

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JAN HAMILTON, ESQ.	
4	On behalf of the Petitioner	3
5	THOMAS C. GOLDSTEIN, ESQ.	
6	On behalf of the Respondent	27
7	SARAH HARRINGTON, ESQ.	
8	On behalf of United States, as amicus curiae,	
9	supporting the Respondent	40
10	REBUTTAL ARGUMENT OF	
11	JAN HAMILTON, ESQ.	
12	On behalf of the Petitioner	50
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 Mr. Hamilton.

7 ORAL ARGUMENT OF JAN HAMILTON

8 ON BEHALF OF THE PETITIONER

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

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

18 Stephanie Lanning fell afoul of the means
19 test because during the first 2 months of a 6-month
20 lookback period, which I will explain in a moment, she
21 had more income than what she had in the rest of the
22 6-month lookback period. That income was from a buyout
23 from her former employer, Payless, and distorted what
24 her income appeared to be during that 6-month period of
25 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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ability 5:13 12:19,21 13:16 22:9 24:13,20 25:19 26:6	add 38:2 added 28:8 31:23,24 addition 14:23 19:9 additional 36:22 address 28:5,6 48:8 addressing 30:4 adjust 21:6,15 47:16 adjustment 21:20 administrable 40:19 adopting 44:14 44:15 advance 44:8 advantage 5:7 affect 45:19 afoul 3:18 agree 8:9 9:12 17:9 26:1 30:6 31:20 37:6,7 38:10 agreed 19:3 agrees 19:12 40:2 ahead 36:4 akin 36:8 Alito 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 allow 8:6 16:19 27:11 36:22 51:19 allowing 15:10 15:10 49:10 allows 6:7 8:10 12:16 23:13 51:4	altered 11:18 altering 39:18 alternative 10:5 ambiguous 10:20 amend 12:21 amended 19:2 24:14,14 25:4 51:3 amendment 11:20 27:12,15 amendments 3:13,14 6:24 7:8 24:25 amicus 1:21 2:8 40:12 amount 3:25 21:14 22:14 29:11 31:11 38:17 41:9 amounts 31:9 33:1 39:16 analysis 9:21 21:23 Anderson 12:7 12:11,14 anomalous 30:17 anomaly 19:25 28:8 answer 10:6,15 11:23 16:18 18:22 28:12 30:2 36:11 37:11 39:5 appeal 51:3,4 appear 6:11 23:10 APPEARAN... 1:14 appeared 3:24 appears 14:10 appendix 4:15 28:15 31:1 applicability 52:1	applicable 28:23 29:5 33:5 37:16 51:21 application 4:5 applied 12:3,10 28:24 36:2 apply 11:17 approach 9:23 area 17:7,8 areas 16:21 17:6 40:16 argued 15:23 argues 49:7 argument 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 arguments 28:4 47:8 articulate 35:11 asked 19:4 asking 39:20 assess 7:9 assessing 40:24 assessment 7:8 8:9 Assistant 1:19 authority 33:22 available 14:23 22:8 48:5,21 avenue 9:23 avenues 8:25 9:16 average 23:17 29:22 46:25 avoid 8:6 avoiding 10:5 aware 36:16 a.m 1:13 3:2 52:14	back 21:4 24:3 32:8,9 35:23 48:13,18 bad 49:24 50:2,6 balance 40:17 bankrupt 21:10 21:13 bankruptcy 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 BAP 51:3 BAPCPA 28:8 29:13 30:5 31:12 33:17,17 39:4 bar 35:14 barely 21:10 based 7:25 15:24 17:12,12 40:4 42:11,13 47:17 52:4 baseline 30:6 basically 52:3 basis 24:21 49:6 49:18,24 beginning 28:23 31:1 35:10 36:19 behalf 1:15,17 1:21 2:4,6,8,12 3:8 27:25 40:12 50:24 believe 14:17 26:21 27:16 believes 37:8 benefit 41:25 49:13 best 7:12 40:3 better 44:5
			B	
			b 25:1 28:19	

46:19	card 51:17	12:24 37:17	49:18,24 50:2	15:6,7 17:14
beyond 14:2	care 38:22	changing 10:22	clearly 10:23	18:16 19:2,8
big 45:9	carried 12:2	chapter 1:3 3:5	clock 25:4	21:6,8,9 22:4
biggest 48:19	case 3:4 5:25 6:5	3:12 5:25 6:4,4	code 3:13,14	25:7,14,14,15
bind 15:5	6:23 12:7,8,11	12:12 18:3	4:13 8:16 12:1	25:18 28:19
binding 22:22	15:1 16:8,16	19:25 20:1,1,3	12:1,2 31:16	44:19 51:2
22:22,22	19:17 20:14	20:13,15 22:3	40:25 48:24	confirming
binds 5:20	21:8,19 22:4	22:9,10 24:20	49:18 50:10	49:25
bit 15:15	22:10,12 23:18	30:9,14,16,21	come 21:4 22:6	Congress 7:3,4
borrowed 30:25	24:23 28:6	30:23,25 31:2	23:21 35:22	7:22 10:13,16
31:14 32:20	31:2 34:15	31:6,7,13,15	comes 16:5,8	11:14,19 13:2
bound 26:22	36:5 41:23	31:16,17,23,24	29:14 44:18	20:9 22:23
bounded 5:18	44:9 46:24,25	32:14,20 33:8	45:18 46:5	26:23 28:8,10
brief 11:13	48:4 50:16	38:15 48:22	47:13	29:7 30:2,4,15
15:16 30:11	51:2,22,23	Chief 3:3,9 14:6	commends 10:4	31:12,17,22,23
35:9,24 36:13	52:13,14	14:11,12,19	commentators	32:20 33:6,16
briefly 22:9	cases 12:7 21:9	16:17,23 17:3	52:8	33:17 37:5,6,7
briefs 36:15	23:25 35:12	18:22,23 23:12	comments 12:19	37:12 38:14,18
brings 7:19	47:3	27:21,22 28:1	commitment	39:15,24 40:17
broad 27:11	case-specific	33:20 36:11	28:23 29:5	40:20 41:1
44:14,15	40:18	37:19,23 38:1	32:23 33:5	47:9 52:6
brought 19:10	causes 9:5	38:9 39:8,18	37:16	congressional
25:1 45:21	cert 28:14	40:9,14 44:13	commits 50:3	52:8,10
bunch 39:25	certain 5:1,11	44:21 45:6,16	complied 9:25	Congress's 4:20
burden 42:12	6:1 9:4 31:11	49:2,14,21	concede 4:5	consequence 4:4
buyout 3:22	35:2,7 36:7	50:11,18,21,25	concept 25:2	consequently
36:6	42:22 51:14,16	52:12	31:14,24	13:4
	51:17	choice 52:8	concerned 31:22	consider 46:2,25
C	certainly 5:13	choose 52:3,5	conclusion 7:16	considering 31:4
C 1:17 2:1,5 3:1	5:22 7:7 16:13	chose 18:19 52:6	condition 43:17	46:6
27:24	26:5 27:7	chosen 18:20	conditions 45:3	constrain 36:23
calculated 7:11	40:20 41:14	40:20	confirm 18:6,24	constrains 15:9
35:1	48:3	circuit 3:11 11:5	45:4,10 49:19	construe 37:17
calculating 6:25	certainty 35:15	12:8,9 51:23	confirmability	contained 3:13
41:4	43:5	circumstance	45:4	8:17
calculation	chance 46:21	15:18	confirmable	contention 5:18
15:24 42:6,21	change 6:17,17	circumstances	18:7 21:23	continue 7:4
43:15 45:2	9:3 10:9,10	10:7 12:5 16:1	40:24	continued 14:5
46:14 47:3,13	14:20 15:18	18:3 19:19	confirmation	contrast 35:8
49:7 50:13	16:1 25:19,24	20:4 24:12	5:20,24 6:2,3	control 28:20
calculations	26:7 41:25	26:7 47:10,13	6:11 12:18	converse 24:6
17:25	43:8 44:9	51:10,11,13,18	14:4,4 21:21	converted 22:10
call 18:9	46:10 48:13,16	clauses 31:9,10	21:25 22:2,7	correct 7:8
capable 18:18	49:11	33:2 39:17	24:16 34:9	25:15,25
car 20:23,24	changed 24:13	clear 7:5,14	45:8,18 49:3,6	costs 38:22
34:10,11,13	changes 7:1 12:5	10:11 21:12	confirmed 12:17	counsel 10:3
51:19				

27:22 40:9 50:1 52:12 count 34:12 35:22 counted 34:17 couple 9:16 15:1 30:3 34:6 course 29:9 court 1:1,12 3:10 5:1,13,18 5:21 6:17,20 6:21 7:8,25 8:11,18 10:7 12:5,14 13:1 14:5 16:9 18:6 22:6 23:5,11 24:15 25:4,16 26:6,9,16,22 28:2,3 30:11 31:7 32:14 34:3 36:14,15 36:22,24 39:11 40:15 41:6 42:3 43:3,9,20 45:4,21,23 46:1,5,12 48:10,15 49:10 courts 6:24 10:10,17 20:19 25:23 30:5,8 30:10 32:2 35:13,16,20 40:21 41:1,3 41:17,19,20,22 43:24 46:18 court's 10:22 created 31:13 creating 10:13 creditor 9:13 28:17 34:8 45:2 46:4 48:25 49:2 creditors 4:2,7 5:20 6:1 13:16 20:5,14,16 28:25 34:20	42:1 44:23 45:25 46:19 48:21 52:7 creditor's 39:1 49:12 creditor-neutral 34:18 cure 24:8 curiae 1:21 2:8 40:12 current 7:21 8:13,14 13:3 17:17 23:16 25:6 29:16,19 29:19,22 30:14 31:8 32:13,15 32:16 33:1 34:3,5 38:10 39:16 40:22 42:6,21 43:15 43:21 46:15,20 47:2,4,14,17 49:9 50:14 cuts 11:11 <hr/> D D 3:1 data 40:4,5,6 date 4:18 14:1,2 17:24 19:23 22:2 28:18,23 34:3 36:21 48:12,13 days 36:20,21,23 deal 47:7 debt 43:14,18 debtor 4:24 5:10 5:15 6:7 7:12 8:6,21,22,25 9:6,10 12:12 12:18,20 13:15 13:19 14:23,25 15:5,19 17:21 18:1,7,17,18 19:6,7,22 23:18,18 24:2 24:5,13 25:5	26:5 27:8 29:17 30:9 34:4,8,9,18,19 36:20,22 37:2 39:2 42:1,17 43:11 44:23 45:24 46:8,21 48:4,22,24 50:2 51:4 debtors 48:5,21 52:7 debtor's 7:2,9 9:5,21 23:19 24:12 28:22 31:8 32:15 34:21 40:22 41:4 47:2,5,14 50:14 decided 51:22 deducted 42:20 43:14 deductions 29:17 define 38:17 defined 7:21 10:21 29:13 38:1 51:18 defines 4:16 8:13 defining 14:14 definition 11:4 11:24 29:7,14 29:19 38:9 39:10,19 40:2 44:5 degree 35:15 delay 19:21 48:7 delayed 14:25 19:17 depart 7:6 Department 1:20 depending 44:15 depends 16:15 17:15 43:8 derived 23:20	29:25 design 37:5 designed 34:19 detailed 7:23,24 determination 14:7 determine 7:10 8:19 13:3 19:23 20:20 51:24 52:6 determined 31:9 33:2 34:3 39:16 determining 7:11 14:17,18 30:7 46:3 deviate 10:7 13:1 deviation 13:7 35:15 devise 8:5 devote 12:13 difference 16:2 34:23 35:4,17 42:24 differences 35:3 35:7 different 4:9 12:3 17:5 25:12 34:25 38:2,3,3,3 42:8 42:14 43:6 disagree 16:23 disagreed 12:9 discharge 20:2 discretion 3:15 3:16 6:25 7:9 7:10 14:8,13 14:15,17 15:3 15:11 16:19 17:5,7 22:25 23:4,10 26:9 26:16 30:19 38:5 39:3,4 48:11 discretionary	6:20 39:6 discussed 22:9 disjuncture 23:23 dismiss 22:15 dismissed 22:12 disposable 7:1 7:19,20,20 11:16 13:4,4 14:14 16:20 17:8 25:2 28:22 29:3,4,7 29:13,16 33:4 34:25 35:1 37:10,15,21,24 38:6 39:10,19 39:19 40:22 41:13 42:6,21 43:15 44:25 45:3 47:4,5,14 47:16,17 49:8 49:9 50:4,14 50:15 dispute 12:4 disputes 24:25 distorted 3:23 district 5:21 10:10 30:18 doing 40:17 drastic 9:25 driving 20:23 drop 22:16 24:17 due 28:24 D.C 1:8,17,20 <hr/> E E 2:1 3:1,1 earlier 42:1,17 economic 41:3 economy 46:10 effect 20:10 30:17 31:16,25 effective 28:18 efforts 7:12 either 24:21,22 27:2 46:11
---	---	---	--	--

elaborate 8:5	exercise 16:19	50:2,6	following 30:23	further 40:8
elevate 40:20	17:5	feasibility 45:22	force 31:15,25	future 35:5
employed 46:17	exigent 19:19	46:3	forecasters 41:3	38:24 40:3,7
employer 3:23	exists 31:8 32:15	fell 3:18	foreclosure	41:18,21 45:24
encompassing	expect 20:24	figure 17:24	19:20 48:6,7	46:2,7 50:15
29:24	35:20	31:5 41:13	Forget 25:21	
enforce 20:19	expected 17:22	46:20	form 7:16 8:21	G
engine 20:25	expects 35:18	file 5:5,6,10,11	former 3:23	G 3:1
21:3	expense 5:12	8:21,22 19:25	formerly 8:16	gainfully 46:16
ensuring 40:18	10:21 31:10	20:13 22:9	forms 36:19	garnishment
entire 52:3	42:21 43:11,14	24:14 25:3	formula 3:15	19:21
entirely 34:21	43:19,21 47:9	34:4 36:18,19	7:14,23,24	general 1:20
equation 22:1	47:17,19 51:11	47:24,25	8:10,12,13	11:2
escape 8:5	expenses 7:11	filed 9:17,18,20	9:24 10:8,13	Ginsburg 4:3,10
ESQ 1:15,17,19	8:15,17 10:14	9:22 25:5,8,24	10:16,17,19	5:2 6:13 13:6
2:3,5,7,11	11:7 21:24	27:11 42:3	11:1,16,17,18	13:13,18,25
essentially 4:24	25:18 29:18	files 48:22	15:21 20:9	18:21 19:9
5:9 7:4 8:10	33:3 34:10	filing 4:18,19,25	22:21,21 26:8	20:5,11,17
12:13 48:17	35:3 47:18,20	6:8 7:2 9:7	26:22,23,25	21:18 22:13,19
establishing	51:14,16,21,25	15:1 19:17,18	27:3,6 33:18	23:2,7,8 47:7
15:13 16:10	explain 3:20 5:2	19:23 24:4,22	33:19 51:14	47:23 51:8
estimate 40:3	18:14	24:23 27:18	formulation	Ginsburg's 21:5
estimation 29:10	explained 23:3	36:21 45:10	33:7	give 7:16 20:16
event 21:12	37:14 38:13	46:22,23 48:14	formula's 8:12	31:18 35:16
49:16	extend 5:14	48:17	10:23	38:16 41:25
events 22:1 36:4	extended 6:3	finish 36:11	forward 24:15	48:10
everybody 40:1	42:19	50:11	39:11,23 42:4	given 11:2 26:7
everybody's	extraordinary	firm 38:23,23	43:18,19 44:4	gives 23:4 46:19
22:14	6:16 13:12	first 3:4,19 4:10	44:12 47:6,22	giving 30:18
exact 33:7	15:25 21:12	4:16 6:1,2	found 4:12,14	go 29:18 32:9
exactly 33:15	extremely 17:25	21:21 24:11	four 14:24 19:15	34:10 36:16
37:20 38:8		28:24 29:1	32:14	48:12
46:15	F	30:3,3 51:1	frame 6:8,10,10	goes 39:1
example 17:17	facing 48:6	fish 38:4	19:8 23:24	going 6:16 10:4
17:21,21 24:2	fact 9:4 14:13	fit 14:5 18:23	24:15 27:6,13	10:23 17:19
27:9 35:17	17:4 28:8	five 41:11	52:1	18:3,24 19:1
36:5 38:16	34:15 35:25	fixed 15:24	frames 5:23	20:24 21:13,24
41:4,25 42:17	42:4 43:21	31:17	friend 29:12	24:3,5,8 25:16
43:11	factors 11:6	fixing 15:6	30:22 31:14	25:22 28:14,15
exceed 36:23	facts 16:16 22:5	fluctuates 46:17	33:4 37:7 40:4	28:19,20 29:8
exception 47:13	46:6	47:1	45:7 50:1	29:11 30:9
exceptions 47:10	fails 8:21	fluid 5:25 18:4	friendly 16:24	33:18 34:2,2
excess 12:13	fairer 46:24	fold 30:3	friend's 30:1,15	34:11 35:19,22
excuse 5:10,14	fairly 44:14	follow 33:20	39:9,21	36:6 38:21
48:24	faith 9:18,19,20	followed 19:6,6	full 28:20 31:24	40:7 41:8,12
excused 26:6	9:21 11:3,4,6	20:21	46:17	42:4 43:18,19
	24:21 49:24			44:12,21,22

45:23,24 46:6 47:5,21 Goldstein 1:17 2:5 27:23,24 28:1 32:6,8,12 32:19 33:12,15 33:24 35:8 37:22,25 38:8 39:14,24 43:2 good 9:8,18,19 9:20,20 11:3,4 11:6 16:17 17:21 24:2,21 47:4 Goodyear 27:10 gotten 20:22 government 35:4 49:21 50:8 52:2 government's 34:24 granting 26:19 26:19 31:6 grants 33:22 gravitational 31:18 greater 36:12 42:5 ground 10:11 guessing 18:1 guidance 11:2 gut 52:3	19:14 20:8,17 21:2,16,22 22:19 23:6,9 23:15 24:10 25:9,12 26:1,5 26:13,21 27:5 27:16,19 50:21 50:23,25 hand 28:4 40:17 40:18 46:1,3 hands 34:21 39:1 happen 41:21,24 42:7,8,9,10,15 43:5,6,10,23 43:23 44:1,22 45:24 46:2,7 happened 4:9 31:12 41:24 49:11 happens 4:7,8 27:8 hard 27:2 36:9 48:15 50:5 hardest 28:6 Harrington 1:19 2:7 40:10,11 40:14 41:14,19 42:10,16 43:1 43:7 44:2,7,20 45:1,13,19 46:13 47:12 48:3 49:5,17 49:23 50:13,19 50:20 health 38:22 hear 3:3 17:2 heard 43:2 hearing 5:24 6:2 6:4,12 14:2,4 24:16 held 6:3 high 4:6 35:14 higher 34:14,15 47:19 higher-paying	42:2 45:14 historically 41:10 home 43:12,13 Honor 6:7,19 7:17 9:11 14:16 16:12 18:11 25:13 honored 26:8 hopefully 28:5 husband 27:9	29:24,25 30:7 30:14 31:9 32:13,16,16,17 33:1,4 34:3,5 34:25 35:1,3 37:10,15,21,24 38:7,10 39:10 39:16,19,20 40:6,7,22 41:4 41:13 42:4,6 42:22 43:15,16 44:25 45:3 46:15,17,20,25 47:2,4,5,11,14 47:16,17 49:8 49:9 50:4,14 50:15 51:10,13 incongruous 5:15 incorporate 51:9 incorporates 51:8,11 increase 9:5,25 24:19 38:22 41:8,12 indicate 19:18 indicates 31:21 indication 7:5 individual's 4:21 industry 41:10 inflation 38:16 38:17,20 41:7 41:9 initially 16:11 inquiry 13:24 inserting 3:15 instance 43:10 instructed 5:7 intended 3:14 7:3 22:23,24 26:23 33:6 38:5 39:4 41:1 interests 10:13 interlocutory 51:2,4	interpretation 8:3 interpreted 20:20 introduced 25:1 inure 49:12 invoked 26:15 involve 27:12 involved 11:9 IRS 51:17 issue 12:15 27:7 28:6
<hr/>				
J				
<hr/>				
J 5:12 21:23 25:17 JAN 1:3,15 2:3 2:11 3:7 50:23 job 9:8 24:4,6,7 27:8,10 34:9 34:14,16 42:2 45:14 joint 23:18 judge 13:10 14:9 14:13 15:9 18:24 19:12 26:20 33:23 judges 3:17 30:19 judicata 22:3 judicial 3:15,16 22:25 26:9 52:10 jurisdiction 17:16 25:24 26:2 justice 1:20 3:3 3:9 4:3,10 5:2 5:17,23 6:13 6:23 7:22 8:8 8:20 9:2,13 10:3,15,19,25 11:11,23 12:20 13:6,13,18,23 13:25 14:6,11 14:12,19 15:3 15:8,9,14,22				

16:8,14,17,23 16:24 17:3,11 17:16,18 18:5 18:13,21,23 19:9 20:5,11 20:17 21:1,4,5 21:17,18 22:13 22:19 23:2,7,8 23:12,25 24:10 25:3,10,21 26:2,3,11,14 26:22 27:1,14 27:16,17,21,22 28:1,7 31:20 32:4,7,10,18 33:10,13,20 34:7,22 36:3,8 36:11 37:19,23 38:1,9 39:8,18 40:9,14,18 41:2,15,16 42:7,13,24 43:4,22 44:3 44:13,21 45:6 45:16 46:8 47:7,23 49:2 49:14,21 50:11 50:18,21,25 51:8 52:12 justify 16:1	42:11,14,15,22 43:22,23,23 44:3,5,23 45:9 45:10 known 17:13 22:5 35:2,7 36:7 43:4 knows 46:2,6 <hr/> L laid 35:10 language 6:21 23:24 32:2,25 33:25 37:16 39:15 51:20,24 52:6 Lanning 1:6 3:5 3:11,18 Lanning's 22:4 largely 8:18 latest 30:10 Laughter 17:10 laundry 11:5 law 8:16 11:8 12:4 20:19 40:16 lawsuit 19:21 leads 8:3 led 10:20 let's 9:5 13:10 13:10 25:23 34:10 45:7 level 35:14 51:3 lightly 31:19 likelihood 20:2 limits 6:1 line 13:24 lines 32:14 list 11:5 litigants 3:17 litigation 15:15 little 20:14 23:22 34:1 loan 17:23 42:18 42:18 lock 28:10 long 24:7	longer 17:22 43:17,19 look 9:9 28:11 30:9,20 33:17 37:20,23 38:6 38:19,24,24 39:23 44:4 45:9 51:23 lookback 3:20 3:22 4:11,17 4:24,25 6:15 9:7,9 25:25 35:1 41:5 46:14,19 48:1 48:12,16 looked 35:12 loses 24:4 27:8,9 losing 18:2 lost 32:4 lot 20:6 44:17 lots 23:4 low 24:6 <hr/> M machinations 10:4 37:6 making 18:18 36:9 42:20,23 March 1:9 markedly 24:13 mathematical 33:18,19 matter 1:11 52:15 matters 32:20 mean 5:5 10:9 21:9 38:4 43:3 44:3 45:7 48:10 means 3:12,18 3:25 4:3,4 23:16 29:16 30:24 31:3 52:3 measured 29:8 mechanical 33:7 33:9 49:8	meeting 5:19 6:1 mentioned 42:1 42:17 merely 49:8 merits 35:24 met 20:3 Midkiff 12:8 mind 14:14 minus 51:14 minute 12:15 minutes 50:22 misunderstood 19:4 modification 12:16 17:19 26:19 modified 11:18 17:12,12 modify 7:25 10:17 18:9 22:6 moment 3:20 Monday 1:9 money 21:14 36:1 39:1 45:11 money's 29:11 month 4:19 18:25 30:10 34:9 46:9 monthly 7:21 8:13,14 13:3 23:16,17 29:16 29:19,19,22,23 30:14 31:8 32:13,15,16 33:1 38:10 39:16 months 3:19 4:5 4:17 6:16 13:12 15:1,24 21:13 22:17 30:2,10 32:16 34:2 38:18 40:5,23 48:1 48:13,17	morning 3:4 mortgage 43:13 move 4:25 8:11 13:10,15,23 14:1,1,7 15:6 19:11 23:13 24:15 33:21 moveable 6:11 6:13 moved 5:23 6:10 13:17 moving 14:20 19:8 23:6 24:1 24:9 27:12 multiplication 49:8 multiplied 31:11 33:3,16 39:17 multiply 39:24 40:22 41:12,13 multiplying 50:17 <hr/> N N 2:1,1 3:1 narrow 10:6 natural 39:12,20 necessarily 16:12 necessary 8:15 8:17 11:7 15:17 need 10:1 12:22 needed 11:9 13:8 needs 19:5 Neither 13:15 never 11:25 19:1 43:9 new 3:12 9:16 10:13 34:9 Ninth 12:8 51:22 note 29:1 45:20 48:10 51:1 number 23:3 40:23,23 47:3
---	---	--	---	---

47:21 50:5	27:24 36:13 40:11	20:16 21:11 28:25 34:11,13	50:24	38:11,13,16,25
O	order 7:16 8:6	37:8 42:20,23	Petitioner's	39:3 42:22
O 2:1 3:1	20:19 22:7	payout 45:9	43:20 47:8	45:7 51:7
object 15:4	51:3,24	pays 34:19	50:1	pointed 31:14
24:20 49:5,15	ordinarily 37:17	people 46:16	phantom 51:19	32:21 35:13
objecting 15:12	ought 12:9	percent 41:11	phrase 32:25	points 10:25
26:16 49:3	17:23 31:20,21	perfect 36:5	33:4	33:25 34:6
objection 14:12	owns 43:12	perform 20:24	pick 48:11,12	37:1
46:4	P	performance	piece 40:5,6	portion 11:9
objective 38:7	P 3:1	5:14	place 4:10 20:9	position 11:14
objects 28:18	page 2:2 28:20	period 3:20,22	21:21 27:2	30:23 34:24,24
45:2	29:20 31:1	3:24 4:11,17	30:20	39:6 49:22
obtained 19:7	pages 4:14 30:21	4:24,25 6:14	plain 20:18	possibility 20:12
obvious 22:24	32:9	6:17 8:11 9:7,9	plan 5:20 7:2 9:8	possible 19:22
26:23	papers 5:1	13:10,11,15,17	9:17,22 12:14	20:8 34:20
obviously 18:18	paragraph	14:7,18,20	12:16,17,18,21	possibly 4:6 18:7
22:23 27:9	28:20 29:14	22:16 23:7,14	15:6,7 16:10	post-confirma...
occur 9:3,4 12:6	31:4	23:21,23 24:1	16:11 17:11,12	12:6,25 36:1,4
13:1 35:5	part 4:16,23 5:8	24:7,9 25:25	17:13 18:6,8,9	post-petition
41:18	6:6,21 8:24	27:15 28:9,10	18:16,24 19:2	10:1 22:11
occurred 13:22	10:17 11:10	28:23 29:5,8	19:8 20:15	27:9
15:2 44:10	22:7 24:18	29:21,25 30:16	21:6,7,9,22	power 10:22
occurs 48:14	28:6 43:7 51:9	31:15,17,22	22:4 24:4,14	36:24
odd 5:3 7:22	51:9	32:17,22,23	24:14,22 25:4	practically 9:10
39:5	particular 28:10	33:5,21 34:16	25:6,7,13,18	practice 35:13
offers 48:9	29:4 32:25	35:2 36:22,24	25:19,22 26:19	preceding 21:13
oil 38:22	41:10 42:12	37:16 38:10,14	28:18,21,24,25	preconfirmati...
okay 20:13,15	49:16	38:23 39:22	29:9 40:23,24	51:5
26:13 27:1,14	particularly	41:5,5 46:9,14	41:8 43:12,17	prediction 47:4
32:6,12 44:7	29:6 38:4,25	46:19 48:12,16	44:18 45:4	predictor 50:15
50:13	44:14	49:15 50:9	47:25 49:4,6	present 12:2
old 8:16 11:8	parties 28:3	permit 22:20	49:19,25 50:3	presume 7:3
one-way 34:7	36:15	permitted 17:7	50:6 51:1	31:8 32:15
37:2	parts 4:11	person 41:9	play 7:19 16:6	presumption
opening 11:13	pay 4:1,2,7 9:10	petition 4:14,18	46:5	31:5,13
operative 28:16	18:25 39:2	4:19 6:9 9:18	please 3:10 6:17	pretend 34:13
opportunity	52:7	9:19 19:23	28:2 40:15	pretty 26:20
21:6,15	paying 7:12	27:10 28:14,15	pledge 12:13	31:21 35:14,21
option 37:13	34:14,16	36:21 42:3	plug 15:17,17	38:23
48:5,7,9,20,24	Payless 3:23	47:25 48:14,18	point 16:18 17:3	previous 38:18
48:25 49:1,3	36:6	48:22 49:12	17:4 18:1	40:5
options 14:23,24	payment 28:24	Petitioner 1:4,16	25:15 28:5	previously 3:16
18:19 19:13,14	43:14,18 51:19	2:4,12 3:8	29:12 30:2,12	pre-BAPCPA
19:15,16 22:8	payments 15:13	36:13 47:8	30:13 32:1,24	35:13
51:5	18:8,10,17,19	48:9 49:7	33:6 35:24,25	price 38:22
oral 1:11 2:2 3:7			36:9,10,14	prices 38:18

primary 24:24	proposes 43:12	R	reflected 42:5	resetting 5:21
principally	43:16 50:3	R 3:1	refusing 49:19	resolved 24:25
30:14	proposition 11:3	raise 34:17	regard 5:15	respect 14:13
prior 4:17,19	24:12,19	35:18	15:11,12 23:19	16:20 24:11,18
6:8 7:7 12:4,17	propositions	raised 28:7	29:24	respectfully 8:8
23:23	4:10 25:13	Ransom 51:23	regime 7:4	16:22
privilege 13:14	propriety 51:25	ratchet 34:8	relate 27:15	respond 50:7
pro 34:7	prospect 24:5	37:2	relevant 28:13	Respondent
problem 16:6	protect 10:12	read 7:15 12:22	reliable 50:15,16	1:18,22 2:6,9
17:6,6 24:2	provide 7:24	26:24 33:8,25	relief 31:6	27:25 40:13
30:5,22 48:19	provided 7:5,23	reading 11:12	rely 51:6	48:4 52:2
problems 15:2	10:16 46:20	37:9	remainder 27:20	Respondent's
24:8	47:9	reads 50:9	remaining 50:22	11:14,21 42:25
proceedings	provides 9:19	real 31:15	remedy 17:19	50:9
48:6,7	23:16	realistic 29:10	52:9,10,10	response 21:18
process 18:4	provision 9:16	really 8:4,5	Remember	rest 3:21
program 42:18	13:11,20 23:13	13:24 18:6	39:15	restart 25:4
prohibit 46:5	28:16 29:2	30:24 37:16	repay 17:22	restrict 38:5
project 30:12	30:21 34:18	40:2	45:25	result 12:23
39:11 40:1	36:12,14 45:22	reason 13:14	repaying 42:17	22:11 39:9,21
44:11 47:21	48:15	20:18 44:24	repeat 32:2	results 8:4,7
projected 6:25	provisions 22:3	49:25	reply 15:16	10:5
7:19 8:3 9:3	28:13 31:7	reasonable 8:15	36:13	review 14:6
10:11 11:17,18	39:7	8:17 11:7	repossession	revising 16:10
11:19,24 13:4	pull 31:18	REBUTTAL	19:20	16:11
14:14 16:20	purpose 14:20	2:10 50:23	representative	revision 15:7,10
17:8 28:22	46:13	receive 23:19	4:21 6:9 22:17	15:12
29:3,3,9 32:22	purposes 29:15	received 28:22	reproduced	rid 32:21,22
33:4,11,14	34:4 35:22	29:5,17 33:5	36:15	right 8:22 14:19
34:25 37:10,15	38:15	37:15	request 13:17	24:7 30:8,9,19
37:21 38:2,6	put 15:5 34:21	receives 23:18	14:7 36:20	34:7,8 37:20
38:19 39:13,21	38:14	recognized 6:25	requested 12:12	40:4 42:16
39:25 41:7		recommend	require 46:1	rise 38:17
44:16,25 45:3	Q	13:9 21:25	required 4:1 5:6	Roberts 3:3 14:6
49:7 50:4 52:4	qualified 20:2	record 13:21	8:22 9:10 37:9	14:11,12,19
52:5	question 11:17	51:6	37:12 45:23	16:17,23 17:3
projecting 47:15	12:23 16:25	reduce 3:15	48:23	23:12 27:21,22
50:16	19:4 21:5	22:25 39:4	requirement	33:20 37:19,23
projection 8:1,2	22:21 26:12	reduced 31:9	16:4 26:7	38:1 39:8,18
promotion	28:12 37:10	33:1 39:16	requirements	40:9 44:13,21
35:20	questions 27:20	reduces 46:21	5:19 7:20	45:6,16 49:2
proof 42:12	40:8	referred 14:24	requires 5:4	49:14,21 50:11
properly 44:17	quite 15:15	19:15	21:11	50:18,21 52:12
property 43:16	30:19 35:25	referring 5:9	requiring 46:18	rock 27:2
proposed 25:7	42:8,14	refile 22:15	res 22:3	route 23:4 36:16
25:22 50:6	quote 11:24,25	refiled 22:12	reserve 27:20	rule 20:19 35:11

rules 20:20,22	48:8,20,23	solution 19:10	started 30:22	23:21
rule-bound	51:20	23:3	38:9	subsequent
22:23	secured 42:2	solve 24:1	starting 30:12	27:17
<hr/> S	43:13,13	somebody 45:8	38:15	substantial
S 2:1 3:1	see 16:1 25:16	someone's 30:7	stated 8:10	20:16
salary 9:8 41:12	25:17 32:18,18	somewhat 10:20	States 1:1,12,21	substituted
SARAH 1:19	32:19 50:5	soon 48:14	2:8 4:12 11:5	51:13
2:7 40:11	sense 11:11	sorry 9:18 17:1	40:12	substituting
Satterlee 12:7	26:24 37:4	17:1 21:16	statute 5:4,6,8	26:9
12:11	46:1,19 47:1	32:12 33:12	5:13,16 7:18	subtle 34:23
saw 14:5	sentence 50:12	37:12 45:13	11:3 12:15	subtracted 8:15
saying 18:15	set 35:14 48:11	sort 31:18 46:22	13:2 14:11	such-and-such
19:5 30:22	48:18	Sotomayor 5:17	16:19 19:5,11	41:7
39:12 41:20,22	sets 29:2	5:23 10:3,15	22:20,24,25	sufficient 36:8
says 4:24 5:3,6	settlement 35:25	10:19 11:1	23:10 26:24	suggest 7:17
5:10 9:17	shift 36:24	25:3,10,21	27:7 33:22	10:17 28:9
10:22 25:5	Shoe 36:7	26:2,3 31:20	34:19 35:7	43:3
30:17 33:4	shoehorn 44:24	43:4	38:4,19,25	suggested 13:19
34:1 35:4	shortly 24:3	Sotomayor's	statutes 4:13	30:3 42:12
51:20,23	show 12:23	36:8	7:15 12:22	50:1 51:8 52:9
Scalia 15:3,8,9	15:25	sought 20:18	19:6 21:24	suggesting 45:15
15:14,22 16:8	showed 4:1	sources 23:17	statutory 6:15	suggestion 33:21
16:14,24 18:23	side 14:15 43:11	29:23	9:1,16 10:8	suggestions 11:8
21:1,4,17	47:9,11 51:10	special 20:3	16:4 28:13	suggests 6:21
26:11,14,22	51:11,13	47:10,12 51:10	40:19 52:6	supporting 1:22
27:1,14,16,17	sign 12:12	51:11,13	Stephanie 1:6	2:9 40:13
32:4,7,10,18	signals 40:25	specially 51:18	3:11,18 22:4	supposed 5:5
36:3 42:7,13	significance	specific 27:8	stick 31:21	20:20 41:3
42:24 43:22	36:12 46:22	30:4	stop 18:21 42:23	46:12
44:3	51:12	specifically 17:7	Stores 36:7	Supreme 1:1,12
schedule 5:5,12	significant 47:3	33:22	strange 8:4,7	sure 32:8,12
5:12 9:24 25:6	silent 13:21	specifics 8:18	29:6 34:20	33:24 34:19
25:7,17,23	simple 20:18	specified 29:7	strategic 46:21	39:1
34:5	47:24	speculate 41:21	strategies 8:6	surrender 43:16
schedules 5:11	simplicity 40:21	43:9,25	strict 4:5	system 37:5
5:12 19:18	simply 10:6 15:6	speculation 44:5	strong 40:25	
21:23 48:23	15:17 16:10	44:6	strongest 38:11	<hr/> T
scheme 40:19	48:7 50:17	spike 38:22	stuck 30:16	T 2:1,1
second 4:23 6:6	sir 33:25	spouse 23:19	subject 15:15	take 7:1 12:5
6:21 8:24	situation 7:10	standard 10:24	22:2 29:17	15:20 17:24
19:24 24:18	9:3,14 10:23	47:18	subjected 9:22	24:16 27:7
30:13 37:2	25:22 44:11,22	standards 26:18	submitted 52:13	28:13 38:16,23
43:12	45:17	51:17	52:15	39:23 40:22
Secondly 51:7	situations 46:16	stands 18:16	subsection 25:1	41:17,22 42:4
section 30:20	slight 24:3	start 7:18 15:23	28:19 29:14,15	43:10,21 46:15
35:10 45:21	Solicitor 1:19	28:15	subsections	49:10
				taken 11:6 12:24

36:12 44:18 45:17 takes 46:22 talking 43:8 taxable 23:20 29:25 tell 38:21 44:6 47:15,21 telling 40:21 tells 19:11 28:17 29:10,22 31:3 36:18 ten 41:11 Tenth 3:11 12:8 term 12:1 23:16 29:13,16 30:13 30:15,24 32:13 32:22 37:15,20 38:1 40:3 41:8 52:5 terms 10:21 35:14 47:15 test 3:12,19,25 20:4 30:24 31:3 42:9,25 42:25 43:25 52:4 text 37:12 Thank 27:22 40:9 50:18,20 50:25 52:11,12 theory 21:20 44:15 thing 15:22 19:24 23:2 29:1 45:20 47:24 48:10 things 38:20 41:17 44:17 think 8:24 15:14 17:20 21:25 24:10 27:11 28:3,4,5 36:8 37:14,19,20 38:2,14 41:2 42:11,12 43:7	45:23 46:13,19 47:16 49:19,23 51:19 third 28:20 37:4 THOMAS 1:17 2:5 27:24 thought 4:20 17:4 18:13 20:9 42:8 three 7:15,15 throw 31:19 throwing 30:18 tie 24:11 ties 12:19 time 3:25 5:14 5:22 6:1,7,10 6:10,14 8:11 14:18,20 19:8 22:14,15 23:24 24:15 27:6,12 27:21 36:5 43:24 46:17,18 46:23 47:25 49:12 52:1 times 33:16 35:18 39:25 49:9 timetable 29:2 time-wise 42:19 timing 5:19,24 tips 46:10 title 34:4 told 13:6 38:19 38:23 tone 11:13 Topeka 1:15 total 14:8 totally 34:13 50:9 triangle 7:16 11:10 tried 35:9 40:17 true 8:4 14:22 48:4 trustee 1:3 3:5 9:23 12:12	13:9,9,16 20:12 21:25 24:20 25:16 28:17 34:8 45:2 46:4 48:25 trustee's 34:12 37:9,11 50:4 truth 44:6 try 35:11 39:25 40:1 trying 28:10 31:4 44:8 turn 18:8 20:25 21:2 39:6 two 4:9,11 10:25 17:5 25:12 30:21 32:9 37:1 47:8 48:1 50:22 type 29:4 42:18 43:8,18 U uncertainty 44:10 undefined 52:5 unemployed 9:6 United 1:1,12,21 2:8 4:12 11:5 40:12 unlimited 37:3 unrepresentat... 49:15 unsecured 13:16 20:14,16 28:25 unusual 40:2 unwieldy 17:25 urging 20:12 use 7:10 13:10 20:15 39:14,21 43:3 46:18 48:15 52:5 V v 1:5 3:5 12:7,11 vacation 43:12	vastly 12:3 view 11:21 17:23 20:21 34:12 43:20 44:8 50:4,9 virtual 43:5 virtually 35:2,7 36:7 W wait 12:14 48:17 waited 48:2 waiter 46:9 waiter's 46:10 want 13:2,20 15:20 25:16 28:13 31:19 32:24 36:14,16 39:11,23 50:7 51:1,7 wanted 7:5 33:17 36:10 39:9,10 wants 6:18 37:7 Washington 1:8 1:17,20 wasn't 10:10 waste 22:14 way 4:13 15:5 16:13 20:22 23:13 24:24 27:4 38:5 45:12 46:11,11 49:10 50:16 ways 10:5 whim 10:10 wife's 15:20 wild 51:17 wins 45:7 word 8:2 11:24 26:1 29:9 33:10,13 39:12 39:20,22 52:4 wording 5:16 words 21:17 33:8 43:4 work 10:24	17:19 workaround 48:20 works 41:9 worse 20:6 wouldn't 22:13 31:19 44:8 wrong 3:12 18:19 X x 1:2,7 Y year 41:12 years 17:22 18:3 24:3 30:11 41:11,11 \$ \$1,000 18:25 0 08-998 1:5 3:4 1 1 31:4 10:03 1:13 3:2 10:55 52:14 101 19:10 23:4 29:20 36:11 101(10A) 4:12 4:16 6:6,22 8:23 23:15 25:5 26:4,22 51:14 101(10A)(A)(ii) 48:9 101(10A)(ii) 13:8 16:5 19:16 11 6:4 12 6:4 13 1:3 3:5,12 5:25 12:12 18:4 20:1,15 22:3 24:20
---	---	--	---	---

30:9,14,16 31:15,17,23 32:20 48:22 1323 12:21 24:11 26:14 27:2,11 1325 25:1 28:16 35:8 51:7 1325(a)(3) 9:19 24:22,24 1325(a)(6) 45:21 1325(a)(7) 9:17 24:22 1325(b) 35:22 46:5 1325(b)(1) 7:13 7:18 28:17 1325(b)(2) 29:15 1327 22:3 1329 12:16,16 15:15 16:23 22:7 25:20,21 35:9,23 36:1 51:6 1978 12:1 1984 24:25	40 2:9 401(k) 17:23 42:18 45 36:20,21,23 <hr/> 5 <hr/> 50 2:12 521 5:10 48:23 521(i) 36:17,18 523 5:9 <hr/> 6 <hr/> 6 4:5,17 15:24 21:13 30:2,10 32:16 34:2 38:18 40:5 48:12,17 6-month 3:19,22 3:24 4:11,17 4:23,25 6:7,15 8:11 13:15,17 19:8 23:6,14 23:20,23 24:1 24:9 25:25 28:9 29:21,25 30:16 31:15,17 31:22,23 32:7 32:17 33:21 38:10,14 41:5 41:5 46:9,14 46:18,25 48:1 48:12 49:15 50:9 52:1 60 31:11 33:3 39:17 49:9 <hr/> 7 <hr/> 7 19:25 20:1,3 20:13 22:10,11 30:21,23,25 31:2,6,13,16 31:24 32:14 33:8 38:15 707 30:20,21 39:15 707(b) 11:10 20:4 51:9,15	51:16,24 707(b)(2)(A)(i) 30:25 78 8:16 <hr/> 8 <hr/> 83 4:14 29:20 34:1 85 31:1 <hr/> 9 <hr/> 91 28:15,20 96 4:14		
<hr/> 2 <hr/> 2 3:19 6:15 13:12 17:22 18:3 22:17 29:15 31:10 33:2 39:17 2005 3:13,14 6:24 7:7 2010 1:9 22 1:9 27 2:6 <hr/> 3 <hr/> 3 2:4 31:10 33:2 39:17 41:11 36 49:9 <hr/> 4 <hr/> 4 30:11 31:10 33:2 39:17				