No. 15-7152

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Crystal L. Wilkerson,
Debtor.

CRYSTAL L. WILKERSON
Debtor-Appellant

— v. —

CYNTHIA A. NIKLAS,
Trustee-Appellee

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLANT AND SEEKING REVERSAL OF THE BANKRUPTCY COURT'S DECISION

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March 8, 2016

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Wilkerson v. Niklas – No. 15-7152

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

Amicus curiae, the National Association of Consumer Bankruptcy Attorneys, is a non-profit organization that does not have any parent companies or subsidiaries, and no publicly-held company has any ownership interest in *amicus curiae.*

CERTIFICATE AS TO PARTIES, RULING, AND RELATE CASES

(A) **Parties and Amici**.
Debtor-Appellant: Crystal L. Wilkerson
Chapter 13 Trustee-Appellee: Cynthia A. Niklas

(B) **Ruling Under Review**. *In re Wilkerson*, No. 14-00582 (Bankr. D. D.C. June 25, 2015).

(C) **Related Cases**: Except for the proceedings below, *amicus curiae* is not aware of "any other related case."

/s/ Daniel M. Press
Daniel M. Press, Esq.

Dated: March 8, 2016

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,000 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.

The resolution of the question presented in this case is of substantial importance to NACBA. Many thousands of debtors represented by NACBA and its members are required to apply the means test formulas in their bankruptcy cases. The proper interpretation of the means test is therefore of vital interest to consumer debtors. Through its educational and representational functions, NACBA seeks to ensure the predictability of bankruptcy relief for both consumer debtors and the consumer bankruptcy bar.

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 did party or party's counsel contribute money intended to fund this brief and no person other than NACBA, its members, or its counsel contributed money to fund this brief.

SUMMARY OF ARGUMENT

Ms. Wilkerson properly calculated her projected disposable income by applying deductions in the amounts specified by the IRS standards for housing and transportation ownership expenses rather than her actual expenses.

The plain language of the statute mandates that deductions for housing and transportation ownership expenses should be the amounts specified in the IRS standards. Congress distinguished between the IRS standards and the debtor's actual expenses and elected to apply actual costs to certain of the debtor's expenses and to apply the IRS standards for housing and transportation ownership expenses. The only requirement is that the expense be "applicable," i.e. that the debtor have some costs related to housing mortgage/rental expense and transportation ownership.

The Bankruptcy Court's finding that the IRS standards are merely a cap to the amount the debtor may deduct for the relevant expenses is textually insupportable as it equates "applicable" with "actual" despite Congress's deliberate distinction between the two. Congress could have limited the deduction to actual expenses as it did with respect to other expense categories but, after specific debate during the finalization of BAPCPA, Congress maintained its determination to apply a standardized deduction in certain categories of expenses.

Use of the IRS standards as required by the statutory text furthers one of the underlying purposes of the means test by creating an objective test that is not

dependent upon the uncertainties inherent in predicting expenses over the course of the debtor's chapter 13 plan.

STATUTORY FRAMEWORK

I. Bankruptcy In General

Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The importance of this regime to the national welfare, and the delicacy of the task, are suggested by the Framers' assignment to Congress of the power to "establish . . . uniform Laws on the subject . . ." U.S. CONST., art. I, § 8, cl. 4. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

The Bankruptcy Code provides several avenues for people weighed down by debt to repay their creditors, receive a discharge of most remaining debts, and exit bankruptcy with a clean financial slate. Individuals seeking bankruptcy relief generally seek liquidation under chapter 7 of the Bankruptcy Code or propose a plan for repayment of a portion of their debt under chapter 13. In practice unsecured creditors generally receive more under chapter 13, than under chapter 7. As a result, Congress has expressed a strong policy of encouraging debtors to take advantage of chapter 13 where possible. *See Perry v. Commerce Loan Co.*, 383 U.S. 392 , 395 (1966); H.R. Rep. No. 103-835, at 57 (1994).

II. Chapter 13

Chapter 13 permits an individual debtor with a source of regular income to receive a discharge of certain debts after completing a bankruptcy plan that meets the Code's requirements. Chapter 13 is completely voluntary; a debtor must elect to petition for bankruptcy under chapter 13. 11 U.S.C. § 303.

Section 1321 directs chapter 13 debtors to file a debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. Chapter 13 plans that meet the requirements set forth in the Code are confirmed by the bankruptcy court. 11 U.S.C. §§ 1322, 1325. Debtors make payments under confirmed plans for the benefit of the debtors' secured and/or unsecured creditors. Upon completion of payments under the plan debtors receive a discharge of all debts provided for by the plan, with limited exceptions. 11 U.S.C. § 1328(a).

III. The Chapter 13 Plan

There are generally four tests that the plan must satisfy in order to be confirmed by the court: the best interest of the creditors test, the feasibility test, the good faith test and the disposable income test. Of these tests, the Chapter 13 Trustee objected to confirmation of the Debtor's chapter 13 plan and the Bankruptcy Court denied confirmation based on the disposable income test of 1325(b)(1)(B). [JA69, 91].[1]

[1] Record cites are to the Joint Appendix.

A. Best Interest of the Creditors Test: The Bankruptcy Code provides that the court "shall confirm a plan…if the value, as of the effective date of the plan, of property to be paid under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on the claim [in a chapter 7 case]." 11 U.S.C. § 1325(a)(4). This test ensures that general unsecured creditors would not be harmed by a debtor's choice of chapter 13 over chapter 7. That is, unsecured creditors must receive as much in a chapter 13 as they would have under a chapter 7 liquidation. The Chapter 13 Trustee originally objected to the debtor's plan based on the best interest of the creditors test, but this objection was apparently resolved. [JA70].

B. Feasibility Test: Section 1325(a)(6) requires that the "debtor will be able to make all payments under the plan and to comply with the plan." If the plan does not meet this standard, often called the feasibility test, confirmation may be denied. Under this test, the debtor must show sufficient income or other financial resources to enable the debtor to make the payment proposed. A plan is considered feasible if the debtor's net monthly income, as reflected on Schedule J, is equal to or greater than the debtor's proposed plan payment. The Chapter 13 Trustee did not object to the debtor's plan based on the feasibility test. [JA68-70].

C. Good Faith Test: Section 1325(a)(3) requires that "the plan [be] proposed in good faith and not by any means forbidden by law." The good faith standard provides a check on actions that abuse the bankruptcy system. It is intended to address specific misconduct, plans imposed for an improper purpose or anything else

that would bring the case within the ambit of bad faith as traditionally interpreted. *Barnes v. Whelan*, 689 F.2d 193 (D.C. Cir. 1982). The Chapter 13 Trustee did not object to the debtor's plan based on the good faith test. [JA68-70].

D. Disposable Income Test: Section 1325(b) permits the chapter 13 trustee or the holder of an allowed unsecured claim to object to confirmation if the debtor does not propose to pay into the plan all of his or her projected disposable income to be received during the applicable commitment period. The test was originally enacted as part of the 1984 amendments to the Code, and it provided express instructions regarding how to take into account the debtor's income and what portion of the that income should be devoted to plan payments. The disposable income test was significantly revised in the 2005 amendments to the Bankruptcy Code. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) ("BAPCPA").

Section 1325(b) now provides that a court may not confirm a plan over the objection of the chapter 13 trustee or unsecured creditor,

> unless, as of the effective date of the plan…(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. § 1325(b)(1)(B). BAPCPA defined a chapter 13 debtor's "disposable income" as "current monthly income received by the debtor . . . less amounts

reasonably necessary to be expended." 11 U.S.C. § 1325(b)(2). In turn, "current monthly income" is defined as "the average monthly income from all sources that the debtor receives . . . derived during the 6-month period" prior to filing the bankruptcy petition. 11 U.S.C. § 101(10A)(A)(i). This figure explicitly excludes social security benefits. 11 U.S.C. § 101(10A)(B).

On the expense-side, for debtors with income above the state median amounts reasonably necessary to be expended "*shall* be determined in accordance with subparagraphs (A) and (B) of [S]ection 707(b)(2)." 11 U.S.C. § 1325(b)(3) (emphasis added). Section 707(b)(2), in turn, provides deductions for standardized "expense amounts specified under the National and Local Standards . . . issued by the Internal Revenue Service for the area in which the debtor resides," secured debts, and other specifically permitted expenses. 11 U.S.C. § 707(b)(2)(A). Housing and transportation allowances fall under the Local Standards. Housing expenses are further divided into "housing and utilities mortgage/rental expense" and "housing and utility non-mortgage expense." [JA62-63] Similarly, transportation expenses are divided into two components: operating costs and ownership costs.[2] Official Bankruptcy Form B22C provides entry lines for each specified deduction and directs the above-median debtor to calculate "disposable income" by subtracting those

[2] Though transportation expenses are covered by the Local Standards, nationwide figures are used for the ownership expense and regional figures are used for the operating expense.

deductions from "current monthly income." *See* Fed. R. Bankr. P. Official Bankruptcy Form B22C (prior to Dec. 1, 2015);[3] [JA62-67].

The Trustee objected to the Debtor's plan for failure to comply with the disposable income test of section 1325(b)(1)(B). [JA69]. Specifically, the Trustee argued that Ms. Wilkerson was not entitled to deduct the amounts specified under the Local Standards for housing and utilities mortgage/rental expense ($1,910) and transportation ownership expense ($517).[4] [JA63] Rather, according to the Trustee, the debtor is limited to actual expenses in each category ($923 and $315, respectively). [JA69].

IV. ARGUMENT

A. The Plain Language of the Statute Demonstrates That Ms. Wilkerson Is Entitled To Deduct the Amounts Specified for Housing and Transportation Expenses.

"The starting point in discerning congressional intent" underlying a provision of the Bankruptcy Code is always "the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Section 707(b)(2) of the Code provides in pertinent part:

> The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue

[3] As of December 1, 2015, the Official Bankruptcy Forms have been revised and renumbered. Official Form B22C is now Official Form 122C-1 and 122C-2.
[4] The relevant tables have been reproduced in Addendum A.

Service for the area in which the debtor resides . . .

11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). The "applicable" standards referenced in the statute, including the applicable standards for housing and transportation expenses, are located in the Financial Analysis Handbook of the IRS's Internal Revenue Manual ("IRM"), which the IRS uses in determining a taxpayer's ability to pay a delinquent tax liability.

The plain language of section 707(b)(2)(A)(ii)(I) demonstrates that Congress decided to use the standardized amounts specified by the IRS for housing and transportation expenses, not the debtor's actual expenses, as the appropriate figures to be used in the Means Test.

First, Congress was very much aware of the difference between using the IRS published standards and "actual monthly expenses." Section 707(b)(2)(A)(ii)(I) explicitly distinguishes between "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards," on the one hand, and "the debtor's actual monthly expenses," on the other. The statute specifies the use of the latter with regard to "the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides."[5]

[5] The Other Necessary Expense category includes expenses such as legal and accounting fees, charitable donations, childcare and education. IRM § 5.15.1.10. The following line of § 707(b)(2)(A)(ii)(I) directs the bankruptcy court also to allow for "reasonably necessary health insurance, disability insurance and health savings account expenses."

Thus, the statute draws a clear distinction between actual expenses and the applicable amounts specified under the IRS published statements. Congress used "applicable" to mean something other than "actual." If the Court is to give effect to all the words of the statute, the term "applicable monthly expense amounts" cannot mean the same thing as "actual monthly expenses." Under the statute, a debtor's "actual monthly expenses" are relevant only with regard to the IRS's "Other Necessary Expenses." As the Supreme Court noted, with respect to deductions taken under the National and Local Standards, including the housing mortgage/rental expense and the transportation ownership deduction, the inquiry requires only "looking at the financial situation of the debtor and asking whether a National or Local Standard table is relevant to him." *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 70 (2011)

Certainly, Congress knew how to say "actual" when it meant to refer to "actual" expenses. In fact, when Congress intended to condition a deduction on a debtor's actual expenditure or showing of need, it did so. For example, section 707(b)(2)(A)(ii) uses the following phrases to describe the nature of various other deductions: "debtor's reasonably necessary expenses incurred," § 707(b)(2)(A)(ii)(I) (Family Violence Prevention and Services Act expenses); "expenses paid by the debtor that are reasonable and necessary," § 707(b)(2)(A)(ii)(II) (expenses for elderly, chronically ill or disabled immediate family members); "reasonable and necessary [expenses]," § 707(b)(2)(A)(ii)(I) (additional allowances for food and

clothing up to 5%); and "actual expenses [that are] are reasonable and necessary," § 707(b)(2)(A)(ii)(V) (additional home energy costs).

The language of these provisions shows that when Congress intended to condition a deduction on a debtor's actual expenditure or a showing of need, it did so. The absence of this type of language with regard to the National and Local Standards — again, the statute refers only to the "debtor's applicable monthly expense amounts specified under the National Standards and Local Standards" — suggests that courts should not require more of the debtor other than to show that the "amount specified" is applicable, that is, it is relevant to the debtor because the debtor has that type of expense. *Ransom*, 562 U.S. at 70 ("a deduction is so appropriate only if the debtor has costs corresponding to the category covered by the table—that is, only if the debtor will incur that kind of expense during the life of the plan").

This reading of section 707(b)(2)(A)(ii)(I) is "mandated by the grammatical structure of the statute." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). The category of "applicable monthly expense amounts specified under the National Standards and Local Standards" is separated by a comma and the conjunctive "and" from the category of "Other Necessary Expenses," thereby emphasizing the separate and independent treatment of the two categories. The wording of the statute specifically differentiates between "applicable" and "actual" monthly expenses and therefore, "applicable" expenses are all those that apply so long as the debtor has that type of expense regardless of whether such expenses are "actual." *Ransom*, 562 U.S. at

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This interpretation is shared by an influential bankruptcy treatise as well:

> Although the Court ruled that a debtor with no actual loan or lease payments at the time of the petition could not claim the car ownership allowance under the IRS standards, its reasoning was that the allowance was not "applicable" to a debtor with no payments. Citing the statute's language referring to "the debtor's applicable monthly expense amounts," the Court held that an allowance was not applicable to a debtor whose individual circumstances included no expense corresponding to the allowance… .The Court expressly declined to decide the issue of whether a debtor whose monthly ownership expenses are less than the allowance may claim the full allowance. However, its reasoning makes it difficult to see how anything but the amount in the IRS table is to be used once the ownership allowance is found to be "applicable." The statute refers to the "amount specified" in the standards and the Court's decision described the standards as "tables that the IRS prepares listing standardized expense amounts for basic necessities."

6 COLLIER ON BANKRUPTCY ¶ 707.04[3][c][i] (16th ed., Alan J. Resnik & Henry Sommer, eds.)

The Judicial Conference Advisory Committee on Bankruptcy Rules has adopted the same view. On Official Bankruptcy Form B22C, debtor was directed to enter the amount of the applicable mortgage/rent expense less home-secured debt as the debtor's Local Standards: housing and utilities; mortgage/rent expense. [JA63]. Subtracting the secured debt amount from the applicable amount specified would be unnecessary if debtors were limited to deducting their actual mortgage expense. Similarly, debtors are instructed to enter the difference between the transportation ownership costs and monthly payments for debts secured by their vehicle. [JA63].

The more recent version of the form, Official Bankruptcy Form 122C-2, takes a similar position.[6] The revised form asks debtors to "calculate the net ownership or lease expense for each vehicle." However, consistent with *Ransom*, the form states that debtors may not claim the expenses if they do not make any loan or lease payments on the vehicle. Thus debtors with some expense in these categories are instructed to use the amount specified by the IRS standards, not their actual expense. While the Official Bankruptcy Forms cannot trump contrary language of the Bankruptcy Code, *see In re Currie*, 537 B.R. 884 (Bankr. C.D. Ill. 2015) (citations omitted), here the majority of courts, the leading bankruptcy treatise, and the rules committee all agree that a plain reading of the statute permits debtors with some expense in the mortgage or transportation ownership categories to deduct the "amounts specified" in the IRS Local Standards. *See In re Harris*, 522 B.R. 804, 815-16 (Bankr. E.D.N.C. 2014) (acknowledging that the minority position that permits deduction of only actual expenses is inconsistent with the Official Bankruptcy Forms and the determinations of the Judicial Conference Advisory Committee on Bankruptcy Rules).

For all these reasons, section 707(b)(2)(A)(ii)(I) should be interpreted as requiring the use of the IRS standards on housing and transportation expenses, not the debtor's actual expenses. Because there is no dispute that Ms. Wilkerson has costs

[6] Official Bankruptcy Form 122C-2 is available at http://www.uscourts.gov/forms/means-test-forms/chapter-13-calculation-your-disposable-income.

corresponding to the categories of housing mortgage/rental expense and transportation ownership expense she is entitled to the deduct the "amounts specified" in the IRS standards.

B. The Contrary Reading of the Statutory Text Is Unsupportable.

The Bankruptcy Court's decision below extends *Ransom* beyond what the plain meaning of the statutory text can support. According to the court below, an expense amount is only "applicable" to a debtor to the extent it is actually incurred, with the IRS Standard serving merely as a cap on the amount of the deduction. [JA78]. That is, according to the lower court, debtors are only permitted to deduct their actual expenses in these categories so long as those expenses are below the amounts specified. This interpretation cannot be reconciled with the plain language of section 707(b)(2)(A)(ii)(I) and the Supreme Court's careful decision in *Ransom*.

First, the Supreme Court's holding in *Ransom* made clear that debtors with no expense of the type specified, i.e., no transportation ownership expense, were not entitled to such a deduction. 562 U.S. at 80. While the Court could have achieved the same result by limiting debtors to their actual expenses, the Court declined to do so. Instead, the Court stated that its reading of the means test gave full effect to the distinction between "applicable" and "actual." *Id.* at 75. Such a distinction would not be necessary if "applicable monthly expense amounts" meant the same thing as "actual monthly expenses." The *Ransom* decision makes clear that debtors are only

required to incur the kind of expenses for which they claim the standardized means-test deduction. *Id.* at 71.

Second, the Bankruptcy Court construed section 707(b)(2)(A)(ii)(I) as though it provided that "debtor's applicable monthly expense ***up to the*** amounts specified under the National Standards and Local Standards…" or perhaps the debtor's monthly expenses would be the monthly expense amount specified under the IRS standards "only if the IRS standards are equal to or lower than the debtor's actual expenses." But the statute does not contain any such language or qualifications. The Bankruptcy Court's interpretation, and that of other courts adopting the minority position, would require adding words to the text of the statute in violation of the basic principles of statutory construction. *See CSX Tranp. Inc., v. Georgia State Bd. of Equalization*, 552 U.S. 9, 29 (2007) (rejecting statutory interpretation that "depends upon the addition of words to a statutory provision") (internal quotation marks and citation omitted); *Patterson v. Shumate*, 504 U.S. 753, 758-59 (1992) (refusing to limit the phrase "applicable nonbankruptcy law" to state law, on the ground that it would require adding limiting language to statute). As discussed above, *see* Part A, Congress knew how to limit deductions to actual expenses, but it chose not to do so with respect to the National and Local Standards.

C. The Legislative History Demonstrates That The Debtor Is Entitled To A Deduction of the Amount Specified in the IRS Standards.

The legislative history supports the Debtor's construction of section

707(b)(2)(A)(ii)(I). The legislative history establishes that Congress was aware that the IRS standards were not the same as a debtor's actual expenses and that Congress did not intend to limit the bankruptcy Means Test expense deductions to the debtor's actual expenses. Instead, Congress adopted a uniform and readily applied formula that created an objective test.

Congress squarely confronted the question of whether to use a debtor's actual expenses in the Means Test calculation, or whether to use IRS standards that might differ markedly from the debtor's actual expenses. During the markup of H.R. 833 (the House legislation which ultimately became BAPCA), Rep. Henry J. Hyde, chairman of the House Judiciary Committee, and a central figure in the enactment of BAPCPA, sought to replace the means test's IRS expense standards with "a reasonably necessary expense standard." Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 523 (2005). Rep. Hyde explained that "a reasonably necessary standard provided more flexibility for the court's determination of a debtor's expenses" than the IRS expense standards allowed. *Id.* at 524 n.222

The House Judiciary Committee ultimately rejected Rep. Hyde's proposed approach and retained the IRS expense standards as part of the means test. In the words of the members of the House Judiciary Committee who opposed the bill that eventually became law, "[t]he bill . . . makes substantial changes to chapter 13 by substituting the IRS expense standards to calculate disposable income . . . [T]he

formula remains inflexible and divorced from the debtor's actual circumstances." Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H. Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. 553 (2005), reprinted in 2005 U.S. Code Cong. & Admin. News 88.

Even after the House mark-up of H.R. 833, Rep. Hyde continued to press for the deletion of the IRS expense standards and the enactment of a more flexible approach. During floor debate, Rep. Hyde criticized the expense standards as "rigid and inflexible." 145 Cong. Rec. H2718 (daily ed. May 5, 1999). The Majority Leader defended them as "clear, defined standards." *Id.* at H2719. The Clinton Administration released a statement warning that the House bill "would limit access to Chapter 7 to debtors who meet an inflexible and arbitrary means test. . . . H.R. 833 simply takes IRS expense standards, which were not developed for bankruptcy purposes, and applies them rigidly to determine ability to repay in bankruptcy."[7] The House shrugged off the criticism and enacted the bill, and the Senate followed suit.

As one commentator has remarked, the rejection "of a chairman's position on legislation considered by his or her own committee by members of his or her own political party is highly unusual." Jensen, 79 AM. BANKR. L.J. at 524. The decision to adopt the IRS expense standards rather than the debtor's actual expenses, in other

[7] Executive Office of the President – Office of Management and Budget, Statement of Administration Policy – H.R. 833 – Bankruptcy Reform Act of 1999, at 1 (May 5, 1999), available at http://clinton2nara.gov/OMB/legislative/sap/ HR833-h.html, reprinted in Jensen, 79 AM. BANKR. L.J. at 526.

words, was not lightly made, and this Court should not undo the congressional judgment after the fact. Congress chose a bright-line approach that did not vary according the debtor's actual expenses.

In balancing the interests of debtors and creditors, Congress can and must draw lines. Often, "the legislature must necessarily engage in a process of line-drawing." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315–16 (1993) (internal quotation marks omitted). "[T]he fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* (internal quotation marks omitted). Congress has drawn such lines throughout the Bankruptcy Code. *See* 11 U.S.C §§ 707(b)(2)(A)(i) (triggering the presumption of abuse for the means test if projected disposable income exceeds a certain dollar value); 707(b)(7)(A), 1325(b)(4) (determining chapter 13 debtors' applicable commitment period based on whether they are over or under the applicable median family income). Here, Congress created an objective test that necessarily raises questions of line-drawing and perceived fairness. But, Congress chose to use the "applicable monthly amounts specified" under the National and Local Standards as a means of relieving bankruptcy courts from the burden of engaging in individualized analyses of the reasonableness of particular debtors' expenditures. Therefore, if debtors have the kind of expense identified in the standards then they are entitled to deduct the amount specified. *Ransom*, 562 U.S. at 70-71.

D. Policy Considerations Militate In Favor Of Debtor's Position.

BAPCPA moved bankruptcy courts from a system of case-by-case determinations of reasonableness to a more uniform approach, based on standardized deductions listed in IRS tables. It also sought to avoid disputes about the reasonableness of particular expenses and instead create an aggregated standard budget that is presumed to represent a reasonable total level of spending for different size households in particular geographic regions of the country. Thus, "[t]he provisions of section 707(b)(2) create a formulaic test to determine whether a debtor's chapter 7 case is to be presumed abusive for purposes of section 707(b)." 6 COLLIER ON BANKRUPTCY ¶ 707.04[3][a]. "In eliminating the pre-BAPCPA case-by-case adjudication of above-median income debtors' expenses, on the ground that it leant itself to abuse, Congress chose to tolerate the occasional peculiarity that a brighter-line test produces." *Ransom*, 562 U.S. at 78.

The statutory interpretation advanced by the debtor is entirely consistent with that congressional purpose. The transaction costs saved by reliance on standardized, uniform tables more than compensate for any perceived unfairness in allowing debtors to take the full housing or transportation expense specified by the National and Local Standards when deciding how much disposable income they have available to pay their unsecured creditors

The statute creates an objective test, based on a reasonable expense allowances, to be applied at the outset of what is likely to be a 60-month bankruptcy process for

consumer debtors under chapter 13. Given the inherent uncertainties of predicting a debtor's expenses several years into the future, it was entirely sensible for Congress to design a system that did not depend on the particular mix of a debtor's actual expenses at the time the case is commenced. *See In re Briscoe*, 374 B.R. 1, 11 (Bankr. D.D.C. 2007) (as long as the aggregate of the debtor's expenses are determined using the means test formula, the debtor is not living better than the average similarly situated debtor.); *but see In re Harris*, 522 B.R. 804 (Bankr. E.D.N.C 2014) (denying debtor deduction in excess of amount specified for mortgage/rent standard and also limiting debtor to actual expenses for transportation ownership expenses). Further as several courts have noted, mandating the use of IRA standards or actual expenses, whichever is lower, incentivizes debtors to spend the full amount of the allowed deduction and penalizes more frugal debtors. *See In re Jackson,* 537 B.R. 238, 250 (Bankr. E.D.N.C. 2015); *In re Swan*, 368 B.R. 12, 22 (Bankr. N.D. Cal. 2007).

CONCLUSION

For these reasons, Amicus, the National Association of Consumer Bankruptcy Attorneys, requests that this Court reverse the Bankruptcy Court's decision below.

Respectfully Submitted,

/s/ Daniel M. Press
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CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains 4760 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Dated: March 8, 2016.

/s/ Daniel M. Press
Daniel M. Press, Esq.

CERTIFICATE OF SERVICE

Daniel M. Press, attorney for amicus curiae, National Association of Consumer Bankruptcy Attorneys, certifies that on this 8th of March, 2016, he caused the foregoing Brief to be electronically filed. Copies of same have been served upon parties' counsel this same date by the CM/ECF system.

/s/ Daniel M. Press
Daniel M. Press, Esq.

ADDENDUM A

Applicable Tables for Housing and Transportation Expenses from the Executive Office of the United States Trustee