APPENDIX

TABLE OF CONTENTS

Appendix A: Court of appeals opinion, Nov. 22, 2024 ..... 1a

Appendix B: District court opinion and order, May 15, 2023 ..... 36a

Appendix C: Bankruptcy court order, July 29, 2022 ..... 54a

Appendix D: Bankruptcy court oral ruling, July 28, 2022 ..... 56a

Appendix E: Statutory provisions 59a

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:

11 U.S.C. 101 ..... 59a
11 U.S.C. 541 ..... 60a
11 U.S.C. 1306 ..... 62a
11 U.S.C. 1322 ..... 63a
11 U.S.C. 1325 ..... 63a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15860

In re: JORDEN MARIE SALDANA,
Debtor.

JORDEN MARIE SALDANA,
Appellant,

v.

MARTHA G. BRONITSKY, Chapter 13 Trustee,
Appellee.

Filed: November 22, 2024

Appeal from the United States District Court
for the Northern District of California

Before SIDNEY R. THOMAS, CONSUELO M. CALLAHAN, and GABRIEL P. SANCHEZ, Circuit Judges.

OPINION

S.R. THOMAS, Circuit Judge:

In this appeal, we consider whether voluntary contributions to employer-managed retirement plans constitute disposable income in a Chapter 13 bankruptcy. We

conclude that such contributions are not disposable income. We reverse the judgment of the district court.

The bankruptcy court had jurisdiction to hear Jorden Marie Saldana's claims pursuant to 28 U.S.C. § 157(b)(1), (2)(L). The district court had jurisdiction to hear Saldana's appeal of two orders of the bankruptcy court. 28 U.S.C. §§ 158(a)(1), 1334. Although the order sustaining the Trustee's objection to her Chapter 13 plan was interlocutory, it became final and appealable once the bankruptcy court entered the confirmation order of Saldana's Third Amended Plan. 28 U.S.C. §§ 158(a)(1), 1334; *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502–03 (2015); *In re Sisk*, 962 F.3d 1133, 1141 (9th Cir. 2020). We have jurisdiction to hear the appeal of the district court's order. 28 U.S.C. § 158(d)(1).

We review *de novo* the district court's decision of an appeal from bankruptcy court. *Elliott v. Pac. W. Bank* (*In re Elliott*), 969 F.3d 1006, 1009 (9th Cir. 2020). We review the bankruptcy court's decision with the same standard of review as the district court. *Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015). Here, as with any question of statutory interpretation, we review the bankruptcy court's interpretation of the Bankruptcy Code *de novo. Vibe Micro Inc. v. SIG Cap., Inc.* (*Matter of 8Speed8, Inc.*), 921 F.3d 1193, 1195 (9th Cir. 2019).

I

Jorden Saldana voluntarily filed for Chapter 13 bankruptcy on April 13, 2022. Saldana is single with no dependents. She is employed as a surgical technician earning $8,481 each month, or about $101,776 annually. Saldana declared bankruptcy to reorganize her finances and seek relief from around $8,549 in unpaid taxes and

$56,045 in other unsecured debts. In her initial petition, she calculated her monthly disposable income (a statutory calculation of how much Saldana should commit to repayment) to be $115.90. Because Saldana is an above-median income debtor, she calculated her disposable income by taking various statutory deductions and exclusions from her disposable income. Among other exclusions, she subtracted qualified retirement contributions of $601 from her monthly income to reach her disposable income. In Saldana's first plan, submitted alongside her petition, she committed to make monthly payments of $300 for 60 months, meaning she would not repay her unsecured creditors (a 0% distribution).

The Chapter 13 Trustee objected to Saldana's first plan because it did not devote all of Saldana's disposable income to repaying unsecured creditors. In her objection, the Trustee requested more documentation about Saldana's retirement exclusion. In response, Saldana filed a sworn declaration stating that she "reduced [her] voluntary retirement shown as TSA Fidelity EE on [her] paychecks to 6% which equates to $484 per months [sic] in order to make ends meet and perform [her] plan obligations."

The Trustee again filed an objection to Saldana's plan because it did not devote all her disposable income to repaying unsecured creditors and again requested more details on her retirement contributions and loan repayments. Saldana filed a declaration which showed she paid $601 each month towards two retirement loans: $355 each month towards a $12,000 retirement loan with a remaining term of 26 months, and $246 each month towards a $7,000 retirement loan with a remaining term of 31

months. This declaration revealed two mistakes: Saldana's loan repayments were not amortized over the life of her Chapter 13 plan (five years), and her exclusion failed to account for her voluntary retirement contributions of $484 each month. Saldana filed an amended means test, which showed her retirement contributions as $747 each month: the aforementioned $484 in contributions to her retirement plan suggesting an amortized retirement loan repayment of $263 each month. Contributing this amount resulted in a negative disposable income calculation, meaning Saldana would not repay her unsecured creditors over the course of the plan. The Trustee again filed an objection arguing that the Bankruptcy Code did not permit Saldana to exclude voluntary retirement contributions from her disposable income. In her objection, the Trustee calculated Saldana's retirement loan amortization differently: $281 for retirement loan repayments and $456 in voluntary retirement contributions.

The Bankruptcy Court for the Northern District of California held a confirmation hearing on the initial plan and sustained the Trustee's objection. The bankruptcy court found persuasive the Bankruptcy Appellate Panel for the Ninth Circuit's decision in *Parks v. Drummond* (*In re Parks*), which held that voluntary retirement contributions are disposable income in a Chapter 13 bankruptcy. 475 B.R. 703 (9th Cir. B.A.P. 2012).

Because the bankruptcy court sustained the Trustee's objection to Saldana's voluntary retirement contributions, Saldana updated her disposable income to only reflect her retirement loan repayment ($281 each month), and filed another amended plan. This plan would repay approximately 30% of her debts to unsecured creditors.

After revising some technical errors, Saldana filed her third amended plan. The bankruptcy court confirmed this plan. Saldana filed a notice of appeal of the bankruptcy court's confirmation order, and the court's earlier order sustaining the Trustee's objection to her voluntary retirement contributions. Saldana requested the bankruptcy court to certify a direct appeal to the Ninth Circuit, but the bankruptcy court denied her request.

The district court affirmed the bankruptcy court. After surveying the various approaches to the question, the district court also found the Bankruptcy Appellate Panel's decision in *Parks* persuasive, and held that voluntary retirement contributions are disposable income, and must be used to repay unsecured creditors. This timely appeal followed.

II

The sole question in this appeal is whether voluntary contributions to an employer-managed retirement plan are considered disposable income in a Chapter 13 bankruptcy.

A

A Chapter 13 bankruptcy is designed for individual debtors with a regular income. 8 Collier on Bankruptcy ¶ 1300.01–02 (16th ed. 2024). In a Chapter 13 bankruptcy case, an individual debtor can discharge their debts to unsecured creditors if they commit to paying back those creditors from their future income for three to five years via a repayment plan. 11 U.S.C. §§ 1322, 1325, 1328. When an individual petitions for Chapter 13 bankruptcy (the petition date), the debtor must declare their "assets and liabilities" and "a schedule of current income and expenditures." Fed. R. Bankr. P. 1007(b). The debtor's property

forms the bankruptcy estate. 11 U.S.C. § 541. Unlike a Chapter 7 case, where the debtor's bankruptcy estate is liquidated, the Chapter 13 estate has a more limited purpose, for example, to determine how much a debtor can spend to maintain their property. 8 Collier on Bankruptcy ¶ 1306.1. The Chapter 13 estate definition, § 1306, adopts the Bankruptcy Code's general definition of what property forms the bankruptcy estate found at § 541. But unlike the general definition, which only considers assets at the time of filing, the Chapter 13 estate is forward-looking: it includes the estate as defined at § 541, but also includes assets of the same type acquired postpetition. § 1306.

A Chapter 13 Trustee is appointed to represent creditors in the case. § 1302(b). Once the debtor proposes a repayment plan, the bankruptcy court will hold a hearing to determine if the plan is feasible. §§ 1324–1325. The Trustee and creditors can attend this hearing and object to the plan's confirmation. *Id.* When confirming the plan, the bankruptcy judge must decide if the plan was proposed in "good faith." § 1325(a)(3); *Sisk*, 962 F.3d at 1150–51. Once confirmed, the debtor begins making payments, collection actions are stayed, and the debtor can discharge their debts to unsecured creditors upon completion of the plan. § 1328. In a Chapter 13 case, only debtors who apply all of their "projected disposable income" to "make payments to unsecured creditors" during the plan are entitled to certain relief—they can discharge all unsecured debts upon completion of their bankruptcy plan and the bankruptcy court can approve the plan over the objections of the bankruptcy Trustee and unsecured creditors. §§ 1325(b)(1)(B), 1328.

Section 1325 calculates a debtor's disposable income using the "ability to pay" test. Current income, defined at § 101(10A)(A), is "the average monthly income from all sources that the debtor receives . . . during the 6-month period" preceding the filing of the bankruptcy case. Disposable income is a debtor's "current monthly income . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i). In other words, disposable income is a figure reached by deducting "reasonably necessary" expenses and excluding other specified expenditures from a debtor's current income. § 1325(b)(2).

For debtors whose income is below the census median, § 1325 does not mandate a specific calculation of reasonably necessary expenses. Rather, which expenses are reasonable (and deductible) is a "factual determination for a trial court." *In re Bruce*, 484 B.R. 387, 390 (Bankr. W.D. Wash. 2012).

For above-median income debtors, like Saldana, the primary deduction mandated by § 1325(b) is the "means test," cross-referenced and adopted from the Chapter 7 context at § 707(b). The means test uses Internal Revenue Service standards for necessary expenses. § 707(b)(2)(A)(ii)(I). The Internal Revenue Manual ("IRM") provides National and Local Standards for certain core expenses—housing, utilities, food, clothing, transportation, health care costs, among others—and includes a non-exhaustive list of "Other Necessary Expenses." IRM § 5.15.1.8–11; *see also Egebjerg v. Anderson* (*In re Egebjerg*), 574 F.3d 1045, 1051 (9th Cir. 2009). Apart from the means test, § 1325(b) also deducts domestic support obligations, charitable contributions, and business expenses from disposable income.

In addition to § 1325(b)'s adoption of the means test and other allowances, other sections of the Code describe disposable income exclusions and deductions. For example, § 1322(f) states "any amounts required to repay [specified retirement] loan[s] shall not constitute 'disposable income.'" And, in defining "current income," § 101(10A)(B) excepts social security benefits, military disability payments, and certain other payments. Applying each deduction and exclusion results in a debtor's disposable income. The issue in this case is whether § 541(b)(7) makes one such exclusion for voluntary retirement contributions to employer-managed retirement plans.

B

Under the Bankruptcy Reform Act of 1978, the consideration of what constitutes disposable income for the purposes of administering a Chapter 13 bankruptcy was confined to Chapter 13. Chapter 5 described the general duties of bankruptcy creditors and debtors and what constituted the property of the bankruptcy estate. The section of Chapter 5 relevant to this case is 11 U.S.C. § 541, which defines the property of the estate. As originally drafted in the Bankruptcy Reform Act of 1978, the section excluded contributions to employer-managed retirement plans from the definition of "property of the estate." *Patterson v. Shumate*, 504 U.S. 753, 759–60 (1992).

However, in 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Prior to the enactment of the BAPCPA, courts routinely held that voluntary retirement contributions were disposable income for the purposes of Chapter 13. *See Davis v. Helbling* (*In re Davis*), 960 F.3d 346, 350 (6th Cir. 2020) (collecting cases).

The BAPCPA aimed to reverse a trend of consumers filing for Chapter 7 bankruptcy, which led consumers to liquidate their assets and resulted in small payments to creditors. Michael D. Contino, Cong. Rsch. Serv., R45137, Bankruptcy Basics: A Primer 11–12, 25–26 & n.298 (2022). The BAPCPA instead encouraged consumers to reorganize under Chapter 13 and make steady payments to creditors over three to five years. *Id.* To accomplish that goal, the BAPCPA's provisions made it harder to file for Chapter 7 bankruptcy, but also offered incentives to file under Chapter 13. *Id.* While generally providing greater protections for creditors, the BAPCPA also added several protections for retirement assets and contributions.

To that end, Congress amended § 541 to provide that:

> (b) Property of the estate does not include
>
> . . .
>
> (7) any amount—
>
> (A) withheld by an employer from the wages of employees for payment as contributions—
>
> (i) to—
>
> (I) [an ERISA-qualified plan, such as a 401(k)]; or
>
> (II) [a 457 deferred compensation plan]; or
>
> (III) [a 403(b) tax-deferred annuity plan];
>
> *except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2);* . . .
>
> (B) received by an employer from employees for payment as contributions—

> [same plans as (A)]; . . .
>
> *except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2);* . . . .

11 U.S.C. § 541(b) (emphasis added).

The addition italicized in the citation has come to be known as the "hanging paragraph," which is the focus of the instant dispute, and the subject of varied bankruptcy court interpretations.

III

In construing a statute, "we begin with the plain words of the statute, employing the familiar canons of statutory construction." *Cheneau v. Garland*, 997 F.3d 916, 920 (9th Cir. 2021) (en banc). If the plain language is clear, our inquiry is complete. *United States v. 475 Martin Lane*, 545 F.3d 1134, 1143 (9th Cir. 2008).

Here, the statutory text unambiguously excludes voluntary contributions from a debtor's disposable income in a Chapter 13 case. The hanging paragraph reads: "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." § 541(b)(7). The words are plain enough. Congress declared that the referenced funds "shall not constitute disposable income as defined in section 1325(b)(2)." *Id.* The reference is to the type of contributions referred to in the preceding subsection. That is, "any amount" "withheld by an employer from the wages of employees for payment as contributions" or "received by an employer from employees for payment as contributions" to specified retirement plans. *Id.* Thus, pursuant to the plain language of the hanging paragraph, debtors can

exclude any amount of their voluntary retirement contributions to employer-managed plans from their disposable income calculation under Chapter 13. The hanging paragraph language that Congress inserted in the BAPCPA is consistent with Congress's intent to encourage individual debtors to reorganize under Chapter 13 and make consistent payments to creditors, rather than file a Chapter 7 liquidation. Contino, 11–12, 25–26 & n.298; *McDonald v. Master Fin. Inc.* (*In re McDonald*), 205 F.3d 606, 614 (3d Cir. 2000) ("[C]ourts have repeatedly emphasized Congress's preference that individual debtors use Chapter 13 instead of Chapter 7.").

This interpretation is also consistent with the fundamental canons of statutory construction. When Congress substantively revises a statute's text, "we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995); *Davis*, 960 F.3d at 354–55. "[A] significant change in language is presumed to entail a change in meaning" even when legislative history is silent as to Congress's intent. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256–60 (2012); *see United States v. Wells*, 519 U.S. 482, 495–97 (1997). Here, amidst the "overwhelming consensus" before enactment of the BAPCPA that voluntary retirement contributions constituted disposable income, Congress amended § 541 to include the hanging paragraph. *Davis*, 960 F.3d at 350 (quoting *In re Johnson*, 241 B.R. 394, 399 (Bankr. E.D. Tex. 1999)). *Compare* 11 U.S.C. § 541 (1978), *with* 11 U.S.C. § 541 (2024). We presume Congress intended to alter that consensus. Nationally, most of the bankruptcy courts that have considered this issue have also concluded that voluntary retirement contributions do not constitute disposable income

for the purposes of Chapter 13. *Davis*, 960 F.3d at 351. The most prominent case for the proposition is *Baxter v. Johnson* (*In re Johnson*), 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006), which read the hanging paragraph like any other disposable income exclusion—such as § 1322(f)'s exclusion for the repayment of retirement loans.

Thus, from the plain language of the statute and the canons of statutory construction, we join the majority of courts that have considered the question in concluding that voluntary retirement contributions do not constitute disposable income for the purposes of Chapter 13.

IV

In addition to the *Johnson* approach, bankruptcy courts have adopted three other different interpretations concerning the hanging paragraph, namely that § 541(b)(7): (1) includes all voluntary retirement contributions, both pre-and postpetition, under the definition of disposable income in Chapter 13; (2) excludes voluntary retirement contributions from the definition of disposable income, so long as the debtor was making those contributions prior to filing the Chapter 13 bankruptcy petition; and (3) exempts the six-month average of voluntary retirement contributions made prior to the declaration of bankruptcy. We do not find these constructions consistent with the statute.

A

The Trustee urges that we adopt the rule that disposable income under Chapter 13 includes all voluntary retirement contributions. As we have noted, this approach was adopted by the Ninth Circuit Bankruptcy Appellate Panel in *Parks*, 475 B.R. at 709, and emanates from a de-

cision of the Bankruptcy Court for the District of Montana. *In re Prigge*, 441 B.R. 667, 676–78 & n.5 (Bankr. D. Mont. 2010). Courts following *Parks*/*Prigge* read the hanging paragraph in the context of § 541, Chapter 13, and the Bankruptcy Code as a whole. The *Parks*/*Prigge* courts emphasize the placement of the hanging paragraph in the § 541 general provisions concerning what constitutes "property of the estate." These courts phrase the interpretive question as "what is 'excluded' from [sic] property of the estate under § 541(b)(7)(A) which also does not constitute disposable income?" *Parks*, 475 B.R. at 708. To answer it, the *Parks*/*Prigge* courts give the hanging paragraph a "very limited" meaning: it was "intended to protect amounts withheld by employers from employees that are in the employer's hands at the time of filing bankruptcy, prior to remission of the funds to the plan." *Prigge*, 441 B.R. at 677 n.5.

At base, the approach adopted by the *Parks*/*Prigge* courts is unpersuasive because it does not give the hanging paragraph *any* meaning. A core canon of statutory construction is the rule against surplusage: courts must construe a statute "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). And where, as here, a proposed "statutory construction . . . 'render[s] an entire subparagraph meaningless,'" we apply the rule against surplusage "with special force." *Pulsifer v. United States*, 601 U.S. 124, 143 (2024) (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128 (2018)).

There is no provision of the Bankruptcy Code that supports the presumption the *Parks*/*Prigge* interpretation aims to defeat. Limiting the hanging paragraph to protect only those funds an employee contributed prepetition "makes no sense, because any funds in the hands of the employer as of the [C]hapter 13 petition date would never be considered to be disposable income, which only includes income received by the debtor after the petition is filed." 5 Collier on Bankruptcy ¶ 541.23; *In re Huston*, 635 B.R. 164, 174 (Bankr. N.D. Ill. 2021); *In re McCullers*, 451 B.R. 498, 505 (Bankr. N.D. Cal. 2011) ("[I]t is unlikely even without the language in question that excluding sums earned by the debtor prepetition from property of the estate would ever be construed as creating postpetition disposable income to [a] debtor."). The debtor has already earned the amount withheld by the employer. When those funds are remitted to their retirement plan, the debtor does not realize any new income. Thus, the *Parks*/*Prigge* approach leaves the hanging paragraph without meaning—a result which Congress could not have intended.

The Trustee places great weight on the hanging paragraph's placement in Chapter 5 of the Bankruptcy Code, which defines the property of the bankruptcy estate, instead of § 1325, where the bulk of Chapter 13's disposable income analysis is dictated. But any inference that might be drawn from the hanging paragraph's placement in Chapter 5 is defeated by § 541(b)(7)'s explicit reference to § 1325, Chapter 13's disposable income calculation. This conclusion is reinforced by § 1306, which explicitly adopts § 541, the Bankruptcy Code's general definition of the estate, as the baseline for defining the Chapter 13 estate. That the hanging paragraph appears outside of

§ 1325's disposable income definition is not odd. Section 1322(f), which excludes retirement loan repayments from disposable income, appears in the section describing Chapter 13 plan requirements, not § 1325. The explicit text of §§ 541, 1306, and 1325 outweighs any implicit meaning derived from the Code's structure.

The Trustee also directs our attention to the hanging paragraph's use of "except that," reasoning its disposable income exclusion should represent an exception to some general rule established by the section. The *Parks*/*Prigge* interpretation does not fare better under this rationale, as an exception without effect is hardly an exception at all. Regardless, drawing from the Sixth Circuit's analysis in *Davis*, we note that Congress uses "except that" at other points in the Bankruptcy Code to mean something other than a straightforward exception, instead with usage akin to the conjunctions "'moreover' or 'and also.'" 960 F.3d at 356 (first citing 11 U.S.C. § 351(2); and then citing 11 U.S.C. § 724(b)). "When there are two ways to read the text"—one where the phrase "except that" "is surplusage, in which case the text is plain," and another where the phrase "is nonsurplusage . . . in which case the text is ambiguous"—"[w]e should prefer the plain meaning." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).[1]

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[1] Although we need not rely on it here because we find the text unambiguous, the legislative history (which largely repeats the text of the statute) does not contain any language that suggests Congress intended for the hanging paragraph to serve as an exception to the remainder of § 541. H.R. Rep. No. 109–31, at 82 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 149 ("Such contributions do not constitute disposable income as defined in section 1325(b)(2) of the Bankruptcy Code.").

Finally, the Trustee argues that adopting the *Johnson* approach would upset Chapter 13's balance of interests between creditors and debtors and invite debtor abuse. But Congress already balanced those interests in the text of the BAPCPA. "We are not at liberty to 'alter the balance struck by the statute' when interpreting the Code." *Sisk*, 962 F.3d at 1145 (quoting *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 471 (2017)). And this exemption for voluntary retirement contributions does not stand alone in the BAPCPA. The Amendments introduced several protections for retirement contributions, including the aforementioned exclusion of retirement loan repayments from a debtor's disposable income as well as other safeguards for retirement savings. § 1322(f); *see, e.g.*, § 522(b)(3)(C) (excluding some retirement funds from the property of the estate).

The *Johnson* approach assuredly allows debtors to devote income to retirement savings that would otherwise go to creditors, but it is not without limitation. The types of retirement plan contributions protected by the hanging paragraph are generally subject to annual contribution limits. *See In re Cantu*, 553 B.R. 565, 577 (Bankr. E.D. Va. 2016), *aff'd sub nom. Gorman v. Cantu* (*In re Cantu*), 713 Fed. App'x 200 (4th Cir. 2017). And all Chapter 13 plans are subject to a good faith requirement. Bankruptcy courts retain the ability to conduct a "fact-intensive examination of the 'totality of the circumstances'" to determine if a debtor's plan is proposed in good faith. *Sisk*, 962 F.3d at 1150 (quoting *Drummond v. Welsh* (*In re Welsh*), 711 F.3d 1120, 1132 (9th Cir. 2013)); *cf. id.* at 1151 ("Debtors do not lack good faith 'merely for doing what the Code permits them to do.'" (quoting *Welsh*, 711 F.3d at 1132)). A debtor's "motivation and

forthrightness with the court in seeking relief" remain relevant in assessing their good faith. *Welsh*, 711 F.3d at 1132.

In sum, applying the *Parks*/*Prigge* holding would run afoul of the express language of the statute, and there are adequate protections in Chapter 13 to avoid debtor abuse.

B

The Bankruptcy Appellate Panel for the Sixth Circuit adopted a middle-ground interpretation between the *Parks*/*Prigge* and *Johnson* interpretations. In *Burden v. Seafort* (*In re Seafort*), it held that voluntary retirement contributions are not disposable income, so long as a debtor was making the contributions prior to declaring bankruptcy. 437 B.R. 204, 209–10 (B.A.P. 6th Cir. 2010). In *Seafort*-BAP, the panel focused on the fact that § 541(a)(1) "establish[es] a fixed point in time" to consider a debtor's contributions to their employer-managed retirement plan. *Id.* at 209.[2]

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[2] Reviewing *Seafort* on appeal, the Sixth Circuit did not reach the issue because the debtors in that case were not making any prepetition contributions. *Seafort v. Burden* (*In re Seafort*), 669 F.3d 662, 663–64 (6th Cir. 2012). However, the Sixth Circuit then rejected the *Johnson* interpretation. *Id.* at 673–74 & n.7. Subsequently, the Sixth Circuit rejected the *Parks*/*Prigge* interpretation, and decided that contributions equal to or less than the prepetition amount are not disposable income. *Davis*, 960 F.3d at 357–58. Then, in *Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527, 534 (6th Cir. 2021), the Sixth Circuit held "that the bankruptcy code's text does not permit a Chapter 13 debtor to use a history of retirement contributions from years earlier as a basis for shielding voluntary post-petition contributions from unsecured creditors." In so holding, the court stated, "we once again have no reason to choose between the *Seafort*-BAP and CMI interpretations of the hanging paragraph." *Id.*

However, the *Seafort*-BAP approach lacks any textual support in the Bankruptcy Code. Although this interpretation may present an attractive compromise between the *Johnson* and *Parks/Prigge* constructions, there is no foundation in the Code to limit a debtor's disposable income to the debtor's prepetition contribution amount. While § 541(a)(1) considers the commencement of a case when defining assets *included* in the estate, § 541(b) contains no express time limitation in defining assets *excluded* from the estate. To adopt this theory would "insert phrases and concepts into the statute that simply are not there." *Gruntz v. County of Los Angeles* (*In re Gruntz*), 202 F.3d 1074, 1085 (9th Cir. 2000) (en banc).

In sum, the Bankruptcy Code does not provide any basis to limit the amount of voluntary retirement contributions a debtor can exclude to their prepetition contribution amount.

C

An additional theory has been espoused by some bankruptcy courts in the Western District of Washington. Those courts hold that § 541(b)(7) exempts voluntary retirement contributions by excluding them from a debtor's current income, one component in the disposable income analysis. *In re Anh-Thu Thi Vu*, No. 15-41405, 2015 WL 6684227, at *3–4 (Bankr. W.D. Wash. June 16, 2015). Because the calculation of current income relies on a six-month look-back period, under this approach a debtor can exclude the six-month average of their voluntary retirement contributions prior to filing. This theory is usually referenced as the "CMI" or "Current Median Income" approach. The main differences between the CMI and the *Seafort*-BAP interpretations are that it (1) benefits debtors who had been making contributions

for at least six months before filing over debtors who recently began or increased their contributions in those six months, and (2) benefits below-median debtors as well. *Anh-Thu Thi Vu*, 2015 WL 6684227, at *4; *Huston*, 635 B.R. at 178–79.

However, the CMI interpretation also lacks textual support in the Bankruptcy Code. It conflates the concepts of "current income" and "disposable income." Current income is just one component of the disposable income calculation, and is thus distinct from disposable income. Section 541(b)(7) specifically references disposable income, but never discusses the concept of current income. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). In sum, there is no textual support for the CMI interpretation, and to employ it would require mixing distinct concepts.

V

In summary, we conclude, consistent with the majority of bankruptcy courts, that voluntary contributions to employer-managed retirement plans do not constitute disposable income in a Chapter 13 bankruptcy. Therefore, we reverse the district court, and remand for further proceedings consistent with this opinion. Each side shall bear its own costs.

REVERSED and REMANDED.

CALLAHAN, Circuit Judge, dissenting:

The majority claims that 11 U.S.C. § 1325(b)(1), which has been referred to as the "hanging paragraph," and which has spawned at least four different judicial interpretations, is unambiguous. The majority's focus on canons of statutory construction to unravel the "grammatical puzzle," *Davis v. Helbling (In re Davis)*, 960 F.3d 346, 354 (6th Cir. 2020), leads it to adopt a result that is contrary to the general purpose of the underlying statute. A result for which there is really no evidence (other than the majority's selective use of canons of statutory construction) that Congress intended. Accordingly, I dissent from the majority conclusion that voluntary contributions to employer-managed retirement plans do not constitute disposable income in a Chapter 13 bankruptcy.

We start at the same place. Before Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") "courts routinely held that voluntary retirement contributions were disposable income for purposes of Chapter 13." Op. at 340-41 (citing *In re Davis*, 960 F.3d at 350). This makes sense. The purpose of a Chapter 13 proceeding is to allow a debtor to "make steady payments to creditors over three to five years" (Op. at 340) in return for which the debts are discharged. But as the creditors will receive less than full payment, any income a debtor with above average income does not need to survive during those three to five years should be allocated as disposable income. Voluntary retirement contributions are by their very nature "voluntary" as that term is commonly understood. The debtor is under no obligation to make them. The debtor could instead invest in the stock market, buy cryptocurrency, or play the lottery.

Why should the debtor's choice of placing some of the disposable income in one particular type of investment make it unavailable to the creditors?

The majority does not really address the consequences of its determination as much as assert that canons of statutory construction support, indeed, compel this conclusion. But in doing so, it misperceives that "the statutory text unambiguously excludes voluntary contributions from a debtor's disposable income in a Chapter 13 case." Op. at 341. If this were true, there would be no need for the opinion's elaboration on the canons of statutory construction. More accurately stated, the majority's position is that the application of canons of statutory construction compels the conclusion that what has been described as a "Gordian knot"[1] or a "grammatical puzzle," is unambiguous.

I do not find the majority's reasoning compelling because, as the majority admits, in the almost twenty years since the passage of the BABCPA, bankruptcy courts and circuit courts have found not one or two meanings of the "hanging paragraph" but four meanings. As explained in some detail below, I agree with my many colleagues who have found that the "hanging paragraph" is truly ambiguous and I conclude that the application of canons of statutory construction to the "hanging paragraph" does not resolve the ambiguity in a compelling manner.

First, while the "words are plain enough" (Op. at 341), their context denies them clarity. This becomes clear when the majority's statement is contrasted with the

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[1] *See Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527, 531 (6th Cir. 2021) (citing *In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014)).

texts of other judicial decisions addressing the "hanging paragraph." The majority opines:

> Here, the statutory text unambiguously excludes voluntary contributions from a debtor's disposable income in a Chapter 13 case. The hanging paragraph reads: "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." § 541(b)(7). The words are plain enough. Congress declared that the referenced funds "shall not constitute disposable income as defined in section 1325(b)(2)." § 541(b)(7). The reference is to the type of contributions referred to in the preceding subsection. That is, "any amount" "withheld by an employer from the wages of employees for payment as contributions" or "received by an employer from employees for payment as contributions" to specified retirement plans. § 541(b)(7). Thus, pursuant to the plain language of the hanging paragraph, debtors can exclude any amount of their voluntary retirement contributions to employer-managed plans from their disposable income calculation under Chapter 13. The hanging paragraph language that Congress inserted in the BAPCPA is consistent with Congress's intent to encourage individual debtors to reorganize under Chapter 13 and make consistent payments to creditors, rather than file a Chapter 7 liquidation. Contino, 11–12, 12 25–26 & n. 298; *McDonald v. Master Fin. Inc.* (*In re McDonald*), 205 F.3d 606, 614 (3d Cir. 2000) ("[C]ourts have repeatedly emphasized Congress's preference that individual debtors use Chapter 13 instead of Chapter 7.").

Op. at 341.

This may seem reasonable but is hardly compelling when compared to the to the opinion of three bankruptcy judges in *In re Parks*, 475 B.R. 703 (9th Cir. BAP 2012).

> As with other provisions contained in BAPCPA, applying statutory interpretation rules to discern Congress's intent in adding § 541(b)(7) is easier said than done. In this case, the statute's placement within § 541 instead of chapter 13 and its reference to disposable income under § 1325(b)(2) in the hanging paragraph reflects its ambiguity. These contextual conundrums have split the courts nationwide. Compare *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256, 263 (Bankr. S. D. Ga. 2006) (holding that § 541(b)(7) excludes all voluntary retirement contributions, both pre and postpetition, from disposable income) and the cases following *Johnson* with *In re Prigge*, 441 B.R. 667 (holding § 541(b)(7) does not permit exclusion of postpetition voluntary retirement contributions in any amount when determining disposable income); *In re McCullers*, 451 B.R. 498, 503–05 (Bankr. N. D. Cal. 2011) (same); *Seafort v. Burden* (*In re Seafort*), 669 F.3d 662, 673–74 (6th Cir. 2012) (same). Although none of these decisions are binding on us, we find the *Prigge* line of cases persuasive. To avoid repetition, we borrow heavily from these decisions.
>
> We begin by looking at the language and structure of § 541, which defines property of the estate generally, as well as its relationship to § 1306, which completes the definition of property of the estate for purposes of chapter 13.
>
> Section 541(a)(1) defines property of the estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case" and

§ 541(a)(6) states that "earnings from services performed by an individual debtor after the commencement of the case" are not brought into the estate. Under the plain reading, "as of the commencement of the case", a debtor's postpetition earnings are not included in property of the estate. However, because this is a chapter 13 case, we cannot ignore the relationship between § 541 and § 1306. Section 1306(a) states:

Property of the estate includes, in addition to the property specified in section 541 of this title—

. . . .

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

"Section 1306(a) expressly incorporates § 541. Read together, § 541 fixes property of the estate as of the date of filing, while § 1306 adds to the 'property of the estate' property interests which arise post-petition." *In re Seafort*, 669 F.3d at 667. It is § 1306(a)(2) which operates to bring the debtor's earnings from postpetition services into his or her estate.

Given this statutory framework, the question then becomes what is "excluded" from property of the estate under § 541(b)(7)(A) which also does not constitute disposable income? In answering this question, we keep in mind that statutory provisions are to be read in harmony in the context of the whole statute. *Hougland v. Lomas & Nettleton Co.* (*In re Hougland*), 886 F.2d 1182, 1184 (9th Cir. 1989) (citing *Davis v. Mich. Dept. of Treasury*, 489 U.S. at 809, 109

S. Ct. 1500). All parts of a statute are to be read as a whole, and in harmony with one another, and not in conflict. *Culver, LLC v. Chiu* (*In re Chiu*), 266 B.R. 743, 747, 750 (9th Cir. BAP 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002). In light of these principles, by reading § 541(a)(1) and § 541(b)(7)(A) together, the most reasonable interpretation of § 541(b)(7)(A) is that it excludes from property of the estate only those 401(k) contributions made before the petition date. *In re Seafort*, 669 F.3d at 673; *In re McCullers*, 451 B.R. at 503–05; *see also In re Prigge*, 441 B.R. at 677 n. 5 (noting that § 541(b)(7) "seems intended to protect amounts withheld by employers from employees that are in the employer's hands at the time of filing bankruptcy, prior to remission of the funds to the plan.") (citing 5 COLLIER ON BANKRUPTCY, ¶ 541.22(C)[1] (15th ed. rev.)). Otherwise, as noted by the Sixth Circuit in *In re Seafort*, if "contributions to a qualified retirement plan never constitute property of a bankruptcy estate . . . Congress would not have needed to include an additional provision in § 541(b)(7)(A) stating that such contributions are excluded from disposable income." 669 F.3d at 673.

From here, it follows that "such amount" referred to in the hanging paragraph of § 541(b)(7)(A) means that only prepetition contributions shall not constitute disposable income. *In re McCullers*, 451 B.R. at 503–04. As a consequence, we are persuaded that the term "except that" in the hanging paragraph was designed simply to clarify that the voluntary retirement contributions excluded from property of the estate are not postpetition income to the debtor. *Id.* at 504–05. Fi-

nally, to give meaning to the words "under this subparagraph" found in the hanging paragraph, it is reasonable to conclude that "Congress intentionally limited the type of contributions to qualified retirement plans that would be excluded from disposable income, namely those 'under this subparagraph', § 541(b)(7)(A), which in turn governs only those contributions in effect as of the commencement of a debtor's bankruptcy case, per § 541(a)(1)." *In re Seafort*, 669 F.3d at 673.

We also attach significance to the fact that § 1306(a)(2) makes postpetition earnings of a debtor part of his or her estate but nowhere in chapter 13 are voluntary retirement contributions excluded from disposable income. To the contrary, when Congress amended BAPCPA, it chose to exclude the repayment of 401(k) loans from disposable income in § 1322(f).4 "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L.Ed.2d 118 (1993). Accordingly, it is likely "that Congress did not intend to treat voluntary 401(k) contributions like 401(k) loan repayments, because it did not similarly exclude them from 'disposable income' within Chapter 13 itself." *In re Seafort*, 669 F.3d at 672. Simply put, without a clearer direction comparable to the carve out from disposable income for the repayment of retirement loans in § 1322(f), it seems unlikely that Congress intended § 541(b)(7)(A) to bestow a benefit on above-median chapter 13 debtors while their creditors absorbed an even greater loss.

475 B.R. at 707–09.

While the majority's reasoning is shorter, the approach in *In re Parks* seems as reasonable, if not more reasonable. The majority's interpretation of the "hanging paragraph" may be plausible, but it is not compelled nor consistent with bankruptcy law and the BAPCPA.

The majority attempts to buttress its conclusion by arguing that it is consistent with the fundamental canons of statutory construction. Op. at 341-42. It argues that: "When Congress substantively revises a statute's text, 'we presume it intends its amendment to have real and substantial effect.'" Op. at 341 (quoting *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995)). It reasons that because the "overwhelming consensus" before the enactment of the BAPCPA was that voluntary retirement contributions constituted disposable income, Congress's amendment of § 541 to include the "hanging paragraph" must have been intended to alter the consensus. Op. at 341-42. But this reasoning ignores the many other ways in which the BAPCPA changed bankruptcy law. It reasons backwards, assuming that the hanging paragraph—a truly minor provision in a broader piece of legislation, which most courts have found to be incomprehensible—must have been intended to have "real and substantial effect." Op. at 341-42. Thus, presumptions from canons of statutory construction are allowed to create a congressional intent where there is no real evidence of such an intent.

Judge Readler in his careful and critical dissent in *In re Davis*, 960 F.3d at 358, offers a sound rebuttal to the argument that the "hanging paragraph" was intended to exclude, for the first time, post-petition voluntary payments to retirement accounts from "disposable income." He reasons:

Having followed the background judicial rule as to pre-petition 401(k) assets, there is no indication that Congress simultaneously displaced the parallel background judicial rule as to post-petition 401(k) contributions. Had Congress decided against a uniform approach to the existing case law backdrop, thereby supplanting the background majority rule that post-petition 401(k) contributions are part of a debtor's disposable income and thus accessible by creditors, it would have said so in express terms. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990) (holding that when Congress incorporated the Federal Employers' Liability Act ("FELA") into the Jones Act without alteration, it also incorporated the prior judicial interpretation of FELA in the Act, as that interpretation was "well established," and "Congress is aware of existing law when it passes legislation"). And Congress, of course, knew how expressly to exclude a debtor's assets from creditors. Case in point: it expressly excluded pre-petition 401(k) contributions from the "property of the estate" available to creditors. 11 U.S.C. § 541(b)(7)(A). Yet Congress, neither in § 541(b) nor anywhere else, made any express reference to a Chapter 13 debtor's post-petition 401(k) contributions being excluded from the disposable income available to creditors during the repayment period. Especially in light of the express language in § 541(b)(7)(A), that absence is telling. See *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S. Ct. 2035, 124 L.Ed.2d 118 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v.*

United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) (alterations omitted))).

That Congress did not disrupt the then-existing approach to post-petition 401(k) contributions makes sense not only as a reflection of Congress's consistent treatment of the Chapter 13 case law backdrop, but also as a reflection of Congress's efforts to balance the interests of debtors and creditors. Through § 541(b)(7)(A), Congress preserved a debtor's pre-filing retirement contributions, which were made at a time when the debtor was unencumbered by the bankruptcy process, incentivized by the tax code, and had an eye to the future. Compare those circumstances, however, to the aftermath of a Chapter 13 filing. By her filing, the debtor has acknowledged that her debts have overwhelmed her income, that she cannot honor obligations made to creditors, and that a new financial path is in order. In that setting, the bankruptcy laws harmonize the needs of debtors and unsecured creditors. See *8A C.J.S. Bankruptcy § 2 (2020).* For debtors, Congress afforded them the opportunity to resolve many debts over the course of a three-or five-year period, where a debtor's spending is tightly controlled by the contours of her bankruptcy plan. *8B C.J.S. Bankruptcy § 1204 (2020).* For unsecured creditors, Congress afforded them a handful of years over which repayment by the debtor is emphasized, to the extent the debtor has "disposable income," that is, income above that needed to afford "current," "necessary" expenses for the debtor's "maintenance or support." *Id.*; 11 U.S.C. § 1325(b)(2). And the expenses necessary for current support do not include, at least for three to five years, additional

> 401(k) contributions a debtor may want to make. *Seafort*, 669 F.3d at 674. As a trade-off for bankruptcy protection and the discharging of debts, and as an effort to compensate unsecured creditors as fairly as possible, the bankruptcy code does not guarantee 401(k) contributions by a debtor until a bankruptcy plan has run its course.

960 F.3d at 359–60. Judge Readler continues:

> To fortify its protection of pre-filing 401(k) contributions, Congress made a second addition to § 541(b)(7)(A), one commonly referred to as the "hanging paragraph." There, Congress added to § 541(b)(7)(A)'s "any amount" provision the clause: "except that such amount under this subparagraph shall not constitute disposable income." As we explained in *Seafort*, with § 541(b)(7)(A) addressing the gross "amount" of a debtor's pre-filing 401(k) contributions, the ensuing "such amount under this subparagraph" clause must reference the same gross "amount" referenced earlier in the subparagraph: pre-filing 401(k) contributions. 669 F.3d at 670 ("[A] close reading of [§] 541(b)(7) indicates that 'such amount' excluded from disposable income refers to prepetition contributions." (quoting *In re McCullers*, 451 B.R. 498, 503 (Bankr. N.D. Cal. 2011))). Equally instructive is the hanging paragraph's opening phrase: "except that." 11 U.S.C. § 541(b)(7)(A). That too is evidence the paragraph was intended to further protect a debtor's pre-petition 401(k) account. That is, not only is the value of the 401(k) account at the time of filing not considered property of the estate, see 11 U.S.C. § 541(b)(7)(A), but it also "shall not constitute" any part of a debtor's post-petition "disposable

income." *McCullers*, 451 B.R. at 503–04. ("Use of the term 'except that' suggests that the purpose of the language is merely to counteract any suggestion that the exclusion of such contributions from property of the estate constitutes postpetition income to the debtor.").

It is often the case that congressional "drafters intentionally err on the side of redundancy," to ensure nothing slips through the legislative cracks. Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 934 (2013) (noting that Congressional drafters "intentionally err on the side of redundancy to capture the universe or because you just want to be sure you hit it") (internal quotation marks omitted). For the sake of certainty, the hanging paragraph serves as a "backstop" against creative arguments by unsecured creditors seeking to reach the debtor's pre-petition 401(k) assets during the Chapter 13 repayment period. *Cf. Yates v. United States*, 574 U.S. 528, 562, 135 S. Ct. 1074, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.) (noting that a seeming statutory redundancy merely "reflects belt-and-suspenders caution: If § 1519 contained some flaw, § 1512(c)(1) would serve as a backstop").

And zealously guarding in all respects pre-petition 401(k) assets is not a trivial concern. Generally speaking, a well-performing 401(k) account generates earnings and/or income, yet "[n]either 'earnings' nor 'income' is defined by the Bankruptcy Code." 7 Norton Bankr. L. & Prac. 3d § 149:3 (2020). To the extent the

> treatment of earnings, income, or other assets related to a pre-petition 401(k) account is unsettled, creditors, in the absence of the hanging paragraph, could argue that amounts generated by a pre-petition 401(k) during the post-petition repayment period qualify as disposable income, which those creditors may claim. Yet those amounts trace back to the same pre-petition 401(k) account created initially from funds "withheld by an employer from the wages of employees." 11 U.S.C. § 541(b)(7)(A).

7 F.4th at 360-61.

Citing *In re Davis*, the majority next seeks shelter in the observation that "most of the bankruptcy courts who have considered this issue have concluded that voluntary retirement contributions do not constitute disposable income for purposes of Chapter 13." Op. at 342 (citing *In re Davis*, 960 F.3d at 351).

However, *In re Davis* is not the last word from the Sixth Circuit. In *In re Penfound*, the Sixth Circuit stated that in *In re Seafort*, 669 F.3d 662 (6th Cir. 2012), it had squarely rejected the "*Johnson* view," which placed post-petition retirement contributions outside the purview of Chapter 13. *In re Penfound* explained that "the bankruptcy code does not countenance such a debtor-friendly result" as to allow post-petition contributions to be excluded for disposable income. *Id.* Rather, "post-petition income that becomes available to debtors after their 401(k) loans are fully repaid is 'projected disposable income' that must be turned over to the trustee for distribution to unsecured creditors.'" *Id.* (quoting *Seafort*, 669 F.3d at 663). The Sixth Circuit distinguished the situation in *In re Penfound* from the situation in *In re Davis*, 960

F.3d at 349, where "a debtor had made steady contributions to her 401(k) for at least six months prior to bankruptcy" and "sought to continue making those regular contributions throughout her commitment period." *In re Penfound*, 7 F.4th at 531. *In re Penfound* reasoned that in *In re Davis*, the court had held that the hanging paragraph is "best read to exclude from disposable income the monthly 401(k)-contributions amount that Davis's employer withheld from her wages *prior* to her bankruptcy" *Id.*[2] (quoting *In re Davis*, 960 F. 3d at 354-55) (emphasis added). The Sixth Circuit further commented that in *In re Davis* it had rejected the *Prigge* interpretation "which never would have permitted a debtor to shield voluntary post-petition 401(k) contributions from creditors." *Id.* at 532.

In *In re Penfound*, the Sixth Circuit concluded that constrained by its prior rejections of the *Johnson* approach (placing retirement contributions outside the purview of Chapter 13) and the rejection of the *Prigge* ap-

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[2] The Sixth Circuit reasoned:

> This interpretation construed BAPCPA's addition of the hanging paragraph "in a way that actually amend[ed] the statute." Id. at 531; *see Stone v. INS*, 514 U.S. 386, 397, 115 S. Ct. 1537, 131 L.Ed.2d 465 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). And it also gave "a meaningful effect—one not already accomplished by § 1325(b)(2)—to Congress's instruction in § 541(b)(7) that 401(k) contributions 'shall not constitute disposable income.'" *Davis*, 960 F.3d at 355; *see Liu v. SEC*, 591 U.S. 71, 88, 140 S. Ct. 1936, 1948, 207 L.Ed.2d 401 (2020) (expressing the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute" (citation omitted)).

7 F.4th at 531–32.

proach (placing retirement contributions within the purview of Chapter 13), it opted for a version of the "CMI interpretation" which construes the hanging paragraph as excluding from a debtor's disposable post-petition income contributions to a retirement plan consistent with the debtor's contributions for six months prior to bankruptcy.[3] *Id.* at 532–33.

I agree with the vast majority of the judges who have had to construe the "hanging paragraph" that it is indeed ambiguous. Having considered the four different interpretations offered by the courts over the last quarter century, I do not find that the application of canons of statutory construction offer a compelling interpretation of the statute. Nonetheless, we are charged with applying the statute where, as here, its application has real consequences to the parties. Accordingly, as Congress's intent in enacting the "hanging paragraph"—assuming it had an intent—eludes discovery, we must determine for ourselves how to enforce the "hanging paragraph." Consistent with another canon of construction, we should consider how to interpret it so that it fits into, and complements, the other provisions of bankruptcy law.

The Sixth Circuit has repeatedly considered the "hanging paragraph" and I find its approach in *In re Penfound* to most closely conform to the other provisions of

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[3] In response to criticism that the court had sua sponte added a six month look-back period, the Sixth Circuit explained: "the reason *Davis* examined the debtor's contributions in the six months pre-filing is that this is the longest look-back period supported by the text of the bankruptcy code and our precedent. As we have explained, the *Seafort*-BAP interpretation would consider a debtor's recurring contribution amount "at the time [his] case [was] filed." 7 F.4th at 533–34 (citing *Seafort*, 437 B.R. at 210 and *In re Davis*, 960 F.3d at 352).

bankruptcy law. Perhaps excluding from a debtor's disposable post-petition income contributions to a retirement plan that are consistent with the debtor's contributions for six months prior to bankruptcy is a compromise that will satisfy neither the advocates of *Johnson* nor of *Prigge*. But it is a workable solution that recognizes the competing interests and is consistent with the overall purposes of bankruptcy law. This approach does the least amount of harm until such time as Congress decides to clarify the statute or change the law. Accordingly, I dissent from the majority's conclusion that voluntary contributions to employer-managed retirement plans do not constitute disposable income in a Chapter 13 bankruptcy.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

Case No. 22-cv-06223-BLF

IN RE: JORDEN MARIE SALDANA,
Appellant.

Filed: May 15, 2023

ORDER AFFIRMING THE BANKRUPTCY COURT ORDER ON APPEAL

Before BETH LABSON FREEMAN, United States District Judge.

This matter is before this Court on appeal, pursuant to 28 U.S.C. § 158(a), from the United States Bankruptcy Court for the Northern District of California (the "Bankruptcy Court"). Appellant Jorden Marie Saldana ("Debtor" or "Appellant") appeals from two Bankruptcy Court Orders. Opening Br., ECF No. 9; *see* Order Sustaining Objection To Confirmation, EOR at 174; Confirmation Order, EOR at 241. On January 5, 2023, Appellee Martha G. Bronitsky, the Chapter 13 Trustee of the bankruptcy estate ("Trustee"), filed a Response Brief. Trustee Br., ECF No. 10. On January 18, 2023, Saldana filed a Reply Brief. Reply Br., ECF No. 11. The Court finds the matter to be appropriate for disposition without oral argument. *See* Civ. L.R. 7-1(b). For the reasons discussed

below, the Court AFFIRMS the Bankruptcy Court Order.

I. BACKGROUND

This case was filed as a voluntary Chapter 13 bankruptcy on April 13, 2022. *See* EOR[1] at 1-52. Debtor is single, has no dependents, and is employed as a surgical technician with a gross monthly income of $8,081. EOR at 28, 30. Her budget includes an ongoing voluntary retirement contribution of $484 as a payroll deduction in Schedule I and repayment of two retirement loans as an expense on Schedule J. EOR at 28-31. Saldana filed a Chapter 13 Plan that required monthly payments of $300 for 60 months with a corresponding divided of 0% to general unsecured creditors. EOR at 53-59. She also filed Official Forms 122C-1 and 122C-2 ("Means Test"). EOR at 61-73. The initial Means Test included a deduction of $601 at Line 41 representing the monthly payments for two retirement loans, and it arrived at a Disposable Monthly Income ("DMI") of $115.90. EOR at 71. Saldana filed a declaration in support of her Chapter 13 Plan in which she stated: "I have reduced my voluntary retirement shown as TSA Fidelity EE on my paychecks to 6% which equates to $484 per months [sic] in order to make ends meet and perform my plan obligations." EOR at 127-28. This indicated she was making a regular voluntary contribution to her retirement plan but reduced it for her Chapter 13 budget. *Id.*

On April 22, 2022, Trustee filed an Objection to Confirmation of Chapter 13 Plan. EOR at 108-13. On April 25,

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[1] "EOR" refers to the Excerpt of Record submitted by Appellant. *See* ECF Nos. 5-6.

2022, the Debtor filed amendments to her Form 107, which was included as part of her initial bankruptcy petition. EOR at 117-26. On May 23, 2022, Trustee filed an Amended Objection to Confirmation of a Chapter 13 Plan, which, among other things, changed the Means Test objection to seek a reduction in the amount listed on Line 41 to reflect amortization of the retirement loans over the term of the plan. EOR at 130-34. On June 29, 2022, the Debtor filed an Amended Means Test that increased the monthly deduction on Line 41 from $601 to $747, which reflected amortization of the retirement loans over the term of the plan and the addition of $484 as a go-forward retirement contribution. EOR at 149-62. On July 1, 2022, the Trustee filed another Amended Objection, which raised that Debtor was not entitled to deduct her voluntary retirement contributions from disposable income in the Means Test. EOR at 163-68.

The Joint Prehearing Statement identified as a remaining issue whether the retirement deduction was an allowable deduction on the Means Test. EOR at 169-70. On July 28, 2022, the Bankruptcy Court conducted a confirmation hearing and sustained the Trustee's Objection to Confirmation. EOR at 288-91. The Bankruptcy Court then issued a written Order sustaining the Trustee's Objection to Confirmation. EOR at 174.

Debtor filed amended plans on August 15, 2022 and August 16, 2022, which eliminated the ongoing retirement deductions as a deduction from the means test. EOR at 179-93. On August 23, 2022, Debtor filed an amended means test. EOR at 201-13. It removed the deduction on Line 41 for ongoing retirement contributions and left only the amortized payment for retirement loans in the

amount of $281, but it calculated the Trustee's fee incorrectly. EOR at 211. Two days later, the Debtor filed another amended means test to correct the error, which resulted in a DMI of $409.77. EOR at 214-26. On September 19, 2022, Debtor filed the Third Amended Plan, which provided for monthly payments of $300 until August 2023 and monthly payments of $728 for the remainder of the 60-month term. EOR at 228-34. The Bankruptcy Court confirmed the Third Amended Plan on September 26, 2022. EOR at 241.

Debtor appealed. ECF No. 1.

II. ISSUES PRESENTED

Saldana identifies two (related) issues for the instant appeal:

> (1) Did the Bankruptcy Court err in sustaining the Trustee's objection to voluntary retirement contributions as a means test deduction? Opening Br. at 2.
>
> (2) Did the Bankruptcy Court err in confirming a plan predicated on an erroneous interpretation of the statutes? Opening Br. at 2.

III. JURISDICTION

28 U.S.C. § 158(a)(1) confers jurisdiction on this Court to adjudicate this bankruptcy appeal. The Bankruptcy Court's Confirmation Order, which resulted in the termination of the adversary proceeding, is a final and appealable order. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 502-03, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015). The Bankruptcy Court's Order Sustaining Objection to Confirmation was interlocutory, but it became appealable upon entry of the final Confirmation Order. *Cf. Cato v. Fresno City*, 220 F.3d 1073, 1074-75 (9th Cir. 2000).

IV. STANDARD OF REVIEW

The issue before the Court, whether a voluntary contribution to a retirement plan is excepted from disposable income, is a purely legal issue of statutory interpretation, which is reviewed de novo. *In re JTS Corp.*, 617 F.3d 1102, 1109, (9th Cir. 2010); *In re Simpson*, 557 F.3d 1010, 1014 (9th Cir. 2009).

V. DISCUSSION

The central issue presented in this appeal is whether voluntary contributions to a retirement account constitute disposable income. The Bankruptcy Court answered that question in the affirmative. As the parties recognize, courts in this country have taken varied approaches to this question, with some holding that voluntary contributions to a retirement account are always disposable income; others holding that voluntary contributions to a retirement account are never disposable income; and still others holding that voluntary contributions to a retirement account are not disposable income if made prior to the bankruptcy filing. The Court will identify the relevant statutory provisions and then summarize these approaches.

A. Statutory Framework

Section 1325 of the Bankruptcy Code governs confirmation of Chapter 13 payment plans. *See* 11 U.S.C. § 1325. Section 1325(b) provides that, after an objection from the Chapter 13 trustee, a Chapter 13 plan cannot be approved "unless . . . [it] provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors." 11 U.S.C. § 1325(b)(1)(B). It defines "disposable income" as the debtor's "current

monthly income . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i). Current monthly income is the average monthly income in the six-month period before the bankruptcy is filed. 11 U.S.C. § 101(10A). For debtors with above the applicable state median income, the "amounts reasonably necessary to be expended" are determined by reference to Section 707(b). 11 U.S.C. § 1325(b)(3). The phrase "projected disposable income" is not defined in the Bankruptcy Code. The Supreme Court has stated that "projected disposable income" is the debtor's disposable income under Section 1325(b)(2) adjusted for any "changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Hamilton v. Lanning*, 560 U.S. 505, 524 (2010).

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, which added Section 541(b)(7) to the Bankruptcy Code. Section 541(b)(7) provides:

> (b) Property of the estate does not include –
>
> . . . .
>
> (7) any amount –
>
> (A) withheld by an employer from the wages of employees for payments as contributions –
>
> (i) to –
>
> (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [commonly known as a 401(k) retirement plan] or under an employee benefit plan which is a

> government plan under section 414(d) of the Internal Revenue Code of 1986;
>
> . . . .
>
> **except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2).**

11 U.S.C. § 541(b)(7).

Before BAPCPA was passed in 2005, "the 'overwhelming consensus' among bankruptcy courts was that wages voluntarily withheld as 401(k) contributions formed part of a debtor's disposable income." *Davis v. Helbling* (*In re Davis*), 960 F.3d 346, 350 (6th Cir. 2020) (collecting cases). But the passage of BAPCPA changed that. The emphasized portion above, known as the "hanging paragraph," has "led to considerable disagreement among courts and litigants nationwide." *Id.* at 351. "Since [the passage of BAPCPA], courts faced with the question of whether voluntary 401(k) contributions constitute disposable income under Section 1325(b) have reached no less than four different conclusions." *In re Aquino*, 630 B.R. 499, 548 (Bankr. D. Nev. 2021). "BAPCPA's insertion of the hanging paragraph into § 541(b)(7) has taken us from an 'overwhelming consensus' among bankruptcy courts to four competing views of whether voluntary retirement contributions constitute disposable income in a Chapter 13 bankruptcy." *In re Davis*, 960 F.3d at 352-53 (internal citation omitted).

B. Approaches Taken by Other Courts

The Court will next summarize how other courts have addressed this question. *See generally In re Aquino*, 630

B.R. at 548-94 (providing comprehensive summary of case law).

i. Voluntary 401(k) Contributions are Always Disposable Income

Several courts have held that voluntary contributions to a 401(k) are always disposable income. This approach is often traced to *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010). Several of the cases adopting this approach—"that voluntary 401(k) contributions are always disposable income under Section 1325(b) in chapter 13 cases filed by above-median income debtors"—come from courts within the Ninth Circuit. *In re Aquino*, 630 B.R. at 548; *see In re McCullers*, 451 B.R. 498 (Bankr. N.D. Cal. 2011); *Parks v. Drummond* (*In re Parks*), 475 B.R. 703 (B.A.P. 9th Cir. 2012). And it is the approach adopted by the Ninth Circuit Bankruptcy Appellate Panel in *Parks*, which the Bankruptcy Court in this case followed.

This approach "focuses on the hanging paragraph's location within § 541." *In re Davis*, 960 F.3d at 351 (citing *In re Parks*, 475 B.R. at 708). Section 541 defines the property of the estate at the filing of the petition. 11 U.S.C. § 541. This line of cases concludes that the hanging paragraph excludes from property of the estate only 401(k) contributions that were made *prior to* the filing of the bankruptcy petition. *See, e.g.*, *In re Parks*, 475 B.R. at 708. These cases conclude that any voluntary retirement contributions made after the filing of the bankruptcy petition thus constitute disposable income. *See, e.g.*, *id.* at 708-09.

ii. No Voluntary 401(k) Contributions are Disposable Income

Another approach that courts have taken is to hold that voluntary 401(k) contributions are never disposable income. The leading decision for this approach is *Baxter v. Johnson* (*In re Johnson*), 346 B.R. 256 (Bankr. S.D. Ga. 2006). The *Johnson* court stated that Section 541(b)(7) "plainly state[s] that [401(k)] contributions 'shall not constitute disposable income.'" *Id.* at 263 (quoting 11 U.S.C. § 541(b)(7)). It stated that Congress had "placed retirement contributions outside the purview of a Chapter 13 plan." *Id.* The court decided that voluntary contributions to a 401(k) plan therefore do not constitute disposable income, regardless of whether they began prior to bankruptcy, as long as they are made in good faith. *Id.*

iii. Voluntary 401(k) Contributions in Pre-Petition Amounts are Not Disposable Income

Other lines of cases have held that voluntary retirement contributions are not disposable income if they were made regularly prior to the filing of the bankruptcy petition. *See In re Davis*, 960 F.3d at 352. Courts have followed two different lines of reasoning in reaching this outcome, and the Court will describe each in turn. In 2020, the Sixth Circuit adopted this approach, making clear it did not choose between the lines of reasoning (*Seafort*-BAP and CMI), as either would produce the same result. *Id.* at 357.

a. *Seafort*-BAP Interpretation

The first interpretation is referred to as the *Seafort*-BAP approach because it comes from the decision of the Sixth Circuit Bankruptcy Appellate Panel in *Seafort v. Burden* (*In re Seafort*), 437 B.R. 204 (B.A.P. 6th Cir.

2010). This approach also focuses on the hanging paragraph's placement in § 541 but "construes the hanging paragraph to exclude the debtor's pre-petition contribution *amount*—rather than merely her accumulated savings—from her disposable income under § 1325(b)(2)." *In re Davis*, 960 F.3d at 352 (emphasis in original) (citing *In re Seafort*, 437 B.R. at 210). Under this approach, a debtor could exclude voluntary 401(k) contributions from disposable income if the debtor made an equal or greater monthly voluntary 401(k) contribution prior to filing for bankruptcy. *In re Seafort*, 437 B.R. at 210.

b. CMI Interpretation

The second interpretation, referred to as the "CMI Interpretation," comes from the Bankruptcy Court of the Western District of Washington. *See In re Anh-Thu Thi Vu*, No. 15-41405-BDL, 2015 WL 6684227 (Bankr. W.D. Wash. June 16, 2015). This approach "construes the hanging paragraph as excluding the debtor's pre-petition contributions from the calculation of her 'current monthly income'—a subcomponent of § 1325(b)(2)'s disposable-income calculation." *In re Davis*, 960 F.3d at 352 (citing *In re Anh-Thu Thi Vu*, 2015 WL 6684227, at *4). As stated above, current monthly income is defined as average income in the six months preceding bankruptcy. 11 U.S.C. § 101(10A). This interpretation would often lead to the same result as the *Seafort*-BAP approach. But under certain circumstances, such as a debtor who began making contributions less than six months before filing the petition, the outcome would be different than that under *Seafort*-BAP.

C. This Appeal

At issue is whether Saldana's voluntary retirement contributions, in an amount she made pre-petition, were properly included as disposable income. Saldana encourages the Court to hold that voluntary retirement contributions in an amount made prior to filing for bankruptcy do not constitute disposable income, adopting either the CMI interpretation or the statutory interpretation approach of the Sixth Circuit in *In re Davis*. Opening Br. at 12-16. Appellee asks the Court to uphold the Bankruptcy Court's decision and follow the Ninth Circuit Bankruptcy Appellate Panel's decision in *In re Parks*. Trustee Br. at 6-15. The Court recognizes that the decision of the Ninth Circuit Bankruptcy Appellate Panel is not binding, but merely persuasive. *See Silverman v. Zamora* (*In re Silverman*), 616 F.3d 1001, 1005 & n.1 (9th Cir. 2010). The Court determines that the interpretation of the statutes determining that voluntary retirement contributions are always disposable income is most persuasive. This approach has been followed by several courts within the Ninth Circuit, including the Bankruptcy Court of the District of Nevada in a recent 2021 decision. *See In re Aquino*, 630 B.R. 499.

The structure of the Bankruptcy Code is instructive. Section 1306 of the Bankruptcy Code defines property for Chapter 13 bankruptcy filings. 11 U.S.C. § 1306. It defines the property of the estate to include "the property specified in section 541" of the Bankruptcy Code, as well as certain property acquired and earnings from services performed after the commencement of a bankruptcy case but before its closing. *Id.* In turn, Section 541, which includes the hanging paragraph, defines property of the estate at the time of filing. 11 U.S.C. § 541. "Section

541(a)(1) defines property of the estate as including 'all legal or equitable interest of the debtor in property as of the commencement of the case' and § 541(a)(6) states that 'earnings from services performed by an individual debtor after the commencement of the case' are not brought into the estate." *In re Parks*, 475 B.R. at 707 (quoting 11 U.S.C. § 541). As summarized by the Sixth Circuit, "Section 1306(a) expressly incorporates § 541. Read together, § 541 fixes property of the estate as of the date of filing, while § 1306 adds to the 'property of the estate' property interests which arise post-petition." *Seafort v. Burden* (*In re Seafort*), 669 F.3d 662, 667 (6th Cir. 2012).

Section 1325 of the Bankruptcy Code then governs confirmation of Chapter 13 payment plans. 11 U.S.C. § 1325. It defines "disposable income" as the debtor's "current monthly income . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i). For debtors with above the applicable state median income, the "amounts reasonably necessary to be expended" are determined by reference to Section 707(b)(2)(A)-(B), referred to as the "means test." 11 U.S.C. § 1325(b)(3). Section 707(b) provides that "[t]he 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 Service." 11 U.S.C. § 707(b)(2)(A)(ii)(I). "[T]he Internal Revenue Manual ("IRM") lists fifteen categories of expenses which may be considered necessary under certain circumstances, such as child care, education and court-ordered payments such

as alimony and child support." *Egebjerg v. Anderson* (*In re Egebjerg*), 574 F.3d 1045, 1051 (9th Cir. 2009) (citing IRM § 5.15.1.10). As the Ninth Circuit has noted, "the IRS guidelines themselves provide that '[c]ontributions to voluntary retirement plans are not a necessary expense.'" *Id.* at 1052 (alteration in original) (quoting IRM § 5.15.1.23). With this framework in mind, "the question presented is whether the very specific provisions of subsection 541(b)(7) . . . override the more general provisions of subsections 707(b)(2) and 132[5](b)." *In re McCullers*, 451 B.R. at 501.

Again, Section 541 states that "[p]roperty of the estate does not include . . . any amount . . . withheld by an employer from the wages of employees for payments as contributions . . . to . . . [a 401(k)] . . . except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." 11 U.S.C. § 541(b)(7)(A). The Court agrees with the several other courts that have determined that the most reasonable interpretation of section 541(b)(7)(A) is to exclude voluntary 401(k) contributions made before the petition date from the property of the estate. *See In re Parks*, 475 B.R. at 708 ("[B]y reading § 541(a)(1) and § 541(b)(7)(A) together, the most reasonable interpretation of § 541(b)(7)(A) is that is excludes from property of the estate only those 401(k) contributions made before the petition date."); *In re McCullers*, 451 B.R. at 503 ("[T]he most natural reading of section 541(b)(7) is that it excludes from property of the estate only those contributions made before the petition date."); *In re Prigge*, 441 B.R. at 677 n.5 ("[Section 541(b)(7)] seems intended to protect amounts withheld by employers from employees

that are in the employer's hands at the time of filing bankruptcy, prior to remission of the funds to the plan"). The "such amount" language in the hanging paragraph means that pre-petition retirement contributions are not disposable income. *In re Parks*, 475 B.R. at 708; *see also In re McCullers*, 451 B.R. at 503-04 ("That Congress intended to exclude from disposable income only the same prepetition contributions excluded from property of the estate is indicated by its specifying the contributions excluded from property of the estate and then stating that "such amount" shall not constitute disposable income.").

And the Court agrees with the meaning of the "except that" language explained by the courts in *McCullers* and *Parks. Prigge* held that the "except that" language was limited to excluding from disposable income any amount that had been withheld by the employer but not yet remitted to the retirement plan itself. *In re Prigge*, 441 B.R. at 677 n.5. The court in *McCullers* stated that the "except that" language serves "merely to counteract any suggestion that the exclusion of such contributions from property of the estate constitutes postpetition income to the debtor." *In re McCullers*, 451 B.R. at 504. It went on to state that "Congress's use of the words 'except that' is entirely consistent with the *Prigge* decision, which held that the purpose of the statute was merely to clarify that the exclusion of certain prepetition contributions from property of the estate did not give rise to disposable income to the debtor." *Id.* (citing *Prigge*, 441 B.R. at 677 n.5). The Court recognizes that it has an obligation to give some effect to the statutory language, and it agrees with the *McCullers* court that this interpretation does just that, noting that the "limited reading is entirely appropriate . . . because the statutory language itself discloses very

modest aims." *Id.* at 505. "In using the words 'except that,' Congress suggests that its only purpose was to negate any inference that the exclusion of such contributions from property of the estate gives rise to income to the debtor." *Id.*; *see also In re Parks*, 475 B.R. at 708 ("[W]e are persuaded that the term 'except that' in the hanging paragraph was designed simply to clarify that the voluntary retirement contributions excluded from property of the estate are not postpetition income to the debtor.").

The Court also notes that its position is supported by other sections of the Code. The Court finds instructive the fact that Section 1306 makes post-petition earnings part of the estate, but voluntary retirement contributions are not excluded from disposable income anywhere in Chapter 13. *See* 11 U.S.C. § 1306(a)(2). Further, the Court notes that in amending BAPCPA, Congress explicitly excluded the repayment of 401(k) loans from disposable income in § 1322(f), but it did not do the same with post-petition voluntary 401(k) contributions. *In re Parks*, 475 B.R. at 708; *see* 11 U.S.C. § 1322(f). "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (alterations in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The fact that Congress explicitly excluded repayment of 401(k) loans from disposable income in Section 1322, but did not do the same with voluntary 401(k) contributions, further supports the Court's conclusion that post-petition voluntary retirement contributions do constitute disposable income. *See In re Parks*, 475 B.R. at

709 ("Simply put, without a clearer direction comparable to the carve out from disposable income for the repayment of retirement loans in § 1322(f), it seems unlikely that Congress intended § 541(b)(7)(A) to bestow a benefit on above-median chapter 13 debtors while their creditors absorbed an even greater loss."); *In re McCullers*, 451 B.R. at 504 ("*Prigge*'s more limited interpretation is reinforced by the fact that Congress used much more direct language in excluding retirement loan repayments from disposable income. Section 1322(f) was placed within the confines of chapter 13 itself, and states explicitly 'any amounts required to repay such loan shall not constitute disposable income under section 1325.'"); *In re Prigge*, 441 B.R. at 677 ("No provision similar to § 1322(f) (excluding repayment of 401(k) loans from disposable income) is cited by the Debtor as authority to exclude voluntary 401(k) contributions, and the Court is aware of none. . . . If Congress had intended to exclude voluntary 401(k) contributions from disposable income it could have drafted § 1322(f) to provide for such an exclusion, or provided one elsewhere.").

The Court also looks to Section 707(b) of the Bankruptcy Code. "Disposable income" is defined as the debtor's "current monthly income . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i). Where the debtor's monthly income exceeds the state median, as here, the "amounts reasonably necessary to be expended" are determined by the means test in Section 707(b)(2). 11 U.S.C. § 1325(b)(3). And "[v]oluntary contributions to 401(k) retirement plans are not mentioned as 'reasonable and necessary expenses' under the 'means test' set forth in § 707(b)(2)(A) & (B)." *In re Parks*, 475

B.R. at 709 (citing *In re Seafort*, 669 F.3d at 672; *In re Prigge*, 441 B.R. at 676; *In re Egebjerg*, 574 F.3d at 1052). This "suggests that Congress did not intend § 541(b)(7)(A) to exclude postpetition 401(k) contributions from disposable income." *In re Parks*, 475 B.R. at 709.

Finally, the Court also agrees that this interpretation is consistent with the Ninth Circuit's decision in *In re Egebjerg*, 574 F.3d 1045. That case dealt with a different issue—whether the debtor's 401(k) loan repayments qualified as a necessary expense for purposes of the means test in a Chapter 7 bankruptcy proceeding. The Ninth Circuit noted that "[w]hen it introduced the means test, Congress provided, by reference to the IRS guidelines, specific guidance as to what qualifies as a necessary expense for the purposes of applying that test." *Id.* at 1052. In its analysis, the Ninth Circuit recognized that "the IRS guidelines themselves provide that '[c]ontributions to voluntary retirement plans are not a necessary expense.'" *Id.* at 1052 (alteration in original) (quoting IRM § 5.15.1.23). The Ninth Circuit explicitly stated that it did "not hold that § 5.15.1.23 is controlling" and that it did not "mean to imply that the IRS standards have been incorporated wholesale into the Bankruptcy Code or that they control outcomes on other issues." *Id.* at 1052 n.3. The Court also recognizes that the IRS guidelines in the IRM do not prevail over the statute, but merely notes that its reading of the statute is consistent with the Ninth Circuit's statement in *Egebjerg*. *See In re Parks*, 475 B.R. at 709.

The Court determines that under the Bankruptcy Code, voluntary contributions to a 401(k) made after filing a petition for Chapter 13 bankruptcy are disposable

income. The Court therefore agrees with the Bankruptcy Court's decision, and it holds that Saldana's voluntary retirement contributions were properly included as disposable income.

VI. ORDER

For the foregoing reasons, the Court AFFIRMS the Bankruptcy Court's Order Sustaining Objection To Confirmation and its Confirmation Order.

Dated: May 15, 2023

/s/ *Beth Labson Freeman*
Beth Labson Freeman
United States District Judge

APPENDIX C

Martha G. Bronitsky
Chapter 13 Standing
Trustee
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Trustee for Debtor(s)

Entered on Docket
July 29, 2022
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

The following constitutes the order of the Court.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

Chapter 13 Case No. 22-40351-RLE13

IN RE JORDEN MARIE SALDANA,
debtor(s).

Hearing: 07/28/2022
Time: 1:30 p.m.
Courtroom: Videoconference
Filed: July 29, 2022

ORDER SUSTAINING THE CHAPTER 13 TRUSTEE'S OBJECTION TO CONFIRMATION

Before ROGER L. EFREMSKY, United States Bankruptcy Judge.

A hearing was held regarding Confirmation of the Debtor's Chapter 13 Plan. Appearances were stated on the record.

For the reasons stated on the record and good cause appearing; IT IS ORDERED

The Chapter Trustee's Objection to Confirmation is Sustained.

Signed: July 28, 2022

/s/ *Roger L. Efremsky*
Roger L. Efremsky
U.S. Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
OAKLAND DIVISION

Chapter 13 Case No. 22-40351-RLE13

IN RE JORDEN MARIE SALDANA,
debtor(s).

July 28, 2022
Excerpts from Transcript of Hearing on
Trustee's Amended Objection to Confirmation of Plan
Before the Honorable Roger L. Efremsky,
U.S. Bankruptcy Judge

ORAL RULING SUSTAINING THE CHAPTER 13 TRUSTEE'S OBJECTION TO CONFIRMATION

Before ROGER L. EFREMSKY, United States Bankruptcy Judge.

* * * * *

[2]

THE COURT: * * * All right. This is the trustee's amended objection to confirmation of the plan.

Mr. Primus, go ahead.

MR. PRIMUS: I don't know if the Court's had a chance to review my prehearing statement. This case raises the question of whether a debtor can take a voluntary retirement contribution as a means test deduction.

Some courts say they can and some can't. There is circuit court authority to allow it from the Fourth and Sixth Circuits. The Bankruptcy Appellate Panel for the Ninth Circuit has not allowed it. The debtor is asking for that deduction, so it's a solid legal question.

THE COURT: All right. Is the matter submitted?

MS. BRONITSKY: Yes, Your Honor.

THE COURT: All right. The Court has reviewed the Ninth Circuit BAP decision by Judge-Jury Markell and Hollowell. I find it to be persuasive, and the Court will file—follow the Ninth Circuit BAP decision in *In re Parks* at 475 B.R. 703. Based on that, the Court will sustain the trustee's objection.

Ms. Bronitsky, if you could be kind enough to upload an order to that effect, just simply say for the reasons stated on the record the objection is sustained?

MS. BRONITSKY: Yes, Your Honor.

THE COURT: All right. Thank you.

MR. PRIMUS: Your Honor?

THE COURT: Yes.

MR. PRIMUS: If we could—well,--

THE COURT: Go ahead, Mr. Primus.

MR. PRIMUS: Well, this is a hotly-contested issue and I don't know what the Court would think of a request for—to certify this to the Ninth Circuit, but I think that's where it needs to be ultimately resolved, at the circuit level.

MS. BRONITSKY: If we're going to do that, we need to do full briefs.

THE COURT: All right. No, I think if you want to take up an appeal, by all means, Mr. Primus. I'm aware of two circuits that go the other way. But again, you know, I have carefully reviewed Judge-Jury's decision and I find it persuasive. I've read the other circuits' decision, but I'm going to follow the Ninth Circuit's BAP decision in *In re Parks*. So, again, if you want to take it up on appeal, you're free to do so. I realize that there is a split of authority amongst some of the courts, so I'll just leave it at that.

* * * * *

APPENDIX E

1. Section 101 of the Bankruptcy Code, 11 U.S.C. 101, provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(10A) The term "current monthly income"—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent); and

(ii) excludes—

(I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);

(II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

(IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

2. Section 541 of the Bankruptcy Code, 11 U.S.C. 541, provides in pertinent part:

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

(b) Property of the estate does not include—

* * * * *

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

* * * * *

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

* * * * *

3. Section 1306 of the Bankruptcy Code, 11 U.S.C. 1306, provides:

Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

4. Section 1322 of the Bankruptcy Code, 11 U.S.C. 1322, provides in pertinent part:

Contents of plan

* * * * *

(f) A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute "disposable income" under section 1325.

5. Section 1325 of the Bankruptcy Code, 11 U.S.C. 1325, provides in pertinent part:

Confirmation of plan

* * * * *

(b)(1) 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—

* * * * *

> (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.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to

the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

* * * * *