her previous 6 months'  
6 income. Another piece of data is we know that she's not  
7 going to have the same income in the future.

8 If there are no further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
10 Ms. Harrington.

11 ORAL ARGUMENT OF SARAH HARRINGTON

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
13 SUPPORTING RESPONDENT

14 MS. HARRINGTON: Mr. Chief Justice, and may  
15 it please the Court:

16 In bankruptcy, as in many areas of the law,  
17 Congress has tried to balance on the one hand, doing  
18 case-specific justice, and on the other hand, ensuring  
19 that the statutory scheme is administrable. Now,  
20 Congress certainly could have chosen to elevate  
21 simplicity over accuracy by telling bankruptcy courts to  
22 take a debtor's current disposable income and multiply  
23 that number by the number of months in the plan in  
24 assessing whether the plan is confirmable. But there  
25 are several strong signals in the code that that is



1 actually not what Congress intended courts to do.

2 JUSTICE ALITO: But do you think bankruptcy  
3 courts are supposed to be economic forecasters? For  
4 example, if you -- after calculating the debtor's income  
5 during the 6-month period, the 6-month lookback period,  
6 should the bankruptcy court said, well -- say: Well,  
7 it's -- inflation is projected to be such-and-such over  
8 the term of this plan, so I am just going to increase it  
9 by the amount of inflation; or: This person works in a  
10 particular industry where historically, over the last  
11 five years or ten years, there's been a 3 percent  
12 increase in salary per year, so I'm going to multiply it  
13 by -- multiply the disposable income figure like that?

14 MS. HARRINGTON: Certainly not,  
15 Justice Alito. Bankruptcy --

16 JUSTICE ALITO: Well, why not? You say that  
17 the bankruptcy courts should take into account things  
18 that are likely to occur in the future.

19 MS. HARRINGTON: Well, bankruptcy courts --  
20 we are not saying that bankruptcy courts should ever  
21 speculate about what might happen in the future. What  
22 we are saying is that bankruptcy courts should take into  
23 account what they know, in this case, already has  
24 happened, but also what they know will happen. And so  
25 to give an example of a change that would benefit

1 creditors, if as -- as I mentioned earlier, if a debtor  
2 has secured a higher-paying job just before or just  
3 after she filed her petition, a Court should be able to  
4 take into account the fact that her income going forward  
5 would be greater than would be reflected in the  
6 calculation of her current disposable income.

7 JUSTICE SCALIA: Well, "know will happen" is  
8 quite different from "likely to happen," and I thought  
9 your test was likely to happen.

10 MS. HARRINGTON: Well, likely to happen  
11 based on what you know now. I think -- we haven't  
12 suggested a particular burden of proof. I think --

13 JUSTICE SCALIA: Not -- not likely, based on  
14 what you know. Well, that's quite different from you  
15 know it will happen.

16 MS. HARRINGTON: Right. So there is an  
17 example mentioned earlier: If the debtor is repaying a  
18 loan to her 401(k) program, that is the type of loan  
19 that can't be extended time-wise. And so she will keep  
20 making those payments, which will be deducted as an  
21 expense in the calculation of her current disposable  
22 income, but -- but you know at a certain point, she is  
23 likely to stop making those payments.

24 JUSTICE SCALIA: Is there a difference  
25 between your test and the Respondent's test?

1 MS. HARRINGTON: Not according to what I  
2 heard Mr. Goldstein say at the argument. Again, we do  
3 not mean to suggest that a court should use --

4 JUSTICE SOTOMAYOR: His words were "known to  
5 a virtual certainty," which are -- likely to happen is  
6 different than likely to happen.

7 MS. HARRINGTON: I think, in part, it  
8 depends on what type of change you are talking about.  
9 Again, we would never say that a court should speculate  
10 about what should happen. But, for instance, to take  
11 another example on the expense side, if a debtor when  
12 she proposes her plan owns a second home, a vacation  
13 home that is secured by a mortgage, then that secured  
14 debt payment is an expense that would be deducted from  
15 her income in the calculation of her current disposable  
16 income. But if she proposes to surrender that property  
17 as a condition of her plan, she will no longer have that  
18 debt payment going forward. And so that's the type  
19 of -- so it will no longer be an expense going forward.  
20 Under Petitioner's view, a court would not be able to  
21 take into account the fact that that current expense --

22 JUSTICE SCALIA: That's -- that's "know will  
23 happen." That is "know will happen." But I don't know  
24 how you can, at one and the same time, say: Courts  
25 shall not speculate, and then say that the test is

1 "likely to happen."

2 MS. HARRINGTON: Well, again, in this --

3 JUSTICE SCALIA: I mean, to -- you know, to

4 look forward and say: Is it likely or not likely?

5 That's speculation. I don't know a better definition of

6 speculation, to tell you the truth.

7 MS. HARRINGTON: Okay. But then, we

8 wouldn't -- we are not trying to advance that view of

9 "likely." And again, in this case the change had

10 already occurred, so there is no uncertainty about what

11 her situation is now and what we can project it to be

12 going forward.

13 CHIEF JUSTICE ROBERTS: It seems to me that,

14 particularly since you are adopting a fairly broad --

15 well, depending on how broad a theory you are adopting

16 of what's projected and what's not, that you are taking

17 into account a lot of things that are more properly

18 taken into account when it comes to whether the plan

19 should be confirmed or not.

20 MS. HARRINGTON: Well, this is --

21 CHIEF JUSTICE ROBERTS: What's going to

22 happen? What's the situation going to be? What should,

23 you know, the creditors get? What should the debtor

24 get? There is no reason to kind of shoehorn those into

25 the projected disposable income.

1 MS. HARRINGTON: Well, except that if the  
2 creditor or a trustee objects, then the calculation of  
3 projected disposable income is one of the conditions of  
4 confirmability of the plan. The court can't confirm it  
5 unless it can --

6 CHIEF JUSTICE ROBERTS: Well, is that -- I  
7 mean, let's say your friend wins up to the point and  
8 somebody else, when it gets to confirmation, can say:  
9 Well, look, you know, there was this big payout before  
10 the filing. So don't confirm it. We know she has got  
11 all this -- all this other money. That -- it could do  
12 it that way, couldn't it?

13 MS. HARRINGTON: I'm sorry, if she got a  
14 higher-paying job just before? Is that what you're  
15 suggesting?

16 CHIEF JUSTICE ROBERTS: Well, whatever the  
17 situation is, can't that be taken into account when it  
18 comes to confirmation?

19 MS. HARRINGTON: Well, it could affect the  
20 -- well, one thing that is important to note that hasn't  
21 been brought up is under Section 1325(a)(6), the court  
22 is actually -- which is the feasibility provision -- the  
23 Court is actually required to think about what is going  
24 to happen in the future, whether a debtor is going to be  
25 able to repay her creditors. And so it doesn't make

1 very much sense to, on the one hand, require a court to  
2 consider what it knows will happen in the future in  
3 determining feasibility, and then on the other hand, if  
4 there's an objection by the creditor or the trustee and  
5 1325(b) comes into play, to prohibit a court from  
6 considering the same facts it knows about what is going  
7 to happen in the future --

8 JUSTICE ALITO: What if the debtor is a  
9 waiter and during the last month of the 6-month period,  
10 because of some change of the economy the waiter's tips  
11 have gone up either way up or way down? What's the  
12 court supposed to do then?

13 MS. HARRINGTON: Well, I think one purpose  
14 of having the 6-month lookback period in the calculation  
15 of current income is exactly to take into account those  
16 situations. There are many people who are gainfully  
17 employed full time, but whose -- whose income fluctuates  
18 over time. And so requiring that courts use the 6-month  
19 lookback period, I think, gives creditors a better sense  
20 of whether the current income figure provided by the  
21 debtor is accurate. It reduces the chance for strategic  
22 filing because it sort of takes some of the significance  
23 away of the time of filing.

24 And so it seems fairer in that case to  
25 consider that 6-month average in a case where income

1 fluctuates up and down as an accurate sense of what the  
2 -- what the debtor's current income is. And again, in  
3 many -- in a significant number of cases the calculation  
4 of a current disposable income will be a good prediction  
5 of what the debtor's disposable income will be going  
6 forward.

7 JUSTICE GINSBURG: How do you deal with the  
8 Petitioner's -- the two arguments Petitioner makes? One  
9 is that on the expense side, Congress provided for  
10 special circumstances, exceptions, and it didn't on the  
11 income side?

12 MS. HARRINGTON: Well, the special  
13 circumstances exception comes in, in the calculation of  
14 the debtor's current disposable income, but it doesn't  
15 tell you what to do in terms of projecting that  
16 disposable income. And so you can adjust what you think  
17 the current disposable income is based on an expense  
18 that isn't accounted for in the standard expenses or an  
19 expense that is accounted for, but is higher than is  
20 accounted for in those expenses. But again, it doesn't  
21 tell you what to do -- how to project that number going  
22 forward.

23 JUSTICE GINSBURG: What about the argument  
24 that this is a simple thing; she didn't have to file the  
25 plan -- she didn't have to file the petition at a time

1 when those two months would be in the 6-month lookback.  
2 She could have waited.

3 MS. HARRINGTON: Well, that is certainly  
4 true of this debtor, of the Respondent in this case.  
5 That is not an option available to all debtors, many of  
6 whom are facing foreclosure proceedings or imminent  
7 foreclosure proceedings. Delay is simply not an option.

8 And if I could address Section  
9 101(10A)(A)(ii) option that the Petitioner offers -- I  
10 mean, one thing to note is it doesn't give the Court the  
11 discretion to set any other -- to just pick any other  
12 6-month lookback period. They pick a date and go 6  
13 months back from whatever that date is. So if a change  
14 occurs very soon before the filing of the petition, it  
15 makes it very hard for a court to use that provision to  
16 change the lookback period because you would have to  
17 wait 6 months, essentially, after the filing of the  
18 petition to set it back.

19 But again, the biggest problem with using  
20 that section as a workaround is that that is an option  
21 that is available to debtors, but not to creditors. If  
22 a debtor files a Chapter 13 petition along with all the  
23 Schedules that are required under Section 521 of the  
24 code, then the debtor has no option for -- excuse me,  
25 the creditor has no option and the trustee has no



1 option --

2 CHIEF JUSTICE ROBERTS: Well, the creditor  
3 has the option of objecting the confirmation of the  
4 plan.

5 MS. HARRINGTON: They can object to  
6 confirmation of the plan, but on what -- what basis? If  
7 the Petitioner argues that the calculation of projected  
8 disposable income is merely a mechanical multiplication  
9 of the current disposable income times 60 or 36, then  
10 they have no way of allowing the court to take account  
11 of a change that has happened just before or after the  
12 time of the petition that would inure to the creditor's  
13 benefit.

14 CHIEF JUSTICE ROBERTS: They can't say: I  
15 object because the 6-month period is unrepresentative  
16 because of this particular event?

17 MS. HARRINGTON: They could say that, but  
18 it's not clear in the code that that is a basis for  
19 refusing to confirm a plan. I think they would have to  
20 make the argument that --

21 CHIEF JUSTICE ROBERTS: Does the government  
22 have a position on that?

23 MS. HARRINGTON: I think unless there were  
24 bad faith it's not clear how that can be a basis for not  
25 confirming a plan, and that was the -- the reason that

1 my friend on Petitioner's counsel suggested. But again,  
2 it's not clear how that would be bad faith, if a debtor  
3 proposes a plan that -- that commits all of her  
4 projected disposable income under the trustee's view of  
5 what that number is, it's hard to see how you could say  
6 that that was a plan that was proposed in bad faith.

7 So again, I just want to -- just to respond  
8 to the -- the argument that the government in  
9 Respondent's view reads the 6-month period totally out  
10 of the code --

11 CHIEF JUSTICE ROBERTS: You can finish the  
12 sentence.

13 MS. HARRINGTON: Okay. The calculation of  
14 a -- a debtor's current disposable income will often be  
15 a reliable predictor of her future disposable income and  
16 when that's the case, then a reliable way of projecting  
17 is simply be multiplying.

18 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
19 Harrington.

20 MS. HARRINGTON: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Hamilton, you  
22 have two minutes remaining.

23 REBUTTAL ARGUMENT OF JAN HAMILTON

24 ON BEHALF OF THE PETITIONER

25 MR. HAMILTON: Thank you, Mr. Chief Justice.

1           First of all, I want to note that the plan  
2 is not confirmed in this case; this was an interlocutory  
3 appeal. There is an amended order at the BAP level that  
4 allows it as an interlocutory appeal. So the debtor  
5 still has preconfirmation options, rather than having to  
6 rely upon 1329 or something else in the record.

7           Secondly I want to point out that 1325 as  
8 has been suggested by Justice Ginsburg only incorporates  
9 a part of 707(b), and the part it doesn't incorporate is  
10 the special circumstances on the income side. It only  
11 incorporates special circumstances on the expense side.  
12 The significance of that is that what has been  
13 substituted for special circumstances on the income side  
14 is the 101(10A) formula minus certain expenses from  
15 707(b).

16           The certain expenses from 707(b) are not a  
17 wild card. They are IRS standards in certain other  
18 specially defined circumstances. The idea that this  
19 would allow a phantom car payment -- no, we don't think  
20 so. There is language in that section that says that  
21 the expenses have to be applicable and actual.

22           And one case recently decided in the Ninth  
23 Circuit, the Ransom case, says that. You have to look  
24 at the language in 707(b) in order to determine the  
25 propriety of the expenses, which has nothing to do with

1 the applicability of the 6-month time frame.

2           What the government and what the Respondent  
3 choose to do here is to basically gut the entire means  
4 test based upon one word, and that's "projected." And  
5 they choose to use an undefined term "projected" over  
6 the statutory language that Congress chose to determine  
7 what debtors should pay to their creditors, and it's a  
8 congressional choice. And as many commentators have  
9 suggested, if there is a remedy here, it is a  
10 congressional remedy and not a judicial remedy.

11           Thank you.

12           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 The case is submitted.

14           (Whereupon, at 10:55 a.m., the case in the  
15 above-entitled matter was submitted.)

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<b>A</b>	<p><b>add</b> 38:2  <b>added</b> 28:8  31:23,24  <b>addition</b> 14:23  19:9  <b>additional</b> 36:22  <b>address</b> 28:5,6  48:8  <b>addressing</b> 30:4  <b>adjust</b> 21:6,15  47:16  <b>adjustment</b>  21:20  <b>administrable</b>  40:19  <b>adopting</b> 44:14  44:15  <b>advance</b> 44:8  <b>advantage</b> 5:7  <b>affect</b> 45:19  <b>afoul</b> 3:18  <b>agree</b> 8:9 9:12  17:9 26:1 30:6  31:20 37:6,7  38:10  <b>agreed</b> 19:3  <b>agrees</b> 19:12  40:2  <b>ahead</b> 36:4  <b>akin</b> 36:8  <b>Alito</b> 6:23 7:22  8:8,20 9:2,13  12:20 17:11,16  17:18 18:5,13  23:25 24:10  28:7 34:7,22  41:2,15,16  46:8  <b>allow</b> 8:6 16:19  27:11 36:22  51:19  <b>allowing</b> 15:10  15:10 49:10  <b>allows</b> 6:7 8:10  12:16 23:13  51:4</p>	<p><b>altered</b> 11:18  <b>altering</b> 39:18  <b>alternative</b> 10:5  <b>ambiguous</b>  10:20  <b>amend</b> 12:21  <b>amended</b> 19:2  24:14,14 25:4  51:3  <b>amendment</b>  11:20 27:12,15  <b>amendments</b>  3:13,14 6:24  7:8 24:25  <b>amicus</b> 1:21 2:8  40:12  <b>amount</b> 3:25  21:14 22:14  29:11 31:11  38:17 41:9  <b>amounts</b> 31:9  33:1 39:16  <b>analysis</b> 9:21  21:23  <b>Anderson</b> 12:7  12:11,14  <b>anomalous</b>  30:17  <b>anomaly</b> 19:25  28:8  <b>answer</b> 10:6,15  11:23 16:18  18:22 28:12  30:2 36:11  37:11 39:5  <b>appeal</b> 51:3,4  <b>appear</b> 6:11  23:10  <b>APPEARAN...</b>  1:14  <b>appeared</b> 3:24  <b>appears</b> 14:10  <b>appendix</b> 4:15  28:15 31:1  <b>applicability</b>  52:1</p>	<p><b>applicable</b> 28:23  29:5 33:5  37:16 51:21  <b>application</b> 4:5  <b>applied</b> 12:3,10  28:24 36:2  <b>apply</b> 11:17  <b>approach</b> 9:23  <b>area</b> 17:7,8  <b>areas</b> 16:21 17:6  40:16  <b>argued</b> 15:23  <b>argues</b> 49:7  <b>argument</b> 1:12  2:2,10 3:4,7  15:16 18:5,12  27:24 30:1,15  35:10 36:13  38:3,12 40:11  43:2 47:23  49:20 50:8,23  <b>arguments</b> 28:4  47:8  <b>articulate</b> 35:11  <b>asked</b> 19:4  <b>asking</b> 39:20  <b>assess</b> 7:9  <b>assessing</b> 40:24  <b>assessment</b> 7:8  8:9  <b>Assistant</b> 1:19  <b>authority</b> 33:22  <b>available</b> 14:23  22:8 48:5,21  <b>avenue</b> 9:23  <b>avenues</b> 8:25  9:16  <b>average</b> 23:17  29:22 46:25  <b>avoid</b> 8:6  <b>avoiding</b> 10:5  <b>aware</b> 36:16  <b>a.m</b> 1:13 3:2  52:14</p>	<p><b>back</b> 21:4 24:3  32:8,9 35:23  48:13,18  <b>bad</b> 49:24 50:2,6  <b>balance</b> 40:17  <b>bankrupt</b> 21:10  21:13  <b>bankruptcy</b>  3:13,14 4:13  6:8,24 7:25  8:11 13:10  16:9 18:24  19:19 27:10  31:16 36:24  40:16,21 41:2  41:6,15,17,19  41:20,22  <b>BAP</b> 51:3  <b>BAPCPA</b> 28:8  29:13 30:5  31:12 33:17,17  39:4  <b>bar</b> 35:14  <b>barely</b> 21:10  <b>based</b> 7:25  15:24 17:12,12  40:4 42:11,13  47:17 52:4  <b>baseline</b> 30:6  <b>basically</b> 52:3  <b>basis</b> 24:21 49:6  49:18,24  <b>beginning</b> 28:23  31:1 35:10  36:19  <b>behalf</b> 1:15,17  1:21 2:4,6,8,12  3:8 27:25  40:12 50:24  <b>believe</b> 14:17  26:21 27:16  <b>believes</b> 37:8  <b>benefit</b> 41:25  49:13  <b>best</b> 7:12 40:3  <b>better</b> 44:5</p>
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