

Nos. 07-10226, 07-10265

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUSAN B. HERSH,

*Plaintiff, Appellee &
Cross-Appellant*

v.

UNITED STATES OF AMERICA,

*Defendant, Appellant &
Cross-Appellee.*

On Appeal from the United States District Court for the Northern District of Texas,
Dallas Division

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

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CERTIFICATE OF INTERESTED PARTIES

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1. Pursuant to Fed. R. App. P. 26.1(a) and Fifth Circuit Rule 28.2.1, *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.

2. The undersigned counsel of record certifies that, in addition to those persons and entities listed in the Certificates of Interested Parties contained in the briefs filed by the Appellant/Cross-Appellee, the Appellee/Cross-Appellant, and *amici curiae* The Financial Services Roundtable, *et al.*, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in

the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: September 26, 2007

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INTERESTS OF AMICI CURIAE

The National Association of Consumer Bankruptcy Attorneys (NACBA) 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* is plaintiff in a related case, *Connecticut Bar Association v. United States*, No. 06cv729 (D. Conn.) (“*CBA*”), which challenges not only 11 U.S.C. §§ 526(a)(4) and 527, but also its companion provision, 11 U.S.C. § 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 deliberations. It is filed with the consent of all parties.

ARGUMENT

The Government’s premise is that the Debt Relief Agency provisions enacted in the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA” or “the Act”) should be construed to apply to licensed attorneys. The text of BAPCPA, however, contains an express rule of construction making clear that those provisions may not be construed in that way. 11 U.S.C. § 526(d)(2). Even if the language of the statute were ambiguous, the statute would for several independent reasons have to be construed not to apply to attorneys. Finally, if this

Court were to conclude that the statute applies to attorneys, §§ 526 and 527 would have to be found to violate the Constitution.

I. THE STATUTE SHOULD BE CONSTRUED NOT TO APPLY TO ATTORNEYS.

This Court should hold that the Debt Relief Agency Provisions do not apply to licensed attorneys, and should, on that basis, affirm the decision of the Court below with respect to §526(a)(4) and reverse it with respect to §527. See *Milavetz, Gallop & Milavetz, PA v. United States* (“*Milavetz*”), 355 B.R. 758, 767-769 (D. Minn. 2006) (so holding); *In re Reyes*, 361 B.R. 276, 279-280 (Bankr. S.D. Fla. 2007); *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005). That is the best reading of the text; it is the proper approach in light of the serious constitutional questions the alternative reading would raise; and it is the construction required by clear statement rules.

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

The plain language of the statute makes clear that attorneys are not included within the statutory definition of “debt relief agency.” *Milavetz* at 768. Attorneys are not in terms included within the statutory definition of “debt relief agency.” The Government’s position appears to be that because bankruptcy assistance includes “providing legal representation with respect to a case or proceeding under

this title,” any attorney who has represented an assisted person in a bankruptcy case is a “debt relief agency.” See Appellants’ Br. 3 n.2.

Whatever the merits of construing the language of § 526 to include attorneys in this backhanded way might be if this were all the statute contained, any such interpretation is impermissible because the statute itself contains a rule of construction that forbids it. See *Milavetz* at 768. The Government concedes that it views this statute as a “regulation of professional ethics” applicable to attorneys. Government Br. 21. But Section 526(d)(2) provides specifically that the provisions at issue here, §§526 and 527, as well as § 528, 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 they are construed to apply to lawyers, these provisions would do just that. They would limit the power of state and federal courts to regulate the legal profession – Section 526, for example, to determine what advice may ethically be given by lawyers, and Section 528, what their advertisements may ethically say. The plain language of Section 526(d)(2) means that the statute may not be construed in a way that leaves attorneys affected by the rules for “debt relief agencies” contained in Sections 526, 527 and 528.

B. 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.

This reading is reinforced by the doctrine of constitutional avoidance. As the Government has correctly explained, “[i]t is fundamental that when ‘an otherwise acceptable construction of a statute would raise serious constitutional problems,’ a federal court must ‘construe the statute to avoid such problems unless such a construction would be plainly contrary to legislative intent.’” Government Br. 24-25 (citations omitted). Even if the text were merely ambiguous about these sections’ application to attorneys, under that doctrine the statute would have to 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).

Sections 526, 527 and 528 would present grave constitutional questions if they were construed to apply to attorneys; indeed, they would be unconstitutional. Section 526 has been held unconstitutional by every court to review its constitutionality on the merits. See, e.g., *Olsen v. Gonzales*, 350 B.R. 906 (D. Ore. 2006); *Zelotes v. Martini*, 352 B.R. 17 (2006). Section 527 would compel attorneys to provide false and misleading information to clients in violation of the First and Fifth Amendments. Sections 528(a)(3), (a)(4), and (b)(2) would compel attorneys to provide misleading statements in their advertising in violation of the First Amendment. And §§ 528(a)(1) and (a)(2) would restrict the practice of law

in violation of the First and Fifth Amendments. (A full discussion of these legal infirmities can be found in the briefs for the plaintiffs in *CBA*. See Plaintiffs' Memorandum In Support Of ("Plaintiffs' Memorandum"), and Reply to Response to ("Plaintiffs' Reply"), Plaintiffs' Motion For Preliminary Injunctive Relief in *CBA*, No. 06cv729 (D. Conn.)

Particularly in light of the rule of construction contained in § 526(d), the statute is at least ambiguous as to whether it is applicable to attorneys. The proper course, therefore, is for this court definitively to construe the statutory term "debt relief agency" in § 101(4A) not to include licensed attorneys, and §§ 526 and 527 (as well as § 528) therefore not to apply to attorneys. Of course if Congress, in fact, intended otherwise, Congress will remain free to enact a law unambiguously expressing its intent.

C. The Statute Lacks the Clarity Necessary to Effect a Congressional Regulation of Legal Practice.

Finally, attorneys should not be deemed to qualify as "debt relief agencies" because the statute should not be construed to interfere with the sanctity of the attorney-client relationship and the traditional mechanisms by which the legal profession is regulated. If attorneys were swept within the category of "debt relief agencies," the statute would trench on the authority of the traditional regulators of the bar, a displacement the statute lacks the clarity necessary to achieve.

“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) (rejecting the suggestion that Congress intended “a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality”); see also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-46 (1994) (“Federal statutes impinging upon important state interests cannot . . . be construed without regard to the implications of our dual system of government. . . . [T]hose charged with the duty of legislating [must be] reasonably explicit.”) (citation and internal quotation marks omitted). It is a longstanding principle of federalism that while areas of traditional state authority may be supplanted by Congress when its enumerated powers permit, if Congress does intend “to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute,’” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); see also, e.g., *Arons v. New Jersey State Bd. of*

Educ., 842 F. 2d 58, 63 (3d Cir. 1988) (“In the absence of explicit provisions, we are not convinced that Congress intended to limit the states' traditional control over the practice of law. Nothing in the statutory language demonstrates a congressional desire to supersede the states' authority to regulate the legal profession.”).¹

Here, Congress has made clear that it does *not* intend the statute to regulate the practice of law, but that that function is left to the States and the federal courts. Even if there were some ambiguity about this, under principles of federalism the statute lacks the clarity required before it may be construed to interfere in that traditional sphere of State regulation.

II. IF IT IS CONSTRUED TO APPLY TO ATTORNEYS, SECTION 526(a)(4) IMPOSES UNCONSTITUTIONAL RESTRICTIONS ON ATTORNEY SPEECH.

Section 526(a)(4) provides that a debt relief agency shall not “advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.”

¹ In *Gonzales v. Oregon*, the Court concluded that principles of federalism were so strong it did not even have to resort to the clear statement rule in that case. *See Oregon*, 546 U.S. at 255 (noting that a clear statement is required), *id.* at 275 (concluding that, in light of principles of federalism, common sense meant that resort to the clear statement rule was not even necessary).

A. Incurring Debt in Contemplation of Bankruptcy

1. Under the Bankruptcy Code, incurring such debt prior to filing bankruptcy may be perfectly lawful and the 2005 statute does not alter this. Nor does Section 526(a)(4) distinguish between incurring debt that will be paid in or after a bankruptcy case and incurring debt that will not. And, indeed, it may often be desirable for a client “contemplating” bankruptcy to incur additional debt.

To be sure, incurring additional debt for fraudulent purposes is completely improper. But such debt 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. Advising a client to engage in any such unlawful conduct is already prohibited, regardless of the Act. See 18 U.S.C. § 2 (imposing criminal liability for counseling an offense). In fact, every state’s rules of professional conduct prohibit an attorney from advising a client to engage in unlawful or fraudulent conduct. See, *e.g.*, Texas Discip. R. Prof. Conduct 1.02(c).

The effect of Section 526(a)(4), if read to apply to attorneys, would not be limited to advice to incur such debt, but would be to prohibit them from advising assisted persons to incur *any* debt, even when it would be entirely lawful and proper to do so and when advising the client to do so would be the sound and ethically proper course. The statute would make it impossible for the attorney to provide the comprehensive advice that it is his or her ethical duty to provide, and

prevent the attorney from playing his or her appropriate role as counselor-at-law, which lies at the very heart of our profession.

There are myriad reasons that an attorney seeking to meet his or her ethical obligations and to provide his or her best legal advice might advise a client contemplating bankruptcy lawfully to incur debt only some of which were described by the District Court. See Plaintiffs' Memorandum in *CBA 7-15* (outlining many of these). For example, in many cases, it is advisable for debtors with unreliable transportation to incur secured debt to purchase a car that will allow them to consistently get to work so that they will have income with which to pay creditors. The negative effect of the bankruptcy on debtors' 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 such cases, the debtors intend to repay the loan either during or after the bankruptcy. And in Chapter 13 proceedings, for example, such fully secured debt must normally be paid in full and the debtors' other creditors benefit from the debtor's reliable transportation at a reasonable cost.

Chapter 13 of the Bankruptcy Code operates differently from Chapter 7. Under Chapter 7, 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. Chapter 13 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 the rights of certain secured creditors are not affected. 11 U.S.C. §§ 1322(b)(2), 1325(a)(5). They will therefore be paid in full. The debtor's future income is placed under court supervision, and the plan will not be approved unless the court is satisfied with the payments that will be made to unsecured creditors, which must be at least equal to the payments they would receive under Chapter 7. 11 U.S.C. § 1325(a)(4). 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, a Chapter 13 filing may therefore be beneficial both to creditors, who may get paid in full and will never be paid less than they would under Chapter 7, to the debtor, who may not lose his or her home, and to society.

Further, the Government has also interpreted the statute as making it unlawful for an attorney to “advise an assisted person or prospective assisted person *to incur more debt . . . to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a*

debtor in a case under this title.” Government Br. 32. This interpretation is narrower than the plain language of the statute, but in any event is invalid.²

This provision would unconstitutionally render the provision of appropriate and ethically required advice unlawful. 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 \$3500 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.

² The most natural reading of the statute is that it makes it unlawful to “advise an assisted person or prospective assisted person . . . to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.” Under the narrower reading, the language prohibiting advice to incur debt to pay attorney fees or charges for representing a debtor in a bankruptcy case would be superfluous, since all such debt is, on its face, in contemplation of bankruptcy. Cf., e.g., *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statutes must be construed to avoid superfluity). The statute also contains two parallel infinitive verbs in its text, “to incur” and “to pay.” The rules of grammar indicate that these two infinitives identify the two prohibitions in the statute: (1) to “advise an assisted person or prospective assisted person *to incur* . . .,” and (2) to “advise an assisted person or prospective assisted person . . . *to pay*. . .,” 11 U.S.C. § 526(a)(4) (emphasis added).

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.

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.

2. Recognizing the infirmity of the statute, the Government does not defend it as written. It argues that attorneys are prohibited by the statute from providing only advice “to incur unnecessary debt for the purpose of abusing the bankruptcy system.” Government Br. 25. But that is not what the statute says, and all of the advice described above and by the Court below fits squarely within the language of the statute. Indeed, it fits within the definitions put forward by the Government, because this advice is, in fact, to incur debt “in contemplation of” – in most cases *because of the imminence of* – bankruptcy. See, e.g., Government Br. 24 (citing Black’s Law Dictionary definition of “contemplation of bankruptcy” as “the thought of declaring bankruptcy because of the inability to continue current

financial operations”). It is only because of the thought that the individual may declare bankruptcy that the advice described above (and in more detail in the briefs in *CBA*) would be ethically required of an attorney. The contextual example of use of the phrase “in contemplation of bankruptcy” given by the Government does not contradict this. It is simply a description of people doing something fraudulent “in contemplation of bankruptcy.” Government’s Br. 23-24. But what is banned here is not giving advice in contemplation of bankruptcy to commit fraud; it is giving advice in contemplation of bankruptcy to incur additional debt.³

B. Constitutional Analysis

1. If it were construed to apply to attorneys, Section 526(a)(4) would take the censor’s knife to the heart of the attorney-client relationship. The statutory provision is a content-based restriction on core protected speech, one immediately subject to strict judicial scrutiny. Worse, it is viewpoint based, and therefore virtually indefensible.

³ Unable to defend the statute as written, the Government also relies at great length on inapposite legislative history. For example, the language quoted repeatedly by the Government about BAPCPA “provisions strengthening professional standards for attorneys and others who assist debtors with their bankruptcy cases,” does *not* refer to the Debt Relief Agency provisions, but, as the full sentence from the House Report describes, “[t]he bill’s consumer protections,” H.R. Rep. No. 109-21, at 17 (2005). See 11 U.S.C. § 303(a)(3)(E); 11 U.S.C. § 707(b)(4). Nor is there any evidence that the Debt Relief Agency provisions were intended to address any misconduct by attorneys. See Plaintiff’s Reply 6-10 in *CBA*.

By preventing an attorney from “advis[ing]” a client or potential client if he or she is an “assisted person” or “prospective assisted person” “to incur more debt in contemplation of such person filing a case” under the Bankruptcy Code, 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 First Amendment forbids laws “aimed at the suppression of ideas thought inimical to the Government’s own interest.” *Id.* at 548-49.

It is settled by Supreme Court precedent that 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). The provision by attorneys of “advice or legal assistance” is given full First Amendment protection. See *Velazquez*, 531 U.S. at 544.⁴ The Court has made clear that “information respecting . . . statutory rights” is “vital.” *Id.* at 546. And limitations on attorney advice to clients impose a “substantial restriction” on that fully protected speech. *Id.* at 544.

⁴ This is because giving advice and counsel to clients is the job of our shared profession, not merely “discuss[ing] the legal consequences of any proposed course of conduct.” Government Br. 27. The Government’s attempt to argue that this latter provision of a description of the law to layperson clients is what is meant by attorney “advice” – an argument based upon an absurd and, frankly, embarrassing attempt to elaborate a nonexistent distinction between a lawyer’s “advice” and what he or she “advises,” Government Br. 27-28 – must therefore be rejected.

In *Velazquez*, the Court held that Congress could not limit the legal advice that might be provided by attorneys, even attorneys funded by the Government. The First Amendment forbids government to “use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning,” *id.* at 543. And restricting attorneys in advising their clients “distorts the legal system by altering the role of the attorney.” *Id.* at 544. Indeed, the Court found that restrictions on attorneys distort the system of justice and impose impermissible systemic costs on the judiciary.⁵

Section 526(a)(4) cannot survive strict scrutiny. The Government asserts that it is designed to prevent lawyers from advising clients to accumulate debt “for the purpose [of] abusing the bankruptcy system.” See Government Br. 22. That interest does not rise to the “compelling” level, but even if it did, the statute is not narrowly tailored to that one circumstance.

First, incurring debt with no intent to repay it is *already* fraudulent, 11 U.S.C. § 523(a)(2), and, independent of § 526, as the Government acknowledges,

⁵ The Act also violates Separation of Powers principles because it interferes with clients obtaining full information about their legal rights. If it applied to attorneys, the statute would affect the ability of the courts properly to implement the substantive law. *See Velazquez*, 531 U.S. at 546 (“The restriction at issue here threatens severe impairment of the judicial function. . . . A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.”).

an attorney could not lawfully advise a client to incur it. Section 526 is unnecessary to prevent such advice.

Nor is it narrowly drawn to that goal. This law is not limited in any way, but covers advice given to any assisted person contemplating filing for bankruptcy to incur debt – to anyone, for any reason – and even if no bankruptcy is ever filed. Congress may prohibit incurring certain debt; it may limit the availability of a discharge for such debt; indeed, it may use it as a trigger to prevent individuals from obtaining bankruptcy relief altogether. But the advice prohibited by the statute is limited to no such category of debt.

Second, the law is not narrowly tailored because of the limited class of clients to whom it applies. 11 U.S.C. § 101(3) (defining “assisted person” as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$ 150,000”). Even if there were some reason such advice from a lawyer should be censored, there is no reason why that limitation should apply only to clients with less than \$150,000.00 in nonexempt property, or those whose debts consist primarily of consumer debts.⁶

⁶ In limiting the legal advice available only to clients of certain means, section 526(a)(4) violates the Equal Protection Clause by restricting provision of legal advice to a group defined by its lack of wealth. “Courts have confronted, in diverse settings, the ‘age-old problem’ of ‘providing equal justice for poor and rich, weak and powerful alike.’” *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)). That principle extends to civil cases, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972). While wealth, of course is not a

Indeed, the scope of the prohibition imposes a further unconstitutional burden on free speech by requiring attorneys to determine at the outset of their representation private financial information about their client's assets that may be wholly irrelevant to the contemplated representation and prohibitively burdensome to discern accurately. See Principal Brief of Appellee/Cross-Appellant ("Hersh") at 25 & n. 26.⁷

Finally, this regulation cannot meet the least restrictive alternative test that is a part of strict scrutiny. Whatever interest this ban on attorney *advice* may serve, it would be far more direct simply to prohibit the *conduct* that Congress finds offensive. The problem, if there is one, would be addressed precisely, and a ban on attorney speech would then be completely unnecessary.

It is a bedrock principle of First Amendment law that, even where government may make certain conduct unlawful, it may not seek to deter such conduct instead through prohibiting the provision of truthful information about it.

suspect classification, the law here trenches on a fundamental right, the right of equal access to the judicial system. See, e.g., *Griffin*, 351 U.S. at 18; Laurence H. Tribe, *American Constitutional Law* 1461 (2d ed. 1988). The status of having \$150,000.00 or more in nonexempt property has no implications for an individual's entitlement to anything under the Bankruptcy Code; that line appears nowhere else in the Code.

⁷ The fact that this law prohibits certain advice being given to "prospective assisted persons" independently renders it void for vagueness. Due Process requires that an individual have notice of what conduct will violate the law. In this case "assisted person" is defined by a person's means and whether his debts are primarily consumer debts. What it would mean to be a "prospective" assisted person is difficult, perhaps impossible, to conceive.

See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) (striking down speech ban under the lesser scrutiny applied to commercial speech on ground the ban was not less restrictive than a direct regulation of the conduct the banned speech was about); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (same); *NAACP v. Button*, 371 U.S. 415, 437 (1963) (First Amendment forbids penalizing those “advocating lawful means of vindicating legal rights”).⁸

2. The restriction on 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” is an even more direct attack on the provision of advice to clients and, indeed, on the legal profession. It is not even limited to payment “in contemplation of bankruptcy,” covering all advice to pay for representation. But even if this provision were read, contrary to its text, so that what is prohibited is advice to “to incur more debt . . . to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a

⁸ As *Velazquez* makes clear, the standard of review utilized in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), for evaluating restrictions placed by State Bar ethical rules upon extrajudicial speech by attorneys “participating before the Courts” – there, a press conference by an attorney representing an indicted defendant – has no application here. *Accord Gentile*, 501 U.S. at 1073 (attorneys have different “First Amendment interest[s]” depending upon “the kind of speech . . . at issue”). In any event, this law could not pass muster even under that standard. Whatever interest is served here, it is far weaker than the “fundamental” “interest under the Constitution” asserted in *Gentile* in “the right to a fair trial by ‘impartial’ jurors.” *Id.* at 1075. Second, the restraint on speech here is not “narrowly tailored” to achieve Congress’s objectives.

debtor in a case under this title,” § 526(a)(4) (emphasis added), it would violate the Constitution, since the ordinary, lawful and ethical mechanism for payment of attorneys in chapter 13 proceedings is through incurring debt to be paid off through the chapter 13 plan.

This restriction suffers from all the infirmities of the other advice restriction in § 526. But this prohibition also may prevent the individual from obtaining legal counsel, though with proper advice he or she could. Laws with this effect flatly violate the First Amendment. It violates the First Amendment to prohibit 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 . . . for assistance”. See *Button*, 371 U.S. 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 deep financial difficulty may obtain an attorney, the Government may not prevent a lawyer from advising it. See *Button*, 371 U.S. at 438-39 (all laws are prohibited whose effect is to suppress the exercise of rights under the First Amendment). Indeed, such an attorney may not constitutionally be punished because he or she would be “advocating lawful means of vindicating legal rights.” *Id.* at 437.

Moreover, this law prohibits giving advice to hire a lawyer only if that lawyer will be hired for purposes of filing a bankruptcy case. Absent a compelling governmental interest – and there is none here – such a content- and viewpoint-based restriction is on its face invalid. See *Button*, 371 U.S. at 438.

This provision, too, offends Separation of Powers principles because it may prevent the presentation to the courts, in many instances, of this class of claim. A restriction with such an effect was found impermissible in *Velazquez*. There, legal services attorneys were prevented from presenting claims or making arguments that a state statute conflicted with a federal statute or that either a state or federal statute by its terms or in its application violated the United States Constitution. This restriction on legal claims that might be brought was held there to “threaten severe impairment of the judicial function.” *Id.* at 546. The infringement on the ability of private attorneys to represent clients in bankruptcy and on the ability of individuals to bring such cases is an *a fortiori* case.

3. If Section 526(a)(4) applies to attorneys, it also violates rights of clients to receive important information. The Supreme Court has frequently recognized that First Amendment rights belong to recipients — or potential recipients — of speech as well as to the speakers themselves. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976), (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)); *Zauderer v. Office of*

Disciplinary Counsel, 471 U.S. 626, 651 (1985). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Even where a would-be speaker is the party challenging a law, he or she is entitled to invoke the *public's* First Amendment right to a diversity of information sources. “The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests.” *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). “[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw.” *Id.*

Information about one’s rights under the law could not be more precious. “The State is not entitled to interfere with . . . access [to civil courts] by denying its citizens accurate information about their legal rights.” *Zauderer*, 471 U.S. at 643. That the restrictions on attorney advice deny “assisted persons” such information provides an independent reason for their invalidation.

4. The relief was appropriate. There are myriad ethical circumstances in which attorneys routinely advise clients to incur debt in contemplation of bankruptcy. Only in very narrow circumstances could incurring debt in contemplation of bankruptcy “abuse the bankruptcy system” as the Government

describes. Appellant’s Br. 17-19.⁹ Because the overbreadth of the statute is substantial – a showing easiest where pure speech is at issue – facial invalidation was appropriate. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

III. IF IT IS CONSTRUED TO APPLY TO ATTORNEYS, SECTION 527 ALSO VIOLATES THEIR CONSTITUTIONAL RIGHTS.

Hersh has provided a litany of some of the ways in which the forced disclosure requirements of §527(b) are false and misleading. Hersh Br. 34-35 (addressing statements in § 527(b)). Section 527(a), too, requires the provision of false and misleading information. See *infra* at 24-25.

The required statements include information that is factually inaccurate and misleading, that attorneys do not believe, and that attorneys could not ethically provide to their clients.¹⁰ These statements also blur the distinction between an attorney and a bankruptcy petition preparer, minimizing the dramatic difference in training, skill and licensing between the two, and the wide range of advice and services that only a Member of the Bar may provide. And they require an attorney

⁹ The “means test” whose manipulation the Government emphasizes, Government Br. 18-19, applies to begin with only to the small minority of chapter 7 debtors above the applicable state median family income 11 U.S.C. § 707(b)(7). Even among that group, as the Government acknowledges, only “an otherwise borderline debtor” presents the risk it hypothesizes. Government Br. 18.

¹⁰ See, *e.g.*, Texas Discip. R. Prof. Conduct 7.02 (prohibiting false or misleading communication about the lawyer or the lawyer’s services, including communication that “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading”).

to state that an attorney's representation is only sometimes advisable, hindering, rather than helping, the debtor.

The Government has never attempted to justify these provisions under any form of heightened scrutiny, let alone the strict scrutiny applicable to content-based laws that compel speech. See, e.g., *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 798, 800 (1988) (strict scrutiny applies); see also, e.g., *United States v. United Foods*, 533 U.S. 405 (2001) (government may not conscript private citizens even to contribute money to disseminate a message that the government itself creates and controls). The case the Government cited below for the deferential test it urged, and the one relied upon by the district court in finding that § 527 imposed only a “reasonable burden,” *does not even articulate a First Amendment standard of review*. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992). *Casey* of course was an abortion case, and it has no application in a First Amendment case such as this. In a single paragraph the Court in *Casey* addressed the “right of a physician not to provide information about the risks of abortion, and childbirth” to his or her patient seeking an abortion. The Court’s entire First Amendment analysis was “We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.” *Id.*

In describing the informed consent requirement, the Court concluded that it implicated “the physician's First Amendment rights not to speak . . . , but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” *Id.* The practice of medicine is of course subject to reasonable regulation, and accurate and relevant informed consent provisions should certainly be upheld against First Amendment challenge. But *Casey* did not articulate a new standard of review or alter the Supreme Court’s First Amendment jurisprudence in the radical way the Government has suggested. The Government apparently cites *Casey* because it seeks to avoid the strict scrutiny that properly applies in this case, but recognizes that the compelled statements, the speech at issue here, are not commercial speech.

In any event, the compelled speech here cannot survive any type of First Amendment scrutiny. The notice required by the § 527(a) includes false information, information an attorney in his professional judgment would not deliver to his or her client, and requires its delivery in a form, too, in which a lawyer would likely not, in the exercise of his or her professional judgment, determine to present it. See *Cohen v. California*, 403 U.S. 15, 24 (1971) (form of expression is protected as well as content). It incorrectly states that the amounts specified in a section of the statute, 11 U.S.C. § 707(b)(2), must be specified in all bankruptcy cases; and it incorrectly states that disposable income must be

determined in all Chapter 13 cases in accordance with that section. It also requires an attorney to provide information that in his or her professional judgment is irrelevant and that his or her client does not need. Thus, for example, not all “assisted persons” provided “bankruptcy assistance” will need advice about the deductions allowed by the means test in Chapter 7. Nor, indeed, will everyone who may receive bankruptcy assistance ever file a bankruptcy petition – so that all that will be provided is irrelevant information the attorney is compelled to deliver which will only confuse the client. Finally, the required form of the compelled statement also intrudes directly upon the attorney’s First Amendment rights.

Section 527(b) seriously misstates what will be required of a debtor who files a bankruptcy petition. It is misleading, too, in suggesting that clients or potential clients may be able to take actions that they are not. Thus, for example, it incorrectly states that filing fees are always required in bankruptcy court; it misstates what documents must be provided; it misdescribes the necessary temporal length of Chapter 13 Plans; it misstates the basis upon which repayment may be required under Chapter 13; and it falsely suggests that all “assisted persons” may “select” relief under Chapters 9, 11, 12, or 15.

It also would require attorneys, including plaintiffs here whose “assisted person” clients are not debtors in bankruptcy, to utter statements that are not in the best interests of their clients and with which they disagree. These include

statements that an attorney may not be required in their case; that a bankruptcy petition preparer could substitute for an attorney; that “someone familiar” with certain chapters of the Bankruptcy Code may be able to assist them rather than an attorney; and that they can get “help” with reaffirmation of debts, preparation of a Chapter 13 plan, and, indeed, obtaining court confirmation of that plan, from someone other than an attorney. The provision, if construed to apply to attorneys, would require them to treat their clients as though they were equipped to assess the complexity of their own cases. It would require them to state that their clients’ cases may be “routine,” even when they are not. It would require them to elide the difference between attorneys and other individuals, including bankruptcy petition preparers, even when they may be ethically bound to clarify that distinction. It would actually force them to urge their client speak to “someone familiar with” the provisions other than chapters 7 and 13, rather than an attorney at law!

These compelled speech requirements cannot survive the strict scrutiny to which they must be subjected. As the Government surely should recognize, there can be no compelling state interest in the promulgation of false and misleading information. And this is profoundly poorly tailored to any interest in the provision of truthful or relevant information.

It is no answer to say that attorneys can correct the compelled statements after they are made. They are false, misleading and confusing and clients will rely on

them, as was presumably intended by Congress. Indeed, there is undisputed evidence that they do so, that attempting to explain and correct the statements takes an enormous amount of time and imposes substantial expense, and that it does not work. See Plaintiffs' Memorandum in *CBA* at 22-24, 50-51; Plaintiffs' Reply in *CBA* at 31 & n. 22.

In any event, where the First Amendment is concerned Congress is required to act with precision, and the imposition of inaccurate and therefore purposeless compelled speech cannot be justified on the ground that, at further cost, attorneys may seek to correct it. See *Button*, 371 U.S. at 438 (“Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”). Neither the initial speech nor further speech required to attempt to correct it may lawfully be compelled.

Nor does it change anything that the standardized statement in Section 527(b) must be provided only “to the extent applicable.” See 11 U.S.C. § 527(b). Many of the statements are simply wrong, and Congress cannot have intended to say that they need never be provided. Nor does this address the inaccurate and misleading information required by Section 527(a)(2). Moreover, it may be impossible for an attorney to determine, at the time the statements must be made, which statements are “applicable” to a particular client. The compelled statements thus must be struck down if they are construed to apply to attorneys.

CONCLUSION

The judgment of the District Court should be affirmed with respect to § 526(a)(4) and reversed with respect to § 527.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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.

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I hereby certify that two paper copies and one electronic copy of the foregoing Brief of *Amicus Curiae* was served by first class mail on September 26, 2007, on the following counsel:

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