Nos. 08-1119, 08-1225

IN THE

# Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, CONNECTICUT BAR ASSOCIATION, BRENNAN CENTER FOR JUSTICE, AND AARP IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*

This brief *amici curiae* supporting Petitioners Milavetz, Gallop & Milavetz, P.A., et al., is filed by two bar associations (the Connecticut Bar Association ("CBA") and the National Association of Consumer Bankruptcy Attorneys ("NACBA") (collectively, the "Bar Associations")), the Brennan Center for Justice at New York University School of Law ("Brennan Center"), and AARP.[1]

The Bar Associations have an important interest in this case because their members are governed by the statutory provisions at issue here, which are part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), codified in the Bankruptcy Code at 11 U.S.C. §§ 526, 527, and 528 ("the Debt Relief Agency Provisions"). These provisions impose various restrictions on the speech and activities of a newly minted category of entities defined by the statute as "debt relief agencies," which the Government and Court of Appeals have interpreted as encompassing attorneys. So construed, the Debt Relief Agency Provisions violate the First Amendment to the Constitution.

The Bar Associations can offer an important perspective on the questions presented by this case. Their members include experienced attorneys familiar with the day-to-day realities of the bankruptcy system and the real-world impact of BAPCPA. Many Americans face bankruptcy as a

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and granted written consent, which is on file with the Clerk. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

result of the recent economic downturn. They face personal and family tragedies – loss of a job, loss of a home, or serious illnesses. They are in dire need of complete and uncensored advice from bankruptcy attorneys.

This Court has recognized that the attorney-client relationship serves to support the goal of "sound legal advice [and] advocacy." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Legal advice can successfully guide a client through the complexities of the bankruptcy system and, indeed, can make the difference between a satisfactory outcome and financial disaster. The Debt Relief Agency Provisions, if applied to attorneys, would profoundly disrupt the attorney-client relationship, at a time when it is most needed by ordinary consumers.

Accordingly, the Bar Associations have filed their own constitutional challenge to the Debt Relief Agency Provisions in the U.S. District Court for the District of Connecticut. On September 9, 2008, the District Court issued an order granting in part and denying in part the Bar Associations' motion for a preliminary injunction. *Connecticut Bar Assn. v. United States*, 394 B.R. 274 (D. Conn. 2008). The District Court's decision is currently on appeal to the U.S. Court of Appeals for the Second Circuit, Nos. 08-4797-CV, 08-5901-CV, 09-001-CV (oral argument scheduled Sept. 24, 2009).

The Brennan Center also has an important interest in this case. The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Its interest in this case arises out of its Justice project, a national, multifaceted effort dedicated to helping ensure that low-income people have access to

effective, enduring, and unrestricted legal assistance in civil and criminal cases. The Brennan Center appeared before this Court on behalf of legal aid lawyers and clients in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), in which the Court struck down a restriction that prohibited attorneys from providing particular "advice or legal assistance" to a client challenging the denial of welfare benefits. *Id*. at 544.

AARP has a significant interest in this case because bankruptcy is a particular concern for older people. AARP has nearly 40 million members over age 50. Bankruptcy filings among people age 55 and older have risen sharply in recent years, with the greatest increases among those 75 and older (up 566.7% between 1991 and 2007) and those ages 65 to 74 (up 177.8%).[2] Overall, filings have risen 150.8 percent among those between the ages of 55 and 64. A majority (62.1%) of all bankruptcies in 2007 had a medical cause.[3]

With limited job opportunities, stagnant incomes, and high medical costs, older people may have more difficulty paying debts or recovering financially if they are forced to file for bankruptcy. Planning for their later years is made all the more difficult if they do not have complete and uncensored advice from attorneys relating to their financial planning, health, and long term care needs, including

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[2] Deborah Thorne, Elizabeth Warren, & Teresa A. Sullivan, Generations of Struggle 1 (2008), *available at* http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf.

[3] David U. Himmelstein, MD, Deborah Thorne, PhD, Elizabeth Warren, JD, Steffie Woolhandler, MD, MPH, et al., Medical Bankruptcy in the United States, 2007, 122 Am. J. Med., 741, 743 (2009), *available at* http://pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf.

possibly filing for bankruptcy. Accordingly, AARP has a substantial interest in ensuring that older people facing increased medical costs and limited income in their later years will have access to complete and uncensored legal advice without unwarranted governmental interference with the attorney-client relationship in the bankruptcy context.

## SUMMARY OF ARGUMENT

The judgment below should be affirmed to the extent it held Section 526(a)(4) unconstitutional, and it should be reversed to the extent it held Sections 528(a)(4) and (b)(2) constitutional.

**I.** The unrebutted record evidence shows that the Debt Relief Agency Provisions cannot withstand any level of First Amendment scrutiny. The Government suggests that the Eighth Circuit's judgment holding Section 526(a)(4) unconstitutional rests on nothing more than "two instances" of "hypothesized" violations of the freedom of speech. Govt. Pet. Cert. in No. 08-1225, at 21. Nothing could be further from the truth. The uncontroverted record assembled by the Bar Associations shows how the Debt Relief Agency Provisions operate in the real world and proves that they increase confusion, sow distrust between attorneys and clients, and exacerbate the plight of consumers considering bankruptcy.

Thus, it is the Government's arguments, not the challenges to BAPCPA, that rest on speculation. The Government seeks to defend BAPCPA not as it operates in the real world, but as it was assertedly meant to operate in some imaginary universe hypothesized by the Government. This Court should assess the impact of BAPCPA as it was drafted and

enacted by Congress, and as it actually operates in practice, rather than according to the *post hoc* re-interpretations of the Government's litigators.

**II.** Section 526(a)(4) would be unconstitutional if applied to attorneys. It is a content-based restriction on speech and cannot satisfy any level of First Amendment review, let alone strict scrutiny. The Government proffers a saving construction (with several alternative phrasings), attempting to limit Section 526(a)(4) to certain ill-defined "abusive practices." Govt. Pet. Cert. in No. 08-1225, at 12 (citation omitted). The Government's construction, however, is not textually supportable and also conflicts with *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933), where this Court addressed the "in contemplation of" bankruptcy test, without suggesting that it was limited to abusive transactions. Further, the Government's reading would render Section 526(a)(4) superfluous, because the examples of "abuse" cited by the Government are already prohibited. The Government's proposed construction also introduces the new constitutional vice of vagueness because it relies on an amorphous standard of "abuse."

**III.** As construed by the Government, Sections 528(a)(4) and (b)(2)(B) also fail any version of First Amendment scrutiny. They are not ordinary disclosure requirements of the kind upheld in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Rather, they are the sort of controversial – indeed, misleading – disclosure rules that *Zauderer* very clearly did *not* approve. Moreover, Section 528 would extend to attorneys representing nondebtors, where the mandated disclosure would be affirmatively false.

**IV.** This Court should construe the Debt Relief Agency Provisions as not applying to attorneys. Such a saving construction would be a simpler and more straightforward solution than the re-interpretations of the provisions urged by the Government.

## ARGUMENT

### I. THE UNCONTROVERTED RECORD DEMONSTRATES THE CONSTITUTIONAL FLAWS IN THE DEBT RELIEF AGENCY PROVISIONS.

This Court has recognized the importance of a full factual context in assessing the constitutionality of a regulation of speech. *See, e.g., Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 668 (1994) (stressing the importance of a record and remanding First Amendment challenge to "permit the parties to develop a more thorough factual record"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495-96 (1986) (rejecting Government's argument that "a review of historical facts" was unnecessary in challenge to restriction on cable speech).

"[I]n cases raising First Amendment issues [this Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). "Deference to a legislative finding" "cannot limit judicial inquiry when First Amendment rights are at stake," because "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so

whether the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978). *See also Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (opinion of Breyer, J.) ("We consequently must examine the record independently and carefully . . . . ").

Thus, in striking down a regulation of speech in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), this Court explained that "[b]oth the District Court and the Court of Appeals found that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars." *Id.* at 489. This Court noted the district court's comment that "'none of the witnesses, none of the depositions that I have read, no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote ... strength wars.'" *Id.* (citations omitted). Similarly, in *Edenfield v. Fane*, 507 U.S. 761 (1993), in the course of striking down a Florida ban on CPA solicitation, this Court observed that the State had "present[ed] no studies that suggest personal solicitation ... creates the dangers ... the Board claims to fear." *Id.* at 771.

The Bar Associations have developed a factual record uncontroverted by the Government regarding the challenged provisions of BAPCPA in their lawsuit in the U.S. District Court for the District of Connecticut. That record demonstrates that the Debt Relief Agency Provisions cannot survive any level of First Amendment scrutiny because they do not advance any legitimate governmental interest at all. Rather than ensuring that debtors receive accurate information about their rights and obligations in the federal bankruptcy system, the challenged provisions

of BAPCPA *increase* public confusion, *mislead* and *harm* consumers, and impose a substantial undue burden on attorney-client communications. Under any standard of constitutional scrutiny, a law regulating protected expression cannot stand where the sole evidence regarding its practical operation shows that it has a wholly counterproductive impact.

The unrebutted factual record includes a series of sworn statements from bankruptcy attorneys and a bankruptcy client documenting the real-world operation of the debt relief provisions. For example, the record reveals that:

- "Most of the information [mandated by BAPCPA] is irrelevant most of the time, much of it is incorrect, and it is confusing to [consumers]."

- An attorney testified that the provisions left his clients "glassy-eyed." "Uniformly, potential clients that come to see me are confused by the required disclosures of BAPCPA." The statute "has not only created confusion for potential clients but in some cases has caused irreparable harm to their ability to obtain a fresh start from the bankruptcy process. In these cases, potential clients have chosen to proceed without an attorney, but have failed to fully comply with the Code and as a result, they have had their cases dismissed."

- Another witness testified that BAPCPA requires attorneys "to give inaccurate and misleading disclosures, causing confusion among clients which takes considerable time to clear up and generally disrupts and interferes with [attorneys'] relations with their clients."

- A client testified that the disclosures "confused us and left us indecisive as to which direction to turn."

With respect to Section 526(a)(4) in particular, the evidence showed that there are many "legal and even necessary reasons why a consumer might incur debt 'in contemplation of bankruptcy.'" For example, it typically makes sense for debtors with old or undependable cars to incur secured debt to purchase more reliable vehicles so they have a consistent means of getting to work and earning an income with which to pay their creditors. Similarly, if a client has an unpaid domestic support obligation, an attorney might advise the client to pay that obligation prior to filing a bankruptcy petition, by incurring additional debt through a home equity line of credit, refinancing a home mortgage loan, or a loan from a 401(k) retirement fund or a family member who is aware that the client intends to file for bankruptcy and that the debt may be discharged. An attorney might advise a client lawfully to incur debt to pay taxes in order to avoid interest, penalties, and civil or criminal liability; to pay wage claims of employees in order to avoid criminal prosecution; to pay insurance premiums in order to avoid the devastating effects on debtors and their families from illness, accidents, natural disasters and so on (indeed, property insurance is often required during the pendency of the bankruptcy proceeding, *see* 11 U.S.C. § 1326(a)(4)); to pay for urgent medical care for the debtor or a family member; to pay for home repairs that are needed for health, welfare and safety of family members; to pay for utility service to avoid a cut off of power; or to pay for tuition for school.

Yet the plain language of Section 526(a)(4) forbids attorneys from advising a debtor to incur more debt in contemplation of bankruptcy. The record evidence shows that the real-world impact of Section 526(a)(4) has been to prevent attorneys from offering such advice, even when the reasons to incur debt are lawful, and even when the debt would be beneficial for both debtors and creditors alike. For example, one bankruptcy attorney testified that, although he had advised debtors legitimately to incur more debt prior to filing for bankruptcy "on numerous occasions over the past 25 years," the enactment of BAPCPA had changed his practice. "Since the enactment of BAPCPA, I have had clients that would have benefited from such advice, but I will not provide it in the future as I feel it could violate the provisions of Section 526." "I am chilled in my ability ethically to counsel my clients, to give them the advice that I see fit and proper, and to zealously represent them . . . ."

The attorney explained:

> For example, since the enactment of BAPCPA, I have had many clients ask about accessing 401(k) accounts or home equity loans in order to save to buy a car, pay taxes or satisfy a domestic support claim. . . . They ask me: How should I pay? "Can I borrow from a 401(k)?" "Can I use a line of credit on my house?" Though these actions are lawful, and indeed, these are debts that would not necessarily be affected by bankruptcy, I cannot advise them to take these steps. They need my help,

> my legal advice, but I am no longer able to advise them what to do.

Another attorney described the plight of a married couple considering filing for bankruptcy who needed to replace an unreliable car:

> My understanding is that advice to get a car loan, which in practical terms would be unaffected by the bankruptcy, or to borrow money from friends or relatives, even though the clients intend to pay them back, would be prohibited under the debt relief provisions. Because of the uncertainty as to whether I am a debt relief agency, I did not offer the same advice to these clients, as I would have prior to BAPCPA.

Section 526(a)(4) also has devastating consequences for clients with health problems:

> Another married couple that I recently met is contemplating filing for bankruptcy and trying to figure out how to deal with medical debt not covered by their insurance. The wife's doctor had recently found a lump in her breast and preliminary tests showed that it is probably cancerous and that surgery and extensive medical treatment was required. Because of the cost, the wife was considering foregoing treatment altogether. . . . Because I may be a debt relief agency, I did not feel that I could fully discuss these options with my clients. . . . Here, I had a client who could die if she did not get prompt medical treatment and I couldn't say

> anything to her about it or discuss her financial options.

The testimony showed that Section 526(a)(4) is counterproductive in practice because it prevents advice that could avert bankruptcy in the first place. An attorney explained that refinancing a home – although it incurs additional debt and thus falls within the plain language of Section 526(a)(4)'s prohibition – can often avoid the need for a bankruptcy filing:

> Just prior to BAPCPA, I conducted two closings with clients for the sole purpose of paying off unsecured debt and medical expenses. In both cases, the loans provided enough funds to satisfy the creditors and avoid filing for bankruptcy. . . . Because I believe that these clients would be "assisted persons" or "prospective assisted persons" under Section 526 and because I may be considered a debt relief agency, I would not offer the same advice to similarly situated clients today.

The second clause of Section 526(a)(4) has a further harmful impact on the attorney-client relationship. The second clause restricts advice to 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." The evidence in the record assembled by the Bar Associations reveals that the second clause, if applied to attorneys, would severely interfere with advice regarding payment of the fee. As one attorney described:

> When the issue of attorney's fees comes up I am prohibited from advising the person to pay my fee and from discussing with my clients common ways that people in financial distress pay for legal representation in a bankruptcy, such as through chapter 13 plan payments, borrowing from [a] family member who is aware the debtor will file a bankruptcy, drawing on a home equity line or obtaining a loan from the debtor's 401(k) plan. This creates an uncomfortable and troublesome situation in which I cannot even discuss my retainer or fees in candor with my clients. As a result, many clients remain perplexed about how I can represent them in a bankruptcy proceeding if I can't even answer a fundamental question.

Another attorney testified: "I have had clients that have forgone medicine, medical treatment, and food in order to scrape up the funds to file for bankruptcy. I had a client who[m] I discovered was eating cat food to save money to pay costs and fees." "Because of the restrictions i[n] Section 526(a)(4), I simply don't know what to tell people who are struggling to meet even their basic necessities."

Section 526(a)(4)'s restriction on advice regarding payment of attorney's fees thwarts the interests of both debtors and creditors by leading clients to make financially costly mistakes:

> Operating without this information, some clients may make uninformed, bad choices. For example, in one case, after I

> told a client he could use any lawful means to obtain funds to pay my fee[,] his response was that he would get a cash advance on his credit card. Then I had to explain that this option would not be appropriate, could result in nondischargeable debt and other possible penalties. However, even in light of his statement, I still could not discuss with him the legitimate ways he could obtain funds to pay me.

In the constitutional challenge brought by the Bar Associations in the District of Connecticut, the Government did not even respond to, much less contradict, any of the factual record demonstrating that the challenged provisions of BAPCPA are counterproductive in practical operation. This established record provides ample basis for invalidating the Debt Relief Provisions under any level of First Amendment scrutiny.

## II. SECTION 526(a)(4) IS UNCONSTITUTIONAL IF APPLIED TO ATTORNEYS.

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." Section 526(a)(4) would be unconstitutional if applied to attorneys.

### A. Section 526(a)(4) Triggers Strict Scrutiny.

This Court has opined that "advice or legal assistance" is entitled to full First Amendment protection and that "information respecting . . . statutory rights" is "vital." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544, 546 (2001). Accordingly, 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).

In *Velazquez*, this Court held that a restriction "foreclos[ing]" attorney provision of "advice or legal assistance" to clients amounted to an unconstitutional viewpoint-based restriction on speech. *See* 531 U.S. at 542, 544. The same reasoning applies here.

Section 526(a)(4) is by its terms a content-based restriction on speech that prevents attorneys from communicating certain information based on its message. The statute "single[s] out a particular idea for suppression because it [is] . . . disfavored." *Velazquez*, 531 U.S. at 541. 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 . . . 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).

"Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." *Ysursa v. Pocatello Educ. Ass'n*, 129 S.Ct. 1093, 1098 (2009) (2009) (citation omitted). Such

content-based regulations must be narrowly tailored to a compelling state interest. *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759, 2772 (2008). Section 526(a)(4) could not possibly meet that standard.

### B. Section 526(a)(4) Is Unconstitutional Under Any Level of First Amendment Scrutiny.

The Government urged below that Section 526(a)(4) should be reviewed under *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), in which five Justices upheld the application of the "substantial likelihood of material prejudice" standard to speech in a press conference by an attorney in connection with a pending case. *Id.* at 1075 (opinion of Rehnquist, C.J.). *Gentile*, however, explained that it involved rules "aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire." *Id.* The Debt Relief Agency Provisions do not fall into either category. *Gentile* cannot be understood as extending to all forms of attorney speech, in all contexts, for such an expansive reading would be foreclosed by *Velazquez*.

Moreover, *Gentile* warned that its standard would permit "only narrow and necessary limitations on lawyers' speech." *Id.* In fact, the Court upheld the restrictions in *Gentile* only after observing that they were "narrowly tailored" to a "fundamental" interest. *Id.* at 1075, 1076. Any reliance on *Gentile* by the Government to water down the applicable standard of review would therefore be unavailing.

In any event, it is plain that Section 526(a)(4) cannot survive any level of First Amendment scrutiny

– including *Gentile*. Even intermediate scrutiny cannot be satisfied by "various tidbits," such as "anecdotal evidence" and "educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). Here, the uncontroverted record shows not only that there is no predicate for Section 526(a)(4), but also that its restriction of speech is wholly counterproductive.

### C. The Government's Saving Construction of Section 526(a)(4) Is Flawed.

#### 1. The Government's Construction of Section 526(a)(4) Is Not Textually Supportable.

The Government offers a saving construction that consists of several alternative phrasings. The Government contends that the phrase "to incur more debt in contemplation of" bankruptcy in Section 526(a)(4) should be construed to refer to (i) "advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors," Govt. Pet. Cert. in No. 08-1225, at 15, or (ii) advice regarding "debt incurred with the expectation of using the bankruptcy discharge to avoid full repayment," *id.* at 16, or (iii) advice to "knowingly load up on debt before filing for bankruptcy," *id*. at 9 (internal quotation marks omitted), or (iv) advice "to accumulate eve-of-filing debt that would abuse the bankruptcy system." *Id.* at 10. None of these various formulations has merit.

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. This Court has interpreted such 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, this 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.

Yet advising a client to incur additional debt in such circumstances can hardly be automatically equated with "abuse." In fact, the record assembled by the Bar Associations shows 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 or she intends to file for bankruptcy. *See* Part I, *supra.*

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. Prior to BAPCPA, it was already settled law that a debtor's good faith could be questioned if there were signs of fraud. *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 notes that rules of professional conduct for attorneys commonly prohibit advice to engage in fraudulent or improper conduct, Govt. Cert. Pet. in No. 08-1225, at 21, and it cites an example where ethics rules have already been applied to police abuse of the bankruptcy system. *Id.* (citing *Attorney Grievance Comm'n of Maryland v. Culver*, 381 Md. 241, 275-76 (2004)).

Entirely apart from Section 526(a)(4), BAPCPA 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"). BAPCPA also expands a bankruptcy court's power to dismiss petitions for "abuse." 11 U.S.C. § 707(b)(1), (3), and (6).

### 2. The Government's Construction Creates A New Vice of Vagueness.

Thus, the Government's reinterpretation of Section 526(a)(4) would read it as adding nothing to existing prohibitions. The only change is that the Government's construction would introduce the new vice of vagueness into the statute. The various formulations offered by the Government are not the same. It is unclear whether the Government thinks its standard encompasses abusive conduct generally, whether it is limited to "loading up" on debt prior to filing a petition, or whether it is focused on attempts to manipulate the "means test" adopted by Congress to restrict the availability of Chapter 7 discharges. Govt. Cert. Pet. in No. 08-1225, at 25-27.

The problem is that 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. Indeed, the term "abuse" in new section 707(b)(3) has given rise to an enormous amount of litigation, sometimes about the legal meaning of the term and often fact-sensitive, and there is no suggestion that section 526(a)(4) would be limited to only that type of abuse. BAPCPA's legislative history confirms that, "as recognized by Congress, 'abuse' may be found to exist

based on a review of the totality of circumstances surrounding the filing. No formula, however well considered or crafted, can be flexible enough to encompass the endless combinations of circumstances which debtors bring to the bankruptcy court. While intended to provide a very objective standard, such formulas have proven historically to be the source of much litigation focused on interpreting and defining all of the parameters of the standards." Bankruptcy Reform, Joint Hearing Before House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. 94 (1999) (statement of Judith Greenstone Miller, Commercial Law League of America) (citation omitted).

Such uncertainty is intolerable in the context of the regulation of speech. Statutory ambiguities and variations in the definition of "abuse" render the Government's test too manipulable and uncertain to provide constitutionally adequate guidance to 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 statute is at least as imprecise as many prohibitions on speech held 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) to incorporate a new standard of "abuse" suffers from the same impermissible vagueness.

### 3. The Structure of Section 526 Does Not Support The Government's Argument.

The Government contends that the structure of Section 526 supports its construction. Govt. Cert. Pet. in No. 08-1225, at 17. The Government's argument is incorrect.

First, the Government points to the remedy afforded by Section 526(c), which provides that in the event of a violation of Section 526(a)(4), the debtor may bring suit against the debt relief agency to recover "actual damages," as well as restitution of any fees paid by the debtor. Govt. Cert. Pet. in No. 08-1225, at 18. But Section 526(c) says nothing about "abuse," and in any event the Government's argument confuses the *substantive scope* of Section 526(a)(4) with the question of *remedy*. The two issues are distinct. In addition, the presence of an "actual damages" remedy will often be irrelevant. The attorney will lose her own fees, and will pay the debtor's attorney's fees, regardless of whether there are actual damages.

The Government also cites subsections 526(a)(2), which prohibits debt relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief, and 526(a)(3), which prohibits debt relief agencies from misrepresenting to debtors the costs or benefits of bankruptcy. Govt. Br. 57. But the Government's interpretation would construe Section 526(a)(4) as largely superfluous in light of these prohibitions. In short, the structure of Section 526 refutes rather than sustains the Government's statutory construction.

#### 4. The Government Ignores the Second Half of Section 526.

The Government fails to analyze the second clause of Section 526(a)(4), which prohibits an attorney from 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." Thus, the second half of the section forbids advice on how to pay an attorney, regardless of whether the payment scheme entailed incurring more debt.

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. As discussed in Part I, *supra*, 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.

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 and access to chapter 13. Advice to incur additional debt before bankruptcy is appropriate in almost every chapter 13 case, and chapter 13 cases have constituted 30% to 40% of all bankruptcies since the 2005 Act. 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.

## III. SECTION 528 IS UNCONSTITUTIONAL IF APPLIED TO ATTORNEYS.

This case also presents the constitutionality of Sections 528(a)(4) and (b)(2)(B), which compel the inclusion of the following 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(a)(4), (b)(2)(B). If attorneys were included within the definition of "debt relief agency," then these provisions would be unconstitutional, under any version of First Amendment scrutiny.

### A. Section 528 Fails First Amendment Scrutiny.

The Government contends that review of Section 528 involves "a straightforward application" of this Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). Govt. Opp. Cert. in No. 08-1119, at 15. The Government's contention is wrong. *Zauderer* governs routine disclosure requirements involving uncontroversial information. Section 528 is not a law mandating factually accurate disclosures.

Rather, as construed by the Government, Section 528 forces attorneys to describe themselves as "debt relief agencies" – a newly created category that will puzzle and confound lay clients. Whether or not attorneys fall within the legal definition of "debt relief agency" created by the statute, the relevant question – in the context of 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. Others may infer that the attorney is no different from a bankruptcy petition preparer or anyone else who provides bankruptcy assistance without a law license. Consumers will be mystified by the reference to lawyers as "debt relief agencies." As one attorney

testified in the Bar Associations' litigation, "[t]he required language forces me to make statements that impede my ability to distinguish myself from nonattorneys or government agencies. In fact, some potential clients have expressed concern to me that the designation denotes that I am an agent for the federal government and that information which would otherwise be confidential might somehow be communicated to the government."

*Zauderer* offers no support to such a misguided disclosure requirement. In *Zauderer*, this Court *overturned* a state court reprimand of an attorney for an advertisement that was neither false nor deceptive and sustained the reprimand *only* to the extent the advertisement omitted a disclosure that a client would be liable for costs in the event a contingent-fee lawsuit was unsuccessful. The Court noted the important constitutional protections accorded to attorney print advertising, 471 U.S. at 642, and indicated that restrictions on it could not be predicated on "unsupported assertions." *Id.* at 648. The Court held that disclosure requirements are permissible only to the extent they "are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. The Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment." *Id.* The Court upheld the state's requirement that an attorney disclose a contingent-fee client's potential liability for costs only because it found that the possibility of deception was "self-evident" and that "substantial numbers of potential clients would be so misled" without the state's disclosure rule. *Id*. at 652.

If anything, *Zauderer* demonstrates the constitutional defect in Section 528. Subsequent cases have reaffirmed that the "reasonably related" test of *Zauderer* has real teeth. This Court has cited *Zauderer* for the proposition that the Government is not free "to enact measures short of a total ban to prevent deception or confusion" simply by asserting that its regulations are necessary to address "potentially misleading" advertising. *Ibanez v. Fla. Dept. of Pro. & Bus. Regulation*, 512 U.S. 136, 146 (1994) (striking down, under *Zauderer,* a compelled disclaimer requirement).

Although this Court has examined the constitutionality of factual disclosure requirements as applied to professionals, it has never upheld such provisions in the absence of any evidence that the regulations were reasonably necessary to address a potential problem – a standard that Section 528 cannot meet. In *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), for example, the Court *invalidated* a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions that were collected during the preceding year that were actually given to the charities for whom the fundraisers worked. The Court explained that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id*. at 796-97 (emphasis in original). The Court rejected any distinction between "compelled statements of opinion" and "compelled statements of 'fact'": "either form of

compulsion burdens protected speech." *Id.* at 797-98. *See also Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 100-01 (1990) (plurality opinion) (reversing attorney punishment for "specialist" claim on letterhead because there was "no contention that any potential client or person was actually misled or deceived," nor "any factual finding of actual deception or misunderstanding").

In short, even assuming that *Zauderer* prescribes the proper First Amendment test, the undisputed factual record demonstrates that Section 528 flunks that test. "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).

### B. Section 528, If Applied To Attorneys, Would Extend To Lawyers For Clients Other Than Debtors.

A further constitutional flaw in Sections 528(a)(4) and (b)(2)(B) is that, if applied to attorneys, they could not be limited to lawyers representing debtors. Rather, they would encompass a host of attorneys representing creditors, landlords, and other clients whose legal issues relate to bankruptcy.

The statute applies to "debt relief agencies." A "debt relief agency" includes, with certain exceptions, "any person who provides any bankruptcy assistance to an assisted person" in exchange for a fee. 11 U.S.C. § 101(12A). "Bankruptcy assistance," is turn,

includes "providing information, advice, counsel, document preparation, or filing, or attendance at a creditor's meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." § 101(4A).

Conspicuously absent from the definition of "bankruptcy assistance" is any reference to a debtor, let alone a specific type of representation. Thus, the express language of Sections 101(4A) and 101(12A) would apply to any attorney engaged by a debtor, creditor or any other non-debtor party. Nothing in the definition of "assisted persons" limits that term to persons who file bankruptcy cases: "The term 'assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250." § 101(3). The term's scope is sufficiently broad to encompass not only persons who are currently debtors, but also any person who may potentially become a debtor, creditors of a debtor, and persons who are potential creditors of potential debtors. The definitions of "assisted person" and "debt relief agency" incorporate no less than six terms defined by section 101 or section 110 ("person," "debt," "consumer debt," "bankruptcy petition preparer," "creditor," "affiliate"). If Congress had wanted to limit their reach to debtors, surely it would somewhere have included the term "debtor," which is also defined in section 101.

Hence, nothing in the text of the statute limits its application to those representing debtors contemplating filing for bankruptcy. The statute could apply to attorneys representing a wide range of nondebtor parties, including customers or employees

of a failed business, non-debtor spouses in divorce or family law proceedings, or anyone else who may need representation related to a bankruptcy proceeding. If applied to attorneys, Section 528 would extend to real estate and commercial lawyers. Counsel for a creditors' committee, whose constituents would include individual and class action plaintiffs, might be a "debt relief agency." The definition of "bankruptcy assistance" is broad enough to apply to advice given by counsel for the plaintiffs and for the creditors' committee. Similarly, counsel for a retirees' committee under section 1114 of the Bankruptcy Code represents clients with claims for retirement and healthcare benefits. *See* 11 U.S.C. § 1114. Many, if not most of the retirees, would fit within the definition of an "assisted person" rendering the retirees' committee's counsel a "debt relief agency."

Section 528(b)(2) requires that the mandatory disclosure appear in advertisements pertaining to "assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." Yet where an attorney represents creditors or landlords rather than debtors, the statement that "We help people file for bankruptcy relief" would be affirmatively false. The Government-mandated disclosure would itself constitute deceptive advertising. Neither the Court of Appeals nor the Government has offered any justification for such a pernicious and ill-conceived disclosure rule.

### C. The Government's Justifications for Section 528 Lack Merit.

The Government maintains that Section 528 is supported by "governmental interests in ensuring that those who enter bankruptcy know what it

entails." Govt. Opp. Cert. in No. 08-1119, at 15 (internal quotation marks and citation omitted). But BAPCPA already requires – in a provision that is not at issue here -- that all advertising subject to the statute must state that it relates to "bankruptcy relief under [the Bankruptcy Code]." 11 U.S.C. § 528(a)(3). Advertisements that promote "assistance with respect to" certain consumer debt or credit problems must disclose that the assistance "may involve" filing for bankruptcy relief. 11 U.S.C. § 528(b)(2)(A). Any interest in ensuring that consumers understand that they would be filing for bankruptcy is thus already met.

Similarly, Section 521(a)(1)(B)(iii)(I) (which is not challenged here) requires written notice to debtors regarding chapters 7, 11, 12, and 13 "and the general purpose, benefits, and costs of proceeding under each of those chapters," as well as "the types of services available from credit counseling agencies," as mandated by Section 342(b). This requirement fully addresses the Government's asserted interest in ensuring that consumers have knowledge or appreciation that they are in fact filing for bankruptcy. The Government has put forth no reason that a two-sentence statement describing an attorney as a "debt relief agency" would serve any additional purpose at all. Indeed, it would only contribute to consumer confusion.

The Court of Appeals suggested that nothing in the Bankruptcy Code precludes petitioners and other members of the Bar from identifying themselves as both attorneys and debt relief agencies in their advertisements. But that suggestion ignores the constitutional principles already discussed in Part III-A, *supra*: it is the Government's obligation to

demonstrate that the regulation of speech is properly tailored to an appropriate interest – it is not the speaker's duty to fix the constitutional defects in the statute.

Nor does the Government explain how an attorney could cure the mystifying label of "debt relief agency" by identifying herself as both an "attorney" and an "agency." The mystification would remain. Further, clarification would be difficult and incomplete given the limited space of an advertisement, where there is little extra room and where long explications in fine print are typically ignored. The issue of limited space is real. One attorney in the Bar Associations' litigation testified: "I was forced to make room in my Yellow Pages listing for the required language by eliminating other important information for potential clients."

The Government also cites legislative history, Govt. Opp. Cert. in No. 08-1119, at 3, but those materials do not support the constitutionality of Section 528. One hearing involved testimony by a creditor who was the owner of a home furnishing store. The retailer's testimony was hearsay purportedly based upon his having "talk[ed] to my customers about why they have filed for bankruptcy," and in any event he *made no mention of attorney advertising at all*. Bankruptcy Reform Act of 1999 (Part II), Hearing on H.R. 833 Before House Judiciary Comm., 106th Cong. 123 (1999). The other piece of legislative history cited by the Government raised a concern that lawyers were not advising their clients properly about the negative consequences of filing for bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, Hearing on H.R. 975 before House Judiciary Comm., 108th Cong.,

1st Sess. 55 (2003) (statement asserting that there are attorney ads that "do not even mention bankruptcy—they talk about 'restructuring' your finances. I question whether these aggressive advertisers inform their clients about the serious downsides of filing for bankruptcy"). This concern is fully addressed by other provisions of the Code that are not challenged here, such as Sections 521(a)(1)(B)(iii)(I), 528(a)(3) and (b)(2)(A). The Government does not and cannot explain why a confusing statement that attorneys are "debt relief agencies" adds to any further consumer understanding on the matter.

## IV. THIS COURT SHOULD AVOID SERIOUS CONSTITUTIONAL QUESTIONS BY INTERPRETING THE STATUTE TO EXCLUDE ATTORNEYS FROM THE CATEGORY OF "DEBT RELIEF AGENCIES."

The Government urges the Court to interpret BAPCPA to avoid, rather than invite, constitutional difficulties. On this basis, the Government seeks to rewrite Sections 526(a)(4) and 528 beyond what the statutory text would allow. But there is a far easier cure for the constitutional infirmities in BAPCPA: construing the definition of "debt relief agencies" to exclude attorneys.

The statutory definition of "debt relief agency" enacted in BAPCPA fails to mention the word "attorney" or "lawyer." 11 U.S.C. § 101(12A). By contrast, the definition of "debt relief agency" explicitly includes the defined term "bankruptcy petition preparer." and the definition includes numerous other defined terms. "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 would have been very easy to do so. After all, Congress provided definitions for more than 63 terms, including "accountant," "affiliate," "entity," "security," and "stockbroker." *See* §§ 101(1), (2), (15), (49), (53A).

Although the statute refers to "legal representation" in the definition of "bankruptcy assistance" (11 U.S.C. § 101(4A)), the most plausible conclusion is that the reference was designed not to sweep all attorneys within the scope of the statute, but rather to fortify the consumer protection provisions of BAPCPA by authorizing bankruptcy courts to regulate non-attorney bankruptcy professionals who engage in the unauthorized practice of law. Thus, subsections (b) and (e) of section 110 were amended to strengthen the protections against unauthorized legal representation in a number of ways, including new required disclosures by bankruptcy petition preparers.

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. 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*.

If the plain language left any ambiguity, the question would be resolved by a rule of construction contained in the Act itself. 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 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, and Section 528, by prescribing what their advertisements may ethically say.

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). This 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). There is no such plain statement here.

The most logical conclusion is that "debt relief agencies" should be defined as including bankruptcy petition preparers and excluding attorneys. Such an interpretation would avoid the serious constitutional questions presented by the Debt Relief Agency Provisions.

## CONCLUSION

The judgment below should be affirmed to the extent it held Section 526(a)(4) unconstitutional, and it should be reversed to the extent it held Sections 528(a)(4) and (b)(2) constitutional. Alternatively, the Court should hold that attorneys do not qualify as "debt relief agencies" within the meaning of BAPCPA.

Respectfully submitted.

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