No. 11-55452

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Cesar Ivan Flores and Ana Maria Flores,
Debtors.

ROD DANIELSON, CHAPTER 13 TRUSTEE
Trustee-Appellant

— v. —

CESAR IVAN FLORES and ANA MARIA FLORES
Debtors-Appellees

ON DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. 6:10-bk-29956-MJ

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN REHEARING *EN BANC* AND IN SUPPORT OF DEBTORS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Danielson v. Flores, No. 11-55452

Pursuant to Rule 29(c)(1) of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: January 23, 2013

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of about 4,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008); *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007).

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom file under Chapter 13 as "above median income debtors" with no "projected disposable income" under section 1325(b)(1)(B). The proper interpretation and application of the five year "applicable commitment period" under section 1325(b)(4)(B) is of great significance to all such debtors because the resolution of that issue dictates whether debtors will be unnecessarily forced to remain in bankruptcy even though they have paid unsecured creditors what is due to them under the projected disposable income test set forth in the Bankruptcy Code.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor part or party's counsel contributed money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

SUMMARY OF ARGUMENT

The plain meaning and intent of section 1325 dictate that the five year "applicable commitment period" of subdivision (b)(4) does not apply to debtors who, like the Debtors in this case, have no "projected disposable income" within the meaning of subdivision (b)(1)(B), as this Court previously held in *Maney v. Kagenveama*, 541 F.3d 869 (9th Cir. 2008). Further, the Supreme Court's holding in *Lanning* supports the conclusion that the calculation of projected disposable income in chapter 13 has remained the same as it was prior to the 2005 amendments to the Code. *Lanning* held that "projected disposable income" is calculated by multiplying the number of months in the debtor's "applicable commitment period" by the debtor's "projected disposable income" to produce the minimum dollar amount paid to unsecured creditors. This use of "applicable commitment period" is referred to as the *monetary* requirement view. The monetary approach endorsed by *Lanning* is inconsistent with *Kagenveama*'s *temporal* requirement that would apply to above-median income debtors with positive disposable income. Under *Kagenveama*, this temporal requirement imposes a mandatory plan length for certain debtors equal to the applicable commitment period. Because *Kagenveama*'s temporal approach conflicts with the Supreme Court's holding in *Lanning*, it must be rejected.

Similarly, the Eleventh Circuit, *Whaley v. Tennyson,* 611 F.3d 873 (11th Cir. 2010), and the Sixth Circuit, *Baud v. Carroll,* 634 F.3d 327 (6th Cir. 2011), have incorrectly interpreted *Lanning* as imposing a mandatory plan length based on the "applicable commitment period," (referred to as a *temporal* requirement, as contrasted with a *monetary* requirement). *Lanning* held that the pre-BAPCPA practice, using "applicable commitment period" to arrive at a *monetary* requirement, is still the current rule. Therefore, this Court should adopt the *monetary* method for determining projected disposable income.

ARGUMENT

I. THE SUPREME COURT IN *LANNING* ENDORSED A MONETARY APPROACH TO PROJECTED DISPOSABLE INCOME THAT IS INCONSISTENT WITH *KAGENVEAMA'S* TEMPORAL APPROACH.

A. The effect of the Supreme Court's *Lanning* opinion on this Court's prior *Kagenveama* ruling.

Hamilton v. Lanning, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010), abrogated this Court's opinion in *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008), with regard to its holding that "disposable income" was based strictly on the debtor's average income and expenses of the prior six months, without adjustment for known or virtually certain changes at the time of confirmation. *Lanning*, 130 S.Ct at 2475.

The panel in *Danielson v. Flores*, 692 F.3d 1021 (9th Cir. 2012) held that *Kagenveama*'s holding with respect to the applicable commitment period was not irreconcilable with *Lanning*, at least as applied to the Debtors in this case. As in *Kagenveama*, Cesar and Ana Flores have no "projected disposable income", that is, no amounts due to unsecured creditors under the projected disposable income test of section 1325(B)(1). The panel did not reconsider the meaning or application of the term "applicable commitment period" in section 1325(b)(4). However, the related holding in *Kagenveama* that the "applicable commitment period" is a *temporal* requirement for debtors with projected disposable income is irreconcilable with *Lanning*.

The "applicable commitment period" as a *temporal* requirement forces debtors to remain in an active chapter 13 cases for 36 months (below-median income debtors) or 60 months (above-median income debtors), regardless of the dollar amount required to be paid to unsecured creditors under the projected disposable income test. Conversely, the "applicable commitment period" as a *monetary* requirement requires the debtor to pay a specific dollar amount (calculated by multiplying the disposable income by the number of months in the "applicable commitment period") to unsecured creditors through the plan, but would be allowed to pay it over a shorter time than the number of months in the "applicable commitment period."

TABLE 1: A Comparison Of Using *Monetary* And *Temporal* Requirements As The Meaning of "Applicable Commitment Period"

	Example	*Monetary Requirement*	*Temporal Requirement*
"Disposable Income"	$200 per month	$200	$200
"Applicable Commitment Period"	60 months	Multiplied by 60	Paid each month over 60 months
"Projected Disposable Income"		Equals $12,000	$200 per month for 60 months
Resulting Monthly Plan Payments		The debtor may propose $200 per month, or may choose to pay the $12,000 faster, e.g., at $300 per month and receive a discharge in 40 months	The debtor is restricted to paying $200 monthly and will not receive a discharge until 60 months have elapsed, increasing the likelihood that debtor may not complete the plan.

B. *Lanning* held that the term "projected disposable income" did not have a "plain meaning" under § 1325(b)(1)(B), and looked to pre-BAPCPA practice; then, seeking evidence that Congress intended to change that practice, found none.

The issue presented in *Lanning* was the determination of the meaning of the term "projected disposable income" in Chapter 13 bankruptcy cases.

> "We granted certiorari to decide how a bankruptcy court should calculate a debtor's 'projected disposable income.'" *Id.* at 2469.

Lanning first found that neither the Bankruptcy Code after the 2005 amendments nor before the 2005 amendments defined "projected disposable income," although the same term was used both before and after the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). *See id.* at 2469; Pub. L. No. 109-8, 119 Stat. 23 (2005). Finding that the "projected disposable income" had no "plain meaning," *Lanning* noted:

> "pre-BAPCPA practice was telling, because we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Id.* at 2473 (internal quotation marks omitted).

Lanning concluded that the pre-BAPCPA usage of the term "projected disposable income" was as follows:

1. In determining "disposable income," the practice was "forward-looking" to the extent of taking into consideration and adjusting for 'known or virtually certain changes to debtors' income or expenses," *id.* at 2473-74); and

2. Having adjusted income and expenses by "known or virtually certain changes," *Lanning* found that this amount was multiplied by 36 months to arrive at the "projected disposable income." Pre-BAPCPA law did not differentiate debtors as "below" or "above" median income, and the "three-year" period in section 1325(b)(1)(B) applied to all debtors.

Lanning discussed the two lines of cases that had developed regarding the role of the "three-year period" in effect prior to BAPCPA. According to *Lanning*, those cases held that the three-year period was either a *temporal* requirement or a *monetary* requirement.

Citing *Collier on Bankruptcy* in expressing the majority view, *Lanning* stated:

> "As a practical matter, *unless there are changes which can be clearly foreseen*, the court must simply multiply the debtor's known monthly income by 36 and determine whether the amount to be paid under the plan equals or exceeds that amount." *Id.* at 2473. (emphasis added)

Lanning's above description is of the *monetary* requirement approach.

Lanning next considered whether, in enacting BAPCPA, Congress intended to change the meaning of "projected disposable income" that had been the pre-BAPCPA practice. *Lanning* found no intent by Congress to change that practice.

> "In light of this historical practice, we would expect that, had Congress intended for 'projected' to carry a specialized – and indeed, unusual meaning in Chapter 13, Congress would have said so expressly." *Id.* at 2474.

> "Congress did not amend the term 'projected disposable income' in 2005, and pre-BAPCPA bankruptcy practice reflected a widely acknowledged and well-documented view that *courts may take into account*

> *known or virtually certain changes to debtors' income or expenses* when projecting disposable income." *Id.* at 2473-74. (emphasis added).

Lanning's conclusion was that the meaning of projected disposable income, post-BAPCPA, continued as it had been before. Although both the initial income and expense amounts (prior to adjustments) and the types of creditors who receive the projected disposable income payments are different under BAPCPA, the underlying formula, as expressed by the terms in section 1325(b)(1)(B), remains the same now as it was pre-BAPCPA, and is as follows:

TABLE 2: "Disposable Income," ,"Applicable Commitment Period" and "Projected Disposable Income" Prior to BAPCPA And Under BAPCPA With *Monetary* Requirement Approach	
Description	***Term used in § 1325(b)(1)(B)***
Income (*Pre-BAPCPA:* Schedule I, adjusted for changes; *Now:* based on average of prior 6 months, adjusted for changes known or virtually certain at the time of confirmation) **Minus** Expenses (*Pre-BAPCPA*: Schedule J, adjusted for changes; *Now: for above median income debtors,* based on prescribed expense allowances, adjusted for changes known or virtually certain at the time of confirmation)	Disposable Income
Multiplied by (*Pre-BAPCPA*: 36 months for all debtors; *Now:* the "applicable commitment period" – either 36 months for below median income debtors or 60 months for above median income debtors)	Period (pre-BAPCPA) and Applicable Commitment Period (BAPCPA)
Equals the minimum dollar amount that must be paid (*Pre-BAPCPA*: through the plan to all creditors; *Now:* only to unsecured creditors through the plan)	Projected Disposable Income

C. *Lanning* found that the pre-BAPCPA majority view had adopted the "forward-looking approach" in determining "disposable income," which does not impose a *temporal* requirement for the plan

In reviewing the differing interpretations of "projected disposable income," *Lanning* applies the term "forward-looking" as follows:

> "Respondent, who favors the forward-looking approach, agrees that the method outlined by petitioner should be determinative in most cases, but she argues that *in exceptional cases, where significant changes in a debtor's financial circumstances are known or virtually certain, a bankruptcy court has discretion to make an appropriate adjustment*." *Id.* at 2471 (emphasis added).

Similarly, in *Lanning*'s survey of pre-BAPCPA usage of "projected disposable income" underlying its holding regarding current law, *Lanning* found:

> "Third, pre-BAPCPA case law points in favor of the 'forward-looking' approach. Prior to BAPCPA, the general rule was that courts would multiply a debtor's current monthly income by the number of months in the commitment period as the first step in determining projected disposable income. … *But courts also had discretion to account for known or virtually certain changes in the debtor's income*." *Id.* at 2472. (emphasis added).

In both passages, *Lanning* uses "forward-looking" specifically to adjust the debtor's income and expenses to take into consideration "known or virtually certain" changes. In contrast, throughout the opinion *Lanning* never applies the term "forward-looking" in connection with considering whether the 36 or 60 months are *temporal* or *monetary* requirements.

The *Flores* dissent, 692 F.3d at 1041, states that interpreting projected disposable income as a *temporal* requirement is "motivated not by policy concerns, but by fidelity to *Lanning*'s view of congressional intent." *Lanning*, however, looked at

Congressional intent relating to the adoption of BAPCPA and found no evidence of any intent to change pre-BAPCPA practice in applying "projected disposable income," which *Lanning* held used a *monetary* rather than a *temporal* requirement. *See Lanning*, 130 S.Ct. at 2473-74. The dissent's stated reason for adopting the *temporal* requirement is not supported by *Lanning*.

D. *Lanning*'s use of the words "calculate" and "calculates" in connection with "projected disposable income" excludes the use of "applicable commitment period" as a *temporal* requirement

Lanning's statement of the issue in question in the case was as follows:

> "We granted certiorari to decide how a bankruptcy court should *calculate* a debtor's 'projected disposable income.'" *Id*. at 2469. (emphasis added).

Again, when issuing its decision, *Lanning* states:

> "Consistent with the text of § 1325 and pre-BAPCPA practice, we hold that when a bankruptcy court *calculates* a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Id*. at 2478. (emphasis added).

If, as *Lanning* states, the "projected disposable income" is *calculated*, a *temporal* requirement use of "applicable commitment period" is excluded. If a temporal use of "applicable commitment period" is correct, there is no calculation (a mathematical process – here, multiplication) involved in the process of determining "projected disposable income." If "applicable commitment period" is a *temporal* requirement, determining "projected disposable income" only involves selecting the number of months the debtor will pay the "disposable income" – for example, stating that the debtor will pay $200 per month for 60 months. Only the *monetary* requirement usage of "applicable commitment period" introduces *calculation* into the determination of "projected disposable income" – where the debtor's $200 per month "disposable income" is multiplied by 60 months, which equals $12,000, which in turn is the dollar amount paid to unsecured creditors.

E. *Lanning*'s rejection of *Kagenveama's* "mechanical approach" (which excludes any income or expense adjustments) in determining "disposable income" is not a rejection of the use of "applicable commitment period" as a *monetary* requirement

Kagenveama's holding, which excluded adjustments to income and expenses in calculating "disposable income," was rejected by *Lanning* as the "mechanical approach." *Id.* at 2475. In rejecting the "mechanical approach," *Lanning* did not reject the use of a multiplication process to calculate "projected disposable income." *Lanning*'s rejection of the "mechanical approach" is the rejection of a simplistic determination of "disposable income," rather than the subsequent multiplication of "disposable income" by "applicable commitment period" to produce "projected disposable income."

Similarly, *Lanning*'s adoption of the "forward-looking approach" is <u>not</u> supportive of the *temporal* requirement. By rejecting the "mechanical approach" and adopting a "forward-looking approach," *Lanning* simply means that in determining "disposable income" the prior six months' average income and expenses are, in unusual situations, to be adjusted to account for known or virtually certain changes at the time of confirmation. *Lanning*'s endorsement of adjustments to income and expenses (the "forward-looking" approach) is unrelated to, and is not an endorsement of, the *temporal* requirement meaning of "applicable commitment period."

F. The use of the "applicable commitment period" as a *temporal* requirement rather than a *monetary* requirement (as in *Kagenveama*), detrimentally affects creditors in many Chapter 13 cases

When applying the meaning of "applicable commitment period" as a *temporal* requirement, the plan length for all above median income debtors—as under *Kagenveama*—is 60 months if the debtor has even a small amount of positive "disposable income." The consequences of nominal positive "disposable income" are significant and detrimental to many creditors, as illustrated in the following example (slightly simplified to exclude payment of interest, trustee's fees, and any attorney's fees).

TABLE 3: Comparison of Plan Disbursements to Secured Creditors And Unsecured Creditors Under *Monetary* and *Temporal* Approaches	
Debtor's Disposable Income	
Current monthly income, as adjusted*, from Form 22C	$4,000
Minus monthly expenses, as adjusted*, from Form 22C	- 3,900
Equals "Disposable Income"	100
Debtor's Debts	
Secured claims (e.g., a car loan)	$4,000
Unsecured claims (e.g., medical bills and credit cards)	15,000
Plan Calculation if "Applicable Commitment Period" is a Temporal Requirement. *The plan must continue in existence for 60 months.*	
Pay all secured claims in full ($4,000 divided by 60)	$67 per mo
Pay unsecured claims at $100 per month	+ 100 per mo
Total monthly Chapter 13 plan payment for 60 months	= 167 per mo
Plan Calculation if "Applicable Commitment Period" is a Monetary Requirement. *The debtor can pay the "projected disposable income" in a shorter period. Here, the debtor elects to pay the plan over 48 months.*	
Pay all secured claims in full ($4,000 divided by 48)	$83 per mo
Pay unsecured claims $6,000 divided by 48	+ 125 per mo
Total monthly Chapter 13 plan payment for 48 months	= 203 per mo

* Adjusted to account for "known or virtually certain changes at the time of confirmation," pursuant to *Lanning*.

As shown above, if "applicable commitment period" is a *temporal* requirement, not only is the car lender adversely affected by receiving lower monthly payments, but unsecured creditors are also receiving their payments more slowly. Stretching out the plan term also increases the risk that the debtor may lose her job during the repayment period, causing the plan to fail. In that event, the creditors will not receive the full dollar amount to which they were entitled.

II. *TENNYSON* AND *BAUD* BOTH CONFLICT WITH *LANNING*.

A. *TENNYSON'S* HOLDING THAT "APPLICABLE COMMITMENT PERIOD" IS A TEMPORAL REQUIREMENT CONFLICTS WITH *LANNING*

The decision in *Whaley v. Tennyson (In re Tennyson),* 611 F.3d 873 (11th Cir. 2010) considers whether "applicable commitment period" is a *temporal* or *monetary* requirement.

> "While we find that a plain meaning of § 1325(b)(4) is more than enough to support Whaley's interpretation of 'applicable commitment period', we also note that the legislative intent behind the BAPCPA amendments compels the finding that "applicable commitment period" be read as a temporal requirement for the length of the bankruptcy plan." *Id.* at 879.

In its cursory decision, it is unclear why *Tennyson* failed to seek guidance on the matter of "plain meaning" and "legislative intent" from *Lanning*. Had *Tennyson* done so, it would have seen that *Lanning* held that the pre-BAPCA practice was to treat "applicable commitment period" as a *monetary* requirement, and that there was no Congressional intent to change that practice.

Furthermore, *Tennyson* assumes that if the plan is kept open longer creditors will benefit. However, as shown above, longer plans means creditors will be paid more slowly. Debtors' income is just as likely (and possibly more likely) to decrease rather than increase over the term of the plan with the potential for decreased plan payments in later years. Creditors of debtors that propose higher plan payments over a shorter period of time may realize greater benefits than creditors of debtors with lower payments and longer plan periods. As a result, maximizing payments to creditors is not served by imposing a mandatory plan length on debtors.

B. *BAUD* ALSO CONFLICTS WITH *LANNING*

Baud v. Carroll, 634 F.3d 327, 339 (6th Cir. 2011) also holds that the "applicable commitment period" is a *temporal* requirement. *Baud*'s analysis is fatally flawed by numerous misinterpretations of *Lanning*'s holding. After discussing "disposable income" and considering the possible uses of "projected," *Baud* states:

> "The Supreme Court has weighed in on this question. In Lanning, the Supreme Court rejected the "mechanical" approach to calculating projected disposable income, under which the debtor's average monthly disposable income figure was simply multiplied by the number of months of the applicable commitment period. Lanning, 130 S.Ct. at 2473-77." *Id.* at 334

This description of *Lanning*'s holding is misleading. A reader might believe that the "mechanical approach" *Lanning* rejected was the process of multiplying "disposable income" by the number of months in the "applicable commitment period" (using it as a *monetary* requirement). In contrast and as discussed above, the "mechanical approach" rejected by *Lanning* was the approach of excluding adjustments to income and expenses. *Baud* repeats this same misleading characterization of *Lanning*'s rejection of the "mechanical approach" again at 345.

Baud's other serious problem involves its attempt to reinvent the plain meaning, pre-BAPCPA practice of determining "projected disposable income" in conflict with

Lanning. *Baud*, 634 F.3d at 341-42. While *Lanning* found the majority pre-BAPCPA practice to be the *monetary* approach, *Baud,* like *Tennyson,* found it to be the *temporal* approach. This entire passage in *Baud* is without merit, since it conflicts with *Lanning*.

III. HAD CONGRESS INTENDED TO MANDATE A MINIMUM PLAN TERM IT COULD HAVE DONE SO, BUT DID NOT.

Had Congress intended to create a mandatory plan length for debtors (a *temporal* requirement), it could have easily done so. Congress included a specific provision setting a *maximum* length for plans proposed by debtors. *Compare* 11 U.S.C. § 1322(d). This demonstrates that Congress could have also established a *minimum* plan length, but it did not.

Section 1325(b)(4)(B) also does not require, even by indirect implication, that plans last 36 or 60 months. Section 1325(b)(4)(B) provides:

> "[For purposes of this subsection, the 'applicable commitment period' –] may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period."

The *Flores* dissent refers to the legislative history that includes a passing mention of this section:

> "The quoted section is confusingly worded, but the title suggests that above-median debtors are to be held to a five-year minimum plan duration without regard to their expenses or disposable income, unless they pay unsecured claims in full over a shorter period." (*Id.,* at 10349)

Whaley v. Tennyson, 611 F.3d 873, at 878 (11th Cir. 2010) offers a similarly confused interpretation of § 1325(b)(4)(B):

> "However, if we were to interpret 'applicable commitment period' as Tennyson advocates, as a multiplier that exists only for § 1325(b)(1), then §1325(b)(4)(B) would be rendered meaningless and superfluous. Section 1325(b)(1)(A) already provides that the [sic] neither the trustee nor the unsecured creditors may object to the bankruptcy plan if unsecured claims are paid in full. Thus, § 1325(b)(4)(B)'s explicit allowance for a shorter 'applicable commitment period,' when unsecured claims are paid in full, is only necessary if the 'applicable commitment period' has a function independent of § 1325(b)(1)."

Contrary to *Tennyson's* above quotation, section 1325(b)(1)(A) does not mandate a full repayment Chapter 13 plan. This section deals exclusively with *individual holders* of individual unsecured claims and not the trustee, since the trustee is never the "holder" of a "claim". Either a trustee or an unsecured creditor may, however, object under section 1325(b)(1)(B). Section 1325(b)(1)(A) provides:

> "[If the trustee or the *holder of an allowed unsecured claim* objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –] (A) the value of the property to be distributed under the plan *on account of such claim* is not less than the amount *of such claim*" (emphasis added).

Under section 1325(b)(1)(A), an unsecured creditor might object if the plan classifies unsecured claims in a manner the creditor views as discriminatory.[1] An unsecured creditor might also object under this section if he believes the property proposed to be paid to him by the debtor is of insufficient value to compensate him

[1] Unsecured claims may be designated as specified classes pursuant to section 1322(b)(1).

for the full amount of the claim.[2] In both of these examples, the plan need not be a 100% repayment plan.

In addition, section 1325(b)(4)(B) does have meaning in the context of using the "applicable commitment period" as a *monetary* requirement (multiplier). It is *not* superfluous, and it does not cause § 1325(b)(1)(B) to create a minimum plan length. Rather, this section prescribes when unsecured claims in an individual case must *be paid in full*, based on the calculated "projected disposable income." For example, where the debtor's total unsecured debt is actually less than her "projected disposable income," this section assures that the unsecured claims must be paid in full, but that no confusion is produced if the calculated "projected disposable income" amount is more than the total unsecured claim amount.

The examples below show how section 1325(b)(4)(B) is applied while using "applicable commitment period" as a *monetary* requirement.

TABLE 4: Purpose of § 1325(b)(4)(B) With "Applicable Commitment Period" Used As *Monetary* Requirement		
	Example 1	*Example 2*
Disposable Income (monthly)	$300	$300
Applicable Commitment Period	x 60	x 60
Projected Disposable Income	= $18,000	= $18,000
Debtor's total unsecured claims	$9,000	$25,000

In Example 1, this above median income debtor will provide to pay his unsecured claims in full through the plan (a 100% plan) because his "projected

[2] Section 1322(b)(8) allows a claim to be paid from property of the estate or property of the debtor].

disposable income" exceeds his total unsecured debt. He is able to shorten his "applicable commitment period" to 30 months under section 1325(b)(4)(B) because 30 months multiplied by $300 (his monthly "disposable income") equals $9,000 – the amount of his total unsecured debt. This avoids the confusion of the debtor appearing to be required to pay a minimum of $18,000 (his "projected disposable income") to his unsecured creditors, when in fact he only owes them $9,000. The same results would apply to a debtor with below median income, except that the number of months used as a multiplier would be 36 instead of 60.

Example 2 is the same as Example 1, except the debtor's total unsecured claims *exceed* his "projected disposable income." This debtor is not required to fully repay all of his unsecured debt ($25,000). Rather, he must pay only $18,000 of it, since that is his "projected disposable income." This debtor will not be able to shorten his "applicable commitment period" under section 1325(b)(4)(B) because his plan will not provide for full repayment of his unsecured debt.

The Trustee-Appellant, Danielson's *Petition for Rehearing En Banc* (at 15), in *Flores,* also cites *Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. 716, 721, 178 L.Ed.2d 603 (2011) as supporting a mandatory plan term, and giving "applicable commitment period" a *temporal* usage. The Petition refers to H.R. Rep. No. 109-31, pt. 1 (2005), and states: "under BAPCPA, debtors [will] repay creditors the maximum they can afford" as supporting a freestanding plan length requirement – a *temporal* requirement.

However, the very next sentence in *Ransom* is inconsistent with a *temporal* requirement, describing the plan length as:

> "*generally* lasting *from* three *to* five years. §§ 1325(b)(1)(B) and (b)(4)." (emphasis added).

Rather than describing a mandatory plan length, the above excerpt from *Ransom* (in light of *Lanning*), clearly envisions that plans may be proposed and confirmed to last *between* three and five years, with some plans proposed and confirmed at less than three years. Such a description is consistent with "applicable commitment period" imposing a *monetary* requirement rather than a *temporal* requirement.

Finally, consider debtors like Cesar and Ana Maria Flores in this case. The Floreses were in fact eligible to file under Chapter 7, and even though they technically have no "projected disposable income," they chose to file under Chapter 13 and voluntarily make payments toward their unsecured creditors with funds otherwise protected from the reach of creditors. *See* Appellee's Opening Brief, Case No. 11-55452 at 37-38. As the Flores point out, a mandatory five year plan length for all above median income debtors in Chapter 13 would obviously encourage other debtors like themselves to stay out of Chapter 13 and to file under Chapter 7, necessarily resulting in even smaller recoveries for unsecured creditors. *Id.*

IV. PUBLIC POLICY CONSIDERATIONS SUPPORT THE MEANING OF "APPLICABLE COMMITMENT PERIOD" AS A *MONETARY* REQUIREMENT

If "applicable commitment period" is a *temporal* requirement, implementation of the plan becomes problematic. There are no provisions in the Bankruptcy Code that account for a debtor who might complete her plan payments and not yet be entitled to a discharge for several more years – requiring the debtor remain in a limbo status for many months. The debtor would find it impossible to re-establish good credit during this time because lenders generally require evidence of the debtor's bankruptcy discharge in order to grant credit. Therefore, if the debtor's car broke down after she paid all of her projected disposable income, but before she received a discharge, she either would be denied credit altogether or be forced to accept a high interest (high risk) loan in order to finance a replacement vehicle. Also, by extending the plan term, the costs of administering the plan are increased for the court and the trustee, with the trustee receiving lower monthly fees for his services – and no fees at all during a period when the debtor is no longer making monthly plan payments, but the discharge has not yet been granted.

Practical concerns arise regarding the maintenance of the files as active cases for the courts, trustees, and attorneys. In addition, the likelihood that some debtors will move from the bankruptcy court's location and lose track of the final steps necessary to obtain a discharge in the long-finished case will produce burgeoning numbers of finished, but yet undischarged cases. Public policy would be better served by avoiding such dysfunction in the bankruptcy courts.

CONCLUSION

Based on the foregoing, NACBA asks this Court to:

1. affirm *Kagenveama*'s holding that where "disposable income" is zero or negative, the "applicable commitment period" does not apply, because in such a case there is no "projected disposable income"; and

2. overrule *Kagenveama*'s holding that "applicable commitment period" is a *temporal* requirement, adopting, in the alternative, the interpretation of "applicable commitment period" in § 1325(b)(1)(B) as a *monetary* requirement serving as a multiplier that when multiplied by "disposable income" produces "projected disposable income" – the total dollar amount that must be paid to unsecured creditors through the plan.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, *Amicus* hereby states that there are four related cases: *Maney v. Kagenveama* ("*Kagenveama*"), 541 F.3d 868 (9th Cir. 2008), *American Express Centurion Bank v. Henderson*, No. 11-35864, *McCallister v. Henderson*, No. 11-35865, and *Danielson v. Flores*, No. 11-55452. Debtors are aware of no other cases in this Court that may be deemed related.

CERTIFICATE OF COMPLIANCE

In accordance with FRAP Rule 29 and Circuit Rule 29-2(c)(3), this brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 4,957 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

_/s/Tara Twomey ______________________
TARA TWOMEY, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, I electronically filed the foregoing document with the Clerk of the Court for Ninth Circuit Court of Appeals by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following parties: NONE

_/s/Tara Twomey ______________________
TARA TWOMEY, ESQ.