No. 08-1225

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The questions presented are as follows:

1. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.

2. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents, who were appellees in the court of appeals, are Milavetz, Gallop & Milavetz, P.A.; Robert J. Milavetz; Barbara N. Nevin; Ronald Richardson (captioned as John Doe); and Lynette Richardson (captioned as Mary Doe). The district court denied the Doe respondents leave to proceed pseudonymously.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 541 F.3d 785. The opinion of the district court denying the government's motion to dismiss (App., *infra*, 29a-44a) is reported at 355 B.R. 758.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 5, 2008 (App., *infra*, 47a). On February 20, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

April 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 48a-53a.

STATEMENT

This case involves a facial First Amendment challenge to 11 U.S.C. 526(a)(4), a provision of the Bankruptcy Code that regulates paid bankruptcy advice. Congress has established certain minimum standards of professional conduct for bankruptcy attorneys, bankruptcy petition preparers, and other "debt relief agencies" that charge consumer debtors for bankruptcy assistance. Section 526(a)(4) provides, *inter alia*, that debt relief agencies may not advise clients to incur additional debt "in contemplation of" filing a bankruptcy petition. The district court declared Section 526(a)(4) facially invalid under the First Amendment. A divided panel of the court of appeals affirmed. Shortly thereafter, the Fifth Circuit upheld Section 526(a)(4) against a substantially similar challenge and endorsed the reasoning of the dissenting opinion in this case. *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743 (2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009).

1. Congress enacted Section 526(a)(4) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring per-

sonal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*House Report*). Described by the House Report as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," *id.* at 3, the BAPCPA both modified the substantive standards for bankruptcy relief and adopted new measures intended to curb a variety of abusive practices that Congress concluded had come to pervade the bankruptcy system.

After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions and, in some circumstances, jeopardized debtors' ability to obtain a discharge of their debts. For example, Congress heard evidence that a civil enforcement initiative undertaken by the United States Trustee Program had "consistently identified * * * misconduct by attorneys and other professionals" as among the sources of abuse in the bankruptcy system. *House Report* 5 (citation omitted). Congress responded by "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The BAPCPA added or strengthened several regulations on bankruptcy professionals' conduct. Those regulations are intended to protect the clients and prospective clients of bankruptcy professionals, the creditors of clients who do enter bankruptcy, and the bankruptcy system. The regulations require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system.

See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D). Many of the regulations apply equally to bankruptcy attorneys, to bankruptcy petition preparers who are not attorneys, and to all other professionals who provide bankruptcy assistance to consumer debtors for a fee; those professionals are collectively termed "debt relief agenc[ies]." 11 U.S.C. 101(12A).[1]

Section 526 sets out four basic rules of professional conduct for debt relief agencies. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising an assisted person to make statements that are untrue or misleading in seeking bankruptcy relief. Section 526(a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the benefits and risks attendant to filing for bankruptcy. And Section 526(a)(4), the provision held unconstitutional below, states:

> 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.

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[1] The term "bankruptcy assistance" is defined to include providing an "assisted person" with advice, counsel (including "legal representation"), or document preparation or filing assistance "with respect to a case or proceeding under" the Bankruptcy Code. 11 U.S.C. 101(4A). An "assisted person" is "any person whose debts consist primarily of consumer debts" and whose nonexempt property is worth less than a specified, inflation-adjusted amount, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

The principal remedy for violations of Section 526 is a civil action by the debtor to recover the debtor's "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). The statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). The bankruptcy court may also impose an injunction or an "appropriate civil monetary penalty" for intentional or recurring violations, either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Respondents are a law firm, two of the firm's attorneys, and two prospective clients. App., *infra*, 1a-2a.[2] They filed this action against the United States, seeking a declaratory judgment that the attorney respondents are not obligated to comply with several of the BAPCPA's provisions regulating debt relief agencies' professional conduct, including the advice limitation in Section 526(a)(4). Respondents contended that licensed attorneys are not "debt relief agencies" within the meaning of the statute even if they provide bankruptcy-related advice to debtors. They also claimed that, to the extent the statute encompasses licensed attorneys, Section 526(a)(4) and other provisions of the BAPCPA violate the First Amendment. *Id.* at 2a.

The district court denied the government's motion to dismiss, App., *infra*, 29a-44a, and then granted summary judgment for respondents, *id.* at 45a. The court held that Section 526(a)(4) and the other challenged provisions violate the First Amendment. *Id.* at 33a-41a.

[2] The district court denied the prospective clients leave to proceed pseudonymously, App., *infra*, 31a-33a, and they disclosed their identities in an amended complaint, see 05-CV-2626 Docket entry No. 34, at 3 (D. Minn. Dec. 15, 2006).

The court further held that attorneys do not fall within the statutory definition of "debt relief agency." *Id.* at 41a-43a.

3. The government appealed, contending in relevant part that attorneys unambiguously fall within the definition of "debt relief agency" and that the district court's constitutional holding was premised on a misreading of Section 526(a)(4). Gov't C.A. Br. 18-41, 49-54. The government explained that the phrase "in contemplation of" bankruptcy is a term of art with a specialized meaning. Based on that established understanding, the government argued, Section 526(a)(4) should be construed to forbid only advice that a client take on new debt on the eve of bankruptcy with the intent of abusing the bankruptcy system. The government further contended that, to the extent the term "in contemplation of" is ambiguous, the doctrine of constitutional avoidance supports the government's narrow reading of the term, which avoids the overbreadth that the district court perceived.

4. The court of appeals affirmed in part and reversed in part. The court unanimously agreed that attorneys may fall within the definition of "debt relief agency," but held by a divided vote that Section 526(a)(4) violates the First Amendment. App., *infra*, 1a-28a.[3]

a. The court of appeals rejected the government's proposed narrowing construction of Section 526(a)(4). App., *infra*, 12a. The court concluded that, under the only permissible interpretation of the statute's "plain language," Section 526(a)(4) prohibits debt relief agencies from advising consumer clients "to incur *any* additional debt when the assisted person is contemplating

[3] The court unanimously rejected respondents' challenges to certain disclosure requirements imposed by 11 U.S.C. 528. App., *infra*, 15a-21a.

bankruptcy," *ibid.*, and that "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws," *id.* at 13a.

Based on that broad construction, the court of appeals held that Section 526(a)(4) is unconstitutionally overbroad.[4] App., *infra*, 12a-14a. The court explained that advice to take on new debt just before bankruptcy will sometimes be legitimate. As examples, the court observed that "it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments," or to purchase a car to ensure "dependable transportation * * * to and from work." *Id.* at 13a-14a. And the court stated that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. The court concluded that the First Amendment precludes regulation of such legitimate advice, and it noted its agreement with three district courts that had reached the same conclusion. See *id.* at 13a & n.8 (citing, *inter alia*, *Hersh* v. *United States*, 347 B.R. 19, 25 (N.D. Tex. 2006)).

The court of appeals did not identify the precise constitutional standard under which respondents' challenge should be evaluated. Respondents had argued that

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[4] The court of appeals did not limit its holding to the plaintiffs before it, but stated more generally that the statute was "unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies." App., *infra*, 12a; see *id.* at 10a n.7, 15a, 21a; see also *id.* at 23a n.13 (Colloton, J., concurring in part and dissenting in part). Nothing in the court of appeals' statutory and First Amendment analysis, moreover, suggests that the court would reach a different conclusion regarding the statute's application to non-attorney professionals who provide bankruptcy advice.

strict scrutiny should apply, while the government had contended that Section 526(a)(4) is a reasonable regulation of attorneys' professional conduct that is to be reviewed more deferentially under the standard announced in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). The court acknowledged that the government had a "legitimate interest" in prohibiting advice that would assist debtors in abusing the bankruptcy system by accumulating more debt in contemplation of bankruptcy. App., *infra*, 12a. But the court held that, on its reading of Section 526(a)(4), the statute was insufficiently connected to that legitimate interest and therefore was unconstitutional under either strict scrutiny or the *Gentile* standard. *Id.* at 12a-13a.

b. Judge Colloton dissented in relevant part. He explained that, in his view, "[t]he text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction," under which "the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system." App., *infra*, 25a. He would have held that the statute, so construed, is constitutional. See *id.* at 22a, 25a, 28a.

First, Judge Colloton observed that the phrase "in contemplation of bankruptcy" is a term of art that "has been construed * * * to mean actions taken with the intent to abuse the protections of the bankruptcy system." App., *infra*, 25a; see *id.* at 25a-26a (collecting authorities). Second, Judge Colloton pointed out that the remedies for a violation of Section 526(a)(4) "emphasize actual damages," and he reasoned that a debtor who follows his attorney's bankruptcy advice is unlikely to be harmed as a result unless he is induced to file "an abusive bankruptcy petition, where the debtor may suffer

damages if the petition is dismissed as abusive." *Id.* at 27a (citing 11 U.S.C. 707(b)(1)). Third, Judge Colloton pointed to legislative history that showed Congress's desire to address "abusive" practices by bankruptcy professionals and by debtors who "knowingly load up" on debt before filing for bankruptcy. *Id.* at 27a-28a (quoting *House Report* 5, 15). The dissent concluded: "Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that [respondents] say[] is absurd, that the [government] says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." *Id.* at 28a.

5. The court of appeals denied rehearing en banc by a vote of 6-5. See App., *infra*, 47a.

6. Thirteen days later, the Fifth Circuit upheld Section 526(a)(4) against a substantially similar First Amendment challenge, reversing one of the district court opinions on which the court of appeals in this case relied. *Hersh*, 553 F.3d at 752-764; see App., *infra*, 13a n.8. The court endorsed the reasoning and the authorities in Judge Colloton's dissenting opinion. See 553 F.3d at 750 n.6, 759 n.17.

7. Respondents have filed their own petition for a writ of certiorari, which seeks review of the court of appeals' holding that attorneys may be "debt relief agencies" for purposes of Section 526, as well as its holding (see note 3, *supra*) that Section 528's disclosure requirements are valid. See Pet. at ii, *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, No. 08-1119 (filed Mar. 5, 2009). The government will address that petition in a separate response.

REASONS FOR GRANTING THE PETITION

A divided panel of the court of appeals has invalidated an Act of Congress, even though the statute can constitutionally be applied to a significant range of conduct. The court failed to give due regard to a narrowing construction that eliminates the perceived constitutional difficulty, and its ruling squarely conflicts with a Fifth Circuit decision that adopted the constitutionally unproblematic construction that the court rejected in this case. The Eighth Circuit's decision also threatens to undermine the important reforms that Congress crafted, after years of study, to reduce the abuse of the bankruptcy system, including abuse encouraged by lawyers. This Court's review is warranted to prevent those harms, to resolve the circuit conflict, and to effectuate Congress's efforts to craft a federal remedy for the provision of abusive bankruptcy advice.

I. THE CIRCUITS ARE IN CONFLICT OVER THE CONSTITUTIONALITY OF AN ACT OF CONGRESS

The court of appeals' decision in this case squarely conflicts with the Fifth Circuit's resolution of the same statutory and constitutional issues as are presented here. As the Fifth Circuit has recognized, Section 526(a)(4) imposes a modest requirement to refrain from urging a debtor to accumulate eve-of-filing debt that would abuse the bankruptcy system. The court of appeals here imposed its own, much more expansive construction and then struck down the statute, so interpreted, as overbroad. As a result, attorneys in the Eighth Circuit who qualify as "debt relief agencies" are free to urge even the most abusive practices without being subject to the federal sanctions and client-protection measures set out in Section 526(a)(4) and (c).

A. In *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009), a bankruptcy attorney challenged Section 526(a)(4) on grounds substantially similar to those respondents raised here. Hersh contended that Section 526(a)(4) unambiguously prohibits attorneys from advising clients who are considering bankruptcy to incur *any* additional debt, and that Section 526(a)(4) so construed is unconstitutionally overbroad. *Id.* at 747 & n.3, 754, 762. A unanimous Fifth Circuit panel rejected both of these arguments. *Id.* at 752-764. The Fifth Circuit acknowledged the court of appeals' contrary holding in this case but stated that it "agree[d] with Judge Colloton's dissenting opinion." *Id.* at 750 n.6.[5]

1. The Fifth Circuit in *Hersh* agreed with the government that Section 526(a)(4) can be construed in a way that focuses directly on Congress's acknowledged purpose in enacting it: preventing attorneys from encouraging their clients to "load up" on debt to abuse the bankruptcy system. 553 F.3d at 758-761. The court noted that the term "in contemplation of bankruptcy" is often used as a term of art that connotes an intent to abuse the bankruptcy system. *Id.* at 758 (citing *Black's Law Dictionary* 336 (8th ed. 2004) (*Black's Law Dictionary*)). Indeed, a few years before Congress enacted the BAPCPA, the Fifth Circuit itself had described the abusive practice of "incurring card debt in contemplation of bankruptcy" with the term "loading up." *Id.* at

[5] Like the respondents in this case, Hersh also argued that attorneys cannot be "debt relief agencies" subject to the restrictions imposed by Section 526(a)(4). See 553 F.3d at 751-752. The Fifth Circuit rejected that argument, *id.* at 752, as the court of appeals unanimously did here, see App., *infra*, 3a-10a.

758-759 (quoting *AT&T Universal Card Servs.* v. *Mercer (In re Mercer),* 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc)). The Fifth Circuit in *Hersh* noted that Judge Colloton had adopted the same reasoning in this case, and it cited Judge Colloton's dissenting opinion for additional supporting sources. *Id.* at 759 & n.17.

The court in *Hersh* also explained that the structure of Section 526 supported the specialized interpretation described above. See 553 F.3d at 759-760, 761. Like Judge Colloton, see App., *infra*, 26a-27a, the Fifth Circuit pointed out that violations of Section 526 may be remedied by awarding the debtor actual damages, which strongly suggests that the practices banned are practices that would actually harm the debtor. See 553 F.3d at 760. And the court noted that Section 526(a)(4) was enacted alongside, and placed together with, "three other rules of professional conduct designed to protect debtors." *Id.* at 761 (citing 11 U.S.C. 526(a)(1)-(3)).

The court in *Hersh* agreed with Judge Colloton that the legislative history and purpose of the BAPCPA supported its construction of Section 526(a)(4). It explained that numerous elements of the BAPCPA were demonstrably "intended to curb abuse," which the court took as further evidence that "as part of this plan, section 526(a)(4) is only meant to curb abusive practices." 553 F.3d at 761; accord App., *infra*, 26a-27a (Colloton, J., concurring in part and dissenting in part).

2. The Fifth Circuit further explained that, even if its reading of Section 526(a)(4) were not the most natural interpretation of the statute, that reading would be compelled by the doctrine of constitutional avoidance. The court identified numerous cases in which this Court had adopted an arguably countertextual construction in the interest of constitutional avoidance, including *Boos*

v. *Barry*, 485 U.S. 312 (1988), on which Judge Colloton had relied significantly, see App., *infra*, 23a-24a. See 553 F.3d at 756-758. As the Fifth Circuit noted, the avoidance doctrine may even require giving "[a] restrictive meaning [to] what appear to be plain words." *Id.* at 757 (quoting *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957)) (first brackets in original).

The Fifth Circuit acknowledged Hersh's argument, identical to that advanced by respondents and endorsed by the court below, that the text of Section 526(a)(4) is so unambiguous that no narrowing construction is possible. See 553 F.3d at 754. The court concluded, however, that "the language of [the statute] can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system." *Id.* at 761; see *id.* at 756. The court explained that, on that reading, "[S]ection 526(a)(4) has no application to good faith advice to engage in conduct that is consistent with a debtor's interest and does not abuse or improperly manipulate the bankruptcy system." *Id.* at 761.

3. The Fifth Circuit concluded that, if Section 526(a)(4) is construed in this manner, it is not facially unconstitutional. The court explained that a statute is not unconstitutionally overbroad unless the "overbreadth is substantial in relation to the statute's legitimate reach." 553 F.3d at 762 (citing *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008)). Hersh did not dispute that Congress could validly regulate the sort of advice to engage in abusive conduct that all parties agreed was covered by Section 526(a)(4). See *id.* at 754-

756.[6] And under the court's narrowing construction, Section 526(a)(4) did not apply to *any* of Hersh's examples of speech that could not constitutionally be prohibited. *Id.* at 763. Accordingly, the Fifth Circuit found it "clear that the potential for the statute to prohibit protected speech is not by any means *substantial* in relation to the statute's legitimate reach." *Id.* at 764.

B. The Fifth Circuit's decision cannot be reconciled with the decision below. The Fifth Circuit adopted the government's proposed construction of Section 526(a)(4), whereas the court below found that construction to be foreclosed by the statutory text. As a result of those divergent statutory interpretations, the Fifth Circuit upheld the statute against a First Amendment challenge, while the court below invalidated Section 526(a)(4) as an unconstitutional infringement on the right of attorneys to provide non-abusive bankruptcy-related advice. And the Eighth Circuit, by a closely divided vote, has declined to reconsider its position en banc. App., *infra*, 47a.

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[6] The Fifth Circuit in *Hersh* noted various contexts in which the First Amendment permits Congress and the States to regulate that sort of unethical attorney advice. For instance, the First Amendment does not protect speech proposing an illegal transaction, and abusive accumulation of debt may amount to fraud or theft. See 553 F.3d at 755 (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982)). Further, the government has a sufficiently important interest in the judicial process, including the bankruptcy system, to justify regulation of attorneys' unethical conduct affecting that process. See *id.* at 755-756 (citing *Gentile* v. *State Bar*, 501 U.S. 1030 (1991), and Model Rules of Professional Conduct Rule 1.2(d)). The court in *Hersh* explained that the abusive accumulation of debt in contemplation of bankruptcy "is akin to committing a fraudulent act," and therefore "Congress can constitutionally prevent attorneys or other debt relief agencies from advising their clients to [commit such an act]." *Id.* at 756.

The question presented here is a recurring one, as substantially similar challenges to Section 526(a)(4) are also pending in the Second and Ninth Circuits.[7] Review by this Court is warranted to resolve the division in the courts of appeals over the constitutionality of this important federal statute.

II. THE COURT OF APPEALS ERRED IN HOLDING SECTION 526(a)(4) UNCONSTITUTIONALLY OVERBROAD

The court of appeals' decision in this case is erroneous. The court below acknowledged that Congress had a "legitimate interest" in restricting bankruptcy professionals from peddling abusive strategies to individuals who are facing bankruptcy. App., *infra*, 12a. The government construes the statute to further that interest directly, by prohibiting only advice that would lead to intentional abuse of the bankruptcy system.

The court of appeals did not dispute that Congress could enact such a prohibition without violating the First Amendment. Rather, the court held that Section 526(a)(4) *unambiguously* sweeps in other attorney advice, unrelated to abuse of the bankruptcy system, and that the statute is therefore fatally overbroad. Both the statutory premise and the constitutional conclusion are flawed. As the text, structure, and purposes of Section 526(a)(4) make clear, Congress forbade only advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors. That prohibition is consistent with the First Amendment.

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[7] See *Zelotes* v. *Adams*, No. 07-1853 (2d Cir. argued Oct. 10, 2008); *Connecticut Bar Ass'n* v. *United States*, No. 08-5901 (2d Cir.) (argument not yet scheduled); *Olsen* v. *Holder*, No. 07-35616 (9th Cir.) (argument not yet scheduled).

A. The court of appeals rejected the government's interpretation of Section 526(a)(4) in a single sentence, asserting that the statute's "plain language" precludes any construction other than the unconstitutionally overbroad one. App., *infra*, 12a. The court did not identify any statutory term that unambiguously compelled such a reading. Rather, without quoting the statutory text, the court stated that "[Section] 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Ibid.* But the statute does not use the temporal phrase "*when* the assisted person is contemplating bankruptcy." Rather, the statute forbids advising the client "to incur more debt *in contemplation of* [bankruptcy]." 11 U.S.C. 526(a)(4) (emphasis added). The difference is significant, as Judge Colloton explained.

The statute's reference to debt incurred "in contemplation of [bankruptcy]" is reasonably read to mean debt incurred with the expectation of using the bankruptcy discharge to avoid full repayment. As Judge Colloton observed, "the phrase 'in contemplation of' has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system." App., *infra*, 25a; see, *e.g.*, *Black's Law Dictionary* 336 (defining "contemplation of bankruptcy" as "[t]he thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*") (emphasis added). Indeed, more than a century of "American and English authorities construing the bankruptcy laws also support the proposition that the words 'in con-

templation of' may be understood to require an intent to abuse the bankruptcy laws." App., *infra*, 25a (Colloton, J., concurring in part and dissenting in part); see *id.* at 25a-26a (citing cases); accord *Hersh*, 553 F.3d at 758-760. Congress's use of an established term of art may reasonably be understood to incorporate the same meaning that those authorities have given it. See, *e.g.*, *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2605 (2007).

The Eighth Circuit did not rebut the dissent's understanding of prior judicial decisions construing the phrase "in contemplation of" in the bankruptcy context. Nor did the court identify any reason to believe that Congress, in enacting Section 526(a)(4), intended to depart from that prior understanding. Indeed, the court did not respond to the dissent's analysis at all; it simply asserted without explanation that "the plain language of the statute does not permit this narrow interpretation." App., *infra*, 12a.

The statutory context and structure support the reading of the term "in contemplation of" that was endorsed by the dissent below and adopted by the Fifth Circuit in *Hersh*. See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). The other three subdivisions of Section 526(a) unambiguously establish rules of professional conduct designed to protect debtors from abusive practices by the attorneys and other debt relief agencies who advise them. See 11 U.S.C. 526(a)(1) (prohibiting debt relief agencies from failing to perform promised services); 11 U.S.C. 526(a)(2) (prohibiting debt

relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief); 11 U.S.C. 526(a)(3) (prohibiting debt relief agencies from misrepresenting to debtors the risks or benefits of bankruptcy). Section 526(a)(4)'s placement alongside these other restrictions indicates that it is likewise properly read to target unethical communications by bankruptcy professionals—not, as the court below held, all manner of lawful and ethical attorney advice. See *Hersh*, 553 F.3d at 761.

Furthermore, the principal remedy for violation of each of Section 526's rules of professional conduct is a suit against the attorney (or other debt relief agency) to recover the debtor's "actual damages," as well as restitution of any fees paid by the debtor. 11 U.S.C. 526(c)(2). Congress's emphasis on the debtor's "actual damages" presupposes that the debtor has been injured by the attorney's conduct. As Judge Colloton noted, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." App., *infra*, 27a; accord *Hersh*, 553 F.3d at 759-760.

"In enacting the BAPCPA, Congress was attempting to address common abuses of the bankruptcy system. Congress concluded that there was a pervasive abuse * * * by debtors who incur debt before bankruptcy with the intention of having their debt discharged." *Hersh*, 553 F.3d at 760 (citing *House Report* 15). Construing Section 526(a)(4) in a way that focuses precisely on that goal is perfectly consistent with the statutory text, structure, and purpose.

B. Even if the court of appeals' broad reading of the statute were the most natural one, the court erred in adopting an interpretation that resulted in invalidating

the statute when a plausible alternative reading is constitutionally unproblematic. Particularly in the context of a First Amendment overbreadth challenge, where the plaintiff's demand is to declare a statute invalid even though it may be legitimately applied in some or many circumstances, the federal courts have not only "the power to adopt narrowing constructions," but "the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos*, 485 U.S. at 330-331; see also, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). Indeed, respondents themselves urged the court of appeals to construe another provision, the term "debt relief agency," to avoid the same constitutional overbreadth objection. *E.g.*, Resp. C.A. Br. 17 ("A statute should be interpreted so as to avoid constitutional issues."). The term "debt relief agency," however, has a statutory definition that forecloses respondents' proposed construction. See 11 U.S.C. 101(12A) (defining "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for * * * payment"); App., *infra*, 6a-10a. By contrast, the phrase "in contemplation of [bankruptcy]" is not defined and can reasonably be read to avoid constitutional problems, particularly in light of its status as a term of art in the bankruptcy context.

This Court has repeatedly applied saving constructions to avoid constitutional difficulties, even without the firm grounding in statutory text and context that the Fifth Circuit's reading of Section 526(a)(4) has. For instance, in *Boos*, this Court considered a First Amendment overbreadth challenge to a federal statute that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police." 485

U.S. at 329. The Court acknowledged that "[s]tanding alone, this text is problematic * * * because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330. Nevertheless, in accordance with the "duty to avoid constitutional difficulties" when a narrowing "construction is fairly possible," the Court construed the statute to apply "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'"—a limitation that was unstated in the statute but ensured the validity of the Act. *Id.* at 330-331 (citation omitted). See also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-578 (1988).

Federal courts construe federal statutes to avoid, not invite, constitutional difficulties. *E.g.*, *Boos*, 485 U.S. at 331. The court of appeals disregarded that important principle when it invalidated Section 526(a)(4) without adverting to the doctrine of constitutional avoidance or explaining why its interpretation of the disputed provision was the only plausible reading.

C. Even if the court of appeals' construction were so clearly required by the text of the statute as to overcome the avoidance doctrine, the court's overbreadth analysis would still be deficient. Because "invalidating a law that in some of its applications is perfectly constitutional * * * has obvious harmful effects," this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. The court of appeals failed to adhere to that principle when it struck down Section 526(a)(4) without giving proper weight to the statute's many legitimate applications.

Advice to engage in conduct that amounts to an abuse of the bankruptcy system is plainly subject to congressional regulation. Congress, the state legislatures and state bars, and the federal and state courts routinely require attorneys to abide by professional standards like Section 526(a)(4). Indeed, the conduct that Section 526(a)(4) targets falls squarely within the scope of Rule 1.2(d) of the Model Rules of Professional Conduct, which prohibits attorneys from advising their clients to engage in fraud. See, *e.g.*, *Attorney Grievance Comm'n* v. *Culver*, 849 A.2d 423, 443-444 (Md. 2004) (disciplining an attorney for advising and assisting a client to load up on debt before declaring bankruptcy). Those requirements serve valid and important governmental interests, both in protecting clients from unethical advice and in protecting the judicial process and other litigants from the harm that ensues when clients follow that unethical advice. As the Fifth Circuit noted, the constitutionality of Rule 1.2(d) has never been in doubt. *Hersh*, 553 F.3d at 756. Section 526(a)(4) regulates the very same conduct.

Section 526(a)(4) therefore may validly be applied to a significant category of unethical attorney advice. Against that legitimate sweep, the court below hypothesized two instances of legitimate, ethical advice to accumulate new debt on the eve of bankruptcy: buying a car and refinancing a mortgage.[8] App., *infra*, 13a-14a. The court added that "[f]actual scenarios other than these

[8] The court assumed that merely refinancing an existing mortgage—that is, exchanging one loan for another with the same principal balance but a different interest rate, repayment period, or other terms—would constitute incurring "more debt" within the meaning of the statute. See App., *infra*, 13a. It is not at all clear that this understanding is correct.

few hypothetical situations no doubt exist." *Id.* at 14a. On that slim and concededly "hypothetical" basis, the majority held the statute unconstitutional as applied to all attorney conduct, including the abusive practices at which Section 526(a)(4) was directly aimed.

As Judge Colloton correctly pointed out, "a facial challenge resting on a 'few hypothetical situations' * * * is unlikely to justify invalidating a statute in *all* of its applications, because 'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" App., *infra*, 24a (quoting *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). The court of appeals here did no more than posit "some impermissible applications" of Section 526(a)(4). *Taxpayers for Vincent*, 466 U.S. at 800. The court did note this Court's admonition that First Amendment challenges of this sort require *substantial* overbreadth compared to the statute's valid coverage. App., *infra*, 15a n.10. But the court merely asserted that "[Section] 526(a)(4) is substantially overbroad," *id.* at 15a, without ever explaining how its "few hypothetical situations" supported that conclusion.

III. THE QUESTION PRESENTED IS IMPORTANT

As this Court has repeatedly observed, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The federal statute at issue here serves an important function in the administration of the Nation's bankruptcy laws, and the circuit conflict over the validity of that statute warrants this Court's review.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama* v. *Citizens Bank*, 549 U.S. 365, 367 (2007) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991)). Section 526(a)(4) is an important part of Congress's effort to preserve that focus on the "honest but unfortunate debtor" by curbing abuse of the bankruptcy system, including abuse that comes at the suggestion of a bankruptcy professional. By invalidating Section 526(a)(4), the court of appeals has frustrated that effort, and the conflict between the decision below and the Fifth Circuit's decision in *Hersh* also undermines Congress's decision "[t]o establish * * * *uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, Cl. 4 (emphasis added); cf., *e.g.*, *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 465-466, 471-472 (1982) (discussing the importance the Framers placed on uniform bankruptcy rules).

A. Congress has long been aware that the relief afforded by the bankruptcy laws creates a perverse incentive for debtors to amass additional debt in contemplation of obtaining a discharge. Congress has recognized that such conduct poses a fundamental threat to the Code's twin goals of affording debtors a fresh start while providing an orderly and equitable system of resolving creditors' claims. For example, when Congress enacted 11 U.S.C. 523(a)(2)(C), which creates a presumption that certain eve-of-bankruptcy debts are not dischargeable, the accompanying Senate Report emphasized that "[e]xcessive debts incurred within a short period prior to the filing of the petition present a special problem: that of 'loading up' in contemplation of bankruptcy." S. Rep. No. 65, 98th Cong., 1st Sess. 9 (1983). The report

explained that "[a] debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property," noting that "[i]n many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent." *Ibid.* As the report concluded, "[n]ot only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation. During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts." *Ibid.* As early as 1973, Congress was informed that "the most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge." *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. I, at 11 (1973).

Congress has accordingly enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections. For instance, it authorized bankruptcy courts to dismiss a petition for "substantial abuse," 11 U.S.C. 707(b) (2000), which could include the debtor's purposeful accumulation of debt in contemplation of bankruptcy. *E.g.*, *Price* v. *United States Tr. (In re Price)*, 353 F.3d 1135, 1139-1140 (9th Cir. 2004). It precluded debtors from obtaining a discharge for debts obtained fraudulently. 11 U.S.C. 523(a)(2)(A). And it provided that certain categories of debts are presumed to be fraudulent and nondischargeable if they are in-

curred on the eve of bankruptcy. 11 U.S.C. 523(a)(2)(C) (2000).

B. When Congress enacted the BAPCPA in 2005, the House Report expressed concern that those earlier measures had not adequately restricted the ability of debtors to "knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." *House Report* 15. Accordingly, Congress strengthened each of the aforementioned protections against bankruptcy abuse. See, *e.g.*, BAPCPA § 310, 119 Stat. 84 (11 U.S.C. 523(a)(2)(C)). Most fundamentally, Congress greatly expanded the bankruptcy courts' authority to dismiss petitions for "abuse" of the bankruptcy system, including in cases in which debtors purposefully incur additional debt in contemplation of filing a petition. See BAPCPA § 102, 119 Stat. 27; *House Report* 48-49. Congress permitted dismissal of a petition based on a less stringent showing of abuse; authorized "any party in interest" to file a motion to dismiss for abuse (except in some cases involving lower-income debtors); repealed the pre-existing presumption in favor of granting the relief sought by the debtor; and specified that bankruptcy courts must consider, in determining whether a petition should be dismissed for abuse when no presumption applies, "whether the debtor filed the petition in bad faith" and whether "the totality of the circumstances * * * of the debtor's financial situation demonstrates abuse." 11 U.S.C. 707(b)(1), (3) and (6); see *House Report* 49.

Congress also made another significant change, which heightened the importance of the professional-conduct regulations at issue in this case. The "principal consumer bankruptcy reform" in the 2005 legislation was the adoption of a "means testing" mechanism in-

tended to ensure that debtors who have the ability to repay at least some of their debts will do so, through a structured repayment plan entered under Chapter 13 of the Bankruptcy Code, instead of obtaining a complete discharge under Chapter 7. *House Report* 48; see *id.* at 2 (describing means testing as the "heart" of the 2005 Act's reform provisions). See generally 11 U.S.C. 109(b) and (e) (eligibility for Chapter 7 and Chapter 13).

Under the means test, a debtor's petition for complete relief under Chapter 7 is presumed to be abusive if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See 11 U.S.C. 707(b)(2)(A)(i) and (iii). If the court finds a petition to be abusive under this standard, it can dismiss the debtor's case or, with the debtor's consent, convert it to Chapter 13, which involves a repayment plan. 11 U.S.C. 707(b)(1). The means test, however, exacerbates the incentive for debtors to manipulate the system by "loading up" on certain debt in contemplation of filing, because payments on secured debts that qualify under Section 707(b)(2)(A)(iii) reduce the amount of the debtor's monthly income counted in the means test, and may therefore allow the debtor to remain eligible for a complete and immediate discharge of unsecured debt under Chapter 7.

C. Congress was accordingly concerned that the introduction of the means test would give attorneys an incentive to counsel their clients to take on additional debt before filing for bankruptcy. As one bankruptcy judge testified, "[t]he more debt that is incurred prior to filing, the more likely the debtor will qualify for chapter 7." *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin-*

istrative Law of the House Comm. on the Judiciary, 105th Cong., 2d Sess. Pt. I, at 25 (1998) (statement of Judge Randall J. Newsome). Thus, the bankruptcy judge testified that, "[p]erverse as it may seem, I can envision debtor's counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford (at least until the bankruptcy is filed) as a way of increasing their deductions under [the means test]." *Ibid.*; see also *B9ankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. Pt. II, at 30 (1999) (statement of Judge William Brown). And as discussed above, see p. 3, *supra*, Congress credited evidence compiled by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals [and] problems associated with bankruptcy petition preparers." *House Report* 5 (quoting Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: The Civil Enforcement Initiative,* Am. Bankr. Inst. J., Sept. 2002, at 12).

Section 526(a)(4) is an important component of Congress's effort to prevent such efforts to circumvent of the means test. If a debtor is made financially worse off by following his attorney's unethical advice to incur more debt in an attempt to take advantage of the bankruptcy system, Section 526 provides him a remedy against the attorney, including both a refund of attorney's fees and actual damages. Section 526 also ensures that attorneys will be subject to a concrete sanction for giving such unethical advice; while state bars have a significant role to play in disciplining attorneys for un-

ethical conduct, the additional remedy provided by Section 526 is both more uniform and more certain. Section 526 also facilitates the client's cooperation through its fee-shifting provision, 11 U.S.C. 526(c)(2), whereas a state bar must rely on public-spirited complainants.

Section 526(a)(4) thus serves both a compensatory and a deterrent function within Congress's carefully designed framework for reducing well-documented ways of abusing the bankruptcy system. The court of appeals' decision invalidating that important tool raises an important question that is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2405

MILAVETZ, GALLOP & MILAVETZ, P.A.;
ROBERT J. MILAVETZ; BARBARA N. NEVIN;
JOHN DOE; MARY DOE, APPELLEES

v.

UNITED STATES OF AMERICA, APPELLANT

COMMERCIAL LAW LEAGUE OF AMERICA,
AMICUS ON BEHALF OF APPELLEE

Submitted: Mar. 11, 2008
Filed: Sept. 4, 2008
(Corrected Sept. 23, 2008)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

Before: BYE, SMITH, and COLLOTON, Circuit Judges.

SMITH, Circuit Judge.

Milavetz, Gallop & Milavetz, P.A., a law firm that practices bankruptcy law, the firm's president, a bank-

ruptcy attorney within the firm, and two clients[1] who sought bankruptcy advice from the firm brought suit against the United States seeking a declaratory judgment that certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)—11 U.S.C. §§ 526(a)(4) and 528(a)(4) and (b)(2)—did not apply to attorneys and law firms and are unconstitutional as applied to attorneys. The district court granted summary judgment to the plaintiffs and issued an order declaring that: (1) attorneys in the District of Minnesota were excluded from the definition of a "debt relief agency" as defined by BAPCPA; and (2) the challenged provisions were unconstitutional as applied to attorneys in the District of Minnesota. We affirm in part and reverse in part.

I. *Background*

On April 20, 2005, BAPCPA was signed into law, amending and adding multiple sections of the Bankruptcy Code ("the Code"). While some of these amendments became effective immediately, the vast majority became effective on October 17, 2005. *See* Pub. L. No. 109-8, § 1501(a), 119 Stat. 23 (2005) ("Except as otherwise provided in this Act, this Act and the amendments made by this act shall take effect 180 days after the date of enactment of this Act").

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[1] The client-plaintiffs sought prebankruptcy advice regarding the incurrence of additional debt prior to filing bankruptcy. The Bankruptcy Code precludes a debt relief agency from advising an assisted person from incurring additional debt in contemplation of bankruptcy. 11 U.S.C. § 526(a)(4). Thus, these client-plaintiffs are appearing on behalf of themselves and all others similarly situated who desire to exercise their First Amendment rights with attorneys regarding bankruptcy information.

One BAPCPA amendment added a new term, "debt relief agency," which is defined in § 101(12A) of the Code. 11 U.S.C. § 101(12A).[2] The amended Code restricts some actions of debt relief agencies, while requiring them to do others. *See* 11 U.S.C. § 526 ("Restrictions on debt relief agencies"); 11 U.S.C. § 528 ("Requirements for debt relief agencies"). For example, § 526(a)(4) bars a debt relief agency from advising a client "to incur more debt in contemplation" of a bankruptcy filing, 11 U.S.C. § 526(a)(4), while §§ 528(a)(4) and (b)(2) require debt relief agencies to include a disclosure in their bankruptcy-related advertisements directed to the general public declaring: "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). The plaintiffs sought alternative remedies. First, plaintiffs requested a declaratory judgment that attorneys did not fall within the definition of "debt relief agency." If the court determined that attorneys fell within the definition of debt relief agency, they challenged the constitutionality of §§ 526(a)(4) and 528(a)(4) and (b)(2), as applied to attorneys.

II. *Discussion*

A. *Debt Relief Agencies*

Initially, we address whether attorneys fall within the Code's definition of debt relief agencies. If they do not, we will have no need to address the constitutionality of §§ 526(a)(4) and 528(a)(4) and (b)(2), which only apply to debt relief agencies. *See Holtan v. Black*, 838 F.2d

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[2] Prior to BAPCPA, the term "debt relief agency" did not exist in the Code.

984, 986 n.3 (8th Cir. 1988) ("Federal courts must avoid passing upon constitutional questions unless they are essential to the disposition of the issues before them.") (citing *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of necessity of deciding them")).

> The term "debt relief agency" means *any person* who provides *any bankruptcy assistance* to an *assisted person* in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—
>
> > (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
> >
> > (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
> >
> > (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
> >
> > (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

> (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

11 U.S.C. § 101(12A) (emphasis added).

Further, the Code defines the term "bankruptcy assistance" to mean:

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, *advice, counsel*, document preparation, or filing, or attendance at a creditors' 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.

Id. at § 101(4A) (emphasis added).

Additionally, the Code defines the term "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250."[3] *Id.* at § 101(3).

The plaintiffs argue that attorneys are not "debt relief agencies" because the definition of debt relief agencies makes no direct reference to attorneys, even though "attorney" is a defined term in the Code, *id.* at § 101(4),[4] but does include the term "bankruptcy petition pre-

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[3] When this suit was commenced, the dollar amount in § 101(3) was $150,000. Subsequently, on April 1, 2007, the amount was adjusted pursuant to 11 U.S.C. § 104. The change, however, is inconsequential for purposes of this case.

[4] "The term 'attorney' means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4). This definition makes no reference to "debt relief agencies" or to subsection (12A).

parer" which, by definition, excludes debtor's attorneys and their staff. *See* 11 U.S.C. § 110(a)(1).[5] Plaintiffs contend that the omission of any reference to attorneys or lawyers while specifically including bankruptcy petition preparers shows Congress's intent to exclude attorneys from the definition of debt relief agencies. Because the plaintiffs contend that constitutionality issues arise in §§ 526(a)(4) and 528(a)(4) and (b)(2) if attorneys are debt relief agencies, they assert that the doctrine of constitutional avoidance should be used to interpret "debt relief agency" to exclude attorneys and thus avoid the potential constitutional issues.

Conversely, the government argues that attorneys are debt relief agencies because the broadly worded definition of the term plainly includes attorneys, *see* 11 U.S.C. § 101(12A) (defining "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment"), and providing legal representation is included in definition of bankruptcy assistance. *See id*. at 101(4A) ("bankruptcy assistance means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing . . . advice, counsel, . . . or legal representation with respect to a case or proceeding under this title").

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[5] "'[B]ankruptcy petition preparer' means a person, *other than an attorney for the debtor or an employee of such attorney* under the direct supervision of such attorney, who prepares for compensation a document for filing [by the debtor in connection with his bankruptcy case]." 11 U.S.C. § 110(a)(1) (emphasis added); *see also id*. at § 110(a)(2) (defining "document for filing" as used in § 110(a)(1)).

Whether attorneys fall within the Code's definition of debt relief agencies is an issue of first impression among the Courts of Appeals. Although the plain language of the definition appears to include bankruptcy attorneys and does not appear to be ambiguous, lower "[c]ourts that have addressed the issue of whether attorneys are debt relief agencies have not been unanimous." *In re Irons*, 379 B.R. 680, 685 (Bankr. S.D. Tex. 2007) (citing cases). Nevertheless, the majority of courts have held that compensated bankruptcy attorneys are debt relief agencies as that term is defined in the Code. *Id.* (finding debtor's counsel was a debt relief agency); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006) (same); *In re Robinson*, 368 B.R. 492 (Bankr. E.D. Va. 2007) (finding debtor's counsel was debt relief agency); *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006) (finding that bankruptcy attorneys are debt relief agencies); *In re Norman*, No. 06-70859, 2006 WL 3053309 (Bankr. E.D. Va. 2006) (finding debtor's counsel qualified as a debt relief agency); *but see In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005) (holding that attorneys are not debt relief agencies); *In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007) (finding that attorneys, generally, are not debt relief agencies, but ruling that debtor's counsel in case at bar was not a debt relief agency because service was provided pro bono and thus counsel did not receive valuable consideration in return for the bankruptcy assistance provided).

In this case, the district court acknowledged that the definition of debt relief agency, "at first glance," appeared to include attorneys, but it ultimately relied on the doctrine of constitutional avoidance to conclude that attorneys did not fall within the definition because if they did portions of §§ 526 and 528 would be unconstitu-

tional as applied to attorneys. The doctrine of constitutional avoidance dictates that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, if interpreting "debt relief agency" to include attorneys "would raise serious constitutional problems," then we should look for another interpretation "that may fairly be ascribed" to the definition that does not raise these concerns. *Id.* at 576-77. We will not, however, adopt an alternative interpretation that is "plainly contrary to the intent of Congress." *Id.* at 575.

"We review the district court's statutory interpretation de novo." *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 914 (8th Cir. 2008). To interpret the statute we first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "If so, we apply the plain language of the statute." *Id.* "A mere disagreement among litigants over the meaning of the statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999).

The plain reading of the definition of debt relief agency, and the defined terms that make up that definition, leads us to conclude that attorneys who provide "bankruptcy assistance" to "assisted persons" are unambiguously included in the definition of "debt relief agen-

cies." *See Olsen*, 350 B.R. at 912 ("[I]t is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of 'debt relief agency,'" and "[t]hus, further use of the tools of statutory construction is not necessary"). The statutory language sweeps broadly and clearly covers the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision.

Congress specifically listed five exclusions from the definition of "debt relief agency," and if it meant to exclude attorneys from that definition it could have explicitly done so. *Id.*; 11 U.S.C. § 101(12A). Moreover, if attorneys were not included in the definition of debt relief agencies, Congress would have had no reason to include § 526(d)(2), which expressly provides that nothing in §§ 526, 527, or 528 (the sections covering debt relief agencies) "shall be deemed to limit or curtail the authority or ability of a State . . . 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)(A) and (B). The legislative history provides further indication that attorneys are included in the definition. *See* H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 4 (April 8, 2005) ("The bill's consumer protections include provisions strengthening professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases") (emphasis added).[6]

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[6] Additionally, while we recognize that the Supreme Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest [a statutory interpretation]," *Lockhart v. United States*, 546 U.S. 142 (2005) (internal quotation marks and brackets

Because attorneys were not specifically excluded from the definition of debt relief agencies, we hold that attorneys that provide "bankruptcy assistance" to "assisted persons" are "debt relief agencies" as that term is defined by the Code. Interpreting the definition of "debt relief agency" to exclude bankruptcy attorneys would be contrary to Congress's intent.

B. *Constitutionality of § 526(a)(4)*

Having concluded that attorneys providing bankruptcy assistance to assisted persons are debt relief agencies under the Code, we now must determine whether the challenged provisions placing restrictions and requirements on debt relief agencies are unconstitutionally overbroad as applied to these types of attorneys.[7] One of the sections challenged by the plaintiffs in this case is § 526(a)(4), which states:

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omitted), we note that on March 9, 2005, Senator Feingold proposed amendment No. 93 to Congress which would have excluded attorneys from the definition of debt relief agencies, *see* 151 Cong. Rec. S2306-02, 2316 (daily ed. Mar. 9, 2005) (statement by Sen. Feingold) ("This amendment would exclude lawyers from the provisions dealing with 'debt relief agencies' . . . ."), but the Senate did not address the proposal.

[7] Even though a more narrowly drawn version of § 526(a)(4) would likely be valid as applied to the plaintiffs in this case, our analysis applies to all attorneys falling within the definition of debt relief agencies, not merely the plaintiff-attorneys. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984) (explaining that the overbreadth doctrine allows a party to challenge a broadly written statute "even though a more narrowly drawn statute would be valid as applied to the party in the case," as "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations and citation omitted).

> (a) A debt relief agency shall not—
>
> . . .
>
> (4) 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.

11 U.S.C. § 526(a)(4).

Plaintiffs assert that the prohibition against advising an assisted person or prospective assisted person to incur more debt in contemplation of bankruptcy violates the First Amendment. The parties disagree as to the level of scrutiny we apply to the constitutional analysis of this limitation on speech. Plaintiffs claim that we should review the constitutionality of § 526(a)(4) under the strict scrutiny standard as the restriction on attorney advice is content-based. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Under strict scrutiny review, the government has the burden to prove that the constraints on speech are supported by a compelling governmental interest and are narrowly tailored, such that the statutory effect does not prohibit any more speech than is necessary to serve the governmental interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

In contrast, the government argues that § 526(a)(4)'s restrictions are a type of ethical regulation, invoking the more lenient standard outlined in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Under the *Gentile* standard, we would balance the First Amendment rights of the attorneys against the government's legitimate interest in regulating the activity in question—the prohibition of advising assisted persons to incur more debt in contemplation of bankruptcy—and then determine whether the regulations impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075.

According to the government, § 526(a)(4) should be interpreted as merely preventing an attorney from advising an assisted person (or prospective assisted person) to take on more debt in contemplation of bankruptcy when the incurrence of such debt is done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge. However, the plain language of the statute does not permit this narrow interpretation. Rather, § 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person is contemplating bankruptcy. The statute's blanket prohibition applies even if the additional debt would not be discharged during the bankruptcy proceedings. 11 U.S.C. § 526(a)(4).

Thus, regardless of whether the government's interest in prohibiting the speech was legitimate (*Gentile* standard) or compelling (strict scrutiny standard), § 526(a)(4) is unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies because it is not narrowly tailored, nor narrowly

and necessarily limited, to restrict only that speech that the government has an interest in restricting. Instead, § 526(a)(4) prohibits attorneys classified as debt relief agencies from advising any assisted person to incur any additional debt in contemplation of bankruptcy; this prohibition would include advice constituting prudent pre-bankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws. Section 526(a)(4), as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited by the Bankruptcy Code or other applicable law.[8]

There are certain situations where it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt in contemplation of bankruptcy. However, under § 526(a)(4)'s plain language an attorney is prohibited from providing this beneficial advice—even if the advice could help the assisted person avoid filing for bankruptcy altogether. For instance, it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments. This could free up additional funds to pay off other debts and avoid the need for filing bank-

[8] Several bankruptcy courts are in agreement with our decision. *See Zelotes*, 363 B.R. at 667 ("Because § 526(a)(4) is not sufficiently 'narrowly tailored to achieve the desired objective,' it is unconstitutional as applied to bankruptcy attorneys."); *Hersh*, 347 B.R. at 25 (concluding that § 526(a)(4) is unconstitutional because: "(1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions," and therefore imposes "limitations on speech beyond what is 'narrow and necessary' "); *Olsen*, 350 B.R. at 916 ("[S]ection 526(a)(4) is overly restrictive in violation of the First Amendment" even if reviewed under *Gentile* standard).

ruptcy all together. *Hersh*, 347 B.R. at 24. Moreover, it may be in the client's best interest to incur additional debt to purchase a reliable automobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work, which will likely be necessary to maintain the debtor's payments in bankruptcy. *Id*. Incurring these types of additional secured debt, which would often survive or could be reaffirmed by the debtor, may be in the debtor's best interest without harming the creditors.[9]

Factual scenarios other than these few hypothetical situations no doubt exist and may further illustrate why incurring additional debt in contemplation of bankruptcy may not be abusive or harmful to creditors. Nonetheless, § 526(a)(4), as written, does not allow attorneys falling within the definition of debt relief agencies to advise assisted persons (or prospective assisted persons)—i.e. clients (or prospective clients) meeting the definition of assisted person—to incur such debt. Thus, § 526(a)(4) is not narrowly tailored nor narrowly and necessarily limited to prevent only that speech which the government has an interest in restricting. Therefore,

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[9] *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (Summer 2005).

> [Section 526(a)(4)'s] prohibition is particularly troubling when it might be completely legal and even desirable for the client to incur such debt. For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case. For example, the client may intend to keep all payments fully current and to reaffirm such debt once the case is filed.

we hold that § 526(a)(4) is substantially overbroad,[10] and unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined in the Code.

C. *Constitutionality of § 528(a)(4) and (b)(2)*

The plaintiffs also challenged the constitutionality of §§ 528(a)(4) and (b)(2)(B), claiming that the advertising disclosure requirements mandated by those sections violate the First Amendment rights of bankruptcy attorneys through compelled speech. The disclosure requirements of § 528(a)(4) are supplemented by § 528(a)(3). These sections state:

> (a) A debt relief agency shall—
>
> . . .
>
> (3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and
>
> (4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy

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[10] *See Veneklase v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001) ("For us to find a statute unconstitutionally overbroad, its 'overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

> relief under the Bankruptcy Code." or [*sic*] a substantially similar statement.

11 U.S.C. § 528 (a)(3), (4).

Similarly, § 528(b)(2)(B) states:

> (2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall—
>
> . . .
>
> (B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

11 U.S.C. § 528(b)(2)(B).

As both §§ 528(a)(4) and (b)(2)(B) require debt relief agencies—which includes attorneys providing bankruptcy assistance to assisted persons—to disclose in their advertising that "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or some substantially similar statement," the statutes compel speech that, similar to a restriction on speech, receives constitutional protection under the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (stating that "[l]aws that compel speak-

ers to utter or distribute speech bearing a particular message are subject to" constitutional scrutiny).

The government contends that Congress enacted § 528's disclosure requirements to address problems with deceitful or unclear advertising by bankruptcy attorneys, bankruptcy petition preparers, or other debt relief entities. This position is supported by legislative history. *See* 151 Cong. Rec. H2063-01, 2066 (daily ed. Apr. 14, 2005) (statement by Rep. Moran) (stating that certain BAPCPA provisions are intended to "[p]revent deceptive and fraudulent advertising practices by debt relief agencies . . ."). But before we can determine whether the government's justification for mandating the disclosures passes constitutional scrutiny, we must first decide the appropriate standard for reviewing the constitutionality of the required disclosures.

We find guidance for this issue from the Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). In *Zauderer*, the Supreme Court considered the constitutionality of a state bar disciplinary regulation requiring attorneys that advertised contingent-fee representation to disclose in their advertisements that clients may still have to bear certain costs even if the case was unsuccessful. *Id*. at 633. As the regulation only required an attorney to "include in his advertising purely factual and uncontroversial information about the terms under which his services w[ould] be available," and "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [the attorney's] constitutionally protected interest in not providing any particular factual information in his advertising is minimal."

Id. at 651. The Court "recognize[d] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but held "that an advertiser's rights are adequately protected as long as disclosure requirements are *reasonably related* to the State's interest in preventing deception of consumers." *Id*. (emphasis added).

On the other hand, restrictions on non-deceptive advertising are reviewed under intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) (ruling that restrictions on commercial speech that is neither misleading nor related to unlawful activity must assert a "substantial interest to be achieved by [the] restrictions" and "the restrictions must directly advance the state interest involved"). Under this standard, the limitation must be narrowly drawn. *Id*. ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive").

The district court in this case reviewed § 528's disclosure requirements under the intermediate scrutiny standard, but we conclude that rational basis review is proper. The disclosure requirements here, like those in *Zauderer*, are intended to avoid potentially deceptive advertising. *See Zauderer*, 471 U.S. at 651, n.14 (rejecting a more strict analysis of the disclosure requirements at issue in that case, and noting that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . .").

By definition, debt relief agencies provide bankruptcy assistance to assisted persons (or prospective assisted persons) "with respect to a case or proceeding under [the Bankruptcy Code]." 11 U.S.C. §§ 101(4A), (12A). Section 528 generally requires debt relief agencies to disclose on its advertisements of bankruptcy assistance services directed to the general public that their services do in fact relate to bankruptcy and that they assist people in filing for bankruptcy. 11 U.S.C. § 528. As in *Zauderer*, the plaintiffs' "constitutionally protected interest in not providing [such] factual information in [their] advertising is minimal." 471 U.S. at 650. Further, the disclosure requirements are reasonably and rationally related to the government's interest in preventing the deception of consumer debtors, as the disclosure requirements are directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy.[11]

Section 528 requires debt relief agencies to disclose: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement," in all of their bankruptcy-

[11] Without ruling on the issue, we note that at least one lower court has held that § 528's disclosure requirements are constitutionally valid even under the stricter intermediate scrutiny analysis, as the government's interest in protecting consumer debtors from misleading advertising is substantial, the disclosure requirements placed on bankruptcy attorneys directly advances the government's asserted interest, and the disclosure requirements are narrowly drawn to serve the government's interest. *See Olsen*, 350 B.R. at 920 (concluding that § 528 "passes constitutional muster" under either rational basis review or intermediate scrutiny review).

related advertising materials directed to the general public. 11 U.S.C. §§ 528(a)(4), (b)(2). The requirement does not prevent those attorneys meeting the definition of debt relief agencies "from conveying information to the public; it . . . only require[s] them to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. Moreover, if any of these attorneys are concerned that the required disclosures will confuse the public, we note that nothing in the Code prevents them from identifying themselves in their advertisements as both attorneys and debt relief agencies. *Olsen*, 350 B.R. at 920. Simply put, attorneys that provide bankruptcy assistance to assisted persons are debt relief agencies under the Code, and the disclosure requirements of § 528 only require those attorneys to disclose factually correct statements on their advertising.[12] This does not violate the

[12] We recognize that the broad definitions of debt relief agency, bankruptcy assistance, and assisted persons, might result in certain attorneys meeting the definition of debt relief agencies even though they do not represent debtors in bankruptcy nor help people file for bankruptcy relief under the Code. Nevertheless, these attorneys are still subjected to the disclosure requirements of § 528(a)(4) when they advertise "bankruptcy assistance services or . . . the benefits of bankruptcy directed to the general public," 11 U.S.C. § 528(a)(3), (4), or when they advertise to the general public that they "provide[] assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." *Id.* at § 528(b)(2). But because § 528 permits a "substantially similar" disclosure to the one suggested by the Code, these attorneys can and should tailor their advertisement disclosure statements to factually represent the "bankruptcy assistance" they provide. These tailored disclosures will meet the requirements of § 528(a)(4) and (b)(2) as long as they are "substantially similar" to the suggested disclosure, a decision which will require a case-by-case determination. *See Olsen*, 350 B.R. at 919-20 (dismissing plaintiffs' claim that § 528 was uncon-

First Amendment. *Id.*; *see also In re Robinson*, 368 B.R. at 500-502 (finding that debtor's counsel was a debt relief agency subject to the strictures of § 528, and that § 528(a)(1)'s requirement for a written contract is constitutional); *In re Norman*, 2006 WL 3053309 at *4 (finding that debtor's counsel qualified as a debt relief agency and thus must comply with the requirements of § 528(a)(1)).

The challenged sections of § 528 only require debt relief agencies to include a disclosure on certain advertisements. Although less intrusive means may be conceivable to prevent deceptive advertising, § 528's disclosure requirements are reasonably related to the government's interest in protecting consumer debtors from deceptive advertising, and thus the section passes constitutional muster.

III. *Conclusion*

In sum, attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, and § 526(a)(4) is unconstitutional as applied to these attorneys, but §§ 528(a)(4) and (b)(2) are constitutional. Accordingly, we affirm in part and reverse in part.

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stitutional, rejecting argument that attorney who met definition of debt relief agency but did not represent bankruptcy debtors was precluded from § 528's disclosure requirements because § 528 permits a "substantially similar" disclosure, which could be tailored to disclose that attorney advised clients about bankruptcy assistance matters but did not represent people in bankruptcy or file bankruptcy petitions, and stating that whether disclosure was "substantially similar" would require case-by-case determination).

COLLOTON, Circuit Judge, concurring in part and dissenting in part.

I concur in all but Part II.B of the opinion of the court. I disagree, however, with the court's holding that 11 U.S.C. § 526(a)(4) is unconstitutionally overbroad in violation of the First Amendment, and I would therefore reverse the district court's decision declaring this statutory provision unconstitutional.

Milavetz, Gallop, & Milavetz, P.A., mounts a facial attack on § 526(a)(4), arguing that the section's potential application to attorneys in hypothetical situations requires that the statute be declared impermissibly overbroad and unconstitutional. This case involves a facial challenge in the First Amendment context, "under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 n.6 (2008). This "overbreadth doctrine," however, is "strong medicine that is used sparingly and only as a last resort." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (internal quotations omitted). It should be applied only when there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The Supreme Court recently emphasized that it has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the stat-

ute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).[13]

To resolve the constitutional challenge brought by Milavetz, we must first construe the disputed statute. When presented with a constitutional challenge to an Act of Congress, we have not only the power, but the duty, to adopt a narrowing construction that will avoid constitutional difficulties whenever possible. *Boos v. Barry*, 485 U.S. 312, 330-31 (1988). In *Boos*, for example, the Court considered a provision of federal legislation that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police." *Id.* at 329 (internal quotation omitted). The Court observed that "*[s]tanding alone*, this text is problematic because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330 (first emphasis

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[13] The district court purported to consider only an "as-applied" challenge to § 526(a)(4), rather than an overbreadth challenge, and ultimately declared the section "unconstitutional as applied to attorneys." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 766 n.4, 769 (D. Minn. 2006). The majority correctly recognizes that the district court's approach is really an overbreadth analysis, and considers the statute under that framework. *See ante*, at 9 & n.7, 11, 13 & n.10. The "as applied" method of analysis, by contrast, considers the statute's application to a "particular claimant" based on "harm caused to the litigating party." *Turchick v. United States*, 561 F.2d 719, 721 n.3 (8th Cir. 1977). "The 'as applied' method vindicates a claimant whose conduct is within the First Amendment but invalidates the challenged statute *only to the extent of the impermissible application*." *Id.* (emphasis added). The district court and the majority have declared § 526(a)(4) unconstitutional in *all* of its applications to *all* attorneys, and the supporting reasoning is thus consistent with "facial overbreadth analysis." *Id.* (punctuation omitted).

added). Nonetheless, citing the "duty to avoid constitutional difficulties by [adopting a narrowing construction] if such a construction is fairly possible," the Court construed the statute narrowly to permit the dispersal of only congregations that are directed at an embassy, and to allow dispersal "only when the police reasonably believe that a threat to the security or peace of the embassy is present." *Id.* at 330-31 (internal quotation omitted). Similarly, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court emphasized that "it is incumbent upon" a federal court to read a statute to eliminate constitutional doubts, "so long as such a reading is not plainly contrary to the intent of Congress." *Id.* at 78.

The challenged provision in this case provides in part 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." 11 U.S.C. § 526(a)(4). Milavetz argues that according to this provision, a debt relief agency may not advise a client to incur *any* debt for *any* purpose when the client is contemplating the filing of a petition for bankruptcy. As such, Milavetz contends that an attorney could be sanctioned for "fulfilling his duty to his client to give legal and appropriate advice not otherwise prohibited by the Bankruptcy Code." (Brief of Appellee 30). Even under Milavetz's broad construction of the statute, a facial challenge resting on a "few hypothetical situations," *ante*, at [14a], is unlikely to justify invalidating a statute in *all* of its applications, because "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, 466 U.S. at 800.

It is unnecessary to resolve whether § 526(a)(4) is impermissibly overbroad when given its broadest reading, however, because the government suggests an acceptable narrowing construction of the statute that would avoid most constitutional difficulties. The government contends that "in contemplation of" filing for bankruptcy is a term of art that denotes an action taken with the intent to abuse the protections of bankruptcy laws. Under this view, the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system.

The text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction. Particularly given the latitude of federal courts to narrow a text to avoid constitutional difficulties, *see Boos*, 485 U.S. at 330-31, the words "in contemplation of . . . filing a case" need not create impermissible overbreadth. Rather, we may recognize that the phrase "in contemplation of" has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system. Black's Law Dictionary reflects this understanding, defining "contemplation of bankruptcy" as "the thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*." *Black's Law Dictionary* 336 (8th ed. 2004) (emphasis added). American and English authorities construing the bankruptcy laws also support the proposition that the words "in contemplation of" may be understood to require an intent to abuse the bankruptcy laws. *In re Pearce*, 19 F. Cas. 50, 53 (D. Vt. 1843) (No. 10873) (concluding that an act was done "in contemplation of bankruptcy" if it was done "in anticipa-

tion of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy*.") (emphasis added); *Morgan v. Brundrett*, 5 Barn. & Ad. 289, 296, 110 Eng. Rep. 798, 801 (K.B. 1833) (Parke, J.) (interpreting "in contemplation of bankruptcy" to mean that "the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy."); *Fidgeon v. Sharpe*, 5 Taunt. 539, 545-46, 128 Eng. Rep. 800, 802-03 (C.P. 1814) (Gibbs, C.J.) (An act made in contemplation of bankruptcy "must be intended in fraud of the bankrupt laws."); *cf. Buckingham v. McLean*, 54 U.S. 151, 167 (1851) ("To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced."); *id.* at 169 (relying on English bankruptcy decisions as instructive authority on meaning of the former Bankrupt Act). Our duty to construe the statute to avoid constitutional difficulties counsels that we should look to these authorities for a plausible alternative to the broad construction urged by Milavetz.

The structure of § 526(a)(4) also supports a narrowing construction. The prohibitions of this statute can be enforced only through the civil remedies provided in § 526(c). An attorney who violates § 526(a)(4) can be sanctioned in just three situations: if a debtor sues the attorney for the available remedies—remittal of fees, actual damages, and reasonable attorney's fees and costs; if a state attorney general sues for a resident's actual damages; or if a court finds that the attorney in-

tentionally violated § 526(a)(4), and chooses to "impose an appropriate civil penalty." 11 U.S.C. § 526(c). The remedies for a violation thus emphasize actual damages. But legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all. If an attorney advises a debtor to refinance his home to lower mortgage payments, or to purchase a reliable car to enable him to pay off his debts, *see ante*, at [13a-14a], then a debtor following that advice would suffer no damage. There is no reason to believe that a client could recover the remittal of attorney's fees or that a court would find a civil penalty "appropriate" as a remedy for legal advice that *benefits* both the debtor *and* his creditors. Rather, a debtor is likely to have a remedy against an attorney only in the case of an abusive bankruptcy petition, where the debtor may suffer damages if the petition is dismissed as abusive, *see* 11 U.S.C. § 707(b)(1), and where an attorney general or a court has reason to seek or impose sanctions against an abusive debt relief agency. The remedial focus of § 526 thus bolsters the proposition that § 526(a)(4) was aimed only at advice given by a debt relief agency that is designed to abuse the bankruptcy process.

The incorporation of an abusive purpose requirement into § 526(a)(4) is also consonant with the evident purpose of the statute. The government argues, and Milavetz acknowledges, that a principal goal of Congress in passing the statute was to "preclude debtors from taking on more debt knowing that it will later be discharged during bankruptcy." (Brief of Appellee 34). A narrowing construction of § 526(a)(4) is in accord with expressions of desire in the legislative history to address "misconduct by attorneys and other professionals," and

"abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." H.R. Rep. No. 109-31, pt. 1, at 5, 15 (2005) (internal quotation omitted), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92, 101. Milavetz itself argues that a broad construction of § 526(a)(4) "goes beyond" this congressional purpose, and is "absurd," because it would prevent an attorney from advising a client to take actions that might avoid the need for filing bankruptcy altogether. (Brief of Appellee 34). Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that one party says is absurd, that the other party says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

For these reasons, I would reverse the district court's decision declaring unconstitutional the provision codified at 11 U.S.C. § 526(a)(4).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

No. 05-CV-2626 (JMR/FLN)

MILAVETZ, GALLOP & MILAVETZ P.A., ROBERT J. MILAVETZ, BARBARA N. NEVIN, JOHN DOE, AND MARY DOE

v.

UNITED STATES OF AMERICA

[Dec. 7, 2006]

ORDER

Plaintiffs ask the Court to declare portions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") unconstitutional. Defendant, United States of America ("the government") moves to dismiss for failure to state a claim upon which relief can be granted. Defendant's motion is denied; the debt relief agency sections of BAPCPA unconstitutionally impinge on attorneys' First Amendment rights.

I. *Background*

On April 20, 2005, BAPCPA was signed into law, and became effective on October 17, 2005. Among its terms, BAPCPA defines a new category of bankruptcy service

provider called a "debt relief agency." 11 U.S.C. § 101(12A) (2005). The law forbids debt relief agencies from doing certain things, and requires them to do others. This lawsuit challenges a number of these provisions.

BAPCPA bars a debt relief agency from advising a client "to incur more debt in contemplation" of a bankruptcy filing. 11 U.S.C. § 526(a)(4). BAPCPA further requires that debt relief agencies' advertisements declare: "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).

Plaintiffs are bankruptcy attorneys, their law firm, and two unnamed members of the public. Their attack on the statute is based on the First Amendment to the United States Constitution. They allege BAPCPA's debt relief agency provisions are unconstitutional as applied to them. They, initially, claim BAPCPA's regulation of attorneys' advice violates the First Amendment. Next, they claim BAPCPA's advertising requirements contravene the First Amendment.[1] Ultimately, they contend Congress did not intend the debt relief agency requirements to apply to attorneys. The government moves to dismiss plaintiffs' First Amendment claims pursuant to Rule 12(b)(6) of the Federal Rules of

[1] In a footnote, the government asks whether plaintiffs have standing to bring these claims, since they are in no danger of immediate harm. The government's query is misplaced; plaintiffs claim BAPCPA's debt relief agency sections both stifle and compel their speech, in violation of the U.S. Constitution. First Amendment jurisprudence makes clear that a claim that a law has a potential chilling effect on speech establishes standing. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988).

Civil Procedure ("Fed. R. Civ. P."). The government's motion is denied.

II. *Discussion*

A. *Motion to Dismiss*

A Rule 12(b)(6) motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. *See Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992). In considering such a motion, the motion, the court construes the complaint, and all of its reasonable inferences, most favorably to plaintiff. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

B. *Unnamed Plaintiffs*

The complaint purports to set out the claims of two unnamed parties: John Doe and Mary Doe. The government denies there is any legal basis for anonymous plaintiffs in this lawsuit. Indeed, Fed. R. Civ. P. 10(a) is explicit: a complaint "shall include the names of all the parties." Notwithstanding Rule 10(a), plaintiffs claim their case falls within a limited realm of cases in which other interests—i.e., privacy and concern about embarrassment—outweigh the public's interest in open disclosure. Plaintiffs are incorrect.

There is a strong presumption against allowing parties to use a pseudonym. *See*, *e.g.*, *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997); *Doe v. Frank*, 951 F.2d 320, 323-24 (11th Cir. 1992); *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979). The reasons are obvious and compelling: identification of litigants is recognized as important in a public proceeding. *See Blue Cross,* 112 F.3d at 872. A

party who invokes the judicial powers of the United States invites public scrutiny. "The people have a right to know who is using their courts." *Id.*

Limited exceptions to the party-publicity rule exist. Case law has recognized three factors which, if present, might support anonymity. They have been found when "(1) plaintiffs seeking anonymity were suing to challenge governmental activity; (2) prosecution of the suit compelled plaintiffs to disclose information 'of the utmost intimacy;' and (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution." *Doe v. Stegall,* 653 F.2d 180, 185 (5th Cir. 1981) (quoting *Wynne & Jaffe,* 599 F.2d at 712-13). Although the listed factors are not exhaustive, they provide valuable guidance.

While the first factor is present here, the third is not. Plaintiffs argue their "wish to obtain legal advice from [plaintiff] attorneys . . . about prebankruptcy planning and filing bankruptcy" (1st Am. Compl. ¶ 10) suffices for the second factor. According to the Doe parties, the "financial situations of private citizens [are] clearly a matter of utmost intimacy, especially when they feel the need to seek advice about bankruptcy." (Pl.'s Brief 23).

Certainly, those facing bankruptcy are in financial straits; but that does not resolve the issue. Plaintiffs offer no case law to support their claim that merely seeking bankruptcy or financial advice is the kind of intimate personal information typically protected by the court. Bankruptcy is a public proceeding; the Doe plaintiffs are disclosing no medical information or deeply personal questions surrounding human reproduction or matters of that nature.

The Court finds the bankruptcy-seeking plaintiffs' interest in their financial privacy is outweighed by the public's stronger interest in maintaining open trials. Accordingly, the Doe plaintiffs shall amend their complaint to include their real names within 10 days of the date of this Order, or their claims will be dismissed.

C. *Constitutional Challenges*

1. *Attorney Advice: Section 526(a)(4)*

Plaintiffs claim BAPCPA's § 526(a)(4), titled "[r]estrictions on debt relief agencies," has "a chilling effect upon lawyers," in violation of their First Amendment rights. (1st Am. Compl. ¶ 39.) Section [526(a)(4)] states:

> 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.

11 U.S.C. § 526(a)(4).

The parties disagree as to the standard of review applied to the constitutional analysis of this section. Plaintiffs claim the standard of review for a restriction on lawful and truthful attorney advice is strict scrutiny. The government replies that § 526(a)(4)'s restrictions are merely a species of ethical regulation, invoking the more lenient standard outlined in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Under *Gentile*, the Court would balance the First Amendment rights of attorneys against the government's legitimate interest in regulating the activity in question, and then determine whether

the regulations impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075. The Court rejects the government's proposed standard.

The "ethical rule" of which the government speaks appears to exist only in its pleadings; the statute discloses no quasi-religious or ethical principle. The government "cannot foreclose the exercise of constitutional rights by mere labels." See *NAACP v. Button*, 371 U.S. 415, 429 (1963). While the section is certainly a rule, nothing in § 526 alludes to ethics. The section is titled "Restrictions on debt relief agencies," and plainly prohibits certain acts. The advice the Section forecloses may be potentially advantageous to creditors, but this does not make it equivalent to ethics either in logic or in law.

When fairly viewed, the Court finds § 526(a)(4) to be a content-based regulation of attorney speech—it restricts attorneys from giving particular information and advice to their clients. Attorneys are forbidden to advise their clients concerning an entire subject—incurring more debt in contemplation of filing for bankruptcy. This is a plain regulation of speech. Beyond this, the forbidden speech trenches on two other important areas of concern.

First, the lawyer's advice to take on certain additional financial obligations in contemplation of bankruptcy may well be in the client's best interest.[2] A law

[2] For example, it may be in the client's interest to obtain or refinance a home mortgage prior to filing bankruptcy, because one who has declared bankruptcy may well be denied a lower interest rate after the filing. If the client gets a lower rate mortgage, the refinanced mortgage may have smaller payments which could forestall, or even prevent the bankruptcy in the first place. Similar arguments can be made concern-

yer's highest duty is to the client, and the statute's forbidden advice may indeed be helpful to the client. Secondly, this statute does not restrict false statements—arguably implicating some "ethical" precept—it forbids truthful and possibly efficacious advice. If this is the government's view of legal ethics, it is a form of ethics unfamiliar to the Court.

As the United States Supreme Court has explained, "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes th[e] essential [First Amendment] right[s]" of private citizens. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). For this reason, "governmental control over the content of messages expressed by private individuals" is unconstitutional except in narrow circumstances. *Id.*

As the Court finds § 526(a)(4) to be a content-based restriction on protected speech, it is subject to strict scrutiny. *Id.* Such a restriction can only survive if (1) narrowly tailored to achieve (2) a compelling state interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The Court finds the government has failed to meet its burden on the first point—§ 526(a)(4) is not narrowly tailored.

The government suggests § 526(a)(4) advances two compelling interests. First, it asserts an interest in protecting creditors. According to the government, § 526(a)(4)'s prohibition discourages prospective bankrupts from accumulating debt in a particular fashion,

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ing automobile loans, or incases where a client needs to co-sign undischargeable student loans. *See Hersh v. United States*, 347 B.R. 19, 24 (N.D. Tex. 2006).

thus deterring debtors from "gaming" the means test by improperly enlarging pre-existing debt, thereby diluting the assets of the bankruptcy estate otherwise available to creditors. Second, it claims § 526(a)(4) protects debtors from attorneys who might lead them to abusive practices which could ultimately result in a denial of discharge of debts under § 523(a)(2)(c). Finally, the government argues that § 523(a)(2)(c) protects the integrity of the bankruptcy system.

Even if the Court assumes the asserted interests are compelling, the restriction is not narrowly-tailored. The government claims the section is narrowly tailored because "it does not limit more speech than is necessary to accomplish this purpose." (Def.'s Brief 25.) The government is mistaken.

Attorneys have a First Amendment right—let alone an established professional ethical duty—to advise and zealously represent their clients. *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 548-549 (2001). Section 526(a)(4) bars an attorney from advising a client to incur any kind of debt, including legitimate debt, in contemplation of bankruptcy. The lawyer has no duty to assist creditors—who are scarcely without their own resources, and may indeed have contributed to the potential-bankrupt's straits by making credit easy to obtain. The attorney's only duty is to the client, and to the law.

Incurring debt on the eve of bankruptcy can scarcely be considered malum in se. To the contrary, for some individuals incurring further obligations, even those which must be adjusted or set aside in the bankruptcy, may be financially prudent. "For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a

lower interest rate, or to buy a new car" before filing for bankruptcy. Erwin Chemerinksy, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 578 (2005). If a client intends to reaffirm the debt after filing bankruptcy, there is no prejudice to the bankruptcy process. BAPCPA's § 526(a)(4) limitation on speech extends beyond any need to protect the bankruptcy process.[3] A lawyer who represents consumers contemplating bankruptcy bears the duty of zealous representation. Conversely, Congress does not have the power "to effect [a] serious and fundamental restriction on advocacy of attorneys." *See Velazquez*, 531 U.S. at 534. If upheld, this law would prevent lawyers from adequately and competently advising their clients. As such, it unconstitutionally impinges on expressions protected by the First Amendment of the Constitution.[4]

2. *Advertising: Section 528(a)(4), (b)(2)*

Plaintiffs challenge BAPCPA's advertising disclosure requirements, claiming § 528 violates their First Amendment rights. This section requires a denominated class, termed "debt relief agencies," to include

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[3] Even under the more lenient *Gentile* standard, § 526(a)(4) fails. *Gentile*'s balancing test allows the law to impose "only narrow and necessary limitations on lawyers' speech." 501 U.S. 1030, 1075 (1991); *see also Hersh*, 347 B.R. at 24-25; *Olsen v. Gonzales*, 350 B.R. 906, 916 (D. Or. 2006); *Zelotes v. Martini*, 2006 WL 3231423 *4 (D. Conn. 2006).

[4] Plaintiffs further claim § 526(a)(4) is unconstitutionally vague and overbroad. The United States Supreme Court has expressed a strong preference for as-applied, as opposed to facial, challenges to the constitutionality of federal laws. *Sabri v. United States*, 541 U.S. 600 (2004). The Court finds this law unconstitutional as applied, and declines to expand its inquiry and consider whether it is also vague and overbroad.

particular, or substantially similar, language in their advertisements. Congress has prescribed that such agencies declare: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4), (b)(2).

Here again, the Court must determine the appropriate standard of review. The choice turns on whether the statute regulates deceptive or truthful advertising. Statutes regulating deceptive commercial speech need only withstand rational basis review. *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626, 651-52 (1985). But restrictions on non-deceptive advertising must employ means that directly advance a substantial government interest. *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

The government argues that BAPCPA regulates deceptive advertising, citing evidence adduced before Congress showing "some bankruptcy lawyers did not mention in their advertisements that their ability to make 'debts disappear' derived from the use of the bankruptcy process." (Def.'s Brief 28.) Plaintiffs respond that, when Congress imposed these requirements on all advertisements of bankruptcy assistance, it mandated a blunderbuss which strikes truthful, as well as false or deceptive advertising. The Court agrees.

With very few exceptions, any party advertising debt relief services must include § 528's statutory statement. The present lawyer-plaintiffs advertise themselves as bankruptcy attorneys in newspapers, telephone directories, television, radio, and the internet. There is no evidence, however, suggesting their bankruptcy assistance advertisements are deceptive in any regard. Even as-

suming some debt relief agencies advertise an ability to make "debts disappear," there is no showing such a statement is deceptive. Under these circumstances, the Court finds it appropriate to analyze this question by applying intermediate scrutiny. *See Zauderer*, 471 U.S. at 641.

The government may only regulate truthful bankruptcy assistance advertisements if: (1) the regulation directly advances (2) a substantial government interest, and is (3) "narrowly drawn." *Cent. Hudson*, 447 U.S. at 566; *Zauderer*, 471 U.S. at 641. The Court finds that BAPCPA's § 528 advertising requirements fail to directly advance the government's purported substantial interest and are not narrowly drawn.

The government contends advertising, absent the compulsory statements, may mislead the lay community into thinking debts can be erased without payment or filing for bankruptcy. The government claims §§ 528(a)(4) and (b)(2) protect against consumer deception"by alerting [them] that a lawyer may use bankruptcy as a means to help them." (Def.'s Brief 28.) Setting aside the implausibility of anyone actually believing in a magic wand capable of making debt go away, it is most unlikely that the insertion of the statement "We are a debt relief agency, we help people file for bankruptcy relief under the Bankruptcy Code" prevents consumer deception; it may well increase it.

The term "debt relief agency" is simply a legislative contrivance. The public is more likely to be confused by an advertisement containing this Congressionally-invented term than one which advertises the services of a bankruptcy attorney.

Beyond this, however, the term "debt relief agency" is almost all-encompassing. It instantly swallows all persons who engage in"bankruptcy assistance," attorneys and non-attorneys alike. Congress's merger of both attorneys and non-attorneys is, itself, likely to confuse the public. There are many non-trivial differences between an attorney's services to his or her clients, and services non-lawyers are permitted to offer. Unlike those who only restructure debt, or perhaps provide bankruptcy forms, attorneys give legal advice and actually represent debtors in bankruptcy proceedings. The requirement that parties so dissimilarly-placed must use the same mandated disclosure statement is likely to cause consumer confusion. In this respect, § 528 fails to directly advance the government's stated interest in clarifying bankruptcy service advertisements.[5]

Section 528's advertising requirement is also not narrowly drawn. The narrowly drawn standard is "something short of a least-restrictive means standard." *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989). A narrowly drawn regulation designed to prevent deception "may be no broader than reasonably necessary to prevent the 'perceived evil.'" *In re R.M.J.*, 455 U.S. 191, 203 (1992). Section 528's language not only regulates misleading advertisements—those

[5] At oral argument, the government's counsel acknowledged areas where the statute is vague. As an example, it appears that the quantum of bankruptcy advice a lawyer offers may require some attorneys to publish the mandated language and others not. The statute makes no distinction between a lawyer who only occasionally has a client facing bankruptcy and those who do so regularly. Quaere: does a 500-person law firm having a single lawyer who regularly does bankruptcy work have to put the disclaimer on every piece of the firm's advertising?

suggesting debts can disappear—it binds all who advertise bankruptcy services. This sweeping regulation goes beyond whatever problem it was designed to address. It broadly regulates absolutely truthful advertisements throughout an entire field of legal practice. The government has failed to show that this restriction on attorneys' commercial speech is justified. As applied to attorneys, this section of BAPCPA fails constitutional scrutiny. Thus, the government cannot prevail on its motion to dismiss.

D. *The "Debt Relief Agency" Definition*

Plaintiffs ask the Court to find attorneys beyond the scope of a BAPCPA "debt relief agency." According to the statute,

> [t]he term 'debt relief agency' means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110.

11 U.S.C. § 101 (12A). This section, of course, makes no direct reference to either "attorney" or "lawyer." It does include the term "bankruptcy petition preparer," which, by definition, expressly excludes attorneys and their staff. *See* 11 U.S.C. § 110(a)(1) (2006). According to plaintiffs, the omission of any reference to attorneys or lawyers, while including a term which excludes attorneys, shows Congress must have intended to exclude attorneys from the "debt relief agency" definition. They also claim it would be absurd for attorneys to provide a statement telling their clients they have a right to an attorney, and that only attorneys can provide legal ad-

vice as required for debt relief agencies under 11 U.S.C. § 527(b).[6]

The government claims the statute includes attorneys because legal representation is included in "bankruptcy assistance," statutorily defined as:

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' 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.

11 U.S.C. § 101(4A).

At first glance, this language might include attorneys. But the glance is deceiving: the statute contains a rule of construction for the term "debt relief agency." The statute provides that nothing in §§ 526, 527, and 528 —those sections imposing requirements on debt relief agencies—shall:

> 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.

11 U.S.C. § 526(d)(2)(A).

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[6] At least one court has found these arguments persuasive, holding that debtor attorneys are not "debt relief agencies." *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005).

If lawyers are placed within the ambit of § 101 (4A), the placement conflicts with § 526(d)(2)(A). The conflict would exist because states would be deprived of their ability "to determine and enforce qualifications for the practice of law." If BAPCPA's debt relief agency sections apply to attorneys, it means Congress has taken upon itself the authority to determine the advice attorneys can give their clients and what attorney advertisements must say, thereby infringing on the state's traditional role of regulating attorneys. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States.")

This view is supported by the doctrine of constitutional avoidance. This doctrine counsels that, in construing a statute for ambiguity, the Court must opt for a construction which avoids grave constitutional questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,575 (1988). The Court perceives a clear ambiguity in this statute—on one hand it appears to regulate a lawyer's practice; on the other, such regulation is specifically reserved to the states. As outlined above, these sections would be unconstitutional if applied to attorneys. For these reasons, the Court finds §§ 526, 527 and 528 do not apply to attorneys.

VI. *Conclusion*

The Court finds BAPCPA sections 526(a)(4) and 528(a)(4), (b)(2) are unconstitutional as applied to attorneys. Moreover, the Court finds the debt relief agency provisions of BAPCPA inapplicable to attorneys. There-

fore, the government's motion to dismiss [Docket No. 13] is denied.

IT IS SO ORDERED.

Dated: December 7th, 2006

/s/ JAMES M. ROSENBAUM
JAMES M. ROSENBAUM
United States Chief District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Case Number: 05-cv-2626 JMR/FLN

MILAVETZ, GALLOP & MILAVETZ P.A., ROBERT J. MILAVETZ, BARBARA N. NEVIN, JOHN DOE, AND MARY DOE

v.

UNITED STATES OF AMERICA

[Apr. 19, 2007]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' motion for summary judgment [Docket No. 37] is granted.
2. BAPCPA's Title 11 U.S.C. Sections 526(a)(4) and 528(a)(4) and (b)(2) are declared unconstitutional,

as applied to attorneys in the District of Minnesota.

3. The Court finds that attorneys in the District of Minnesota are excluded from the term "debt relief agency," as defined in 11 U.S.C. § 101(12A); as such, Minnesota attorneys are relieved of any duties relating to BAPCPA-defined debt relief agencies imposed by that statute.

April 19, 2007 — RICHARD D. SLETTEN, CLERK
Date

BY:
/s/ KATIE THOMPSON
KATIE THOMPSON, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2405

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

v.

UNITED STATES, APPELLANT

COMMERCIAL LAW LEAGUE OF AMERICA,
AMICUS ON BEHALF OF APPELLEE

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA—MINNEAPOLIS
(0:05-cv-02626-JMR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Riley, Judge Colloton, Judge Gruender, Judge Benton and Judge Shepherd would grant the petition for rehearing en banc.

December 05, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

APPENDIX E

1. 11 U.S.C. 101 provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(3) The term "assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' 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.

* * * * *

(12) The term "debt" means liability on a claim.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bank-

ruptcy petition preparer under section 110, but does not include—

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

* * * * *

2. 11 U.S.C. 526 provides:

Restrictions on debt relief agencies

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted

person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) 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.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this

section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys'fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall—

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability—

(A) 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

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.