No. 08-1119

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Section 101(12A) of Title 11 of the United States Code defines the term "debt relief agency" as "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," with five enumerated exceptions. Section 528 of Title 11 requires any "debt relief agency" to include certain disclaimers in any public advertising that promotes specified bankruptcy-related services. The questions presented are as follows:

1. Whether an attorney who provides bankruptcy assistance to an assisted person in return for valuable consideration, and who does not fall within one of the five exceptions, is a "debt relief agency" for purposes of 11 U.S.C. 526-528.

2. Whether 11 U.S.C. 528 violates the First Amendment to the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A46) is reported at 541 F.3d 785. The opinion of the district court denying the government's motion to dismiss (Pet. App. A1-A15) 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 (Pet. App. A89). The petition for a writ of certiorari was filed on March 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves provisions of the Bankruptcy Code that Congress enacted in 2005 to regulate paid bankruptcy advice. One of those provisions, 11 U.S.C. 528, requires that certain professionals who charge consumer debtors for bankruptcy assistance, defined as "debt relief agencies," give notice to their clients and potential clients about the nature and terms of the services the debt relief agencies provide. Debt relief agencies must include those notices both in contracts with clients and in advertising directed to the general public. Attorneys and others who fall within the statutory definition of "debt relief agency" are also subject to other restrictions on solicitation and representation in bankruptcy matters. The district court concluded both that attorneys cannot be "debt relief agencies" under the statute and that Section 528's disclaimer requirements violate the First Amendment as applied to attorney advertising. Pet. App. A9-A15. The court of appeals reversed, holding that attorneys may be debt relief agencies and that Section 528 is constitutional. *Id.* at A32-A39.

1. Congress enacted the provisions at issue here as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal 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. 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). The legislative record documented a recurring problem with "increasingly aggressive lawyer advertising" that offered to make consumers' debts "disappear," yet concealed from prospective clients the fact that pursuing debt relief would involve a bankruptcy filing, which has significant consequences for the debtor's ability to obtain credit in the future. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform: Hearing on H.R. 975 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 55 (2003) (statement of Dean Sheaffer, National Retail Federation); see, *e.g., Bankruptcy 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 123 (1999).

The BAPCPA added or strengthened several restrictions on bankruptcy professionals' conduct. Those restrictions are intended to protect the clients and prospective clients of bankruptcy professionals, the creditors of clients who do enter bankruptcy, and the bank-

ruptcy system. The pertinent provisions 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).

Sections 526, 527, and 528 all include restrictions on a broad class of bankruptcy professionals, collectively termed "debt relief agenc[ies]." 11 U.S.C. 101(12A); see 11 U.S.C. 526, 527, 528. The term "debt relief agency" is defined to include "any person who provides any bankruptcy assistance to an assisted person," *i.e.*, a consumer debtor, for valuable consideration. 11 U.S.C. 101(12A).[1] The term also includes any "bankruptcy petition preparer under" 11 U.S.C. 110. The Bankruptcy Code establishes five exceptions (none relevant here) to the definition of "debt relief agency," for in-house preparers, tax-exempt nonprofits, creditors, banks, and copyright owners. 11 U.S.C. 101(12A)(A)-(E). The term "bankruptcy assistance," on which the definition of "debt relief agency" relies, is defined in turn 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).

Section 528 includes several disclosure requirements that apply when a debt relief agency advertises its services to the general public. First, advertisements that

[1] 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).

promote either "bankruptcy assistance services" or "the benefits of bankruptcy" must make clear that the services or benefits "are with respect to bankruptcy relief under [the Bankruptcy Code]." 11 U.S.C. 528(a)(3); see 11 U.S.C. 528(b)(1) (defining what advertisements are covered). Second, advertisements that promote "assistance with respect to" certain consumer debt or credit problems must disclose that the assistance "may involve" filing for bankruptcy relief. 11 U.S.C. 528(b)(2)(A). Third, advertisements in either of the aforementioned two categories must also include either a specified disclaimer—"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) and (b)(2)(B).[2]

Section 528 is enforceable in two principal ways. First, any contract with an assisted person that does not comply with the disclosure requirement is void. 11 U.S.C. 526(c)(1). Second, if a debt relief agency intentionally or negligently fails to comply with Section 528, an assisted person may bring a civil action to recover his own "actual damages," as well as any fees already paid. 11 U.S.C. 526(c)(2).

2. Petitioners are a law firm that advises debtors, two of the firm's attorneys, and two prospective clients. Pet. App. A18-A19.[3] They filed this action against the

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[2] Section 528 also requires disclosure to a client once a debt relief agency begins to provide "bankruptcy assistance services" to any "assisted person." The debt relief agency must execute a written contract with the client that explains what services the debt relief agency will provide and what fees the client will have to pay. 11 U.S.C. 528(a)(1) and (2).

[3] The district court denied the prospective clients leave to proceed pseudonymously, Pet. App. A3-A4, and they disclosed their identities

United States, seeking a declaratory judgment that the attorney petitioners are not obligated to comply with several of the BAPCPA's provisions regulating debt relief agencies' professional conduct, including the disclaimer requirements in Section 528(a)(4) and (b)(2). Petitioners contended that licensed attorneys are not "debt relief agencies" within the meaning of the statute. They also claimed that, to the extent the statute encompasses licensed attorneys, Section 528's disclaimer requirements and other provisions of the BAPCPA violate the First Amendment. *Id.* at A19.

3. The district court denied the government's motion to dismiss, Pet. App. A1-A15, and granted summary judgment for petitioners, *id.* at A16.

The court first held that Subsections (a)(4) and (b)(2) violate the First Amendment "[a]s applied to attorneys." Pet. App. A13. The court concluded that those provisions regulate truthful commercial speech, not deceptive advertising, and therefore are subject to intermediate scrutiny. *Id.* at A10 (citing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)). The court held that the disclaimer requirements cannot satisfy that test because they are not "narrowly drawn." *Id.* at A11. The court also struck down a separate regulation of debt relief agencies, 11 U.S.C. 526(a)(4), on different First Amendment grounds. *Id.* at A5-A9.

The court then held, apparently in the alternative, that attorneys are categorically excluded from the definition of "debt relief agency" and therefore not covered by Sections 526-528. Pet. App. A13-A15. The court acknowledged the government's argument that a "debt

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in an amended complaint, see 05-CV-2626 Docket entry No. 34, at 3 (D. Minn. Dec. 15, 2006).

relief agency" is defined as a provider of "bankruptcy assistance," and that the term "bankruptcy assistance" is defined to include providing "counsel" or "legal representation." *Id.* at A13-A14 (quoting 11 U.S.C. 101(4A) and (12A)). "At first glance," the court observed, "this language might include attorneys." *Id.* at A14. But the court relied on another provision of the Bankruptcy Code to reach a contrary conclusion. Section 526(d)(2)(A) provides that nothing in Sections 526-528 displaces States' authority to set "qualifications for the practice of law." The district court concluded that treating attorneys as "debt relief agencies" would "infring[e] on" States' power to regulate attorneys and thus was precluded by Section 526(d)(2)(A). Pet. App. A14-A15. The court also stated that, because the application of Sections 526-528 to attorneys would violate the First Amendment, the "doctrine of constitutional avoidance" supported a construction of the term "debt relief agency" that did not encompass lawyers. *Id.* at A15.

4. The court of appeals unanimously reversed the holdings at issue here, although the panel divided on another aspect of the statute. Pet. App. A18-A46.

a. The court of appeals first concluded that attorneys may fall within the definition of "debt relief agency." The court noted that Congress had specifically defined both "debt relief agency" and several terms used in the definition of "debt relief agency." Those definitions "sweep[] broadly," the court concluded, "and clearly cover[] the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision." Pet. App. A26. In holding that no such exclusion applied, the court noted that Congress had adopted five specific exceptions to the definition of "debt relief agency," none of which benefitted petitioners. *Ibid.* The

court of appeals also concluded that constitutional-avoidance considerations could not justify petitioners' reading of the term "debt relief agency" because that reading was foreclosed by the statute's plain language. See *id.* at A25.

b. The court of appeals also rejected petitioners' constitutional challenge to Section 528's disclaimer requirements. Pet. App. A32-A39. The court concluded that, because Section 528 regulates potentially misleading commercial advertising, it is subject to rational-basis review rather than to any form of heightened scrutiny. *Id.* at A36 (citing *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 n.14 (1985)). Under that standard, the court held, Section 528 is a valid regulation that is "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." *Ibid.* The court noted that the required disclaimer consists only of "factually correct statements," because attorneys subject to the requirement are debt relief agencies as the Code uses that term. *Id.* at A37. The court of appeals also observed that, because the statute permits the substitution of a "substantially similar" disclaimer, any attorney who does not actually assist with bankruptcy filings can "tailor" the disclosure statement to assuage any concern about its accuracy. *Id.* at A38 n.12.

c. The court of appeals also held, over Judge Colloton's dissent, that Section 526(a)(4) violates the First Amendment. Pet. App. A27-A32; see *id.* at A39-A46 (Colloton, J., concurring in part and dissenting in part). The government filed a petition for rehearing en banc on that issue, which the court of appeals denied by a vote of

6-5. *Id.* at A89. The government has filed its own petition for a writ of certiorari on that issue, No. 08-1225 (filed Apr. 3, 2009).

DISCUSSION

1. Petitioners seek review of the question whether an attorney can be a "debt relief agency" under Section 101(12A). Because there is no circuit conflict on that issue, plenary review is not warranted. Although the constitutional-avoidance considerations on which petitioners rely could have some relevance to the issue raised in the government's certiorari petition, which seeks review of a different aspect of the court of appeals' decision, the Court can properly consider the definition of "debt relief agency" in that case without separately granting review in this case.

a. The decision below was the first appellate ruling to construe the BAPCPA term "debt relief agency." The Fifth Circuit subsequently agreed with the decision below and held that attorneys are encompassed by that term under the applicable statutory definition. *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 749-752 (2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009). No court of appeals has held to the contrary.[4]

Invoking decisions of district courts and bankruptcy courts (Pet. 9-12), petitioners contend that the lower courts are "divided" on the question whether attorneys can qualify as debt relief agencies. Pet. 9 (capitalization

[4] The issue has been raised in a number of other cases pending in the courts of appeals. See *Connecticut Bar Ass'n* v. *United States*, No. 08-4797 (2d Cir.) (argument not yet scheduled); see also *Olsen* v. *Holder*, No. 07-35616 (9th Cir.) (argument not yet scheduled) (issue raised by amicus curiae); *Zelotes* v. *Adams*, No. 07-1853 (2d Cir. argued Oct. 10, 2008) (issue raised by amici curiae).

and boldface omitted). But of the decisions petitioners cite that address the issue,[5] all reject their position, except for a single opinion of the Bankruptcy Court for the Southern District of Georgia, *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66 (2005). One bankruptcy court's outlier interpretation is an inadequate basis to justify review by this Court.[6]

b. The court of appeals correctly interpreted the BAPCPA term "debt relief agency." Because the statute defines the term, petitioners' attempts to parse the three-word term instead of its explicit and detailed definition (Pet. 13-15) are unavailing. "Statutory definitions control the meaning of statutory words . . . in the usual case." *Burgess* v. *United States*, 128 S. Ct. 1572, 1577 (2008) (quoting *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Under the plain terms of the BAPCPA definition, a person who provides specified services to specified recipients for specified consideration is a "debt relief agency," regardless of his professional credentials.

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[5] One decision concerns only pro bono legal representation, which is not bankruptcy assistance rendered for valuable consideration and thus not restricted by Sections 526, 527, or 528. *In re Reyes*, No. 07-CV-20689, 2007 WL 6082567, at *6-*7 (S.D. Fla. Dec. 19, 2007), aff'g in part and rev'g in part 361 B.R. 276 (Bankr. S.D. Fla. 2007).

[6] The bankruptcy court issued that ruling *sua sponte* on the day the BAPCPA took effect and outside the context of any pending case. The United States Trustee sought to appeal the ruling, but the district court concluded that the Trustee could not appeal until the statute was interpreted in an actual case or proceeding. See *In re Attorneys at Law & Debt Relief Agencies*, 353 B.R. 318, 320, 322-323 (S.D. Ga. 2006). Thus, even in that district court, the issue remains open if the United States Trustee or a state law enforcement official seeks to enforce a professional-conduct restriction against an attorney in the future, see 11 U.S.C. 526(c)(3), (4) and (5).

In addition, although the BAPCPA definition of "debt relief agency" does not incorporate the separately defined term "attorney," 11 U.S.C. 101(4), the statute expressly recognizes that an individual can become a "debt relief agency" by providing legal representation. A person may become a debt relief agency by providing "bankruptcy assistance," 11 U.S.C. 101(12A), and the term "bankruptcy assistance" includes both "providing *legal representation* with respect to a case or proceeding under [the Bankruptcy Code] and "*appearing in a case* or proceeding on behalf of another," 11 U.S.C. 101(4A) (emphases added). Thus, the statute contemplates that providers of legal services will be debt relief agencies if the legal representation concerns a bankruptcy proceeding, the client is a consumer debtor, and the work is performed for a fee.[7]

Finally, Section 101(12A) exempts five distinct categories of persons from the definition of "debt relief agency." That Congress carefully assembled this list of exceptions without making an exception for attorneys is further reason not to infer such an exception. Pet. App. A26; *Hersh*, 553 F.3d at 751.

Petitioners' reliance (Pet. 17-18) on 11 U.S.C. 526(d)(2)(A) is misplaced. Section 526(d)(2)(A) provides

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[7] Petitioners contend (Pet. 16-17) that excluding only unpaid representation is "illogical," and that *all* legal representation should therefore be excluded from the definition. Congress plainly chose to exempt donated services from the rules that apply to compensated services, and that decision is neither illogical nor unprecedented. In any event, petitioners' solution would not cure the perceived problem: work by *non-attorney* professionals would still be exempt if performed for free, but covered if performed for pay. See 11 U.S.C. 101(12A); see also 11 U.S.C. 110(a)(1) (defining the term "bankruptcy petition preparer" to mean "a person * * * who prepares *for compensation* a document for filing") (emphasis added).

that Sections 526, 527, and 528 shall not "be deemed to limit or curtail the authority or ability * * * of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State." But Section 526(d)(2)(A) pertains only to *qualifications* for the practice of law, such as requirements for admission to the bar. The companion provision illustrates as much. See 11 U.S.C. 526(d)(2)(B) (recognizing that each federal court has similar authority to "to determine and enforce the qualifications for the practice of law before that court"). Nothing in Section 526(d)(2) disavows a federal role in regulating the conduct of bankruptcy professionals practicing in federal bankruptcy court. To the extent that state law is consistent with the federal rule, the two complement each other.[8] "[T]o the extent that [state] law is inconsistent with [Sections 526, 527, and 528]," however, federal law expressly provides that the state law is preempted. 11 U.S.C. 526(d)(1).

c. Petitioners contend that the doctrine of constitutional avoidance requires that the term "debt relief agency" be construed not to apply to attorneys. Although petitioners are correct that a reasonable interpretation of a federal statute that avoids a substantial constitutional question is to be preferred (Pet. 21), that undisputed principle provides no sound basis for granting review in this case.

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[8] Indeed, some of the conduct covered by Section 526 is also prohibited by state law, although Section 526 provides valuable new federal means of enforcing those rules and deterring violations. Compare, *e.g.*, 11 U.S.C. 526(a)(4), with *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).

The government has filed its own petition for a writ of certiorari seeking review of the court of appeals' invalidation of Section 526(a)(4). That provision restricts debt relief agencies from advising clients to take on more debt "in contemplation of [bankruptcy]." The government's petition contends that the term "in contemplation of [bankruptcy]" should be construed with due regard for the principle of constitutional avoidance and that, so construed, Section 526(a)(4) is not unconstitutionally overbroad. The courts of appeals have divided on those related questions, and the government's petition explains why those issues warrant this Court's review.

By contrast, the avoidance doctrine does not counsel in favor of petitioners' purported narrowing construction of the term "debt relief agency." First, the text of Section 101(12A) will not bear that interpretation. See, *e.g.*, *Department of HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002) (avoidance doctrine does not apply where the statute unambiguously forecloses the proffered saving construction). Second, while the debate over the constitutionality of Section 526(a)(4) may justify reading *that* provision narrowly (as the government has argued), petitioners' narrowing construction would necessarily also narrow numerous *other* provisions that depend on the definition of "debt relief agency" and that are indisputably constitutional, even as applied to attorneys. See, *e.g.*, 11 U.S.C. 526(a)(1) (debt relief agencies may not fail to perform services they promised to undertake); 11 U.S.C. 527(a)(2) (debt relief agencies must provide their clients with certain admonitions about the requirements of the bankruptcy process).

Third, and most significantly, petitioners' proposed narrowing construction would not actually solve the

problem that the court of appeals identified in Section 526(a)(4). To be sure, accepting that construction would moot *petitioners'* constitutional challenge to that provision, because the statute would no longer apply to petitioners (nor would any other provision in Sections 526, 527, and 528). But non-attorneys who fall within the statutory definition of "debt relief agency" could still bring the same First Amendment challenges to Section 526(a)(4) that petitioners have pursued in this litigation. And although the court of appeals stated only that it was invalidating Section 526(a)(4) "as applied to attorneys," Pet. App. A32, nothing in its reasoning suggests that it would reach a different conclusion if an identical challenge were brought by a non-attorney debt relief agency, such as a bankruptcy petition preparer.[9]

Accordingly, the question whether an attorney may be a BAPCPA "debt relief agency" does not warrant review in its own right. Nonetheless, if the Court grants the government's petition in No. 08-1225, and if (despite the defects noted above) petitioners wish to urge their construction of the term "debt relief agency" as an alternative ground for defending the court of appeals' determination that Section 526(a)(4) cannot be applied to their own conduct, they can do so. The Court need not grant the petition in this case to give petitioners that opportunity. See, *e.g.*, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 56 (2006) ("[G]ranting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says."). For that reason, it is appropriate to hold the petition in this case if the govern-

[9] Petitioners appeared to argue below that attorney speech enjoys special First Amendment status, see Pet. C.A. Br. 28-29, 38-39 (citing *Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533 (2001)), but the court of appeals did not adopt that rationale.

ment's petition is granted. But because so many constitutionally unproblematic statutory restrictions depend on the definition of "debt relief agency," and because the lower courts have reached consistent interpretations of that term, this Court should not reach out to construe it unnecessarily by granting plenary review here.

2. The court of appeals' decision upholding Section 528 against petitioners' First Amendment challenge is correct and does not conflict with any decision of another court of appeals.[10] Further review is not warranted.

a. The decision of the court of appeals does not implicate any circuit conflict. The Fifth Circuit in *Hersh* considered a similar challenge to the disclosure requirements of 11 U.S.C. 527(b), which it determined was "essentially parallel" to petitioners' challenge to the disclosure requirements of Section 528. 553 F.3d at 768. The Fifth Circuit agreed with the Eighth Circuit's analysis in this case, *ibid.*, and held that the BAPCPA's disclosure requirements are supported by sufficiently weighty governmental interests in "ensuring that those who enter bankruptcy know what it entails." *Id.* at 766. No court of appeals has reached a contrary conclusion.[11] In the absence of a circuit conflict on this challenge to a four-year-old statute, further review is not warranted.

b. The court of appeals' decision was a straightforward application of this Court's decision in *Zauderer* v.

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[10] Petitioner also suggests (Pet. ii, 9) that the statute violates the Due Process Clause of the Fifth Amendment. That contention was not pressed in or passed on by the court of appeals, see Pet. C.A. Br. 19, 41-50, and is not properly presented here.

[11] The issue is currently pending before the Second and Ninth Circuits. See *Connecticut Bar Ass'n* v. *United States*, *supra*; *Olsen* v. *Holder*, *supra*.

Office of Disciplinary Counsel of the Supreme Court, 471 U.S. 626 (1985). In *Zauderer*, this Court held that disclosure requirements in professional advertising need only be "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651; accord *id.* at 656 (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part) (agreeing, "[w]ith some qualifications," that "a State may impose commercial-advertising disclosure requirements" that satisfy that reasonable-relationship standard); see also *Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618, 634-635 (1995) (the First Amendment requires only "limit[ed] * * * scrutiny" of regulations on "pure commercial advertising" by lawyers). The court of appeals here, like the Fifth Circuit in *Hersh*, concluded that the BAPCPA's disclosure requirements meet that reasonable-relationship standard. That context-specific conclusion does not warrant further review.

Citing another portion of *Zauderer*, petitioners contend (Pet. 24-25), that the correct standard of review is the intermediate-scrutiny framework set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). But the portion of *Zauderer* that petitioners discuss involved actual restrictions on the content of advertising. See 471 U.S. at 632-633, 639. The aspect of *Zauderer* that is controlling here, on which the court of appeals correctly relied, is the discussion of disclosure requirements. See *id.* at 650-653. In that section of its opinion, this Court explained that there are "material differences between disclosure requirements and outright prohibitions on speech," and it rejected the attorney advertiser's contention that First Amendment challenges to those two different forms of regulation entailed "precisely the same inquiry." *Id.* at

650. And whereas petitioners suggest (Pet. 26-28) that Section 528 is invalid unless it is the least restrictive means of furthering Congress's interest in consumer protection, this Court in *Zauderer* expressly "reject[ed] [the] contention that we should subject disclosure requirements to a strict 'least restrictive means' analysis," because disclosure requirements are themselves less restrictive than other regulations. 471 U.S. at 651 n.14; see also *Went for It*, 515 U.S. at 632 ("[T]he 'least restrictive means' test has no role in the commercial speech context.").[12]

Petitioners do not dispute the existence of the problem that Congress addressed in Section 528, *i.e.*, misleading lawyer advertising that touts debt relief without making clear that a bankruptcy filing would be involved. See p. 3, *supra* (summarizing the legislative record). Rather, petitioners contend only (Pet. 27) that *Congress* lacks a valid interest in regulating that problem because it should be left to the States and the courts. That contention lacks merit. Bankruptcy is a subject of particular *federal* concern, see U.S. Const. Art. I, § 8, Cl. 4, and Congress has the power to address attorney misconduct that specifically affects the bankruptcy area. Section 528 responds to the valid concern over misleading attorney advertising in the bankruptcy context, and the court

[12] As the court of appeals explained, at least one court has concluded that Section 528 would pass muster even under the more searching *Central Hudson* standard. Pet. App. A37 n.11 (citing *Olsen* v. *Gonzales*, 350 B.R. 906, 920 (D. Or. 2006), appeal pending, No. 07-35616 (9th Cir. filed July 24, 2007)). Thus, even if *Zauderer* left the applicable standard of scrutiny unsettled, petitioners might not prevail in their challenge even under their preferred standard. In particular, the disclosure requirement at issue here "targets a concrete, nonspeculative harm." *Went for It*, 515 U.S. at 629.

of appeals correctly concluded that it satisfies the reasonable-relationship standard set out in *Zauderer*.

Petitioners also assert (Pet. 27-30) that the disclaimer requirements cover too many advertisements and that the disclaimers will themselves be misleading. Petitioners misread the statute in both respects. The disclaimer requirements apply only to advertising that is "directed to the general public," 11 U.S.C. 528(a)(3) and (b)(2), and that actually promotes defined forms of bankruptcy assistance or debt relief, 11 U.S.C. 528(b)(1) and (2). Petitioners' hypotheticals (Pet. 28-29 & n.4) focus on whether an attorney *provides* bankruptcy assistance and so may be a debt relief agency; the relevant question is whether the attorney also *advertises* bankruptcy assistance services and so must include disclaimers in those advertisements (but not others). As for petitioners' contentions that using the statutory term "debt relief agency" in the disclaimer will be confusing, petitioners are "free to expand upon and clarify for [their] clients" the "generalizations" made by the statute," *Hersh*, 553 F.3d at 767, such as by making clear that they are attorneys (unlike some other debt relief agencies). Pet. App. A37. They may even modify the disclaimers as they see fit, so long as their disclaimers are "substantially similar" to the model disclaimer set forth in the statute. 11 U.S.C. 528(a)(4) and (b)(2)(B); see Pet. App. A38 n.12.

Accordingly, none of petitioners' generalized complaints about Section 528's scope or burden provides any basis for further review.

CONCLUSION

With respect to the first question presented, the Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *United States* v. *Milavetz, Gallop & Milavetz, P.A.*, No. 08-1225 (filed Apr. 3, 2008), and then dispose of this case accordingly. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009