

Nos. 07-35616, 07-35762

IN THE
United States Court of Appeals
for the Ninth Circuit

ERIC OLSEN, KEVIN D. SWARTZ, JASON C. MCBRIDE,
PLAINTIFFS-CROSS-APPELLANTS,

v.

MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA;
ILENE LASHINSKY, IN HER OFFICIAL CAPACITY AS UNITED STATES TRUSTEE,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS-CROSS-APPELLANTS URGING AFFIRMANCE IN PART
AND REVERSAL IN PART**

HENRY J. SOMMER
NATIONAL ASSN. OF CONSUMER
BANKRUPTCY ATTORNEYS
7118 McCallum Street
Philadelphia, PA 19119
(215) 242-8639

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990

Counsel for amicus curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), *amicus curiae* The National Association of Consumer Bankruptcy Attorneys states that it is a nongovernmental corporate entity that has no parent corporations and does not issue stock.

Jonathan S. Massey
Attorney of record for *amicus curiae*
The National Association of
Consumer Bankruptcy Attorneys

Dated: January 17, 2008

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
STATEMENT OF CONSENT	1
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE STATUTE SHOULD BE CONSTRUED AS NOT APPLYING TO ATTORNEYS.	3
A. Under the Plain Language of the Statute, These Provisions Do Not Apply to Attorneys.	4
B. The Rule of Construction Shows That The Provisions Do Not Apply To Attorneys.	7
C. If The Statute Were Deemed Ambiguous, It Should Be Construed Not To Apply To Attorneys In Order To Avoid The Substantial Constitutional Questions That Would Otherwise Be Presented.	10
II. IF CONSTRUED AS APPLYING TO ATTORNEYS, SECTION 526(a)(4) WOULD BE UNCONSTITUTIONAL.	10
A. The Government’s Reading Is Not Textually Supportable.	10
B. The Second Clause of Section 526(a)(4) Undermines The Government’s Argument.	17

III. IF CONSTRUED TO APPLY TO ATTORNEYS, SECTION 528 WOULD BE UNCONSTITUTIONAL BECAUSE IT WOULD REQUIRE ATTORNEYS TO PROVIDE FALSE AND MISLEADING INFORMATION IN THEIR ADVERTISEMENTS.	20
CONCLUSION	27
CERTIFICATE OF COMPLIANCE	28
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

CASES:

Attorney Grievance Comm’n of Maryland v. Culver, 381 Md. 241 (2004)	14
Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).....	22
Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983).....	21
Borgner v. Florida Bd. of Dentistry, 537 U.S. 1080 (2002).....	24
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York, 447 U.S. 557 (1980).....	21, 22, 27
Chicago v. Morales, 527 U.S. 41 (1999).....	16
Chisom v. Roemer, 501 U.S. 380 (1991).....	9
Coates v. Cincinnati, 402 U.S. 611 (1971).....	16, 17

Connecticut Bar Association v. United States, No. 06cv729 (D. Conn.).....	1, 25
Conrad, Rubin & Lesser v. Pender, 289 U.S. 472 (1933).....	11
Edenfield v. Fane, 507 U.S. 761 (1993).....	22
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).....	10
Florida Bar v. Went For It, 515 U.S. 618 (1995).....	19, 22
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).....	8
Gonzales v. Oregon, 546 U.S. 243 (2006).....	8
Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006).....	2, 13
Houston v. Hill, 482 U.S. 451 (1987).....	17
In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005).....	<i>passim</i>
In re Charles, 334 B.R. 207 (Bankr. S.D. Tex. 2005)	14
In re Reyes, 361 B.R. 276 (Bankr. S.D. Fla. 2007)	4
Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001).....	19

Lockhart v. United States, 546 U.S. 142 (2005).....	9
Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758 (D. Minn. 2006)	<i>passim</i>
NAACP v. Button, 371 U.S. 415 (1963).....	19, 20
New York Times v. Sullivan, 376 U.S. 254 (1964).....	21
Olsen v. Gonzales, 350 B.R. 906 (D. Ore. 2006).....	<i>passim</i>
Plummer v. City of Columbus, 414 U.S. 2 (1973) (per curiam)	16
Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781 (1988).....	21
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).....	22
Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).....	22, 23, 26
U.M.W. v. Illinois Bar, 389 U.S. 217 (1967).....	20
Winters v. New York, 333 U.S. 507 (1948).....	16
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).....	21, 23, 26, 27
Zelotes v. Martini, 352 B.R. 17 (D. Conn. 2006)	2, 13

CONSTITUTIONAL PROVISIONS:

United States Constitution

First Amendment*passim*

FEDERAL STATUTES:

11 U.S.C. § 101(4).....5
11 U.S.C. § 101(4A)5, 10
11 U.S.C. § 101(5)19
11 U.S.C. § 101(12).....18
11 U.S.C. § 101(12A)4
11 U.S.C. § 101(1), (2), (15), (49), (53A)5
11 U.S.C. § 523(a)(2).....13
11 U.S.C. § 526(a)(4).....*passim*
11 U.S.C. § 526(d)(2)2, 7, 8
11 U.S.C. § 5271, 7
11 U.S.C. § 527(b).....6
11 U.S.C. § 5288, 21, 25
11 U.S.C. §§ 528(a)(3), (a)(4), and (b)(2)3, 20
11 U.S.C. § 704(a)(1).....13
11 U.S.C. § 707(b)(1)15
11 U.S.C. § 707(b)(4)(C)-(D).....14, 15
11 U.S.C. § 72613
11 U.S.C. § 1322(b)(2)13
11 U.S.C. § 1325(a)(4), (b)13
11 U.S.C. § 1325(a)(5).....13
18 U.S.C. § 214
18 U.S.C. §§ 152-15713

FEDERAL RULES:

Fed. R. App. P. 26.1(a) iii
Fed. R. Bankr. P. 9011(b)15

MISCELLANEOUS:

A. Doyle, Silver Blaze, in *The Complete Sherlock Holmes* 335 (1927)9

ABA Model Rules of Professional Conduct R. 1.2(d).....4

STATEMENT OF CONSENT

This brief is filed with the consent of all parties.

INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys (“NACBA”) has an important interest in this case because it is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. NACBA has more than 2,500 members located in all 50 states and Puerto Rico.

Amicus respectfully submits that its nationwide perspective allows it to provide useful assistance to this Court regarding the constitutional issues arising from the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA” or “the Act”). The NACBA is plaintiff in a related case, *Connecticut Bar Association v. United States*, No. 06cv729 (D. Conn) (“CBA”), which challenges the same provisions at issue here, including 11 U.S.C. §§ 526(a)(4), 527, and 528 (collectively the “Debt Relief Agency provisions”). Because of the significant implications of this case for *amicus* and its members, this brief is submitted in order to assist this Court in its decision in this case.

SUMMARY OF ARGUMENT

The Government's defense of Section 526(a)(4) is premised on a proposed rewriting of the Act that is contrary to its text. The Government cites the principle that a statute should be construed to avoid constitutional difficulties. But the Government fails to follow that principle to its logical conclusion. The simplest and most obvious saving construction in this case is that the Debt Relief Agency provisions should be construed as not applying to licensed attorneys. BAPCPA contains an express rule of construction mandating that very saving construction. 11 U.S.C. § 526(d)(2).

If construed as applying to attorneys, the Debt Relief Agency provisions would violate the right to free speech. The District Court in this case properly struck down Section 526(a)(4) under the First Amendment. In fact, Section 526(a)(4) has been held invalid by every court to review its constitutionality on the merits. See, e.g., *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006), appeal docketed, Nos. 07-10226 & 07-10265 (5th Cir.); *Olsen v. Gonzales*, 350 B.R. 906 (D. Ore. 2006), appeal docketed, No. 07-35616 (9th Cir.); *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006), appeal docketed, No. 07-1853 (2d Cir.); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758 (D. Minn. 2006), appeal docketed, No. 07-2405 (8th Cir.).

In addition, if applied to attorneys Sections 528(a)(3), (a)(4), and (b)(2) would be unconstitutional because they would compel attorneys to provide a misleading statement in their advertising in violation of the First Amendment.

Given the important constitutional questions presented by this case, it is easy to overlook the human dimension of this controversy. Many consumer bankruptcy clients are in crisis. They are often in the midst of personal and family tragedies – divorce, loss of a job, or serious, and sometimes life-threatening, illnesses. They are in dire need of complete and uncensored advice from bankruptcy attorneys, to whom they must have unfettered access. This advice, and the ability of lawyers to guide their consumer clients through the complexities of the bankruptcy process, can make the difference between a satisfactory outcome and financial disaster. It is unconscionable, as well as unconstitutional, for the Government to interfere with the attorney-client relationship when it is most needed by ordinary consumers.

ARGUMENT

I. THE STATUTE SHOULD BE CONSTRUED AS NOT APPLYING TO ATTORNEYS.

The Government's defense of Section 526(a)(4) is premised on the principle of constitutional avoidance: "A statute should be construed to avoid, rather than invite, constitutional difficulties." Govt. Br. 12. But the Government's proposed interpretation of Section 526(a)(4) ignores a much more obvious and natural saving construction. This Court should hold that the Debt Relief Agency provisions do

not apply to licensed attorneys and should, on that basis, affirm the judgment of the Court below with respect to Section 526(a)(4) and reverse it with respect to the remaining provisions of BAPCPA.

Three courts have held that the Debt Relief Agency provisions do not apply to attorneys. See *In re Reyes*, 361 B.R. 276, 279-280 (Bankr. S.D. Fla. 2007); *Milavetz v. United States*, 355 B.R. 758 (D.Minn.2006), appeal pending, No. 07-2405 (8th Cir.); *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005). Such an interpretation reflects the best reading of the text, is the construction required by clear statement rules, and avoids the serious constitutional questions presented by this case.

A. Under the Plain Language of the Statute, These Provisions Do Not Apply to Attorneys.

BAPCPA provides that the provisions in question apply to an entity known as a “debt relief agency.” As one district court has commented, “[t]he term ‘debt relief agency’ appeared nowhere in the legal lexicon prior to the adoption of BAPCA and is a creation of the drafters of BAPCA. Prior to this legislation there was no such term of art. So, while the experts who drafted BAPCA are entitled to a failing grade in Legislative Drafting 101, the Court is left to determine what Congress intended.” *In re Reyes*, 361 B.R. at 279.

The statutory definition of “debt relief agency” does not include the word “attorney” or “lawyer.” 11 U.S.C. § 101(12A). It does include the term

“bankruptcy petition preparer,” but that term is separately defined in § 110 and expressly *excludes* attorneys and their staffs. “Attorney” is separately defined in § 101(4), which makes no reference to debt relief agencies or to subsection (12A). Plainly, had Congress meant to include “attorneys” within the category of “debt relief agencies,” it could have done so expressly in §§ 101(12A) or 101(4). Indeed, Congress provided definitions for more than 63 terms, including “accountant,” “affiliate,” “entity,” “security,” and “stockbroker.” *See* §§ 101(1), (2), (15), (49), (53A). In short, Congress typically provided a definition of a term if it was to be encompassed within the Act.

Judge Lamar Davis has therefore concluded that the “plain language” of the statute excludes attorneys: “‘attorney’ and ‘debt relief agency’ are not synonymous nor do they in common understanding include each other. . . . Because the definition of ‘debt relief agency’ omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise.” *In re Attorneys at Law*, 332 B.R. at 69.

To be sure, a debt relief agency is defined as an entity that provides “bankruptcy assistance,” which may include “providing legal representation.” 11 U.S.C. § 101(4A). However, that definition does not prove that “attorneys” are included within the statutory term of “debt relief agencies.” As the Government acknowledges, one of the purposes of BAPCPA was “to protect debtors from

abusive practices.” Govt. Br. 25. Judge Davis opined that the reference to “legal representation” was designed to fortify the consumer protection provisions of BAPCPA by authorizing bankruptcy courts to regulate non-attorney bankruptcy professionals who engaged in the unauthorized practice of law:

[I]t is well-known that non-lawyers often attempt to provide “legal representation,” often to poorer, less educated, and more vulnerable citizens. . . . I conclude that the inclusion of the term “legal representation” in the definition of ‘bankruptcy assistance’ was Congress's effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who are before the Court, who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law, and whose existing remedies for any damage is more theoretical than real.

In re Attorneys at Law, 332 B.R. at 69.

This inference is strengthened by the disclosure provisions of BAPCPA. Section 527(b) requires debt relief agencies to inform assisted persons that they have the right to hire an attorney or to represent themselves, that only an attorney can render legal advice, and how to perform services pro se that would be universally provided if the person hired an attorney. If attorneys were considered to be “debt relief agencies,” this disclosure provision would be nonsensical: it would require an attorney to inform a client that he or she had the right to hire an attorney:

It is hard to imagine that the language which, again, conspicuously omits the word “attorney” really requires an attorney to tell an assisted person that he/she has the right to hire an attorney or how to prepare the documents pro se that the attorney is poised to prepare on that

person's behalf. It is far more likely that the provision is a consumer protection provision intended to regulate that universe of entities who assist persons but are not attorneys.

Id. at 70.

Properly construed, the Debt Relief Agency provisions do not apply to attorneys. Rather, they regulate bankruptcy petition preparers and other entities that may exploit consumers seeking bankruptcy assistance.

B. The Rule of Construction Shows That The Provisions Do Not Apply To Attorneys.

If the plain language left any ambiguity, the question would be resolved by a rule of construction contained in the Act itself, which requires this Court to conclude that the Debt Relief Agency provisions do not apply to attorneys. Section 526(d)(2) provides specifically that the provisions at issue shall not “be deemed to limit or curtail the authority or ability of a State or subdivision or instrumentality thereof to determine and enforce qualifications for the practice of law under the laws of that State; or of a Federal court to determine and enforce the qualifications for the practice of law before that court.” 11 U.S.C. § 526(d)(2).

If the Debt Relief Agency provisions were construed as applying to lawyers, they would violate the rule of construction contained in the Act. They would limit the power of state and federal courts to regulate the legal profession – Section 526, for example, by determining what advice may ethically be given by lawyers, Section 527, by mandating what disclosures they ethically must provide, and

Section 528, by prescribing what their advertisements may ethically say. Indeed, the Government describes the Debt Relief Agency provisions as “establish[ing] certain minimum standards of professional conduct” and regulating “professional ethics.” Govt. Br. 3, 22. As the Minnesota district court explained, “[i]f BAPCPA’s debt relief agency sections apply to attorneys, it means Congress has taken upon itself the authority to determine the advice attorneys can give their clients and what attorney advertisements must say, thereby infringing on the state’s traditional role of regulating attorneys.” *Milavetz*, 355 B.R. at 768.¹

Values of federalism complement the rule of construction. “The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). The Supreme Court has recognized that federal statutes ordinarily will not be interpreted as displacing state authority over professions such as law or medicine, absent a clear and plain statement of congressional intent. See *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

¹ Any suggestion that Section 526(d)(2) preserves only the power to regulate bar admissions rather than the conduct of attorneys would have no merit. The power to determine and enforce qualifications for the practice of law necessarily includes the power to regulate attorney conduct. A state must have the authority to determine whether and when an attorney may be suspended or disbarred for violating ethical rules.

In view of the rule of construction supplied by BAPCPA itself, as well as the principles of federalism reflected by the traditional state regulation of the legal profession, Judge Davis concluded that it would be unreasonable to construe BAPCPA as effecting, *sub silentio*, a vast expansion of federal power:

It would be a breathtakingly expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of this Act, which in no clear fashion lay claim to the right to do any such thing. It could possibly violate the Tenth Amendment to the Constitution as well. I cannot conceive that as long as this bill has been pending any such intent could have gone unnoticed and undebated by the states. Nor can I conceive that Congress would ever take such an astounding step toward the federal regulation of professionals without forthrightly and expressly stating its intent.

In re Attorneys at Law, 332 B.R. at 70. In this case, the absence of statutory history reflecting such a momentous decision by Congress is equivalent to the “dog that did not bark.” *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing A. Doyle, *Silver Blaze*, in *The Complete Sherlock Holmes* 335 (1927)).²

Accordingly, the rule of construction embodied in BAPCPA requires that the Debt Relief Agency provisions be interpreted as not applying to attorneys.

² The District Court cited an amendment proposed by Senator Feingold, which would have expressly excluded lawyers from the definition of “debt relief agencies.” 350 B.R. at 912. The Senate did not act on the proposal. Yet the District Court itself recognized that “the Supreme Court has stated that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a statute.” *Id.* at 912 n.2 (citing *Lockhart v. United States*, 546 U.S. 142 (2005)). Indeed, the Senate might well have concluded that, because attorneys were *already* outside the definition of “debt relief agencies,” Senator Feingold’s amendment was unnecessary.

C. If The Statute Were Deemed Ambiguous, It Should Be Construed Not To Apply To Attorneys In Order To Avoid The Substantial Constitutional Questions That Would Otherwise Be Presented.

If there were any statutory ambiguity, the Debt Relief Agency provisions would have to be interpreted as not applying to attorneys, under the principle that a statute should be construed to avoid grave constitutional questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Debt Relief Agency provisions would present grave constitutional questions if they were construed to apply to attorneys; indeed, they would be unconstitutional. The proper course, therefore, is for this Court authoritatively to construe the statutory term “debt relief agency” in § 101(4A) so that it does not include licensed attorneys.

II. IF CONSTRUED AS APPLYING TO ATTORNEYS, SECTION 526(a)(4) WOULD BE UNCONSTITUTIONAL.

If this Court were to reach the constitutionality of Section 526(a)(4), it should affirm the judgment of the District Court. The Government’s defense of the provision hinges on a radical rewriting of the statutory language, which is not textually supportable and which introduces the new vice of statutory vagueness.

A. The Government’s Reading Is Not Textually Supportable.

The Government insists that the phrase “to incur more debt in contemplation of” bankruptcy in Section 526(a)(4) should be construed “to refer to the recognized problem of debtors’ purposefully accumulating new debt in an effort to *abuse* the

protections of the Bankruptcy Code.” Govt. Br. 31 (emphasis added). According to the Government, Section 526(a)(4) “preclud[es] bankruptcy professionals from encouraging their clients to *abuse* the bankruptcy system by taking on additional debt in contemplation of filing a bankruptcy petition.” *Id.* at 14 (emphasis added).

There are several problems with the Government’s argument.

First, the text of the statute says nothing about “abuse” of the bankruptcy system. Instead, the statute refers simply to incurring debt “in contemplation of” bankruptcy. The Supreme Court has interpreted this language broadly: “the controlling question is with respect to the state of mind of the debtor and whether the thought of bankruptcy was the impelling cause of the transaction.” *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933). The Court in *Conrad, Rubin & Lesser* did not suggest that the “in contemplation of” bankruptcy test is limited to fraudulent transactions. To the contrary: the Court held that attorney’s fees paid for a completely legitimate purpose – to enable a lawyer to negotiate with creditors for a time extension for the repayment of debt and, if necessary, for operation of the debtor’s business under the creditors’ supervision – nonetheless fell within the “in contemplation of” bankruptcy test. *Id.* at 478. The Court explained that “negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. A man is usually very much in contemplation of a result which he employs counsel to avoid.” *Id.* at 479

(citation and internal quotation marks omitted). Accordingly, the Supreme Court has indicated that any debt incurred with a view to bankruptcy, or incurred because a bankruptcy filing is planned, falls within the category of debts incurred “in contemplation of” bankruptcy.³

Yet advising a client to incur additional debt in such circumstances can hardly be automatically equated with “abuse.” In fact, the Government concedes that, in many instances, it is entirely proper for a debtor to incur additional debt on the eve of bankruptcy – indeed, to incur debt *precisely because* he intends to file for bankruptcy. Govt. Br. 28-29. For example, it may well be advisable for a debtor with unreliable transportation to incur secured debt in advance of bankruptcy to purchase a car that will allow him to continue working so that he will have income with which to pay creditors. The negative effect of bankruptcy on the debtor’s credit scores may make it impossible, or at the very least much more expensive, to obtain a car loan after filing a petition for relief. In the typical Chapter 13 consumer bankruptcy, such fully secured debt must normally be paid in

³ The contextual examples of the phrase “in contemplation of bankruptcy” cited by the Government (Govt. Br. 24) do not support its argument. To be sure, a person who undertakes a fraudulent act while “in contemplation of bankruptcy” may do so with the prospect of bankruptcy in mind. But that example does not prove that all debts incurred with the prospect of bankruptcy in mind are *ipso facto* fraudulent. What Section 526(a)(4) bans is not giving advice in contemplation of bankruptcy to commit fraud; it is giving advice in contemplation of bankruptcy to incur additional debt.

full, and the debtors' other creditors will benefit from the debtor's reliable transportation at a reasonable cost. However, the plain language of Section 526(a)(4) would bar such advice. The District Courts striking down Section 526(a)(4) have cited other examples of incurring debt with the prospect of bankruptcy in mind that a competent lawyer might include as part of the legal advice he or she is ethically required to give a client. *Zelotes*, 352 B.R. at 24; *Olsen*, 350 B.R. at 916-17; *Hersh*, 347 B.R. at 24.⁴

The next problem with the Government's attempt to rewrite Section 526(a)(4) is that it would render that provision entirely superfluous. Debt incurred for fraudulent purposes is already nondischargeable, and, indeed, incurring it may give rise to criminal liability. 11 U.S.C. § 523(a)(2); 18 U.S.C. §§ 152-157. The

⁴ Chapter 13 of the Bankruptcy Code provides for a structured repayment plan. The debtor agrees to pay what he or she can, or in some cases what government guidelines require, ordinarily over several years. In order for the plan to be approved by the Bankruptcy Court, it must provide that certain rights of secured creditors are not affected. 11 U.S.C. §§ 1322(b)(2), 1325(a)(5). The debtor's future income is placed under court supervision, and the plan will not be approved if the court is not satisfied with the payments to be made to unsecured creditors, which must be at least equal the amount they would receive under Chapter 7. 11 U.S.C. §§ 1325(a)(4), (b). Under Chapter 13, the debtor is permitted to retain nonexempt property, which may include nonexempt equity in his or her home; Chapter 13 prevents foreclosure and normally provides that the mortgagee will be paid in full or brought current in payments. Compared to the alternative of Chapter 7, under which most of a debtor's nonexempt assets are liquidated and creditors may ultimately be paid some or all of the debts they are owed, 11 U.S.C. §§ 704(a)(1), 726, a Chapter 13 filing may be beneficial to creditors, who may well be paid in full and will never be paid less than they would under Chapter 7, to the debtor, who may retain his or her home, and to society.

Government admits that, prior to BAPCPA, it was already “settled law that a debtor’s good faith should be questioned if the debtor makes purchases in contemplation of a bankruptcy case.” Govt. Br. 28 (citing *In re Charles*, 334 B.R. 207, 222 (Bankr. S.D. Tex. 2005)). Advising a client to engage in any unlawful conduct was also already prohibited, prior to BAPCPA. *See* 18 U.S.C. § 2 (imposing criminal liability for counseling an offense). Every state’s rules of professional conduct prohibit an attorney from advising a client to engage in unlawful or fraudulent conduct. *See, e.g.*, ABA Model Rules of Professional Conduct R. 1.2(d). In fact, the Government itself states that “rules of professional conduct for attorneys commonly prohibit advice to engage in fraudulent or improper conduct,” Govt. Br. 10, and it cites an example where ethics rules have already been applied to police abuse of the bankruptcy system. Govt. Br. 22 (citing *Attorney Grievance Comm’n of Maryland v. Culver*, 381 Md. 241, 275-76 (2004)).

Entirely apart from state ethics rules, Section 707 of the Act requires an attorney who represents a consumer debtor in filing a bankruptcy petition to make her own reasonable investigation into the circumstances giving rise to the debtor’s petition, including a specific inquiry into the veracity of the debtor’s debt and asset schedules. 11 U.S.C. § 707(b)(4)(C)-(D). By signing the petition, the attorney personally certifies that she has determined that the petition is well-grounded in

fact, that she has no knowledge that the debtor's schedules are incorrect, and that she has determined that the petition does not constitute an "abuse" under Section 707(b)(1). *See id.*; *see also* Fed. R. Bankr. P. 9011(b) (by signing petition, attorney certifies that "it is not being presented for any improper purpose" and "factual contentions have evidentiary support"). The Government itself acknowledges that, under these provisions, "a bankruptcy attorney plainly could not encourage a client to incur new debts just to buttress an anticipated bankruptcy filing." Govt. Br. 28. In short, the Government's interpretation of Section 526(a)(4) would read it as adding nothing to existing prohibitions.

Moreover, the Government's construction introduces the new vice of vagueness into the statute. The Government has plucked the term "abuse" from thin air. It is not defined by the Act, and it does not (unlike existing ethical rules and statutory provisions) enjoy an operating history and background understanding. As a result, the Government's statutory revision creates a palpable danger that "abuse" will be defined in different and unpredictable ways.

For example, the Government itself offers several different formulations of the test. It variously insists that Section 526(a)(4) covers: (1) "advice to engage in abusive conduct," Govt. Br. 26; (2) advice "to manipulate the system by 'loading up' on debt in contemplation of filing a petition," Govt. Br. 19; (3) advice to accumulate debt "in order to manipulate the bankruptcy system, such as to secure a

more advantageous discharge or to circumvent the requirements for chapter 7 relief.” Govt. Br. 11. These formulations are not equivalent. The first focuses on abusive conduct generally; the second on “loading up” on debt prior to filing a petition; and the third on attempts to manipulate the “means test” adopted by Congress to restrict the availability of Chapter 7 discharges. *See* Govt. Br. 19. Such variations in the definition of “abuse” render the Government’s test too manipulable and uncertain to provide constitutionally adequate guidance to bankruptcy attorneys.

A statute is impermissibly vague when the conduct it forbids is not ascertainable. *See Chicago v. Morales*, 527 U.S. 41, 56 (1999). “[People] of common intelligence cannot be required to guess at the meaning of the enactment.” *Winters v. New York*, 333 U.S. 507, 515 (1948). The void-for-vagueness rule is particularly important in the speech context, because of the possibility of a chilling effect. Under the Government’s reinterpretation of Section 526(a)(4), the category of “advice to engage in abusive conduct,” Govt. Br. 26, is at least as imprecise as many prohibitions on speech the Supreme Court has declared void for vagueness. For example, in *Plummer v. City of Columbus*, 414 U.S. 2 (1973) (*per curiam*), the Court held that a statute providing that “[n]o person shall *abuse* another by using menacing, insulting, slanderous, or profane language” was facially invalid. *Id.* at 2 (emphasis added). In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Court struck

down a municipal ordinance prohibiting three or more persons to “conduct themselves in a manner annoying to persons passing by.” *Id.* at 614. In *Houston v. Hill*, 482 U.S. 451 (1987), the Court invalidated an ordinance making it “unlawful for any person to ... in any manner oppose ... or interrupt any policeman in the execution of his duty.” *Id.* at 455. The Government’s proposed rewriting of Section 526(a)(4) suffers from the same impermissible vagueness.

B. The Second Clause of Section 526(a)(4) Undermines The Government’s Argument.

The Government claims that the second clause of Section 526(a)(4) – which restricts advising a client to “pay an attorney . . . fee or charge for services performed as part of preparing for or representing a debtor in a case under this title” – supports its interpretation of the first clause. The Government is incorrect.

First, the Government claims that the District Court’s reading of the phrase “in contemplation of” bankruptcy would render the second half of Section 526(a)(4) superfluous. Govt. Br. 25-26. But that argument rests on the Government’s crabbed view that the second half of Section 526(a)(4) is limited to advice to a client “to incur more debt . . . to pay an attorney.” If the second half were read literally – to forbid advice on how to pay an attorney, regardless of whether the payment scheme entailed incurring more debt – the superfluity posited by the Government would vanish.

Moreover, it is evident that the second half of Section 526(a)(4) is not a reason to prefer the Government's statutory construction. Rather, the second half of Section 526(a)(4), even as interpreted by the Government, is a separate First Amendment violation. One of the most difficult issues faced by financially distressed debtors is how to pay for legal representation. Chapter 7 debtors can expect to pay \$1200 to \$2500 for legal representation and Chapter 13 debtors can pay \$1500 to \$4000 and up depending on the complexity of the case. There are many instances in which it is lawful and appropriate to advise a debtor to borrow money to pay a bankruptcy attorney's fee. A debtor may access a fully secured home equity line of credit to pay the fee, essentially using some of the equity in his or her home to produce cash. It may also be advisable for a debtor to borrow from a 401(k) plan to finance representation.

Indeed, in Chapter 13 cases, which can save a home from foreclosure but which give rise to higher attorney fees because of their complexity, clients ordinarily pay their attorneys by incurring additional debt. Usually, a portion of the attorney's fees are paid up front with the remainder being paid through the plan. That portion of the fee that is paid through the plan constitutes a debt to the attorney which is approved by the court and paid out as part of the plan.⁵

⁵ A "debt" is defined as a "liability for a claim;" 11 U.S.C. § 101(12); a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated,

Section 526, if applicable to lawyers, would forbid them from advising their clients to use this standard arrangement which ordinarily harms no one, is subject to court approval, and is usually the only realistic way a debtor can afford legal representation. To prohibit an attorney from advising a client regarding the payment of fees is a direct attack on the provision of advice to clients and, indeed, on the legal profession.

Hence, the second half of Section 526(a)(4) suffers from all the First Amendment infirmities of the first half of Section 526(a)(4). Courts must “accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer.” *Florida Bar v. Went For It*, 515 U.S. 618, 634 (1995). By preventing an attorney from advising a client regarding payment, the statute “single[s] out a particular idea for suppression because it [is] . . . disfavored.” *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

The second half of Section 526(a)(4) also presents further constitutional concerns because it may well prevent the individual from obtaining legal counsel. The Supreme Court has held that laws with this effect flatly violate the First Amendment. As the Court explained in *NAACP v. Button*, 371 U.S. 415 (1963), a law prohibiting an individual from “advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . .

unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” *Id.* § 101(5).

for assistance” violates the First Amendment. *Id.* at 434; *see also U.M.W. v. Illinois Bar*, 389 U.S. 217, 223 (1967) (holding *Button* broadly applicable). “There . . . inheres in [such a] statute the gravest danger of smothering all discussion looking to the eventual institution of litigation.” *Id.* If incurring debt is the only way a person in financial distress may obtain a lawyer, the Government may not prevent an attorney from advising it. *See Button*, 371 U.S. at 438-39 (form of law is irrelevant if its effect is to stifle the exercise of First Amendment rights).

Therefore, Section 526(a)(4) would be unconstitutional if it were construed as applying to attorneys.

III. IF CONSTRUED TO APPLY TO ATTORNEYS, SECTION 528 WOULD BE UNCONSTITUTIONAL BECAUSE IT WOULD REQUIRE ATTORNEYS TO PROVIDE FALSE AND MISLEADING INFORMATION IN THEIR ADVERTISEMENTS.

If attorneys were included within the definition of “debt relief agency,” then Sections 528(a)(3), (a)(4), and (b)(2) would be unconstitutional because they compel the inclusion of the following misleading statement in advertising: “‘We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.’ or a substantially similar statement.” 11 U.S.C. § 528 (b)(2)(B), (a)(4).

The District Court sustained these provisions on the ground that their purpose was to prevent deceptive and fraudulent advertising by debt relief

agencies. 350 B.R. at 920. The District Court held that the provisions could therefore satisfy both the “reasonable relationship” test of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and the intermediate scrutiny of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557 (1980).⁶

The District Court’s decision was incorrect because the court failed to analyze whether the compelled statement directly advanced any governmental interest. The decision below conflicts with the judgment of the U.S. District Court for the District of Minnesota, which properly held unconstitutional the required statement mandated by Section 528. *Milavetz*, 355 B.R. at 766-67. The Minnesota judgment is persuasive.

⁶ The District Court erred by not applying undiluted First Amendment scrutiny. The sentence, “We are a debt relief agency,” when uttered by an attorney, is not commercial speech because it does not propose a commercial transaction. Noncommercial speech does not lose its fully protected character simply because it appears in the commercial context. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988) (solicitation does not lose fully protected nature merely because it is “intertwined” with speech with commercial characteristics); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983) (“The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech.”); *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (paid newspaper ad entitled to full First Amendment protection). The Section 528 provisions, however, are invalid under any level of scrutiny.

“It is well established that ‘the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.’” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). See also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (*Central Hudson* requires government to prove “a substantial interest to be achieved by [the] restrictio[n] on commercial speech”) (citation omitted); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 625-26 (1995) (intermediate scrutiny cannot be satisfied by “mere speculation and conjecture”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (“anecdotal evidence and educated guesses” do not suffice).

The Government cannot meet this burden. The Government cannot demonstrate the existence of any problem with pre-BAPCPA advertising by bankruptcy attorneys. In fact, the District Court below found that bankruptcy attorney advertising prior to BAPCPA was not misleading or deceptive:

Prior to section 528 of the Code, consumer bankruptcy attorneys advertised themselves truthfully as bankruptcy attorneys. Such advertising was not illegal, false, deceptive, or misleading.

350 B.R. at 920. The Minnesota district court similarly found that “[t]here is no evidence” that “bankruptcy assistance advertisements are deceptive in any regard.” *Milavetz*, 355 B.R. at 766. Hence, the First Amendment predicate for a regulation of speech is entirely absent.

Moreover, under intermediate scrutiny the Government must also “prove that the regulation directly advances that interest and is not more extensive than is necessary to serve that interest.” *Thompson*, 535 at 374 (internal quotation marks and citation omitted). Yet the required statement in Section 528 is not tailored to any interest in preventing deception. In fact, the statement itself is factually inaccurate and misleading. Whether or not attorneys fall within the legal definition “debt relief agency” created by the statute, the relevant question – in the context of commercial speech to “members of the public” who are “often unaware of the technical meanings” of legal terms – is how the words would be understood in “ordinary usage.” *Zauderer*, 471 U.S. at 652. Whatever one thinks a “debt relief agency” might be, an attorney in private practice certainly does not qualify as one in the ordinary understanding of a consumer. Many consumers may think that a “debt relief agency” is a governmental agency. They will be mystified by the reference to lawyers as “debt relief agencies.”

The Minnesota district court explained:

The term “debt relief agency” is simply a legislative contrivance. The public is more likely to be confused by an advertisement containing

this Congressionally-invented term than one which advertises the services of a bankruptcy attorney.

Milavetz, 355 B.R. at 767.

Moreover, to assert that an attorney is a “debt relief agency” is to suggest that she is no different from a non-attorney bankruptcy petition preparer or anyone else who provides bankruptcy assistance. This suggestion would create new types of consumer confusion. Attorneys provide legal advice and can represent debtors in court. They therefore differ dramatically from bankruptcy petition preparers and similar entities. As the Minnesota district court observed:

Congress's merger of both attorneys and non-attorneys is, itself, likely to confuse the public. There are many non-trivial differences between an attorney's services to his or her clients, and services non-lawyers are permitted to offer. Unlike those who only restructure debt, or perhaps provide bankruptcy forms, attorneys give legal advice and actually represent debtors in bankruptcy proceedings. The requirement that parties so dissimilarly-placed must use the same mandated disclosure statement is likely to cause consumer confusion.

355 B.R. at 767.

In short, far from preventing deception, the statute would foster it, by requiring advertising by attorneys to carry the inherently misleading label “We are a debt relief agency.” “If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated.” *Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari) (criticizing

Eleventh Circuit decision upholding a compelled disclaimer requirement for dentist advertising).

Worse, Section 528 mandates that the “debt relief agency” language be included even when the covered attorney will not, in fact, help clients file for bankruptcy. The statement must be included in advertising directed at the general public “indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt.” § 528(b)(2)(B). Thus, the mandatory language must be included in advertisements directed at creditors and landlords by attorneys who never represent bankruptcy debtors.⁷ Since “bankruptcy assistance” is defined so broadly, even family lawyers would, according to the terms of the statute, have to include these statements in their advertising – even though they, too, do not, in fact, help people file for bankruptcy.

The District Court’s reasoning is not sufficient to withstand any level of First Amendment scrutiny. The District Court found merely that attorneys could neutralize the misleading effects of the mandatory statement through additional language of their own:

[S]ection 528 does not prohibit consumer bankruptcy attorneys from identifying themselves as both bankruptcy attorneys and “debt relief

⁷ The plaintiffs in *Connecticut Bar Association v. United States*, No. 06cv729 (D. Conn), include attorneys who are ostensibly covered by the Act even though they do not represent bankruptcy debtors.

agencies” in advertisements. Thus, the forced inclusion of “debt relief agencies” in advertisements gives consumers more accurate information to better determine what type of debt relief agency they may require.

350 B.R. at 920.

But the District Court’s reasoning turns the First Amendment upside down. The Government bears the burden of proving that the mandatory “debt relief agency” language is narrowly tailored to an important interest. The Government cannot meet its burden simply by asserting that the mandatory language, while misleading and deceptive in its own right, can be clarified by additional disclosures that attorneys are free (but are under no legal compulsion) to make. In effect, the District Court put the onus on private attorneys to fix the problems created by the Government’s mandatory “debt relief agency” language. Moreover, it is not clear whether additional disclosures could fully undo the confusion. Regardless, attorney advertising will have to be longer, more expensive, and less accurate as a result of the Act.

“If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The District Court failed to follow that fundamental principle here.⁸

⁸ The test prescribed by *Zauderer* does not apply because the sentence, “We are a debt relief agency,” is not a purely factual and uncontroversial statement. *See*

Milavetz, 355 B.R. at 766 (declining to apply *Zauderer* and instead applying *Central Hudson* test). In any event, the challenged provisions would not survive constitutional scrutiny even under the *Zauderer* test, which differs from the *Central Hudson* test only in its somewhat more relaxed third prong, because, as the discussion in the text makes clear, it is not “appropriately tailored” to prevention of deception.

CONCLUSION

The judgment of the District Court should be affirmed in part and reversed
in part.

Respectfully submitted,

HENRY J. SOMMER
NATIONAL ASSN. OF CONSUMER
BANKRUPTCY ATTORNEYS
7118 McCallum St.
Philadelphia, PA 19119
(215) 242-8639

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
7504 Oldchester Rd.
Bethesda, MD 20817
(301) 915-0990

Counsel for amicus curiae

Dated: January 17, 2008

CERTIFICATE OF COMPLIANCE

I hereby certify that:

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,000 words or less.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6602 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Jonathan S. Massey
Attorney for *amicus curiae*

Dated: January 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that two paper copies of the foregoing Brief of *Amicus Curiae* were served by first class mail on January 17, 2008, on the following counsel:

Mark B. Stern
Mark R. Freeman
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(202) 514-5714

Attorneys for Appellants

Keith D. Karnes
Olsen, Olsen & Daines, LLC
1599 State St.
Salem, OR 97301
(503) 362-9393 office

Attorney for Plaintiffs-Cross-Appellants

Jonathan S. Massey
Attorney for *amicus curiae*

Dated: January 17, 2008