ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

33rd Annual
Duberstein Bankruptcy
Moout Court Competition
Saturday, March 1, 2025
through Monday, March 3, 2025

AMERICAN BANKRUPTCY INSTITUTE

COMPETITION PROBLEM

33RD ANNUAL
DUBERSTEIN BANKRUPTCY
MOOT COURT COMPETITION
March 1 – March 3, 2025

No. 24-0115

IN THE

Supreme Court of the United States

OCTOBER TERM, 2024

IN RE GLENN FREY, DEBTOR

DESPERADO BANK, PETITIONER

V.

GLENN FREY, RESPONDENT.

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED, LIMITED TO THE FOLLOWING QUESTIONS:

1. Whether 11 U.S.C. § 1322(b)(2) precludes a chapter 13 debtor from modifying the rights of the holder of a secured claim that is secured only by a security interest in real property consisting of both the debtor's principal residence and income-generating rental property.

2. Whether 11 U.S.C. § 1325(b)(1) allows a chapter 13 debtor to exclude from the calculation of disposable income voluntary, post-petition contributions to his or her 401(k) retirement plan.

Written by Hon. John T. Gregg and Hon. Paul R. Hage. Judge Gregg is a United States Bankruptcy Judge for the Western District of Michigan. Judge Hage is a United States Bankruptcy Judge for the Eastern District of Michigan. The authors express no opinion on the issues presented herein.

This problem may not be used or reproduced without the consent of the authors for any purpose other than the Duberstein Bankruptcy Moot Court Competition.

Recommended for Full Text Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

GLENN FREY,

CASE NO. 23-0359

DEBTOR.

____/

DESPERADO BANK,

APPELLANT

V.

GLENN FREY,

APPELLEE.

____/

Direct Appeal from the United States Bankruptcy
Court for the District of Moot

Decided: February 10, 2024

Before: Felder, Meisner and Walsh, Circuit Judges

OPINION

Felder, Circuit Judge:

Under chapter 13 of the Bankruptcy Code,[1] an individual debtor with regular income may adjust his or her debts by repaying creditors over time, thereby allowing the debtor to retain his or her property. *See Hamilton v. Lanning*, 560 U.S. 505, 508 (2010). Shortly after the commencement of a case, a chapter 13 debtor must propose a plan pursuant to which payments are made for a period of three to five years, a timeframe known as the "applicable commitment

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq*. Specific chapters of the Bankruptcy Code are identified herein as "chapter __" and specific sections of the Bankruptcy Code are identified herein as "section __."

period." 11 U.S.C. §§ 1321, 1322(a)(1), (d), 1325(b)(4). If the bankruptcy court confirms the plan, the chapter 13 trustee typically collects a portion of the debtor's earnings and thereafter disburses them in accordance with the plan's terms. 11 U.S.C. §§ 1322, 1326; *Harris v. Viegelahn*, 575 U.S. 510, 514 (2015). Upon completion of plan payments, among other things, a debtor is entitled to a discharge of his or her debts. 11 U.S.C. § 1328; *see United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 264 (2010).

As a general rule, a chapter 13 debtor is permitted to modify the rights of a secured creditor by bifurcating its claim through a process frequently referred to as "cramdown." 11 U.S.C. §§ 1322(b)(2), 1325(a)(5); *Assocs. Com. Corp. v. Rash*, 520 U.S. 953, 955 (1997). Section 506 provides that a claim that is secured by a lien on property is treated as a secured claim only to the extent of the value of the property on which the lien is fixed. 11 U.S.C. § 506(a)(1). The amount of such creditor's claim exceeding the value of the property is unsecured. *Id*.

Section 1322(b)(2) contains an important exception to this general rule. It provides that a chapter 13 plan may not modify the "rights" of a holder of a claim that is "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 328-32 (1993).[2] If the rights of a secured creditor are subject to the anti-modification provision in section 1322(b)(2), the debtor's plan must contemplate payment in full of the secured creditor's claim. 11 U.S.C. §§ 1322(b)(5), 1325(a)(5), 1328; *see also In re La Brada*, 132 B.R. 512 (Bankr. E.D.N.Y. 1991) (Duberstein, C.J.).

Unsecured creditors are treated differently in chapter 13. The debtor need not pay unsecured claims in full as long as the plan provides that (i) the debtor will pay all "projected

---

[2] A substantially similar provision exists in chapter 11. *See* 11 U.S.C. § 1123(b)(5). Sections 1123(b)(5) and 1322(b)(2) are referred to collectively as the "anti-modification provisions" of the Bankruptcy Code. Because these sections are worded identically, case law and legislative history for one section may be used to interpret the other.

disposable income" during the applicable commitment period, and (ii) unsecured creditors receive at least as much as they would receive if the debtor's assets were liquidated under chapter 7. 11 U.S.C. §§ 1325(a)(4), 1325(b)(1). Broadly stated, "disposable income" means "current monthly income" received by the debtor less amounts reasonably necessary for the maintenance or support of the debtor and his or her dependents. 11 U.S.C. § 1325(b)(2).[3] In turn, "current monthly income" is defined as "the average monthly income from all sources … that the debtor receives" in the six months preceding the filing of the bankruptcy petition. 11 U.S.C. § 101(10A).

With this statutory framework in mind, the present appeal addresses two frequently litigated issues in chapter 13. First, Glenn Frey, the chapter 13 debtor (the "Debtor"), sought to modify the rights of Desperado Bank ("Desperado"), pursuant to sections 506(a)(1), 1322(b)(2), and 1325(a)(5), by reducing its claim to the value of its collateral, a six-unit apartment complex called "The Henley." Desperado objected, asserting that it is entitled to a secured claim for the full amount of its indebtedness under section 1322(b)(2) because the Debtor resides in one of the six apartment units in The Henley. Desperado thus maintained that its claim is "secured only by a security interest in real property that is the debtor's principal residence." If its secured claim is modified, Desperado will have a significant unsecured deficiency claim in the Debtor's chapter 13 case for which it will receive only pennies on the dollar over a period of five years.

This potential deficiency claim brings us to the second issue on appeal. Desperado objected to the Debtor's plan on the basis that he is not proposing to devote all his "projected disposable income" because he intends to commence making voluntary contributions to his 401(k) retirement plan post-petition. Desperado contended that such amounts must instead "be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B). Conversely, the

[3] The "amounts reasonably necessary to be expended" for an above-median income debtor are determined by applying the "means test" set forth in section 707(b)(2). 11 U.S.C. § 1325(b)(3).

Debtor argued that he can exclude such amounts from the calculation of disposable income because retirement contributions are outside the purview of a chapter 13 plan, citing section 541(b)(7).

The bankruptcy court confirmed the Debtor's plan, overruling the objections of Desperado on both issues. The court concluded that although the Debtor resided in one unit of The Henley, Desperado's claim was subject to cramdown because the majority of the building was income-generating rental property, not his personal residence. The court also determined that the Debtor's proposed contributions to his 401(k) retirement plan could be excluded from the calculation of disposable income, thereby resulting in significantly less money for unsecured creditors, including Desperado. Desperado was granted leave to appeal the bankruptcy court's confirmation order directly to this court. Having considered the arguments of the parties, we affirm on both issues.

Factual Background and Procedural History[4]

The Debtor is a builder and contractor that resides in the city of Seven Bridges in the State of Moot. Beginning in 2010, the Debtor was employed by Doolin' Dalton Homes, LLC ("Doolin Dalton"), the largest residential builder in the State. For the duration of his pre-bankruptcy employment with Doolin' Dalton, approximately ten years, the Debtor participated in the company's 401(k) retirement program, contributing 5% of each of his paychecks, which is the maximum amount that his employer would match.

In 2015, the Debtor inherited from his parents a six-unit apartment building in downtown Seven Bridges called The Henley.[5] Originally called the Hotel California, The Henley was built by the Debtor's parents as an eighteen-room boutique hotel in 1969. In the early 1990s, the Debtor's parents converted the hotel into two- and three-bedroom rental units.

[4] The facts, as set forth herein, have been stipulated to by the parties.

[5] The Debtor has never married and has, at all times since he inherited the property, been the sole owner of The Henley.

In late 2015, the Debtor moved into one of The Henley's six units and made it his principal residence; he resides there to this day. The building had suffered from years of neglect by the Debtor's parents who, due to financial and health issues, were unable to maintain the property. In 2017, the Debtor personally took out a $2.8 million loan from Desperado for purposes of renovating the building. This loan was to be repaid over a period of twenty years. As the sole security for repayment of the loan, the Debtor granted Desperado a first-priority mortgage on The Henley, which was properly recorded in the county register of deeds. With the proceeds of the loan, the Debtor personally spent two years renovating all six units and the common areas of the apartment building. Upon completion of the renovation in 2019, the building was fully occupied.[6]

At some point in 2019, the Debtor had a falling out with Doolin' Dalton. Doolin' Dalton complained that the Debtor was frequently late for work and characterized his time spent working on The Henley as "wasted time." The Debtor and Doolin' Dalton agreed to part ways in February 2020. In June 2020, inspired by the renovation work that he had done at The Henley, the Debtor formed his own construction business, Take it Easy Building, LLC ("Take it Easy"), which specialized in renovating commercial buildings in downtown Seven Bridges. As a start-up with only a few employees, Take it Easy did not offer a 401(k) plan. As such, upon his separation from Doolin' Dalton in 2020, the Debtor was not contributing any funds to a retirement plan.

In March 2020, the Governor for the State of Moot declared a public health emergency due to the Covid-19 pandemic. Like many large cities, the downtown of Seven Bridges was hit hard by the pandemic. The higher prevalence of infections in the city, widespread anxieties about crowded public spaces, and business closures reduced the appeal of city living. Moreover, as remote work became more accessible and accepted, residents increasingly moved to suburban and

[6] At all relevant times, The Henley was taxed as a single parcel of real property. The Debtor pays the taxes on the real property, and then passes the cost of the taxes on to tenants through higher rents.

rural areas. This left both residential and commercial property occupancy rates in downtown Seven Bridges at historically low levels.

The Henley was not immune to these problems. Indeed, by April 1, 2021, three of its units were vacant. Take It Easy likewise fell on hard times. Due to the exodus of people from downtown Seven Bridges, and a temporary freeze on spending by the local business community, there was limited demand for renovation work. In October 2021, the Debtor reluctantly shut down Take it Easy. He used substantially all his personal savings to satisfy vendor obligations of the company, many of which he was personally liable for under applicable non-bankruptcy law. The forgoing resulted in the Debtor being unable to service his personal loan to Desperado.

On February 20, 2022, Desperado filed suit against the Debtor seeking a judgment on the promissory note. Desperado obtained a default judgment against the Debtor in the amount of $2.3 million in May 2022. Upon obtaining the default judgment, Desperado commenced a foreclosure proceeding with respect to The Henley. In need of money, and notwithstanding the fact that he had previously told Doolin' Dalton that he'd come back to work for the company only after "hell freezes over," the Debtor was rehired by Doolin Dalton in June 2021.

Seeking to stave off the foreclosure, the Debtor filed a petition for relief under chapter 13 on July 5, 2022.[7] On his bankruptcy schedules, the Debtor listed the value of The Henley as only $1.8 million. Desperado was scheduled with a secured claim in the amount of $2.3 million. On July 10, 2022, Desperado filed a proof of claim asserting a secured claim in the same amount and identifying The Henley as the sole collateral for the debt. The Debtor testified at his section 341

---

[7] It is undisputed that the Debtor was eligible to be a chapter 13 debtor as of the petition date. The Debtor's total debts to all creditors totaled approximately $2.5 million, which was under the combined secured and unsecured chapter 13 debt limit that was temporarily in place as of the petition date. *See* 11 U.S.C. § 109(e) (2022).

meeting of creditors that, although the building was once again fully occupied, its value had dropped significantly since the beginning of the pandemic.

On July 19, 2022, the Debtor filed his chapter 13 plan. Because the Debtor had an income above the State median, he was required to make payments to his creditors over a period of five years from his "projected disposable income." The plan contemplated that the Debtor would recommence making voluntary monthly 401(k) contributions of 5% from each of his paychecks to the Doolin' Dalton 401(k) plan and excluded those contributions from the calculation of his "projected disposable income." The plan also contemplated that the secured claim of Desperado would be modified pursuant to sections 506(a)(1), 1322(b)(2) and 1325(a)(5); Desperado's secured claim would be reduced to $1.8 million and it would be granted a $500,000 unsecured deficiency claim.[8] Desperado's secured claim was placed in a class of its own. The $500,000 deficiency claim was placed in a class with the Debtor's other general unsecured creditors.

Desperado timely filed an objection to the plan. It first asserted that its secured claim could not be modified pursuant to section 1322(b)(2). Moreover, Desperado argued, even if its claim could be modified, the plan could not be confirmed under section 1325(b)(1) because all the Debtor's "projected disposable income" was not being contributed due to the voluntary 401(k) contributions that he was making.[9]

The bankruptcy court confirmed the plan over the objection of Desperado, holding that although the Debtor resided in one unit of The Henley, the secured claim could be modified because the building did not serve exclusively as his personal residence. The court also held that

---

[8] The Debtor's valuation of the building was supported by an appraisal and was not disputed by Desperado.

[9] Desperado did not object to the plan, or the voluntary 401(k) contributions, on lack of good faith grounds. *See* 11 U.S.C. § 1325(a)(3). Rather, Desperado's position below was simply that such amounts cannot be excluded from the calculation of "projected disposable income" under section 1325(b)(1).

the Debtor's proposed prospective, voluntary contributions to the Doolin' Dalton 401(k) plan could be excluded from the calculation of disposable income, as they were consistent with his prior practice while he was employed by the company. The bankruptcy court thereafter certified the disputes for direct appeal pursuant to 28 U.S.C. § 158(d)(2)(A).

Discussion

I. Legal Standard

The parties do not dispute the facts as set forth herein. Rather, the issues that we address in this appeal involve questions of law. Thus, our review is *de novo*. *See, e.g.*, *Fox v. Hathaway (In re Chicago Mgmt. Consulting Grp.)*, 929 F.3d 804, 809 (7th Cir. 2019). Under a *de novo* standard of review, the reviewing court decides an issue as if the court were the original trial court in the matter. *See, e.g.*, *Razavi v. Comm'r of Internal Revenue*, 74 F.3d 125, 127 (6th Cir. 1996).

II. A Chapter 13 Debtor is Permitted to Modify the Rights of the Holder of a Secured Claim That is Secured Only by a Security Interest in Real Property That Contains Both the Debtor's Principal Residence and Rental Property

The first issue on appeal requires us to undertake a classic case of statutory construction: whether a chapter 13 debtor is precluded from modifying the rights of a holder of "a claim secured only by a security interest in real property" that consists of "the debtor's principal residence" and income-generating rental property. *See* 11 U.S.C. § 1322(b)(2). Most courts have concluded that under section 1322(b)(2), the rights of a holder of a claim secured by multi-use property that includes the debtor's principal residence are subject to modification. *See, e.g.*, *Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough)*, 461 F.3d 406, 408 (3d Cir. 2006); *Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 1-2 (1st Cir. 1996); *see also Reinhardt v. Vanderbilt Mortg. & Fin., Inc. (In re Reinhardt)*, 563 F.3d 558, 563 (6th Cir. 2009) (expressing doubt that anti-modification provision applies to real property containing more than debtor's principal residence). Earlier this

year, two of our colleagues sitting in another circuit – over a strong dissent – reached the opposite conclusion, albeit in the context of section 1123(b)(5). *Lee v. U.S. Bank N.A.*, 102 F.4th 1177, 1187 (11th Cir. 2024).[10]

Our analysis begins (and, for that matter, ends) with the plain meaning of some of the more benign and bland words in the English language. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (when the "words of a statute are unambiguous … this first canon is also the last: judicial inquiry is complete." (citations omitted)). Undefined by the Bankruptcy Code, the term "is" has been ascribed two meanings. *Lee*, 102 F.4th at 189-90 (Pryor, J., dissenting); *see also Ransom v. FIA Card Serv., N.A.*, 562 U.S. 61, 69 (2011) (undefined statutes given ordinary meanings by referring to legal and general dictionaries (citation omitted)); Laura N. Coordes, *The Anti-Modification Rules' Application to Mixed Property: "It depends on what the meaning of the word 'is' is"*, 44 BANKR. L. LETTER, no. 9, Sept. 2024, at 1. According to one meaning, the term "is" denotes a description by connecting a subject and predicate to establish a characteristic or to place the subject in a specific class. *Lee*, 102 F.4th at 1184 (citation omitted). The other meaning denotes equivalence or exclusivity by deeming the subject as equal to the predicate nominative. *See id.* at 1189 (Pryor, J., dissenting) (citation omitted); *cf. In re Scarborough*, 461 F.3d at 411.

To determine which meaning to apply, we need look no further than "that" and "the," the words in the text that appear immediately before and after "is." *See, e.g.*, *Bartenwerfer v. Buckley*, 598 U.S. 69, 75-76 (2023) (applying ordinary meaning as discerned from proper grammar and usage rules). Section 1322(b)(2) relies on the word "that" to refer to the real property as the "debtor's principal residence," while the word "the" clarifies that such reference is being made to one specific item. *Lee*, 102 F. 4th at 1189 (Pryor, J., dissenting); *see also Nielsen v. Preap*, 586

[10] Because we agree with the parties that the totality of the circumstances test adopted by certain lower courts is misplaced, we need not consider it herein. *See Lee*, 102 F.4th at 1186; *In re Scarborough*, 461 F.3d at 414.

U.S. 392, 407-408 (2019) (use of the definite article "the" means something previously specified). Or, to put it another way, "that" refers to real property equal to, or exclusively serving as, "the" debtor's principal residence.

Our interpretation is also supported by the grammatical placement of the word "only." Section 1322(b)(2) uses "only" to qualify both the "real property" and the "debtor's principal residence." *In re Moorer*, 544 B.R. 702, 706 (Bankr. M.D. Ala. 2016) (citation omitted); *see In re Scarborough*, 461 F.3d at 412; *see also* THEODORE M. BERNSTEIN, THE CAREFUL WRITER: A MODERN GUIDE TO ENGLISH USAGE 315-16 (1998) ("Normally, the proper positioning of the word only requires no more than asking yourself, 'What does it actually modify?'"). Here, although Desperado's security interest unquestionably extends only to real property, that same real property - The Henley - does not only serve as the Debtor's principal residence. Rather, it constitutes commercial real property that is used to generate income for the Debtor. Thus, by its plain grammatical meaning, section 1322(b)(2) does not protect Desperado's rights from modification.

Desperado contends that such an interpretation would be in error, as the word "only" qualifies real property and not the principal residence of the debtor. We are not persuaded. After all, if Congress had intended such a meaning, it easily could have written section 1322(b)(2) to protect holders of a claim secured "by a security interest in *a single parcel of real property* that includes the debtor's principal residence." *Lopez v. Credit Union One (In re Lopez)*, 511 B.R. 517, 519 (Bankr. N.D. Ill. 2014) (emphasis added); *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (courts should decline to read words into the statute). Congress instead opted to use language that, by its plain meaning, requires the real property to constitute only a debtor's principal residence and nothing more.

Our colleague in dissent suggests that our reading of the statutory scheme is incomplete because we fail to account for newly defined terms in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and the Bankruptcy Technical Corrections Act of 2010 ("BTCA"). Specifically, the dissent points to the definition of a "debtor's principal residence" in section 101(13A), which in turn refers to "incidental property" in section 101(27B). *See Lee*, 102 F.4th at 1184-85. According to the dissent, Congress used these two definitions to clarify that the anti-modification provision in section 1322(b)(2) applies to mixed-use real property. For several reasons, we disagree.

First, section 101(13A) focuses on the debtor's actual use of the property allegedly constituting the debtor's principal residence. *See In re Colcord*, 2015 WL 5461543, at *3 (Bankr. E.D. Mich. Sept. 16, 2015); *see also Fed. Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428, 1441 (6th Cir. 1985) (observing that if real property is used for additional purposes beyond principal residence, rights of holder of secured claim may be subject to modification). Here, the Debtor has never *used* all six units in The Henley as his principal residence. Rather, the Debtor resides in a mere 16% of the real property that serves as Desperado's collateral.

Second, section 101(13A)(A) provides that a "debtor's principal residence … means" a "residential structure," an undefined term that, standing alone, might be considered broad in scope. However, section 101(13A)(B) qualifies section 101(13A)(A) with a list of items and/or characteristics. 11 U.S.C. § 101(13A)(B); *see* 11 U.S.C. § 102(3) (defining "includes"). While that list is non-exclusive, it is not limitless. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (canon of *noscitur a sociis* provides that "words grouped in a list should be given related meaning"); *cf. Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2082-83 (2024) (canon of *ejusdem generis* requires text to "embrace only objects similar in nature to the specific examples

preceding it."). Section 101(13A)(B) restricts the scope of the "residential structure" in section 101(13A)(A) by limiting it to only those items and/or characteristics which are directly related to a debtor's actual living unit. With respect to the appeal before us, the income-generating units that are part of The Henley bear no semblance to the items that are listed in section 101(13A)(B).

Third, the legislative history to the BTCA expressly provides that it was "not intended to enact any substantive changes to the Bankruptcy Code." 156 Cong. Rec. H7161 (daily ed. Sept. 28, 2010) (statements of Rep. Smith). As such, the BTCA left unaffected the meaning of a "debtor's principal residence." Yet, even if we were to ignore the BTCA's legislative history, section 101(27B) still would not protect Desperado's rights from modification. Clearly, the five income-producing rental units at issue in this appeal do not fall within section 101(27B)(B) or (C). That leaves us with section 101(27B)(A), which is also unavailing because those same units are not "commonly conveyed … in the area where the real property is located." 11 U.S.C. § 101(27B)(A). Rather, section 101(27B)(A) means objects such as an attached garage, a tool shed, a ceiling fan, or a greenhouse. *See Pawtucket Credit Union v. Picchi (In re Picchi)*, 448 B.R. 870, 875 (1st Cir. 2011).

Regardless, all of this is a moot point. Let's assume that a plausible argument could be made that income-generating rental units fall within the scope of a "debtor's principal residence," whether as "incidental property" or otherwise. Our conclusion would not change, as the real property at issue still needs to equate to, or exclusively serve as, the Debtor's principal residence for purposes of section 1322(b)(2). 7 COLLIER ON BANKRUPTCY ¶ 1123.02 (Richard Levin & Henry J. Sommer eds., 16th ed.). Because the record below unequivocally demonstrates that The Henley is comprised of six units, only one of which constitutes the Debtor's principal residence,

we need look no further than the plain meaning of section 1322(b)(2) to determine that Desperado's rights are subject to modification.

While we are confident that the meaning of the anti-modification provision is straightforward, we nonetheless acknowledge some courts have perceived an ambiguity. *See, e.g.*, *Lomas*, 82 F.3d at 4; *In re Abrego*, 506 B.R. 509, 514 (Bankr. N.D. Ill. 2014). When two plausible interpretations of the same statute create an uncertainty, it is appropriate to consider the legislative history. *See, e.g.*, *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (citation omitted). The legislative history to section 1322(b)(2) is admittedly sparse. Section 1322(b)(2) was enacted as part of the Bankruptcy Code in 1978 with a goal of protecting the residential mortgage market. *See Nobelman*, 508 U.S. at 332 (Stevens, J., concurring) (citation omitted). Beyond that, the legislative history to section 1322(b)(2) provides no insight as to whether mixed-use property, like The Henley, is subject to the anti-modification provision. *Lomas*, 82 F.3d at 4-7 (citations omitted).

In 1994, however, the Bankruptcy Code underwent significant revisions. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). For the first time, Congress included an anti-modification provision in chapter 11 with language identical to that found in chapter 13. 11 U.S.C. § 1123(b)(5); *see also Robers v. United States*, 572 U.S. 639 643 (2014) (identical words in different part of same statute presumed to have same meaning). The legislative history to section 1123(b)(5) expressly states that the anti-modification provision is not intended to "apply to a commercial property, or to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence." H.R. Rep. No. 103-835, 2d Sess. at 46 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3354.

The legislative history continues by citing favorably to a decision in which the court determined that the anti-modification provision in section 1322(b)(2) does not apply when a

debtor's principal residence also contains income-generating rental property. *Id*. (citing *In re Ramirez*, 62 B.R. 668 (Bankr. S.D. Cal. 1986) (citations omitted)). The 1994 amendments thus reliably demonstrate that Congress was fully aware of, and directly addressed, the very issue before us today when it enacted section 1123(b)(5). Because the facts of this appeal are similar, if not identical to *In re Ramirez*, we are persuaded that Desperado's rights are subject to modification under section 1322(b)(2).

Finally, we feel compelled to briefly comment from a policy perspective. Desperado asks us, in theory, to allow it to manipulate the Bankruptcy Code by knowingly making commercial loans disguised as residential mortgage loans, all so it can receive the protection of the anti-modification provision. Consider the absurdity that would result from Desperado's interpretation. The anti-modification provision could be extended to a 200-unit apartment complex or even an industrial cattle farm so long as the debtor resides in or on a small sliver of the property. *See In re Lopez*, 511 B.R. at 519-20 (citations omitted); Keith M. Lundin, LUNDIN ON CHAPTER 13, § 80.6, https://www.lundinonchapter13.com/Content/Section/80.6 (last visited Nov. 21, 2024) (citations omitted). At the same time, a debtor would lose, as a matter of law, the opportunity to save his home, one of the most fundamental protections of chapter 13 reorganization proceedings. *See Harris*, 575 U.S. at 514. We cannot condone such deleterious outcomes.

For the foregoing reasons, we hold that section 1322(b)(2) does not protect from modification the rights of a holder of a claim secured by income-generating rental property that includes the debtor's principal residence. We therefore affirm the decision of the bankruptcy court.

III. Contributions to a Chapter 13 Debtor's 401(k) Retirement Plan May Be Excluded From the Calculation of Disposable Income

The second issue on appeal is no less challenging than the first. It requires us to consider whether a chapter 13 debtor may exclude from the calculation of disposable income voluntary

contributions to a retirement plan that are made for the first time post-petition. BAPCPA significantly changed the Bankruptcy Code by introducing several new provisions, one of which is found in chapter 13. Section 1322(f) expressly provides that a chapter 13 debtor's repayment of a loan from a qualified retirement plan "shall not constitute 'disposable income' under section 1325." 11 U.S.C. § 1322(f). Consistent with the text, courts have overwhelmingly held that section 1322(f) means that any amounts used to repay a loan from an employer's retirement plan are precluded from being treated as disposable income. *See, e.g.*, *Miner v. Johns (In re Miner)*, 589 B.R. 51, 57 (W.D. La. 2018). Chapter 13 is silent, however, regarding whether voluntary, post-petition contributions made to a retirement plan constitute disposable income.

Congress instead chose to address such contributions in chapter 5, thereby ensuring that a debtor's retirement savings are protected under any chapter, including chapter 13. *See* 11 U.S.C. §§ 103(a), 541(b)(7). Section 541(b)(7) picks up where section 1322(f) left off by excluding from property of the estate "any amount … withheld by an employer from the wages of employees for payment as contributions … to … an employee benefit plan" qualified by the Employee Retirement Income Security Act of 1974 ("ERISA"). 11 U.S.C. § 541(b)(7); *see* 29 U.S.C. § 1003(a) (defining coverage under ERISA). In what is frequently referred to as "the hanging paragraph," section 541(b)(7) provides the following: "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). Congress thus engrafted onto section 541 a provision expressly excluding from disposable income in chapter 13 *any amount* of voluntary retirement contributions that a debtor makes to a qualified benefit program.

Since the enactment of BAPCPA, courts have been hopelessly divided as to how to interpret the relationship between the hanging paragraph in section 541(b)(7) and the calculation of

disposable income under section 1325(b)(2). Most courts have adopted the interpretation first articulated in *In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006) by concluding that, regardless of whether a debtor was making voluntary retirement contributions as of the commencement of the case, post-petition contributions are excluded from the calculation of disposable income. *See, e.g.*, *Saldana v. Bronitsky (In re Saldana)*, __ F.4th __, 2024 WL 4864187 (9th Cir. Nov. 22, 2024); *Miner*, 589 B.R. at 58 (collecting cases). According to the majority approach, "Congress … placed retirement contributions outside the purview of a Chapter 13 plan," subject only to any applicable non-bankruptcy law limitations on the amount of the contributions and the issue of good faith. *In re Vanlandingham*, 516 B.R. 628, 633 (Bankr. D. Kan. 2014).

The majority approach is not without its detractors. *See, e.g.*, *Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527, 531 (6th Cir. 2021) (citations omitted). These courts conclude, albeit for at least three inconsistent reasons, that "the hanging paragraph is best read to exclude from disposable income the monthly 401(k)-contribution amount that [the debtor's] employer withheld from her wages" prepetition, but not necessarily post-petition contributions in the same amount. *Id*. (citations omitted); *see also Davis v. Helbling (In re Davis)*, 960 F.3d 345, 355 (6th Cir. 2020); *In re Prigge*, 441 B.R. 667, 677 (Bankr. D. Mont. 2010). Under the minority approaches, where a debtor has not been making voluntary retirement contributions prepetition, the debtor is precluded from excluding post-petition contributions from disposable income under section 1325(b).

As always, we begin with the text of section 541(b)(7), keeping in mind that a plain meaning can be discerned from even an inelegantly or awkwardly drafted statute. *See Lamie*, 540 U.S. at 534. The text of section 541(b)(7) that precedes the hanging paragraph is unambiguous in that it excludes from property of the estate those retirement contributions already made as of the petition date. *See* 11 U.S.C. § 541(b)(7); *Miner*, 589 B.R. at 60 (citation omitted). The hanging

paragraph is likewise unambiguous. *Miner*, 589 B.R. at 60. It plainly and conclusively establishes that voluntary retirement contributions "shall" be excluded from disposable income under section 1325(b) without any qualifiers. *Id.*; *see also Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016) ("shall" is mandatory (citation omitted)). As one of our sister circuits recently observed:

> The words are plain enough. Congress declared that the referenced funds "shall not constitute disposable income as defined in section 1325(b)." 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…. 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….

In re Saldana, 2024 WL 4864187, at *5 (citations omitted). Because we cannot say it any better, we hereby adopt the reasoning of *In re Saldana* in full.

The lack of any temporal restriction in section 541(b)(7) further supports our interpretation. Unlike section 541(a), section 541(b)(7) contains no distinction between retirement contributions withheld prepetition and those withheld post-petition. *Compare* 11 U.S.C. § 541(a) ("as of the commencement of the case"), *with* 11 U.S.C. § 541(b)(7). *See In re Garza*, 575 B.R. 736, 747-48 (Bankr. S.D. Tex. 2017). Congress clearly knew how to impose temporal limitations, as it did throughout chapter 5. *See, e.g.*, 11 U.S.C. §§ 502(b), 503(b)(9), 543(c)(2). Indeed, section 541(b) itself presents such a temporal dichotomy by imposing a limitation under section 541(b)(6) but not under section 541(b)(7). *Compare* 11 U.S.C. 541(b)(6), *with* 11 U.S.C. 541(b)(7). *See, e.g.*, *In re Egan*, 458 B.R. 836, 848 (Bankr. E.D. Pa. 2011); *see also GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 440 (2020) (under the doctrine of *casus omissus pro omisso habendus est*, "a matter not covered is to be treated as not covered" (citation

omitted)). Through its temporal silence, section 541(b)(7) excludes from disposable income *all* retirement contributions, regardless of the time at which they are made.

Not so, says Desperado. Relying in large part on *In re Prigge* and its progeny, Desperado contends that the hanging paragraph was only intended to address property of the estate, not the calculation of disposable income otherwise determined by section 1325(b). As such, Desperado asks us to exclude from property of the estate only the amounts contributed to a retirement plan prepetition. We cannot subscribe to such an interpretation, as it fails to give the hanging paragraph any meaning whatsoever. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (no part of a statute should be rendered "inoperative or superfluous, void or insignificant" (quotation and citation omitted)). More to the point, the *Prigge* interpretation "'makes no sense, because any funds in the hands of the employer as of the [C]hapter 13 petition date would never be considered disposable income, which only includes income received by the debtor after the petition is filed.'" *In re Saldana*, 2024 WL 4864187, at *6 (citations omitted).

Undeterred, Desperado directs us to section 1306, which extends property of the estate to post-petition property and earnings of a chapter 13 debtor. 11 U.S.C. § 1306(a). Desperado argues that because the Debtor has proposed to make post-petition retirement contributions from his future earnings that constitute property of the estate, he must take them into account when calculating his disposable income. We find this argument strained, if not contrived. On its face, section 1306 is clearly subject, through an express cross-reference, to the inclusions and exclusions of property of the estate set forth in section 541:

> Section 1306 incorporates *all* of § 541 into the definition of estate property in the Chapter 13 case, including those exceptions detailed in subsection (b). And because § 541(b)(7) expressly excludes voluntary retirement contributions from the bankruptcy estate, there is no need for § 1306 to contain a duplicative provision excepting such contributions. The exception becomes applicable with the wholesale incorporation of § 541.

In re Drapeau, 485 B.R. 29, 36 (Bankr. D. Mass. 2013) (emphasis in original); *see In re Garza*, 575 B.R. at 747-48. In other words, because section 1306 incorporates section 541 in its entirety, a debtor's retirement contributions were never included as property of the estate in the first place. *In re Garza*, 575 B.R. at 749-50.

Moreover, it is of no consequence that Congress placed the exclusion of voluntary retirement contributions in chapter 5 instead of chapter 13. *See, e.g.*, *In re Cantu*, 553 B.R. 565, 575-76 (Bankr. E.D. Va. 2016). After all, section 541(b)(7) does the work in chapter 5 and chapter 13 by excluding voluntary retirement contributions both from the bankruptcy estate and the calculation of disposable income. *See In re Saldana*, 2024 WL 4864187, at *7; *see also* 11 U.S.C. § 103(a). It was therefore unnecessary for Congress to exclude retirement contributions from disposable income for a second time in the same interconnected statutory scheme.[11]

The text of section 1325(b)(1)(B) also strengthens our conclusion. A "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted). In *Hamilton v. Lanning*, a decision rendered after the enactment of BAPCPA, the Supreme Court held that the undefined term "projected disposable income" in section 1325(b)(1)(B) refers to the debtor's "disposable income" under section 1325(b)(2) adjusted for changes "known or virtually certain" to occur during the applicable commitment period. 560 U.S. at 516. Emphasizing this point, the Court explained that:

[11] Desperado also overlooks the fact that section 541(b)(7) excludes "*any* amount … withheld" for the purpose of voluntary retirement contributions that are permitted under applicable non-bankruptcy law. 11 U.S.C. § 541(b)(7) (emphasis added). The use of the term "any amount" is unmistakably significant, as it imposes no limitation whatsoever. *In re Cantu*, 553 B.R. at 575; *see Any*, Merriam-Webster's Collegiate Dictionary 56 (11th ed. 2003). When "any amount" is read in conjunction with the term "contributions," it is clear that Congress did not intend to create a distinction between amounts contributed pre- and post-petition.

> in ordinary usage[,] future occurrences are not "projected" based on the assumption that the past will necessarily repeat itself. For example, projections concerning a company's future sales or the future cashflow from a license take into account anticipated events that may change past trends.

Id. at 513-14. As such, "projected disposable income" is a forward-looking, post-petition concept.

The majority approach sensibly follows *Lanning* by allowing voluntary post-petition employee retirement contributions that are readily ascertainable at the time of confirmation to be excluded (not deducted) from the calculation of disposable income. *See, e.g.*, *In re Vanlandingham*, 516 B.R. at 637; *see also* 7 COLLIER ON BANKRUPTCY ¶ 541.23. Here, the Debtor fully disclosed in both his means test and proposed plan that he intends to contribute to his 401(k) account on a post-petition, forward-looking basis. And, he proposed a contribution that is well within the limits set forth in ERISA and other applicable non-bankruptcy law.[12] These are exactly the kind of projected changes contemplated in *Lanning*.

The dissent questions our interpretation from a historical perspective by creatively suggesting that the enactment of section 541(b)(7) was nothing more than Congress's attempt to codify then-existing precedent. In *Patterson v. Shumate*, the Supreme Court held that qualified retirement funds did not constitute prepetition property of the estate under section 541(c)(2). 504 U.S. 753, 756-66 (1992). Fair enough. However, BAPCPA resulted in a profound change to then-existing law. *In re Saldana*, 2024 WL 4864187, at*5 (substantive revisions to statutory text are presumed to "have real and substantial effect" (citation omitted)). The legislative history reveals that BAPCPA was designed to amplify the protection of a debtor's retirement contributions, not preserve the status quo:

---

[12] *See Retirement Topics – 401(k) and Profit Sharing Plan Contribution Limits*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-401k-and-profit-sharing-plan-contribution-limits (last visited Nov. 26, 2024).

> The intent … is to *expand* the protection for tax-favored retirement plans or arrangements *that may not already be protected* under Bankruptcy Code section 541(c)(2) pursuant to *Patterson v. Shumate*, or other state or Federal law.

H.R. Rep. No. 109-31, pt. 1, at 63-64 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 132-33 (emphasis added). Congress thereafter codified its policy goals by enacting numerous provisions in BAPCPA that relate to retirement contributions. 11 U.S.C. §§ 362(b)(19), 522(b)(3)(C), (d)(12), 541(b)(7), 1322(f)(2). The dissent's reliance on *Patterson* is therefore misplaced.

Our point is further illustrated by the explicit discussion of sections 541(b) and 1325(b) in the legislative history:

> Section 323 of the Act amends section 541(b) of the Bankruptcy Code to exclude as property of the estate funds withheld or received by an employer from its employees' wages for payment as contributions to specified employee retirement plans, deferred compensation plans, and tax-deferred annuities. Such contributions do not constitute disposable income as defined in section 1325(b) of the Bankruptcy Code.

H.R. Rep. No. 109-31, pt. 1, at 82, *reprinted in* U.S.C.C.A.N. 88, 149. Congress thus sought to protect voluntary retirement contributions from creditors regardless of when they were made. Nothing in the legislative history counsels otherwise.

One final word. While the statutory framework is arguably more challenging than it needs to be, the consequences of our decision are not hard to understand. If the post-petition retirement contributions the Debtor makes to the 401(k) plan sponsored by Doolin' Dalton are excluded from the calculation of disposable income, he will exit bankruptcy with the retirement savings to which he otherwise would be entitled. *See also Clark v. Rameker*, 573 U.S. 122, 129 (2014) (protection of a debtor's essential needs is paramount (citation omitted)). Conversely, if the calculation of disposable income includes post-petition retirement contributions, the Debtor will be unfairly penalized. He will be forced to devote those funds to the repayment of creditors under his plan, foregoing a critical aspect of a reorganization proceeding under chapter 13 – financial security

upon retirement. *See also Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (fundamental purpose of chapter 13 is to provide fresh start).

We realize that a savvy, if not conniving, debtor may seek to distort his or her calculation of disposable income by committing more than is reasonable under the circumstances. The Bankruptcy Code already contemplates this very situation by requiring a debtor to propose a plan in good faith under section 1325(a)(3). If a debtor attempts to manipulate the amount of his retirement contributions, we are confident that the bankruptcy court will do its job by denying confirmation. Here, neither Desperado nor any other party in interest has alleged that the Debtor lacked good faith when he proposed his plan. *See* Fed. R. Bankr. P. 3015(f). Rather, the Debtor seeks to contribute only 5% of his income, an amount that is consistent with his previous contributions to the same 401(k) plan. And, the Debtor's proposed retirement contributions are far below the maximum amount permissible under applicable non-bankruptcy law.

With all of that said, our interpretation of section 541(b)(7) comports with the purpose and policy inherent in any case filed under chapter 13. It strikes a balance between the Debtor's financial security while, at the same time, requiring the Debtor to pay Desperado and his other creditors the maximum amount he can afford.

We therefore hold that a chapter 13 debtor may exclude from the calculation of disposable income his or her voluntary contributions to a qualified retirement plan, even if those contributions commence post-petition. We thus affirm the decision of the bankruptcy court.

Conclusion

For the foregoing reasons, we AFFIRM the decisions of the bankruptcy court below.

Walsh, Circuit Judge, dissenting:

Today we tackle two difficult issues that have divided the courts. Unfortunately, on both issues, the majority adopts an approach that relies heavily on policy, legislative history, and canons of statutory construction instead of the statutory text. Accordingly, I must dissent.

I. The Anti-Modification Provisions Apply to Mixed-Use Property that Constitutes the Debtor's Principal Residence

The first issue before the court is whether section 1322(b)(2) precludes a chapter 13 debtor from modifying the claim of a secured creditor where such creditor's collateral constitutes mixed-use property in that it contains both the debtor's principal residence *and* income generating property. If section 1322(b)(2) applies because The Henley constitutes the Debtor's principal residence, then Desperado is entitled to a secured claim in the full amount of its debt, $2.3 million, which claim must be paid in full over time. Conversely, if section 1322(b)(2) is inapplicable because The Henley includes five leased units, then Desperado's claim can be bifurcated under section 506(a), leaving Desperado with a secured claim in the amount of $1.8 million and an unsecured deficiency claim in the amount of $500,000 that will be paid only pennies on the dollar.

In *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 331-32 (1993), the Supreme Court held that section 1322(b)(2) protected from modification all the rights of the holder of a claim secured only by a security interest in the debtor's principal residence. Thus, section 1322(b)(2) prohibits a chapter 13 debtor from utilizing section 506(a) to reduce the secured claim associated with an undersecured homestead mortgage to the fair market value of the mortgaged residence. *Id.* at 325-26. *Nobelman* does not, however, address the discrete question of the scope of the phrase "real property that is the debtor's principal residence" as used in section 1322(b)(2).

That analysis gets somewhat complicated in so-called mixed-use cases, where real property collateral serves both as a debtor's principal residence and as income-producing property. Three

of our sister circuits, and dozens of lower courts, have struggled with this issue and have adopted different approaches. *See* Briana C. Breault, *The Anti-Modification Debate: Analyzing the Eleventh Circuit's Approach in Lee v. United States Bank Nat'l. Ass'n. and Divergent Circuit Interpretations*, 2024 NORTON BANKR. L. ADVISER, no. 8, Aug. 2024, at 1.

The First Circuit and the Third Circuit have held, as the majority does today, that the anti-modification provisions do not apply unless the real property at issue serves *exclusively* as the debtor's principal residence. *See Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough)*, 461 F.3d 406 (3d. Cir. 2006); *Lomas Mortg., Inc. v. Louis*, 82 F.3d 1 (1st Cir. 1996).[13] In reaching this conclusion, the *Scarborough* court reasoned that the word "is" in the phrase, "real property that is the debtor's principal residence," equates the term "real property" with the term "principal residence." *In re Scarborough*, 461 F.3d at 411.

Other courts have adopted the so-called "emerging approach" or "bright-line includes approach," which holds that the anti-modification provisions are applicable in mixed-use scenarios as long as the debtor principally resides in some portion of the real property. *See, e.g.*, *In re Sandoval*, 640 B.R. 165 (Bankr. E.D. Wis. 2022); *In re Lister*, 593 B.R. 587 (Bankr. S.D. Oh. 2018); *In re Hock*, 571 B.R. 891 (Bankr. S.D. Fla. 2017); *In re Addams*, 564 B.R. 458 (Bankr. E.D.N.Y. 2017); *In re Brooks*, 550 B.R. 19 (Bankr. W.D.N.Y. 2016); *Wages v. J.P. Morgan Chase Bank, N.A. (In re Wages)*, 508 B.R. 161 (B.A.P. 9th Cir. 2014); *In re Macaluso*, 254 B.R. 799 (Bankr. W.D.N.Y. 2000). This latter approach was recently adopted by the Eleventh Circuit in *Lee v. U.S. Bank Nat'l Ass'n*, 102 F.4th 1177 (11th Cir. 2024).

In *Lee*, the debtor borrowed funds and signed a note that was secured solely by a mortgage on 43 acres of real property in rural Georgia. *Id.* at 1180. The debtor resided in a home on two

[13] Interestingly, the *Lomas* court found that the anti-modification provisions are ambiguous whereas the *Scarborough* Court held that they are not. *See In re Scarborough*, 461 F.3d at 413.

acres of the property. The balance of the property was leased to a farming company. The debtor defaulted on the $253,000 mortgage and filed for relief under the Bankruptcy Code. In her plan, she valued the property at $138,0000 and proposed to modify the mortgage lender's claim by reducing it to the value of the collateral. *Id.* The mortgagee argued that the debtor's plan could not be confirmed because the anti-modification provision did not allow her to modify its rights. The bankruptcy court agreed, and the district court affirmed.

The Eleventh Circuit affirmed as well, holding that the plain language of the anti-modification provisions does not require a debtor to use a property "only" or "exclusively" as the debtor's principal residence. *Id.* at 1181. Rather, the anti-modification provisions merely require that the property "is" the debtor's principal residence. "Is," the court reasoned, means that something has a given quality or characteristic. *Id.* at 1184. But that something may also have other qualities or characteristics. As the Eleventh Circuit noted: "A debtor's real property may have as one of its qualities that it is her principal residence. But it can also have other qualities, like having a lemonade stand or a beehive." *Id.*

As with all issues involving interpretation of the Bankruptcy Code, proper analysis of this issue begins with the statutory text. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute … begins where all such inquiries must begin: with the language of the statute itself…. [I]t is also where the inquiry should end, for where … the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (internal citations omitted)). The Supreme Court has stated time and again that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The "emerging approach" is most harmonious with the statute's plain language. The anti-modification provisions quite plainly set forth three distinct requirements with respect to their applicability: (i) the secured creditor's security interest must be in real property, (ii) the real property must be the only security for the debt, and (iii) the real property must be the debtor's principal residence. *See In re Brooks*, 550 B.R. at 25. In this case, the first two requirements are easily satisfied. Indeed, it is not disputed that Desperado's security interest is in real property. Nor is it disputed that such real property is the only security for the Desperado loan. The dispute thus turns on whether The Henley constitutes the Debtor's principal residence. Because the Debtor has, at all relevant times, resided at The Henley, the requirements of section 1322(b)(2) are met.

Relying primarily on the dictionary definition of the word "is,"[14] the majority effectively adds a fourth requirement to this test, requiring that the real property be used "exclusively" or "only" as a principal residence for the anti-modification provisions to be triggered. This argument misses the mark. While the word "only" is used in the statute, the word quite clearly modifies the word "secured" and nothing else and clarifies that a claim is not subject to the anti-modification provisions if it is secured by other collateral in addition to the debtor's principal residence, such as personal property. *See Utzman v. Suntrust Mortg., Inc.*, 2016 WL 795739 (N.D. Cal. Mar. 1, 2016). Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had meant for the anti-modification provisions to be triggered only where real property served *exclusively* as the debtor's principal residence, it would have said that explicitly by inserting the word "exclusively" before the phrase "the debtor's principal residence." *See In re Hock*, 571 B.R. at 895. Of course, Congress did not say that.

[14] The fact that the majority is forced to rely on dictionary definitions of so called "benign and bland words" such as "is," "that" and "the" tells you everything you need to know about the strength of its plain meaning argument; the statutory language simply does not say what the majority wants it to say.

The majority's analysis would have been more compelling prior to recent revisions to the Bankruptcy Code. In 2005, Congress enacted the BAPCPA which, for the first time, defined "debtor's principal residence" as "a residential structure, including incidental property, without regard to whether the structure is attached to real property." *See* 11 U.S.C. §§ 101(13A); 101(27B). Five years later, Congress further expanded the definition of "debtor's principal residence" by inserting, after the words "residential structure," the phrase "if used as the principal residence by the debtor." *Id.* Courts generally agree that, collectively, these amendments evidence Congress' intent to expand the scope of the anti-modification provisions in order to provide broader protections to lenders. *See Wissel v. Deutsche Bank Nat'l Tr. Co. (In re Wissel)*, 619 B.R. 299 (Bankr. D. N.J. 2020) (declining to follow *Scarborough* due to change in statutory text).

The "emerging approach" provides a clear, straightforward, and predictable test that lenders and borrowers can rely on, and courts can apply. Absent such an approach, what happens when a debtor decides to operate a small business out of his or her home, as millions of Americans have done in the aftermath of the Covid-19 pandemic? If a homeowner decides to run a daycare, a pottery shop or even a law practice out of the home, does that convert the home from being a debtor's primary residence to being commercial property that is not subject to the anti-modification provisions? Where does one draw the line? Can a debtor, seeking to obtain an advantage in bankruptcy vis-à-vis his or her mortgage lender, simply "rent out a garage apartment or convert a basement into a rentable apartment" on the eve of bankruptcy, thereby denying the lender of the benefit of its bargain? *In re Zaldivar*, 441 B.R. 389, 390 (Bankr. S.D. Fla. 2011). I fear that the approach adopted by the majority will lead to gamesmanship.

Although bankruptcy courts get it right most of the time, *Bullard v. Blue Hills Bank*, 575 U.S. 496, 507 (2015) ("[B]ankruptcy courts … rule correctly most of the time."), requiring them

to make case-by-case determinations as to whether and when a mixed-use property crosses some undefined threshold from being a "principal residence" to some other type of use is unworkable. *See In re Wages*, 479 B.R. 575, 579-82 (Bankr. D. Idaho 2012). The predictability afforded by the "emerging approach" benefits all parties and is exactly what is needed to avoid disruption in the home mortgage market. *See, e.g.*, *In re Lister*, 593 B.R. at 595. Moreover, the "emerging approach" avoids expensive and time-consuming litigation over these issues, and in doing so will conserve judicial resources which, regrettably, are already stretched far too thin.

Despite proclaiming that the statute is unambiguous, the majority focuses heavily on policy and legislative history. It posits that Congress could not have intended for loans such as the Desperado loan to receive special protection in bankruptcy. Because the statutory language is indeed unambiguous, it is improper to engage in such an analysis. In any event, if Congress enacted into law something different from what it intended with section 1322(b)(2), then it should amend the statute to conform it to its intent. It is, however, "beyond [the courts'] province to rescue Congress from its drafting errors, and to provide for what we might think … is the preferred result." *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (citation omitted). Rather, the judicial branch's duty is simply to interpret and apply the statutes that the legislative branch has enacted.

That the Desperado claim cannot be modified is not catastrophic to Frey or similarly situated debtors. He still enjoys several benefits in chapter 13. For instance, Desperado is stayed from enforcing its pre-petition judgment, 11 U.S.C. § 362(a)(2), obtaining possession of its collateral, 11 U.S.C. § 362(a)(3), and enforcing its lien. 11 U.S.C. §§ 362(a)(4), (5). Moreover, the anti-modification provision does not preclude the Debtor from imposing procedural and accounting requirements on Desperado in order to effectuate the cure of its default under the plan.

See Fed. R. Bankr. P. 3002.1. All that section 1322(b)(2) requires is that the debtor's chapter 13 plan must provide for the full payment of the Desperado claim over time.

II. Voluntary Contributions to a Chapter 13 Debtor's 401(k) Retirement Plan May Not Be Excluded From the Disposable Income Calculation

The second issue before the Court is whether a chapter 13 debtor is permitted to make voluntary contributions to a 401(k) retirement plan from his or her post-petition wages. Contrary to the conclusion of the majority today, which focuses heavily on canons of statutory construction and fails to address the "grammatical puzzle" in the statutory text, *Davis v. Helbling (In re Davis)*, 960 F.3d 346, 354 (6th Cir. 2020), I would hold that a debtor cannot exclude voluntary retirement contributions from his or her post-petition disposable income.

Prior to 2005, the "overwhelming consensus" among courts was that wages voluntarily withheld post-petition as 401(k) contributions formed part of a debtor's disposable income for purposes of section 1325. *See Seafort v. Burden (In re Seafort)*, 669 F.3d 662, 666 (6th Cir. 2012). Courts reached this conclusion based on "the clear language of the statute" as then written as well as the "perceived … inherent unfairness in a debtor paying himself by funding his own savings account, retirement plan, or pension fund while paying creditors only a fraction of their just claims." *N.Y.C. Emps. Ret. Sys. v. Sapir (In re Taylor)*, 243 F.3d 124, 128-29 (2d Cir. 2001).

The enactment of BAPCPA added two exclusionary sections of importance here. The first, section 1322(f), clearly provides that any amounts required to repay a loan from a retirement account shall not constitute "disposable income" under section 1325. 11 U.S.C. § 1322(f). The second provision, section 541(b)(7), is far less clear. That section provides that property of the estate does not include "any amount … withheld by an employer from the wages of employees for payment as contributions to [a 401(k)-retirement plan] … *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) (emphasis added). The italicized language, which has befuddled courts for twenty years, is frequently referred to as "the hanging paragraph."

It is noteworthy that the "hanging paragraph" is found outside the confines of chapter 13, in section 541. Section 541 defines what is and what is not property of the estate. Section 541(a)(1) provides that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property *as of the commencement of the case*," subject to certain exceptions set forth in subsections (b) and (c) of the statute. 11 U.S.C. § 541(a)(1) (emphasis added). In chapter 13 cases, "property of the estate" is expanded by section 1306(a), which provides:

> (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…; and
> (2) *Earnings from services performed by the debtor after the commencement of the case* but before the case is closed….

11 U.S.C. § 1306 (emphasis added). "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.

There are several competing interpretations of section 541(b)(7). Some courts, like the majority today, adopt the so-called *Johnson* approach and hold that voluntary contributions to a retirement account are permitted under section 541(b)(7), limited only by the good faith requirement of section 1325(a)(3). *See Saldana v. Bronitsky (In re Saldana)*, __ F.4th __, 2024 WL 4864187 (9th Cir. Nov. 22, 2024). Other courts adopt the so-called *Seafort*-BAP or CMI approaches, which allow a debtor to continue making voluntary contributions to a retirement plan if he or she was regularly withholding such amounts from wages pre-petition. *See In re Davis*, 960 F.3d at 357. Still others adopt the *Prigge* approach, holding that voluntary post-petition contributions to a retirement account can never be made because such amounts need to be included

in the disposable income calculation and, thereafter, paid to unsecured creditors. *See In re Seafort*, 669 F.3d at 671. I believe that the *Prigge* approach is the best interpretation of the statutory text in that it synthesizes prior precedent and best harmonizes the structure of the Bankruptcy Code.

The Bankruptcy Code strikes a "careful balance between the interests of creditors and debtors." *Clark v. Rameker*, 573 U.S. 122, 129 (2014). Every asset that the Bankruptcy Code permits a debtor to withdraw from the estate is an asset that is not available to repay creditors. *Id.* (citing *Schwab v. Reilly*, 560 U.S. 770, 791 (2010)). While honest but unfortunate debtors are most deserving of a fresh start, they most certainly are not entitled to a head start. The grand bargain captured in chapter 13 is that a debtor can retain his or her property but, during the applicable commitment period, such debtor must pay *all* his or her income not necessary for "maintenance and support" to creditors. 11 U.S.C. § 1325(b)(2). That bargain is broken if, as the majority holds, the debtor is permitted to voluntarily fund his or her post-bankruptcy retirement during this period. *See In re Saldana*, 2024 WL 4864187 at *9 (Callahan, J., dissenting) ("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"). Planning for retirement is undoubtedly important. But creditors should not have to bear the cost of the debtor's retirement plan. Simply put, chapter 13 requires that retirement planning be deferred until after a debtor has fulfilled his or her plan obligations.

The foregoing argument is admittedly one of policy. But it is supported by the statutory text. Section 541(b)(7) does not authorize a chapter 13 debtor to make voluntary retirement contributions. If Congress had intended that amounts to fund a chapter 13 debtor's retirement be excluded from the "disposable income" calculation, it surely could and would have categorically said that in sections 1322 or 1325. *See In re Prigge*, 441 B.R. 667, 677 (Bankr. D. Mont. 2010).

Indeed, Congress did just that in the BAPCPA, when it created an express exclusion from "disposable income" for amounts necessary to repay a loan from the debtor's retirement plan in section 1322(f). It is sensible to assume that Congress's placement of 401(k) loan repayments within chapter 13 itself and its placement of the language at issue here in a separate section was deliberate. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1992) ("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."). The obvious conclusion is that Congress, in enacting the BAPCPA, did not intend to treat voluntary 401(k) contributions in the same manner that it was treating 401(k) loan repayments.

Moreover, if Congress had intended a significant change in pre-BAPCPA law, one would expect Congress to have said something. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (internal citations omitted). It is highly unlikely that such a change would be accomplished through an inelegantly drafted and disjointed "hanging paragraph" placed in section 541, which focuses on property of the estate, not disposable income.

The better interpretation of section 541(b)(7) is that it was intended merely to codify the pre-BAPCPA caselaw regarding retirement accounts including, but not limited to, the Supreme Court's ruling in *Patterson v. Schumate*, 504 U.S. 753 (1992), wherein the Court held that funds contributed pre-petition to a chapter 13 debtor's retirement account were not property of the estate and, thus, could not be reached by creditors.[15] Section 541(b)(7) clarifies that pre-petition retirement contributions do not constitute property of the estate.

[15] *See* Carl W. Mills, Karen M. Chau & Hilary McDonnell, *Retirement Contributions Under § 541(b)(7): The True History of BAPCPA § 323: Part I*, 41 AM. BANKR. INST. J. 30 (Dec. 2022) (discussing legislative history).

What, then, is the meaning of the "hanging paragraph?" The "hanging paragraph" should be read together with the rest of section 541. With minor exceptions not relevant here, section 541 does not deal with assets acquired post-petition. *See In re McCullers*, 451 B.R. 498, 503 (Bankr. N.D. Cal. 2011). That is why section 1306(a) is necessary in the chapter 13 context; it pulls post-petition assets into the estate. *See Parks v. Drummond (In re Parks)*, 475 B.R. 703, 707 (B.A.P. 9th Cir. 2012) ("[W]e cannot ignore the relationship between § 541 and § 1306."). As noted, section 1306(a)(2) clearly and unequivocally states that "earnings from services performed by the debtor" post-petition are property of the chapter 13 estate. There is no exception in section 1306(a) for portions of the post-petition earnings that the debtor voluntarily elects to contribute to his or her retirement account. *See In re Saldana*, 651 B.R. 570, 577 (N.D. Cal. 2023) ("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."); *In re Aquino*, 630 B.R. 499, 598 (Bankr. D. Nev. 2021) (summarizing cases).

The phrase "such amount," as used in the "hanging paragraph," refers back to the *prepetition* contributions referenced earlier in section 541(b)(7). *In re Parks*, 475 B.R. at 708 ("it follows that 'such amount' referred to in the hanging paragraph … means that only prepetition contributions shall not constitute disposable income."). As one court explained:

> Section 541(b) creates exceptions to section 541(a). This structure suggests that section 541(b)(7) excludes from property of the estate only property that would otherwise be included in the estate under section 541(a). Thus, the 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. 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.

In re McCullers, 451 B.R. at 503-04.

Courts rejecting the *Prigge* approach contend that it renders the "hanging paragraph" largely superfluous, as it is admittedly a rare circumstance where pre-petition retirement funds would ever be received post-petition such that they could arguably be considered post-petition income. This court is mindful of its obligation to adopt an interpretation of the statute that accords some effect to the statutory language in question. In his thoughtful dissent in *In re Davis*, Judge Readler quite reasonably posits that the purpose of the "hanging paragraph" is to clarify that *post-petition* dividends, capital gains, early withdrawals, mandatory withdrawals, and involuntary cash-outs from the *pre-petition* retirement accounts referenced in section 541(b)(7) are not "disposable income" for purposes of section 1325(b)(2). *See In re Davis*, 960 F.3d at 361-62 (Readler, J., dissenting); *see also In re Saldana*, 2024 WL 4864187 at *13 (Callahan, J., dissenting). This somewhat limited reading of the "hanging paragraph" is entirely appropriate "because the statute itself discloses very modest aims." *In re McCullers*, 451 B.R. at 505. This is evidenced by the inclusion of the words "except that" at the beginning of the "hanging paragraph," which suggests that Congress merely intended to negate any inference that an unsecured creditor could seek to characterize the post-petition receipt of such *pre-petition* retirement funds as "disposable income."

Further support for the *Prigge* approach comes from section 1325(b)(2)(A)(i), which states that "disposable income means current monthly income received by the debtor … less amounts reasonably necessary to be expended … for the maintenance of support of the debtor…." Here, because the Debtor's income exceeded the state median, the "amounts reasonably necessary to be expended" are determined by the "means test" set forth in section 707(b)(2). 11 U.S.C. § 1325(b)(3). Voluntary contributions to a retirement plan are not included on the list of "reasonable and necessary expenses" considered in the calculation set forth in section 707(b)(2). *See* 11 U.S.C. § 707(b)(2). In fact, voluntary retirement contributions were *expressly excluded* from the list of

necessary expenses on Official Form B 122C-2, which provides the formula for calculating "reasonable and necessary expenses." *See* Official Form B 122C-2, Chapter 13 Calculation of Your Disposable Income, line 17 (Apr. 2022).[16] Moreover, the *Internal Revenue Manual* promulgated by the Internal Revenue Service, which Congress relied upon to determine "amounts reasonably necessary to be expended" under section 1325(b)(2), expressly provides that "voluntary retirement plans are *not a necessary expense*" and "voluntary contributions to retirement accounts … may be considered *flagrant conduct*." IRM § 5.15.1.28(4) (emphasis added); *see also Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045, 1052 (9th Cir. 2009). Against this backdrop, it is hard to believe that Congress intended to overturn the prior "overwhelming consensus" among courts and bless voluntary retirement contributions by adding section 541(b)(7).

Finally, the approach adopted by the majority once again invites gamesmanship and abuse. It incentivizes individuals in financial distress to enhance their 401(k) contributions in advance of their bankruptcy filing for purpose of putting themselves in a better position to meet the "good faith" standard that the majority adopts. Ironically, these enhanced contributions might themselves contribute to the debtor's ultimate bankruptcy filing, as they take monies away that could otherwise be used to settle creditor claims. And certainly where, as here, a debtor has not made any contributions to a retirement account in the years prior to his bankruptcy filing, such debtor should not be permitted to immediately start contributing post-petition and begin diverting large amounts of disposable income towards retirement as opposed to creditor claims.

Section 541(b)(7) may well be the most poorly drafted and ambiguous provision in all the BAPCPA, legislation that all acknowledge was enacted to ensure "that debtors devote their full

---

[16] Line item 17 of that form unequivocally instructs that in calculating "Deductions from Your Income" the above-means chapter 13 debtor may include as a necessary expense "[t]he total monthly payroll deductions that your job requires, such as retirement contributions…." It then directs: "*Do not include amounts that are not required by your job, such as voluntary 401(k) contributions*…." *Id.* (emphasis added).

disposable income to repaying creditors." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 78 (2011) (discussing legislative history). It has puzzled courts for two decades and has been characterized by our respected colleagues as "inelegantly drafted," a "Gordian knot" and a "grammatical puzzle." *In re Davis*, 960 F.3d at 354, 356 (citations omitted). Nevertheless, the majority quite incredibly claims that the text of section 541(b)(7) is "plain enough." It adopts the *Johnson* approach and its cursory and reflexive interpretation of the "hanging paragraph" and relies primarily on canons of statutory interpretation to support its holding.

In *In re Seafort*, the Sixth Circuit rejected the *Johnson* approach and adopted the *Prigge* approach. *In re Seafort*, 669 F.3d at 671. Subsequently, in *In re Davis*, 960 F.3d at 353 and *Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527, 534 (6th Cir. 2021), the Sixth Circuit expanded on its analysis and adopted something similar to the *Seafort*-BAP and the CMI approach, holding that voluntary contributions to a retirement account may be permissible where the debtor was regularly making such contributions prior to the petition date but are not permissible when the debtor had not been regularly making such contributions.

Although I would adopt the *Prigge* approach as the approach that is most faithful to the statutory text, in this case, it is undisputed that the Debtor has not made *any* pre-petition contributions to a retirement plan since 2020. He may have had a legitimate reason why he did not; Take It Easy did not offer a retirement plan.[17] Nevertheless, regardless of whether one adopts the *Prigge* approach, the *Seafort*-BAP approach or the CMI approach, the result here is the same. The Debtor should not be permitted to defer money that chapter 13 contemplates should be paid to his creditors to prefund his retirement.

---

[17] Notably, the *Penfound* court 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. This is true even if the debtor had no ability to make further contributions in the six months preceding filing; the code makes no exception for such circumstances." *In re Penfound*, 7 F.4th at 534.