Nos. 08-1119, 08-1225

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONERS

Alan S. Milavetz
Chad Wm. Schulze
Walter Hodynsky
MILAVETZ, GALLOP & MILAVETZ, P.A.
6500 France Avenue South
Edina, MN 55435
(952) 920-7777

Thomas F. Miller
Thomas F. Miller, P.A.
1000 Superior Blvd, Ste 303
Wayzata, MN 55391
(952) 404-3896

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
Alexander R. Bilus
Michael J. Newman
Joshua Richards
Justin C. Danilewitz
Kate O'Keeffe
Francesco P. Trapani
Evan Posner
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999

Counsel for Petitioners

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Michael Docherty
Attorney at Law
4600 West 77th Street
Edina, MN 55435
(952) 897-6646

QUESTIONS PRESENTED

1. Whether, with due regard for the canon of constitutional avoidance, the phrase "debt relief agency," defined in 11 U.S.C. § 101(12A), excludes "attorney."

2. Whether 11 U.S.C. § 526(a)(4), prohibiting an attorney from advising a client to incur debt in contemplation of bankruptcy or to pay an attorney, violates the First Amendment's guarantee of free speech.

3. Whether 11 U.S.C. § 526(a)(4) may be construed narrowly, and, when construed narrowly, whether it is unconstitutionally vague.

4. Whether 11 U.S.C. § 528 improperly restrains commercial speech by requiring mandatory, misleading disclosures in an attorney's truthful, non-deceptive advertising in violation of the First Amendment's guarantee of free speech.

5. Whether 11 U.S.C. § 528, requiring mandatory, misleading disclosures in an attorney's truthful, non-deceptive advertising, violates Fifth Amendment Due Process.

PARTIES TO THE PROCEEDING

Petitioners are the law firm Milavetz, Gallop & Milavetz, P.A.; attorney Robert J. Milavetz, president of Milavetz, Gallop & Milavetz, P.A.; attorney Barbara N. Nevin; and individuals Ronald and Lynette Richardson. Respondent is the United States.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Milavetz, Gallop & Milavetz, P.A. discloses that it has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PRELIMINARY STATEMENT

Petitioners are Robert J. Milavetz and Barbara N. Nevin, two attorneys licensed to practice law in the State of Minnesota; the law firm Milavetz, Gallop & Milavetz, P.A.; and two individuals, Ronald and Lynette Richardson. Petitioners challenge the constitutionality of sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) of the Bankruptcy Code, 11 U.S.C. §§ 526(a)(4), 528 (a)(4), and 528(b)(2)(B), asserting that these provisions violate the First Amendment.

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. A-18, is reported at 541 F.3d 785. The order of the district court granting petitioners' motion for summary judgment, Pet. App. A-16, is not reported. The opinion of the district court denying the Government's motion to dismiss, Pet. App. A-1, is reported at 355 B.R. 758.

JURISDICTION

The court of appeals entered its judgment on September 4, 2008. The court of appeals denied rehearing on December 5, 2008. Petitioners timely filed their petition for writ of certiorari on March 5, 2009. The Government timely requested, and was granted, an extension of time to file its petition for writ of certiorari until April

6, 2009. The Government timely filed its petition for writ of certiorari on April 3, 2009. On June 8, 2009, the Court granted both petitions and consolidated the cases. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The relevant statutory provisions are 11 U.S.C. §§ 101(3), 101(4), 101(4A), 101(5), 101(12), 101(12A), 110(a), 329, 526(a)(4), 528(a)(4), and 528(b)(2)(B). These statutory provisions are reproduced in the appendix at the end of this brief.

STATEMENT OF THE CASE

In 2005, Congress amended the Bankruptcy Code to add section 526(a)(4), which provides in pertinent part:

> 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 . . .

11 U.S.C. § 526(a)(4). The Government contends that the phrase "debt relief agency" includes "at-

torneys," and, therefore, attorneys subject to the provision are barred from advising any "assisted person," including a client, to "incur debt" in contemplation of bankruptcy or "to pay an attorney."

In 2005, Congress further amended the Code to add sections 528(a)(4) and 528(b)(2)(B). Section 528(a)(4) provides in pertinent part:

> A debt relief agency shall . . . clearly and conspicuously use the following statement in [any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public]: '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). Similarly, section 528(b)(2)(B) provides:

> 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 . . . 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). The Government contends that these provisions also apply to attorneys, and, accordingly, attorneys subject to their terms are required to disclose in their advertisements the statements directed by these sections.

A. General Background

Petitioners Robert Milavetz and Barbara Nevin are attorneys who provide bankruptcy advice and counseling to clients. Joint App. 37a. They practice as part of petitioner law firm Milavetz, Gallop, and Milavetz, P.A. Joint App. 37a-38a. Petitioners Ronald and Lynette Richardson are two individuals who sought bankruptcy advice from the firm. Joint App. 38a.

Petitioners Milavetz, Nevin, and their law firm work in the consumer bankruptcy field, representing debtors and creditors. Joint App. 60a. Collectively, they have advised thousands of clients who have filed for bankruptcy relief. Joint App. 38a. Among other things, they have been called upon to counsel clients on such matters as obtaining home or car loans prior to filing for bankruptcy. Joint App. 60a. Petitioners adver-

tise their legal services in newspapers, telephone directories, television, radio, and the internet. Joint App. 38a-39a.

B. Course of the Proceedings Below

Petitioners filed an action in the district court seeking a declaration that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to attorneys. Alternatively, petitioners contended that, if these provisions apply to attorneys, they are unconstitutional under the First Amendment. Joint App. 34a-35a. Petitioners asserted both "facial" and "as-applied" challenges to these provisions. *See, e.g.*, Joint App. 48a, 53a-54a.

On January 11, 2006, the Government moved to dismiss petitioners' complaint. On December 7, 2006, the district court denied the Government's motion to dismiss, ruling instead that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) are unconstitutional, and that they do not apply to attorneys. Pet. App. A-15.

Applying "strict scrutiny" to section 526(a)(4), the court invalidated the provision as an impermissible "content-based" restriction that was not "narrowly tailored" to serve a "compelling" governmental interest. Pet. App. A-6. Applying "intermediate scrutiny" to sections 528(a)(4) & (b)(2)(B), the court likewise invali-

dated these provisions on the grounds that they failed to "advance" a substantial governmental interest and were not "narrowly drawn." Pet. App. A-7-8.

In the alternative, the district court also ruled that, as a matter of statutory interpretation, the term "debt relief agency" does not include "attorneys." Pet. App. A-15. The court observed that the definition of "debt relief agency" is ambiguous, Pet. App. A-13, and, invoking the canon of avoiding constitutional issues, held that "attorneys" falls outside the scope of sections 526(a)(4), 528(a)(4), and 528(b)(2)(B). Pet. App. A-15. Subsequently, on April 19, 2007, the court entered summary judgment in petitioners' favor. Pet. App. A-16-17.

On appeal, the Eighth Circuit affirmed the district court's ruling that section 526(a)(4) is unconstitutional, but reversed the court's holdings concerning sections 528(a)(4) & (b)(2)(B), and whether the phrase "debt relief agency" includes "attorneys." Pet. App. A-39. With respect to section 526(a)(4), the court reasoned that, regardless of whether it applied "strict scrutiny" or the lesser standard of review articulated in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), the statute was not "narrowly tailored, nor narrowly and necessarily limited," to restrict only the speech the Government had a legitimate interest in restricting. Pet. App. A-30.

Turning to sections 528(a)(4) & (b)(2)(B), the court upheld these provisions, reasoning that they were "reasonably related" to the governmental interest of requiring accurate advertising disclosures. Pet. App. A-39. The court also concluded that the phrase "debt relief agency" plainly encompasses attorneys. *Id.*

SUMMARY OF THE ARGUMENT

This case involves a series of statutory provisions that, if applicable to attorneys, strike at the heart of fundamental First Amendment values, place attorneys in conflict with applicable state ethical regulations, and compel attorneys to make confusing and misleading disclosures.

Section 526(a)(4) provides that a "debt relief agency" shall not "advise" an "assisted person or prospective assisted person" to "incur more debt in contemplation of" filing a case under the Bankruptcy Code or "to pay an attorney." 11 U.S.C. § 526(a)(4). If section 526(a)(4) is interpreted to apply to attorneys, it is unconstitutional because it impermissibly interferes with a lawyer's obligation to truthfully advise a client regarding a client's entirely lawful conduct. It is also unconstitutional because it impermissibly interferes with the client's right to receive the attorney's advice.

In turn, sections 528(a)(4) & (b)(2)(B) collectively provide that a "debt relief agency" shall clearly and conspicuously state in any advertisement regarding *inter alia* "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures," and "eviction proceedings," that "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)(B). If these compelled statements are interpreted to apply to attorneys, they are likewise unconstitutional because they impermissibly regulate the content of truthful, non-deceptive advertising, and additionally render this advertising confusing and misleading.

In this case, there are numerous reasons to conclude that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to attorneys, thus avoiding these constitutional questions. Each provision applies to attorneys only if "attorney" is included within the definition of "debt relief agency." For a number of reasons, the phrase "debt relief agency" does not unambiguously include attorneys. Likewise, including attorneys within the scope of the phrase "debt relief agency" would generate absurd results. Further, it is "fairly possible" to construe the phrase "debt relief agency" as not encompassing "attorneys," thus avoiding the question of the constitutionality of these statutory provisions. In addition, the Court should determine that "debt relief agency"

does not encompass attorneys because concluding otherwise would interfere seriously with the relationship between attorneys and their clients – an area of traditional state regulation. Before the Court will interpret a federal statute to have this effect, it generally requires that Congress' intent to interfere must be "clear and manifest." Because the requisite "clear and manifest" expression of intent is lacking in this case, the Court should conclude that Congress did not intend to include "attorneys" within the scope of "debt relief agency."

If "debt relief agency" *does* include attorneys, section 526(a)(4) is unconstitutional. Section 526(a)(4) improperly purports to prevent an attorney from providing truthful information to a client regarding the client's lawful conduct. Although the Government contends that section 526(a)(4) properly constrains only certain narrow categories of wrongful behavior, the statute cannot be limited in this way, and is substantially overbroad. Among other reasons, construing the statute in the manner the Government suggests would render the statute impermissibly vague.

Alternatively, section 526(a)(4) is an improper content-based restriction that fails to satisfy the requirements of strict scrutiny. To begin with, the Government cannot articulate a compelling interest to justify the statute's interference with an attorney's advice to a client regard-

ing the client's activities. In addition, section 526(a)(4) is not narrowly tailored to serve any such interest.

The Government contended below that, rather than apply strict scrutiny, section 526(a)(4) should be reviewed under the somewhat more relaxed standard applied in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Pet. App. A-29. *Gentile*, however, has no application here. In any event, the Government cannot satisfy the *Gentile* standard because, among other things, section 526(a)(4) is not narrowly tailored to serve the Government's alleged interest.

If "debt relief agency" includes attorneys, sections 528(a)(4) & (b)(2)(B) are also unconstitutional. These sections improperly purport to restrict the content of truthful and non-deceptive advertising. The Government contends that Congress' interest in regulating advertising under these sections is to prevent a particular type of deception. The advertising that petitioners engage in, however, is not of the allegedly proscribed type. Accordingly, there is no legitimate reason to require petitioners to make the disclosures that these statutory provisions direct. Worse, the compelled disclosures are themselves unwanted, confusing, and misleading.

The provisions of sections 528(a)(4) & (b)(2)(B) do not meet the requirements of inter-

mediate scrutiny. Petitioners' advertising is truthful and non-misleading, and the Government lacks a substantial interest in regulating advertising that is truthful and non-deceptive. The Government cannot demonstrate that its regulation directly and materially advances its interest. Finally, sections 528(a)(4) & (b)(2)(B) are not narrowly drawn.

Even if intermediate scrutiny were inapplicable in this case, sections 528(a)(4) and 528(b)(2)(B) are not "reasonably related" to any interest in preventing deception. The sections themselves are confusing and misleading, and impose regulations – and sanctions for failure to comply with them – that are vastly disproportionate to any harm the Government seeks to redress.

For these reasons, and as explained more fully below, the Court should conclude that the phrase "debt relief agency" does not include attorneys, and, therefore, that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to petitioners. Alternatively, the Court should affirm the decision of the Eighth Circuit that section 526(a)(4) is unconstitutional, and reverse the decision of the lower court upholding the constitutionality of sections 528(a)(4) & (b)(2)(B).

ARGUMENT

I. The Phrase "Debt Relief Agency" Does Not Include Attorneys.

The plain meaning of a statute ordinarily controls its construction. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). This mandate does not apply, however, if the statutory language is ambiguous or the plain meaning leads to an absurd result. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (finding statutory language to be ambiguous); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989) (agreeing that, because of the oddity of the result, the particular provision could not "mean what it says"); *Gleason v. Thaw*, 236 U.S. 558, 560 (1915) (interpreting section of the Bankruptcy Act of 1898 to avoid absurdity in its application).

In addition, where the constitutionality of a statute is challenged, it is a "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (citations and marks omitted). Finally, in order for a section of the Bankruptcy Code to displace state law in an area traditionally subject to comprehensive state regulation, this Court has required that the requisite federal

statutory intent must be "clear and manifest." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (declining to adopt an interpretation of section 548 of the Bankruptcy Code that would have disrupted state regulation of real property titles through state law foreclosure proceedings, stating "[t]o displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'") (citations omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'") (citation omitted).

The definition of "debt relief agency" in section 101(12A) does not unambiguously encompass "attorneys." Further, inclusion of "attorneys" within the scope of section 101(12A) yields results that are properly described as "absurd." For these reasons, the Court should conclude that "attorneys" do not fall within the scope of "debt relief agency."

Alternatively, even if section 101(12A) is not formally ambiguous, it is at least "fairly possible" to construe the phrase "debt relief agency" as excluding attorneys, thus avoiding the question of the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B). This conclusion is all the more appropriate because including attorneys

within the definition of "debt relief agency" trenches seriously upon the relationship between attorneys and their existing and prospective clients, thus interfering with traditional state regulation of the practice of law without a federal statutory directive that is "clear and manifest."

A. The Phrase "Debt Relief Agency" Does Not Unambiguously Include Attorneys, and Treating Attorneys As Debt Relief Agencies Generates Absurd Results.

As a general matter, a statute is ambiguous if its language admits of more than one plausible interpretation. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 n.2 (2005). In considering whether a statute may be read plausibly in more than one way, it is not sufficient to consider the text of the provision in isolation: statutory ambiguity "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (construing several sections of the Bankruptcy Code together and observing

that "[s]tatutory construction . . . is a holistic endeavor"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936).

Context is critical for several reasons. To begin with, a statutory provision that seems clear in isolation may, in fact, be ambiguous when considered in the larger context of the statutory scheme of which it is a part. *See Robinson*, 519 U.S. at 341 (observing that, although the term "employees" as used in a particular statute appeared "[a]t first blush" to mean current employees, "[t]his initial impression…[did] not withstand scrutiny in the context of" that section at issue in light of the entire statutory scheme). Conversely, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," because, for example, "the same terminology is used elsewhere in a context that makes its meaning clear…or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Timbers*, 484 U.S. at 371 (citations omitted).

Section 101(12A) provides that "debt relief agency" means, in part, "any person who provides any bankruptcy assistance to an assisted person." 11 U.S.C. § 101(12)(A). Read in isolation, the phrase "any person" might appear at first blush to include "attorney." This facial im-

pression, however, does not withstand contextual scrutiny.

First, if Congress had intended to include "attorney" within the scope of section 101(12A), it almost certainly would have done so expressly by mentioning the term "attorney" at least somewhere in the section. "Attorney" is a defined term under the Code, and, as a general matter, whenever Congress intends specifically to include "attorney" within the scope of a particular section it does so expressly. *See, e.g.*, *id.* §§ 502(b)(4), 504, 1103(b). This is especially true when Congress intends to regulate the conduct of attorneys and their provision of legal services in relation to bankruptcy proceedings. *See, e.g.,* 11 U.S.C. §§ 327, 328, 329, 330, 331.

For example, section 329 regulates certain fee arrangements between a debtor and the debtor's attorney, and specifically uses the term "attorney" in its prescriptions. 11 U.S.C. § 329. Historically, section 329 derives from section 60d of the former Bankruptcy Act of 1898, 11 U.S.C. § 96d (repealed 1979), which, like other provisions of the Act addressing attorneys, also specifically used the term "attorney." Given this longstanding convention, it is striking that Congress specifically declined to mention "attorney" anywhere in the definition of "debt relief agency." Indeed, Congress' careful and specific mention of "attorney" throughout section 329

and other similar provisions of the Code serves only to highlight the contrasting incongruity of section 101(12A). *See also* 18 U.S.C. § 155 (prescribing criminal penalties for certain fraudulent agreements to fix the fees of an "attorney" who provides certain legal services in connection with a bankruptcy case).

As this Court has explained, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations and marks omitted). The fact that Congress specifically references "attorney" in multiple provisions of the Code, but not anywhere in section 101(12A), indicates that Congress did not intend "attorney" to fall within the definition of "debt relief agency."

Second, Congress' failure to mention the term "attorney" anywhere in section 101(12A) is all the more striking because Congress specifically stated in section 101(12A) that a "bankruptcy petition preparer" is a "debt relief agency." This is noteworthy because a "bankruptcy petition preparer" is *already* defined elsewhere in the Code as essentially a person who provides bankruptcy assistance to an assisted person and, thus, a bankruptcy petition

preparer falls readily within the definition of "debt relief agency" without the need for any express reference to "bankruptcy petition preparer" in section 101(12A). Specifically, section 110 of the Code already defines a "bankruptcy petition preparer" as "a person, other than an attorney . . . who prepares for compensation a document for filing" in a bankruptcy case – a quintessential form of "bankruptcy assistance" provided to an "assisted person." 11 U.S.C. § 110(a). In contrast, the Code defines "attorney" as simply "attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4).

Given that "bankruptcy petition preparer" is already defined in section 110 as a type of person who falls readily within the category of those who provide bankruptcy assistance to assisted persons, whereas "attorney" is *not* already defined in this way, one would expect Congress to have expressly designated "attorney" as a "debt relief agency" if that had been Congress' intent, and not "bankruptcy petition preparer." Yet Congress did precisely the opposite, specifically designating "bankruptcy petition preparer" as falling within the scope of section 101(12A) even though doing so was essentially redundant. Congress was thus exceptionally careful to ensure that "bankruptcy petition preparer" was included, and, presumably, if Congress had intended to include "attorney" within the scope of

section 101(12A), it would have been at least as careful, given that the definition of "attorney" in section 101(4) does not by itself place attorneys within the scope of the definition of "debt relief agency." This also supports the conclusion that Congress did not include attorneys as "debt relief agencies."

Third, reference to the full text of section 101(12A), and particularly the types of entities that are *excluded* from the scope of "debt relief agency" under certain circumstances, further suggests that Congress did not intend "debt relief agency" to include "attorneys." To begin with, section 101(12A) excludes from the definition of "debt relief agency" "any person who is an officer, director, employee, or agent of a person who provides assistance." 11 U.S.C. § 101(12A)(A). For example, if a "bankruptcy petition preparer" is a corporation, the exclusion in section 101(12A)(A) shields the corporation's officers, directors, and employees who are not themselves providing "bankruptcy assistance" to an "assisted person" from compliance with the provisions of the Code applicable to debt relief agencies, as well as potential liabilities associated with failure to comply. Lawyers and law firms, however, are commonly organized as partnerships with partners, associates, and counsel, rather than as corporations with officers and directors. It is clear that Congress understood this because the definition of "attorney" in section

101(4) specifically includes a "partnership" authorized under applicable law to practice law.

Including "attorney" within the definition of "debt relief agency" in section 101(12A) would thus create the anomaly that, in the case of a 500-attorney law firm organized as a partnership, if merely one attorney "provides any bankruptcy assistance to an assisted person" then the entire firm and all of its partners would be a "debt relief agency" subject to all of the attendant requirements of sections 526 and 528, and associated liabilities. Yet, in the case of a 10-employee corporate "bankruptcy petition preparer," the opposite would be true because the officers and directors of a corporation are excepted from the definition. This contrasting result makes little sense. If Congress had intended attorneys to be "debt relief agencies," presumably Congress would have crafted the exclusion in section 101(12A)(A) in a way that mirrors the reality that lawyers and law firms are commonly organized as partnerships.

As this Court has explained, under the canon *noscitur a sociis*, "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (citations and marks omitted). Further, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of

many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co. Polaroid Corp.*, 367 U.S. 303, 307 (1961) (citation omitted). The term "any person" is likewise capable of many meanings and potential overbreadth. Construed in context, it is properly limited by reference to section 101(12A)(A), the terms of which suggest that Congress did not intend to include attorneys within the scope of "debt relief agency." *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384 (2003) (applying *noscitur* canon and construing phrase "other legal process" narrowly to conform to usage in statute); *Gleason*, 236 U.S. at 560 (interpreting the general term "property" narrowly in the discharge section of the Bankruptcy Act where a broad interpretation would be contrary to the context of the term as used in other sections); *Neal v. Clark*, 95 U.S. 704, 708-09 (1877) (limiting the meaning of the term "fraud" as used in the bankruptcy laws to instances of active fraud, not implied fraud, by reference to surrounding terms).

In addition, section 101(12A)(C) further excludes from the definition of "debt relief agency" a "creditor" of an 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." 11 U.S.C. § 101(12A)(C). Notably, attorneys are often "credi-

tors" of the bankrupt debtors they advise and represent because these attorneys often receive their fees over time, particularly in chapter 13 cases. Indeed, the provisions of chapter 13 specifically contemplate that the debtor's attorney will be paid over time as an administrative expense under the debtor's plan – with a plan being *the* quintessential form of "restructuring" of a debt. *See* 11 U.S.C. § 1326(b)(1); *In re Sanders*, 347 B.R. 776, 780 (N.D. Ala. 2006) (the claim of the debtor's bankruptcy attorney for unpaid fees are properly paid out as an expense of administration under the debtor's chapter 13 plan along with other priority claims); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (Brennan, J., plurality opinion) ("[T]he restructuring of debtor-creditor relations…is at the core of the federal bankruptcy power"); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 530 (1936).

Accordingly, with respect to the payment of his or her own fee, the attorney in this situation would *not* be a "debt relief agency" because of the exclusion stated in section 101(12A)(C), and could thus advise his or her client to incur additional debt to pay the fee to be restructured under the plan, even though section 526(a)(4) provides that a debt relief agency "shall not…advise an assisted person…to incur more debt…to pay an attorney." 11 U.S.C. § 526(a)(4). This anomaly further indicates that Congress did not in-

tend attorneys to be included within the scope of "debt relief agency."

Fourth, including "attorney" within the scope of "debt relief agency" would lead to the anomalous result of requiring some bankruptcy attorneys to plainly misrepresent their services to the public. As noted, a "debt relief agency" is required under sections 528(a)(4) and 528(b)(2)(B) to state in their advertizing: "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)(B). As also noted, a "debt relief agency" is defined as a person who provides "bankruptcy assistance" to an "assisted person." In turn, an "assisted person" is *anyone* who has primarily consumer debts and relatively few assets. In other words, the definition of "assisted person" is not limited to debtors. Nor is the definition of "bankruptcy assistance" limited to assistance provided to debtors. Indeed, an assisted person may be a *creditor*, so long as the creditor has primarily consumer debts and relatively little property – for example, a tort victim with limited assets seeking bankruptcy representation in order to collect a wrongful injury claim against a bankrupt individual or corporation. *Connecticut Bar Ass'n v. United States*, 394 B.R. 274, 281 (D. Conn. 2008) (finding that "assisted person" includes "customers of a failed business, non-debtor spouses, or anyone else who may need

representation related to a bankruptcy proceeding").

There are a large number of bankruptcy attorneys who *only* advise and represent creditors. Yet if the term "debt relief agency" includes "attorney," then any attorney who represents a *creditor* who falls within the definition of "assisted person" will nevertheless be required to make the disclosures directed by 528(a)(4) and (b)(2)(B) – a result that is absurd because, as applied to these attorneys, these disclosures would be plainly false and misleading as these attorneys do not help people file for bankruptcy relief.[1]

Fifth, including "attorney" within the scope of "debt relief agency" would have the additionally absurd result of requiring an attorney to refrain in some circumstances from giving perfectly legitimate, beneficial advice to a debtor client. As noted, section 526(a)(4) provides that a "debt relief agency" shall not "advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing" for bankruptcy or "to pay an attorney." 11 U.S.C. § 526(a)(4). Of course, there are numerous instances in which it is in the best interests of the

[1] The same anomalous problem does not arise with respect to bankruptcy petition preparers because they do not provide services to creditors.

debtor, as well as the debtor's creditors, for the debtor to incur new debt in contemplation of bankruptcy. For example, it may be beneficial to advise a debtor to incur new debt for the purpose of refinancing an existing loan at a lower interest rate, thus lowering the overall burden on the debtor's resources. It may also be beneficial to advise a debtor to incur new debt for the purpose of purchasing a car to commute to work in order to earn the wages necessary to fund a chapter 13 plan.[2] Apart from the obvious absurdity of prohibiting this kind of counsel, section 526(a)(4) sets up an untenable conflict between its provisions and the attorney's ethical obligation to counsel his or her client in a fully complete and competent way.[3] Indeed, in many circumstances an attorney cannot comply with both section 526(a)(4) *and* applicable state law ethical regulations because the two inherently conflict.[4] This anomalous interference with state regulation of attorneys further suggests that Congress did not intend the phrase "debt relief agency" to include attorneys.

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[2] These and additional examples are discussed in greater detail below. *See infra* Part II.A.1.

[3] The same problem does not arise with respect to bankruptcy petition preparers who are not subject to the same ethical obligations.

[4] This problem is discussed in greater detail below. *See infra* Part II.A.1.

Likewise, it will often be beneficial for an attorney to advise a client regarding incurring debt "to pay for an attorney." *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-69 (1977) ("rare is the client,…even one of…modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge"). For example, when the client asks the attorney how the client can pay for the attorney's services, if the attorney permits payment over time, the attorney should in straightforward fashion be able to advise the client of that fact. *See id.* (observing that, for ethical reasons, the commercial arrangement between the attorney and client should be fully disclosed). Yet this would constitute "advising" the client to "incur debt" in the form of incurring an obligation to the attorney for the attorney's services and, thus, be proscribed under the statute. This absurd result also suggests that Congress did not intend the phrase "debt relief agency" to include attorneys.[5]

Sixth, including "attorney" within the scope of "debt relief agency" would have the additionally anomalous result of conditioning the quality and comprehensiveness of the attorney's advice

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[5] The same difficulty does not arise in the context of prohibiting non-lawyers from advising individuals about incurring debt to pay an attorney. If anything, it leaves it to the attorney to discuss with the client how the attorney may be paid.

on the client's relative wealth. As noted, the concept of "debt relief agency" is limited to the provision of "bankruptcy assistance" to "assisted persons," and "assisted person" is limited to those of relatively limited means. 11 U.S.C. § 101(3). Thus, debtors (or creditors) with non-exempt property worth in excess of $164,250, and those with primarily business debts, may receive unrestricted advice. This bizarre and highly discriminatory result further suggests that Congress did not intend "debt relief agency" to include attorneys.[6]

Seventh, it is not necessary to include "attorney" within the scope of "debt relief agency" to fulfill the statute's purposes. Although the purposes underlying the "debt relief agency" provisions in the Code are not entirely clear, the Government has argued that the purposes behind these provisions are to "strengthen professionalism" and "prevent abuse." Res. Pet. 3. Of course, as noted, including attorneys within the scope of "debt relief agency" would actually erode professionalism by unduly and inappropriately restricting the advice an attorney may provide to his or her debtor clients. It would also require,

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[6] The same anomalous problem does not arise with respect to bankruptcy petition preparers because they do not provide legal advice. *See* 11 U.S.C. § 110 (e)(2)(A) ("A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice").

in some circumstances, false and misleading advertising. *See Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 767 (1976) (rejecting argument that withholding pricing information from the public was necessary to promote professionalism, and observing that "[a] pharmacist who has a continuous relationship with his customer is in the best position…to exert professional skill for the customer's protection.").

In contrast, *excluding* attorneys from the scope of "debt relief agency" would strengthen professionalism by policing the roles of bankruptcy petition preparers and other non-lawyers who provide services similar to those of bankruptcy petition preparers. As a general matter, bankruptcy petition preparers and other non-lawyers are not qualified or able to provide the kind of legal counsel that bankrupt debtors often need. By tightening restrictions on non-lawyers, the statutory scheme would promote professionalism by encouraging debtors to seek advice from attorneys.

Excluding attorneys from the scope of "debt relief agency" would also help prevent abuse. Again, encouraging debtors to seek advice from attorneys is more likely to result in compliance with the full range of requirements for the successful commencement and completion of cases under the Bankruptcy Code.

The court below stated that reference to another provision of the Code, section 526(d)(2), supports the position that "debt relief agency" includes "attorney." Pet. App. A-26. Section 526(d)(2) is a savings clause, providing that nothing in sections 526, 527, or 528 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). The court below believed that this provision demonstrates that Congress intended attorneys to be included within the scope of "debt relief agency" because otherwise this provision makes no sense. Pet. App. A-26. On the contrary, the provision makes perfect sense if attorneys are excluded from the scope of "debt relief agency" because section 526(d)(2) is best read as expressly preserving the ability of the States to determine and enforce restrictions on the unauthorized practice of law by bankruptcy petition preparers and other non-lawyers.

The court below also stated that excluding "attorneys" from the scope of "debt relief agency" would be contrary to the intent of Congress. Pet. App. A-27. In support of this analysis, the court pointed to an amendment offered by Senator Feingold during deliberations on the legislation that would have clarified that attorneys are ex-

cluded from the definition of "debt relief agency" in section 101(12A). *See* 151 Cong. Rec. S2180 (daily ed. Mar. 7, 2005). Senator Feingold, however, withdrew the amendment voluntarily before it went to a vote. *See* 151 Cong. Rec. S2463 (daily ed. Mar. 10, 2005). In context, the voluntary withdrawal may be viewed as demonstrating that Senator Feingold came to the ultimate conclusion that the amendment was unnecessary because attorneys already are *not* included within the scope of the provision.

Construed in context, the phrase "debt relief agency" does not unambiguously include attorneys. Further, including attorneys within the scope of this provision generates demonstrably absurd results, is not necessary to fulfill the statute's purposes, would actually defeat the statute's purposes in significant ways, and otherwise would have bizarre and discriminatory effects. The Court should avoid these results by determining that "attorneys" are not included within the scope of "debt relief agency."

B. The Concept of "Debt Relief Agency" Should Be Construed to Exclude Attorneys to Avoid Reaching the Constitutionality of Sections 526 and 528.

Alternatively, even if the Court determines that section 101(12A) is not formally ambiguous, it is nonetheless "fairly possible" to construe the phrase "debt relief agency" as not including attorneys. In this case, the Court should do so to avoid reaching the question of the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B).

As the Court has explained, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). As the Court has also noted, this canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Courts should "not lightly assume that Congress intended to infringe constitutionally protected liberties," and therefore "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J.*

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

As the Court's precedents further demonstrate, in considering whether it is possible to construe a statute in a way that avoids addressing its constitutionality, relevant canons of construction are properly consulted. For example, in *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982), the Court considered whether it was possible to construe section 522(f) of the Bankruptcy Code to avoid resolving a challenge to its provisions under the Fifth Amendment. Section 522(f) permits a debtor to eliminate certain liens on assets the debtor claims as exempt, and makes no distinction between liens that attach before or after the effective date of the legislation. In *Security Indus. Bank*, a creditor claimed that the statute violated the Fifth Amendment by eradicating liens already in place prior to the statute's enactment. To avoid reaching the constitutional question, the Court invoked the canon that statutes generally apply prospectively rather than retroactively. *Id.* at 79; *see also INS v. St. Cyr*, 533 U.S. 289, 311 (2001) (upholding a district court's jurisdiction to hear an alien's challenge to deportation in spite of a statutory provision stating "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having

committed" the offense that the alien committed, by relying in part on the canon "requiring a clear statement of congressional intent to repeal habeas jurisdiction," thereby avoiding reaching the constitutional issues involved if judicial review were not allowed); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

In this case, numerous canons support the conclusion that the phrase "debt relief agency" does not encompass attorneys, thereby avoiding the constitutional issues decided in the courts below. In addition to the examples discussed above, of particular relevance is the canon that the Court will avoid a construction of the Bankruptcy Code that would seriously interfere with areas of traditional state regulation by requiring that any such intention on the part of Congress be expressed in terms that are "clear and manifest." *BFP*, 511 U.S. at 544 (citation omitted).

In *BFP*, the Court considered whether a trustee in bankruptcy could undo a state-law foreclosure sale under the fraudulent transfer provisions of section 548 of the Code on the ground that the sale had realized a price that was less than the "reasonably equivalent value" of the foreclosed property. In construing the meaning of the phrase "reasonably equivalent value" appearing in the section, the Court explicitly avoided an interpretation that would permit a trustee to undo foreclosure sales conducted in

conformity with state law. The court reasoned that, "[i]t is beyond question that an essential state interest is at issue here," and that if trustees could routinely avoid state law foreclosure sales under section 548, "[t]he title of every piece of realty purchased at foreclosure would be under a federally created cloud." *Id.* at 544. In rejecting this outcome, the Court explained that, "[t]o displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'" *Id.* (citations omitted).

In this case, it is also true that there is an essential state interest at issue. As the Court has long recognized, attorney conduct is an area of traditional state regulation. *See Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) ("[R]egulation of the [Arizona] bar is a sovereign function of the Arizona Supreme Court."); *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 and the District of Columbia within their respective jurisdictions."); *Bates*, 433 U.S. at 361; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Moreover, as noted, including attorneys within the scope of "debt relief agencies" trenches seriously on established attorney-client relations, and interferes significantly with state regulation

of attorney conduct.[7] Accordingly, before the Court concludes that attorneys are included within the scope of "debt relief agency," Congress' intent to include them should be "clear and manifest." In context, section 101(12A), which does not even mention the word "attorney," falls well short of this standard.

For all of these reasons, the Court should avoid reaching the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B), by concluding that "debt relief agency" does not include "attorney."

II. If "Debt Relief Agency" Includes Attorneys, Section 526(a)(4) Is Unconstitutional.

A statute is facially overbroad, and therefore invalid under the First Amendment, "if it prohibits a substantial amount of protected speech." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). As the Court has concluded, protected speech includes the provision of private legal advice to a client concerning the client's lawful activities. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-549 (2001). Although in some instances Congress may restrict advice-giving in order to insure the integrity of a message that it

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[7] *See also infra* Part II.A.1 (discussing this interference).

pays for and seeks to disseminate, *Rust v. Sullivan*, 500 U.S. 173 (1991), Congress may not restrict an attorney's private advice regarding a client's lawful activities because doing so impermissibly erodes the fundamental integrity of the attorney-client relationship and the basic freedoms and values that this relationship protects. *Velazquez*, 531 U.S. at 546-49; *see also Virginia State Bd. of Pharm.*, 425 U.S. at 773 (concluding that State may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity" even though the State may be "fearful of that information's effect").

In addition, a statute that imposes a content-based restriction on speech is impermissible under the First Amendment unless, under principles of strict scrutiny, the restriction (1) serves a compelling governmental interest, (2) is narrowly tailored, and (3) is the least restrictive means of advancing the Government's interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994). "'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." *Playboy Entm't Group, Inc.*, 529 U.S. at 817 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). Likewise, "the burden is on the Gov-

ernment to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

Alternatively, where a regulation designed to protect the integrity of the judicial process also imposes a burden on lawyers' speech, the Court may apply a different standard under which the Court first balances the government's legitimate interest in regulating the activity in question against the lawyers' rights, and then determines whether the regulation imposes "only narrow and necessary limitations on lawyers' speech." *Gentile*, 501 U.S. at 1075. In such a case, regardless of whether the Government has an interest in imposing the burden, the regulation is invalid unless it is both narrowly tailored and necessary to the government's legitimate purpose. *Id.*

In this case, section 526(a)(4) is facially overbroad because it proscribes a substantial amount of protected speech. In addition, section 526(a)(4) constitutes an invalid content-based restriction because it fails to satisfy the requirements of strict scrutiny. Alternatively, section 526(a)(4) does not satisfy the requirements of the Court's analysis in *Gentile*.

A. Section 526(a)(4) Is Unconstitutionally Overbroad.

A lawyer's advice to a client concerning a client's lawful conduct is "noncommercial" speech. *Bd. of Trs. of State Univ. v. Fox*, 492 U.S. 469, 482 (1989) (characterizing "legal advice" as noncommercial in nature, as opposed to "commercial speech," which encompasses speech that "*proposes* a commercial transaction"). Accordingly, restrictions on a lawyer's advice are subject to the full range of relevant First Amendment challenges, including the Court's facial overbreadth jurisprudence. *Id.* at 482-83 (observing that, although restrictions on commercial speech are not subject to facial overbreadth analysis, restrictions on noncommercial speech may be invalidated on this basis). Further, because a lawyer's advice is a form of professional speech critical to the functioning of our legal system, it may, under appropriate circumstances, receive "the strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). As the court below properly ruled, "we hold that section 526(a)(4) is substantially overbroad." Pet. App. A-32 n. 10 (citing *Veneklase v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001) (discussing overbreadth doctrine)

(quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (same))).[8]

Under the Court's precedents, a statute is facially overbroad if it sweeps within its proscriptive scope not only conduct that the Government may constitutionally restrict, but also a substantial amount of protected speech that it may not. For example, although a State may enact a prophylactic ban on a lawyer's commercial, in-person solicitation of clients, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), it may not enact a restriction so broad as to encompass in-person, noncommercial solicitation of public interest litigation, *In re Primus*, 436 U.S. 412 (1978). As the Court has explained, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see also Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 475 (2007) ("The Government may not suppress lawful speech as the

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[8] As noted, "protected speech" properly includes the provision of private legal advice to a client concerning the client's lawful activities. *See Velazquez*, 531 U.S. at 546-549. In general, the categories of unprotected speech are relatively few. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (listing examples); *R.A.V. v. St. Paul*, 505 U.S. at 382-83 (discussing traditional areas of unprotected speech); *see also Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) ("The inquiry into the protected status of speech is one of law, not fact.").

means to suppress unlawful speech.") (citations and marks omitted); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L.REV. 1, 29 (2000) (discussing the *Ohralik* and *Primus* decisions).

In this case, section 526(a)(4) both threatens and compels severe and substantial impairment of protected aspects of the attorney-client relationship by restricting an attorney's provision of private advice regarding a client's lawful activities. Notably, section 526(a)(4) does not render it unlawful for a client to actually incur more debt in contemplation of filing a bankruptcy case or to pay an attorney. Rather, the statute prohibits an attorney from *advising* the client to incur more debt in contemplation of bankruptcy or to pay an attorney. Further, the statute prohibits this advice without limiting the kinds of debts subject to the prohibition or the circumstances of their incurrence. Thus, in addition to prohibiting advice to undertake potentially unlawful conduct (e.g., the fraudulent incurrence of debt), Congress has also, in substantial part, prohibited the attorney from advising the client concerning what the client may lawfully do. In other words, the statute requires the client to be kept in the dark regarding "truthful information about entirely lawful activity." *Virginia State Bd. of Pharm.*, 425 U.S. at 773.

In addition, by prohibiting an attorney from "advising" a client to incur more debt in contemplation of bankruptcy or to pay an attorney, the statute also effectively bars the attorney from *talking about* these matters with a client. For example, if an attorney cannot "advise" a client to incur more debt, the attorney also cannot participate in a discussion with the client weighing the pros and cons of a client's pending decision to incur more debt. After all, the whole point of the discussion would be to help the client reach a conclusion, which might well be to incur additional debt before filing a bankruptcy case.

Worse, the language of the prohibition is worded so broadly and vaguely, and is backed by such onerous and ill-defined sanctions, that it must unavoidably chill in substantial measure a lawyer's expression of advice that is not only the lawyer's right and duty to provide, but also the client's right to hear.

As the Court has explained, the First Amendment protects not only the speaker, but also those who would hear the speech – in this case the lawyer's clients and prospective clients. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386-87 (1998) ("Our decisions have concluded that First Amendment protection extends equally to the right to receive information"); *Virginia State Bd. of Pharm.*, 425 U.S. at 756 ("where a speaker exists . . . the protection

afforded is to the communication, to its source and to its recipients both"); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (it is "well established that the Constitution protects the right to receive information and ideas"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (same).

Further, the sanctions associated with violation of section 526(a)(4) are not to be taken lightly: "First Amendment interests are fragile interests," and, as in this case, "a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). Because section 526(a)(4) substantially restricts and chills protected speech, it is facially overbroad.

1. Section 526(a)(4) prohibits and chills a substantial amount of protected speech.

The protections afforded an attorney's advice to a client or prospective client under the First Amendment are properly robust. As the Court has noted, "lawyers are essential to the primary governmental function of administering justice." *Goldfarb*, 421 U.S. at 792. Indeed, no other trade or profession is "as essential" to this critical governmental purpose. *Hoover*, 466 U.S. at 568 n.18 (citations and marks omitted). Not only is the attorney's role necessary to the proper

functioning of the courts, it is also essential to the vindication of individual rights and likewise the public's perception of the integrity of the judicial process as a whole.

If Congress may impair an attorney's function by truncating such things as "complete analysis of the case, full advice to the client, and proper presentation to the court," then "[t]he courts and the public would come to question the adequacy and fairness of professional representations." *Velazquez*, 531 U.S. at 546. This, in turn, would inevitably erode the essential underpinnings of our representational system of advocacy and the basic concepts of justice that it supports. Accordingly, just as Congress may not prohibit an attorney from advising a client that he or she may lawfully challenge an existing statute as illegal or unconstitutional, *id*. at 547-49, Congress may not prohibit an attorney from advising a client about the legality of the client's other activities, such as lawfully incurring debt prior to commencing a bankruptcy case or to pay an attorney.

In its every day application, section 526(a)(4) trenches seriously on the attorney-client relationship and the lawyer's advisory role in very real and practical ways. Clients and prospective clients often approach attorneys with problems that, in their own minds, are frequently ill-defined from a legal perspective. For example, a

client may arrive at an attorney's doorstep armed with a tale of acute financial tragedy, but have no idea what legal recourse may be available to address it, let alone the details of what the client may permissibly do to secure the benefits of any available relief, or avoid its forfeiture. Within our system, the client expects and trusts that the attorney will help define the client's problems legally, and answer the client's legal questions fully. If a client in precarious financial straits inquires, for example, whether it is lawful to borrow money to refinance an existing mortgage to obtain a lower rate of interest prior to filing for bankruptcy, or incur additional debt to purchase a car necessary to get to work, it is unacceptable for the attorney to be prohibited from offering a response other than "I cannot answer your question."

Attorneys are ethically bound to represent their clients competently and diligently, to communicate to a client all necessary information, to assist them in making an informed decision about the legality of a particular course of conduct, and to understand their rights and obligations. *See* Model Rules of Prof'l Conduct R. 1.1 (2009) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in

representing a client."); *id.* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *see also id.* R. 1.4, cmt. 5 ("The guiding principle [regarding the provision of advice to a client] is that a lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests."); *accord* Minnesota Rules of Prof'l Conduct R. 1.1, 1.3, 1.4(b), 2.1; *see also In re Disciplinary Action Against Redburn*, 746 N.W.2d 330, 334 (Minn. 2008) (finding attorney's "lack of communication with all of the clients at issue also violated the requirement of Rule 1.4(b), that an attorney 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'") (citation omitted); *In re Charges of Unprofessional Conduct in Panel Case No. 23236*, 728 N.W.2d 254, 258 (Minn. 2007) ("Rule 1.4(b) states that '[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.' Lawyers comply with Rule 1.4 when they provide their clients with 'sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.'"); *In re Disciplinary Action Against Keate*,

488 N.W.2d 229, 234 (Minn. 1992) (discussing Rule 1.4(b) as an "affirmative duty" to provide the client with necessary information); *see generally Evans v. Jeff D.*, 475 U.S. 717, 728 n.14 (1986) ("Generally speaking, a lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice.").

An attorney cannot comply with these basic principles unless the attorney is free to advise the client regarding his or her options under a particular set of circumstances, or offer advice regarding the legality of a client's proposed course of conduct. Because section 526(a)(4) severely truncates these critical advisory functions, it places the attorney in an unacceptable bind.

As noted, section 526(a)(4) does *not* render unlawful a client's incurrence of additional debt prior to commencing a bankruptcy case or to pay an attorney. Hence, under the ethical rules outlined above, the attorney cannot ethically advise the client that he or she can *never* incur additional debt prior to filing for bankruptcy because that would not be a true statement of the law. At the same time, under section 526(a)(4), the attorney *is* prohibited from advising a client about perfectly legal or beneficial debt options. As a result, the attorney can only remain silent about the subject, which in and of itself violates

the ethical standards listed above. If the client does happen to ask whether he or she can incur debt in a manner that is, in fact, unlawful, the attorney might answer simply "no," but must still refrain from explaining alternative, legitimate financing options (which silence, if anything, might have the perverse effect of encouraging a desperate debtor to pursue a questionable financing option simply for lack of the lawyer's articulation of a legitimate alternative).

The Government has opined that the evil sought to be regulated under section 526(a)(4) is attorney advice involving the incurrence of debt "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge." Pet. App. A-29; *see* Res. 8th Cir. Br., at 29-30. But apart from the fact that these standards are themselves entirely vague, the short answer to the Government's proposition is that they appear nowhere in the statute. By its terms, the statute is not limited to "abusive" conduct. Because the statute sweeps far more broadly than the government suggests, and squarely encompasses perfectly legitimate counsel, it is substantially overbroad.

As the court below properly noted, section 526(a)(4) "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." Pet. App. A-29 (emphasis in original). As the court below also observed, section 526(a)(4) thus sweeps within its scope not only the incurrence of debt for questionable purposes, but those that are entirely beneficial as well. Pet. App. A-30.

Again, section 526(a)(4) provides that "a debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case…or to pay an attorney." 11 U.S.C. § 526(a)(4). This would include, for example, the perfectly legitimate advice that it might be in the debtor's best interests "to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments." Pet. App. A-31; *see also* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) (discussing this example). Advice of this kind is perfectly proper because there is nothing inherently unlawful about such a refinancing, and lowering the client's interest rate may be beneficial not only to the client, but also to his or her creditors: by paying less in interest to one creditor, the client will have more funds to pay the claims of others.

Likewise, section 526(a)(4) would also prohibit the attorney from advising the client "to incur additional debt to purchase a reliable auto-

mobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work." Pet. App. A-31; *see supra* Chemerinsky, at 579. Once again, this advice is perfectly legitimate because there is nothing inherently unlawful about a client borrowing money to purchase reliable transportation. Indeed, it may be entirely beneficial not only to the client, but also to his or her creditors: by having dependable transportation, the client may retain his or her employment, and thus the wages necessary to pay the claims of creditors outside of bankruptcy, or perhaps in bankruptcy under a chapter 13 repayment plan. *See* 11 U.S.C. § 1322(a)(1) (providing that a chapter 13 plan shall "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan."); 8 COLLIER ON BANKRUPTCY ¶ 1322.02[1] (15th ed. 2009) ("Chapter 13 repayment plans are generally, but not necessarily, funded primarily out of future income.").

As a further example, section 526(a)(4) would prohibit an attorney from advising a client to sell a house that the client can no longer afford and move into less expensive quarters, such as a rented apartment, in advance of a potential bankruptcy filing. The attorney is prohibited from offering this advice because doing so would constitute advising the client to incur additional

debt in the form of the rental obligations under the lease, even though this would be beneficial advice. Similarly, a client may need medical attention, but may be concerned whether he or she can afford to pay the doctor's bills because doing so would likely cause the client to default on other obligations that the client might discharge in bankruptcy. Under section 526(a)(4), the attorney is prohibited from advising the client to seek medical care and, if necessary, address the client's other obligations in a bankruptcy proceeding because doing so would constitute advising the client to incur additional debt in the form of the necessary medical expenses. Again, the prohibition applies even though the advice would be beneficial to the client, and might also be beneficial to the client's creditors (who would likely be worse off if the debtor became incapacitated with illness).

Additional examples abound because section 526(a)(4) is not limited to any particular type of "debt," and the concept of "debt" under the Bankruptcy Code is far reaching. Specifically, the term "debt" is defined to mean "liability on a claim," 11 U.S.C. § 101(12), and the term "claim" is defined expansively to mean any "right to payment" regardless of the nature of the right, 11 U.S.C. § 101(5). *See Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) ("a 'claim' is defined…as a 'right to payment,'…and a 'right to payment,' we have said, 'is nothing more nor less than an en-

forceable obligation'") (quoting *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). Thus, the concept of "debt" as used in section 526(a)(4) encompasses virtually every kind of liability, including unpaid taxes, doctors' bills, attorneys' fees, credit card debt, and tort liabilities. *See Davenport*, 495 U.S. at 558 (observing that, under the Code, the term "debt" is coextensive with the term "claim").

Individuals incur "debt" routinely simply by such ordinary acts as consuming utility or medical services for which they subsequently receive a bill; by driving cars covered by mandatory no-fault coverage for which they pay premiums in arrears; or by living in a community that sends bills for property taxes after the taxes have been incurred. Thus, taken to its logical extreme, section 526(a)(4) would effectively prohibit an attorney from answering any of the following questions if posed by a client contemplating bankruptcy: "May I co-sign a student loan for my child's education?"; "May I continue to pay my grocery bills with my credit card?"; "Should I take on a second job?" Because all of these perfectly lawful activities involve incurring debt in one form or another, the attorney cannot answer any of the client's questions, or suggest answers

to these questions as potential solutions to a client's problems.[9]

Similarly, the sweep of section 526(a)(4) is not limited to attorneys who practice bankruptcy law. An individual in financial difficulty seeking advice regarding a personal injury tort claim might approach an attorney who does not specialize in bankruptcy law for advice or representation regarding the claim. The client may wish to pursue the claim in order to pay off his or her debts out of any recovery. As soon as the attorney learns that the client is in financial difficulty and contemplating bankruptcy, however, the attorney would be prohibited from advising the client to hire a personal injury lawyer other than on a pro bono basis because doing so would constitute advising the client to incur additional debt.

In addition, because individuals in financial straits often lack ready cash, it is also often the case that they lack immediate resources to pay

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[9] Of course, the attorney may not know at any particular point whether the client or prospective client actually anticipates filing for bankruptcy. An attorney might inquire at the outset of the relationship, but still might not discover the client's intentions. For example, the client may not have any intention of filing for bankruptcy until *after* learning about the subject fully from the lawyer. *See infra* Part II.A.1 (discussing further the difficulty of applying the "in contemplation of" bankruptcy standard).

for legal services, or for necessary court filing fees. Not surprisingly, individuals may find it necessary to borrow the required funds, whether, for example, from an existing line of credit or a relative, or to agree to pay the attorney over time. Yet, if the client asks the attorney if, for example, it is lawful to borrow the necessary funds from his or her mother to pay the attorney or pay the court, the attorney cannot answer. Likewise the attorney cannot advise the client that he or she may pay the attorneys' fee over time because doing so would be to advise the client to incur debt to pay an attorney (unless the exception set forth in section 101(12A)(C) happens to apply in a chapter 13 case – *see supra* Part I.A.

The impact of section 526(a)(4) on the attorney-client relationship is all the more troubling because, as noted, the section applies only to advice that a "debt relief agency" gives to an "assisted person." By definition, an "assisted person" is someone whose debts consist primarily of consumer debts, and whose nonexempt assets are worth less than $164,250. 11 U.S.C. § 101(3). In other words, "assisted persons" are typically individuals with the least available means. Accordingly, whereas debtors with greater resources may receive completely unrestricted advice, those with lesser means may not. It is difficult to imagine a greater affront to basic concepts of justice than one that curbs beneficial

advice to the least affluent members of society, implicating directly the very values that robust protection of attorney-client advice under the First Amendment are designed to preserve. *See Velazquez*, 531 U.S. at 546; *see also Virginia State Bd. of Pharm.*, 425 U.S. at 763-64 (in concluding that a consumer's right to information regarding prescription drug prices through advertising was "convincing," the Court observed that a ban on this kind of communication "hits…hardest the poor, the sick, and particularly the aged" who are the least able to acquire the beneficial information otherwise).

The chilling effect of section 526(a)(4) also should not be ignored. Section 526(c)(3) empowers "the chief law enforcement officer of a State, or an official or agency designated by a State" to seek injunctive relief barring any violation of section 526, including those that are unintentional, and likewise to pursue an action on behalf of residents of the state to recover damages against anyone who violates the section. 11 U.S.C. § 526(c)(3). In any such action, section 526(c)(3) further authorizes the recovery of costs and attorneys' fees against the violator. In addition, section 526(c)(5) permits a court, on its own motion or on motion by the debtor or the United States trustee, to enjoin a violation of section 526, and to "impose an appropriate civil penalty" against the violator, if the court finds that the person "intentionally violated" section 526, or

engaged in a "clear and conspicuous pattern or practice of violating the section." 11 U.S.C. § 526(c)(5).

As review of these sanctions reveals, they are circumscribed by relatively vague parameters. To begin with, the phrase "appropriate civil penalty" for intentional violations is undefined. In addition, there is no time limit restricting claims based on unintentional violations. As a result, liability could accumulate for years. This is particularly troubling because, in many instances, a lawyer may well have no idea at the time he or she is advising a client to incur debt that this is being done "in contemplation of" bankruptcy. For example, in the situations discussed above in which the client seeks advice regarding a tort claim or a family law matter, the client may, in fact, be contemplating bankruptcy, but the lawyer may be unaware of that intent.[10] Yet section 526 imposes sanctions not only for intentional violations, but also those that are unintentional.

In addition, as a practical matter, it will often be difficult to determine whether a particular

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[10] Notably, section 526(a)(4) does not specify who has to be "contemplating" bankruptcy – the attorney, the client, or both. Historically, the relevant inquiry is the client's intent. *See infra* Part II.A.2 (explaining historic interpretation of the phrase "in contemplation of" in the bankruptcy context).

client or prospective client is, in fact, an "assisted person," thereby triggering application of the proscriptions of section 526(a)(4) in the first place. As noted, an "assisted person" is someone who has primarily consumer debts and who has nonexempt property worth less than $164,250. In order to determine with any degree of precision whether an individual is an "assisted person," an attorney will often require a fair amount of information regarding the person's debts and assets, including a fairly exact valuation of the client's property. Worse, a client's debts, as well as the value of his or her assets, can easily change over time, thereby causing the client to be an "assisted person" at one point, but not another. Accordingly, in order to remain certain whether a client is an assisted person or not (and therefore whether the attorney must comply with section 526(a)(4) or not in advising the client), the attorney would have to periodically update his or her understanding of the client's financial circumstances.

This sort of burden is likely to have unfortunate and serious chilling effects. Because an attorney has an ethical obligation to provide full and complete advice to a client, if the client is *not* an "assisted person," the attorney is obligated to provide beneficial advice that would be prohibited under section 526(a)(4) if the client were an "assisted person." Yet, because it will often be difficult to tell whether a client is, in

fact, an "assisted person," the attorney will feel compelled by the sanctions associated with any violation of section 526(a)(4) to refrain from providing that advice, even though the client may not, in fact, be an "assisted person." Caught in such a dilemma, attorneys may simply respond by declining to provide advice to any person in financial difficulty. *See Smith v. California*, 361 U.S. 147, 152-53 (1960) (where bookseller was liable for inadvertently selling obscene material, the bookseller could be expected to sell only books that it inspected, thereby chilling the selection of books for sale and, hence, information available to the public). At the very least, a person who "contemplates protected activity" under section 526(a)(4) would be "discouraged by the *in terrorem* effect of the statute." *Bates*, 433 U.S. at 380; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (observing that "even minor punishments can chill protected speech"). The provision is thus unconstitutional.

2. A limiting construction of section 526(a)(4) is not warranted.

The Government has itself invoked the canon of avoiding constitutional questions and has argued in favor of construing section 526(a)(4) in a truncated way by restricting its scope to advice to incur debt "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy dis-

charge." Pet. App. A-29; *see* Res. 8th Cir. Br., at 29-30; Government's Cert. Petition, at 15. The government derives this limitation from the fact that section 526(a)(4) prohibits advice to incur debt "in contemplation of" filing a bankruptcy case. The government contends that the phrase "in contemplation of" carries an implied, fixed meaning of "abusive conduct." The government's argument is untenable.

First, there is no sound basis for the government's contention in the text of section 526(a)(4), the context of the Bankruptcy Code as a whole, or the legislative history behind section 526(a)(4). In particular, there is nothing in the text of section 526(a)(4) itself that suggests that the phrase "in contemplation of" means anything other than its common, ordinary meaning, which includes "to have in view as contingent or probable or as an end or intention" without any necessary connotation or implication of abusive intent. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 283 (9th ed. 1983); *see also* AMERICAN HERITAGE COLLEGE DICTIONARY 308 (4th ed. 2004) (defining "contemplation" to mean, among other things, "[i]ntention or expectation" and "contemplate" to mean, among other things, "[t]o have in mind as an intention or possibility"). Moreover, contextual comparison to another section of the Bankruptcy Code that employs the same phrase "in contemplation of" demonstrates

that the phrase cannot bear the weight of the government's interpretation.

Specifically, the same phrase appears in section 329, which provides in relevant part that "[a]ny attorney representing a debtor in a case under this title . . . shall file with the court a statement of the compensation paid or agreed to be paid . . . for services rendered or to be rendered in contemplation of . . . the case." 11 U.S.C. § 329. As used in section 329, the phrase "in contemplation of" does not imply, nor is it limited to, abusive conduct. *See* 3 COLLIER ON BANKRUPTCY ¶ 329.03[1][d] & [e] at 329-9 (15th ed. 2009) (discussing meaning of the phrase "in contemplation of" as used in section 329). Rather, it simply means "with a view to a bankruptcy filing" in the sense that a filing is imminent or likely. Where Congress uses the same language in different parts of the same act, it is presumed to have the same meaning in both places. *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (It is a "normal rule of statutory construction…that 'identical words used in different parts of the same act are intended to have the same meaning.'"). There is no reason to abandon that principle here, particularly since nothing in the legislative history purports to define the phrase "in contemplation of" in the manner the government suggests.

Second, the phrase "in contemplation of" qualifies only part of the prohibition set forth in section 526(a)(4). In particular, section 526(a)(4) prohibits a debt relief agency from advising an assisted person "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney." The phrase "or to pay an attorney" is not limited by the phrase "in contemplation of." Thus, at best, the government's gloss would apply to only part of the section, and would not limit the prohibition of proper advice regarding payments to attorneys.

Third, as an historical matter, the Court has previously interpreted the phrase "in contemplation of" bankruptcy in a manner at odds with the government's construction. Specifically, section 60d of the Bankruptcy Act of 1898, the predecessor to current section 329, authorized a court to reexamine a debtor's payment to an attorney if the payment was, among other things, made "in contemplation of" the filing of a petition commencing a bankruptcy case. 11 U.S.C. § 96d (repealed 1979). In construing the phrase "in contemplation of," the Court reasoned that it meant whether bankruptcy was at least in some sense "the impelling cause of the transaction," in contrast to whether the payment was "wholly separate from any exigency of bankruptcy." *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933); *see also* 3 COLLIER ON BANKRUPTCY ¶ 60.69 at 1147-48 (14th ed. 1977) (analyzing sec-

tion 60d and stating that the term "contemplation" as used in the section meant simply that "the debtor, in making the transfer, is influenced by the imminence of bankruptcy").

On the strength of this interpretation in *Pender*, the Court concluded that the payment to the attorney in that case to engage in "negotiations to prevent bankruptcy" was properly "in contemplation of bankruptcy" even though the attorney's role was to help the debtor *avoid* a bankruptcy filing. 289 U.S. at 479. Obviously, the attorney's activities in *Pender* had nothing to do with abusing the bankruptcy system, and yet the "in contemplation of" phrase was satisfied. In other words, far from supporting the limiting gloss the government suggests, the phrase "in contemplation of" has always meant what one would expect it to mean – namely, conduct with a view to a probable bankruptcy filing and nothing more. As noted, there is no evidence that, in enacting section 526(a)(4), Congress intended the phrase "in contemplation of" to bear anything other than its accepted meaning as used in section 329 and its predecessor, section 60d. Accordingly, it is appropriate to presume that Congress did not intend any meaning other than the historically accepted definition. *See Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure") (cita-

tions and marks omitted); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction").

Fourth, when Congress wishes to restrict the applicability of a provision of the Bankruptcy Code to apply only to abusive or fraudulent conduct, it knows how to do so expressly, and uses words quite different from the phrase "in contemplation of." For example, section 707(b) permits a court to dismiss a chapter 7 bankruptcy case upon a showing that granting bankruptcy relief "would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b). Notably, section 707(b) was amended extensively in 2005, by the same act that added section 526(a)(4) to the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27-35 (2005). If Congress had intended to limit the scope of section 526(a)(4) to "abusive" conduct, it presumably would have used the same terminology that is used in section 707(b). The fact that Congress did not use the same terminology in section 526(a)(4) suggests strongly that it did not intend the same limitation. *See Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion") (citations and marks omitted).

Conversely, when Congress intends to supplement or qualify the phrase "in contemplation of" bankruptcy with some additional element of "abusive conduct," it does so by adding the additional element expressly, and not by relying on some inherent implication of abuse in the phrase "in contemplation of." For example, section 152 of title 18 prescribes criminal penalties for any person who "in contemplation of a case under title 11 . . . knowingly and fraudulently transfers or conceals any of his property." The fact that Congress did not add a similar supplemental restriction in section 526(a)(4) once again suggests strongly that it intended no such restriction to apply. *See FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 302 (2003) ("[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991).

As the Court has noted, it is certainly true that, "[i]n considering a facial challenge, this Court may impose a limiting construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (citing *Virginia Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). But as the Court has hastened to add, that is so only if the particular statute "is 'readily susceptible' to such a con-

struction." *Id*. Where, as here, there is no "text or other source of congressional intent" that identifies "a clear line this Court could draw," a limiting construction is not warranted. *Id*.

Moreover, in this case, applying the limiting construction that the government proposes would simply substitute one constitutional infirmity for another. The government's interpretation – that the phrase "in contemplation of" means "with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge" – is itself entirely vague, and therefore constitutionally unsound.

As the Court has explained, the "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 128 S. Ct. at 1845 (2008). Under the doctrine, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id*. at 1846. For example, the Court has struck down statutes "that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent' – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning." *Id*.; *see also Coates v.*

City of Cincinnati, 402 U.S. 611, 614 (1971) (striking down a statute as vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all"); *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 598-99, 609 (1967) (striking down statute that made "seditious" utterances or acts grounds for removal, where the definition of "seditious" was unclear and a speaker would not know where the line was drawn between seditious and non-seditious utterances); *Winters v. New York*, 333 U.S. 507, 509 (1948) ("It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment").

In this case, the phrase "in contemplation of" is not defined; it specifies no comprehensible normative standard of conduct; and it lacks the "settled meaning" the Government would ascribe to its language. Moreover, even if the Government's limiting gloss on the phrase were accepted, it, too, fails to satisfy these criteria because the gloss itself offers no reasonably certain means to ascertain the relevant prohibited conduct. Accordingly, applying the construction

that the Government prefers would not save the statute from unconstitutionality. It would simply trade one constitutional problem for another.[11]

B. Alternatively, Section 526(a)(4) Is a Content-Based Restriction that Fails Strict Scrutiny.

As the Court has explained, "Government action that stifles speech on account of its message" contravenes the basic premise of the First Amendment that "each person should decide for himself or herself the ideas and beliefs deserving of expression." *Turner*, 512 U.S. at 641. Among other reasons, restrictions based on the content of the message "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* Because of this danger, and likewise the importance of the values to be protected, "the First Amendment, subject only to

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[11] In the First Amendment context, a statute may be challenged for vagueness on either "facial" or "as-applied" grounds. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 576 (1974). In this case, augmented by the Government's impermissible gloss, section 526(a)(4) would be vague under either standard. The statute would be facially vague because no one could reasonably ascertain what might constitute "abusive" advice. Likewise, petitioners in this case could not reasonably ascertain what might constitute "abusive advice" on an "as-applied" basis.

narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private persons." *Id.* In reviewing controls of this kind, the Court applies "the most exacting scrutiny." *Id.* at 642; *see also Playboy Entm't Group, Inc.*, 529 U.S. at 813.

The "principal inquiry" in determining whether a restriction is "content-based" or "content-neutral" is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner*, 512 U.S. at 641. In general, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* In this case, there is no doubt that section 526(a)(4)'s prohibition against advising a client to incur debt in contemplation of filing a bankruptcy case or to pay an attorney is a content-based restriction.

As noted, section 526(a)(4) does not make it unlawful for a client to incur indebtedness in contemplation of bankruptcy or to pay an attorney. As further noted, the broad sweep of the statute encompasses activities that are not only plainly legitimate, but also beneficial. Moreover, what the statute prohibits is speech *about* the client's potential activities or proposed course of conduct. The statutory restriction is thus prop-

erly "content-based" because it restricts the advice an attorney may give based on the message the attorney conveys.

Further, given that the prohibition set forth in section 526(a)(4) applies only to advice given to persons with relatively limited means, but permits unrestricted advice to everyone else, it is also difficult to understand how section 526(a)(4) serves a governmental interest that is "compelling." The United States argued below that one of the purposes of the restriction is to prohibit attorneys from advising their clients to take on additional debt in order to get around the "means test" that limits the availability of bankruptcy relief. *See* 11 U.S.C. § 707(b) (setting forth the "means test" restricting bankruptcy relief in chapter 7 cases); Res. 8th Cir. Br., at 25-26. Debtors with relatively little means, however, are most likely to satisfy the means test in any event because, in general, the test does not restrict the availability of bankruptcy relief to debtors with below-median incomes. *See* 11 U.S.C. § 707(b)(7) (2005) (providing a safe harbor from dismissal on the basis of means testing where the debtor's current monthly income annualized is below the applicable median family income). Thus, even assuming that the restriction in section 526(a)(4) would have the desired effect the Government recites, it applies only to those least likely to engage in the "abuse" the Government targets.

Moreover, the Government argued below that a second purpose of the restriction is to protect debtors from abusive practices that could lead to a denial of their discharges. Res. 8th Cir. Br., at 37. A debtor who engages in abusive practices may, indeed, be denied a discharge of his or her preexisting debts. *See, e.g.*, 11 U.S.C. §§ 707(b)(3), 727 (2005). But there is no reason to believe that this risk is any greater for debtors with little means than for anyone else. Likewise, there is no reason to believe that attorneys have systematically led debtors generally (let alone the poorest of them) to engage in conduct that has resulted in a denial of their discharges by advising them to incur debt in contemplation of bankruptcy or to pay an attorney. Certainly, as far as our research reveals, review of the reported cases does not indicate that this is even a common problem.

As the Court has explained, its decisions "have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. at 438-39. As the court has also explained, it is "no answer" to say that the purpose of the relevant regulation "was merely to insure high professional standards and not to curtail free expression." *Id.* Here, the Government's arguments fall far short

of satisfying its burden of demonstrating a "compelling" governmental interest. *See also Wisconsin Right to Life, Inc.*, 551 U.S. at 478 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech."); *see generally Free Speech Coalition*, 535 U.S. at 245 (observing that, even the "prospect of crime . . . by itself does not justify laws suppressing protected speech").

In any event, even assuming that section 526(a)(4) serves a compelling governmental interest, it is more than evident that the section is not narrowly tailored to serve that interest. The Government contends generally that the principal evil to which the statutory prohibition is directed is "abusive conduct." Pet. App. A-29. Assuming that is so, Congress easily could have tailored the statute far more narrowly to capture advice about whatever abusive activities it had in mind. Instead, Congress elected to impose a broad, blanket prohibition limited only in the sense that it applies to advice given to a class of persons with relatively little property while leaving unrestricted the advice an attorney may give to everyone else.

The statute also fails to satisfy the "least restrictive means" standard. *See Playboy Entm't Group, Inc.*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's pur-

pose, the legislature must use that alternative" because "[t]o do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit."). Instead of restricting attorney advice regarding the incurrence of debt, Congress easily could have specifically rendered unlawful the actual conduct that it deems to be abusive (whatever that may be), and, as a corollary, required disclosure of the kinds of abusive conduct it has proscribed so that "assisted persons" would be aware of it, as well as any penalties associated with engaging in the proscribed conduct.

There are several ways in which this disclosure could be affected. Before filing for bankruptcy relief, individual debtors are required to undergo debt counseling with a debt counseling service. *See* 11 U.S.C. § 109(h)(1) (2005). A standard form of disclosure regarding proscribed "abusive" conduct could be part of the required materials for this counseling. Alternatively, a standard form of disclosure could be required among the disclosures prescribed in section 528. 11 U.S.C. § 528 (2005).

Alternatively, Congress could have addressed the problem in a different way. Current ethical rules already prohibit attorneys from "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rules of Prof'l Conduct R.

1.2(d) (2009). Likewise, these rules prohibit attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* R. 8.4(c). Similarly, they prohibit "engage[ing] in conduct that is prejudicial to the administration of justice." *Id.* R. 8.4(d); *accord* Minnesota Rules of Prof'l Conduct R. 1.2(d) (2007). Rather than proscribe attorney speech in the manner set forth in Section 526(a)(4), Congress could have set up a program to enhance enforcement of existing ethical rules as applied in the bankruptcy context. These and other examples demonstrate that section 526(a)(4) is not the least restrictive means of advancing the Government's interest.

Finally, the statute is unconstitutional on either a "facial" or "as-applied" basis. In order to constitute a "facially" invalid content-based restriction, the statute must be unconstitutional in all of its applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (in order to mount a facial challenge, the challenger "must establish that no set of circumstances exists under which the Act would be valid."). In contrast, in an "as-applied" challenge, the statute need be unconstitutional only as applied to the conduct of the challengers. *See, e.g., Goguen*, 415 U.S. at 567-68.

In this case, the statute is facially invalid because, in every instance in which it applies, it ef-

fectively prohibits an attorney from talking fully and candidly *about* the incurrence of debt in contemplation of filing a bankruptcy case or to pay an attorney. Although the Government might have a legitimate interest in prohibiting attorneys from *encouraging* clients to engage in misconduct (if properly framed), that is not what the statute says. It prohibits attorneys from "advising" clients to incur more debt in contemplation of filing a bankruptcy case or to pay an attorney. Included within the scope of "advising" is the function of counseling a client about the legality of any particular debt incurrence idea or option, and the counseling function, at least in its explanatory sense, is never one that the Government has a legitimate interest in truncating in this context.

In any event, the statute is at least invalid on an "as-applied" basis with respect to the activities petitioners routinely engage in. With regard to the petitioner attorneys, this includes providing advice and counsel concerning bankruptcy matters. With respect to the petitioner clients, this includes receiving this advice. As discussed previously, the statute bars all kinds of legitimate and beneficial counsel. Because the statute impermissibly invades both the attorneys' right to provide this advice as well as the clients' right to receive it, the statute is unconstitutional.

C. Section 526(a)(4) Is Invalid Under This Court's Standard in *Gentile*.

In an effort to avoid strict scrutiny, the Government argued below that section 526(a)(4) should be reviewed under the Court's less stringent analysis undertaken in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *See* Res. 8th Cir. Br., at 27. *Gentile* involved a state rule of professional responsibility that prohibited an attorney from making extrajudicial statements to the press that had a substantial likelihood of materially prejudicing a judicial proceeding. *Id.* at 1033. The rule was designed to preserve the fairness of trials, much like other rules governing courtroom proceedings, and did not involve truncating the attorney-client relationship. This case, of course, is quite different, as demonstrated in part by considering the matter from the perspective of the client.

As discussed above, for a client seeking advice from an attorney, the attorney is already barred under applicable state-law rules of professional conduct from counseling the client to engage in abusive conduct. Thus, from the perspective of the client, section 526(a)(4) adds nothing to the applicable regulatory structure, except to prevent the attorney from also providing beneficial advice that the client may want or need to hear. Accordingly, from the client's perspective, section 526(a)(4) cannot serve any legitimate

ethical function not already covered by some other regulation. Thus, in its practical effect, it can only serve as a content-based restriction that suppresses lawful advice. Accordingly, reference to the Court's analysis in *Gentile* is misplaced because Congress has no legitimate need to impose the regulation.

In addition, the regulation at issue in *Gentile* applied only to attorneys. In contrast, section 526(a)(4) applies to any person who provides bankruptcy assistance to an assisted person, including non-lawyers. Because the analysis in *Gentile* is tied to a State's regulation of the activities of lawyers for the sake of preserving fair trials, it has, at best, attenuated relevance to the Government's regulation of the activities of attorneys *and* non-attorneys in a manner that has nothing to do with how a trial is conducted.

Further, *Gentile* involved a collision of constitutional rights. On the one hand, the attorney had a constitutionally protected right to speak. On the other, the litigants had a constitutionally protected right to a fair trial. Because the two interests collided, some mediating rule was required, and the Court applied one by relaxing somewhat the attorney's constitutional right of free expression. Here, of course, there is no such collision. No competing constitutional right weighs in favor of allowing the Government to truncate an attorney's duty to provide full and

complete advice, or a client's right to receive it. Accordingly, the analysis in *Gentile* does not apply.

In any event, even if *Gentile* controls, the Government cannot satisfy its requirements. Regardless of whether section 526(a)(4) protects an important governmental interest, it does not impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075. As discussed above, the restrictions that section 526(a)(4) imposes are neither narrowly tailored, nor necessary to prevent "abusive" advice. Accordingly, section 526(a)(4) cannot pass muster under *Gentile*.

III. If "Debt Relief Agency" Includes Attorneys, Sections 528(a)(4) & (b)(2)(B) Are Unconstitutional.

The First Amendment embraces "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations omitted). As the Court has explained, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* This fundamental concept is critical to the professional lives of attorneys and the role they fulfill within our society and legal system: among other things, attorneys must have sufficient "freedom of mind" to advise

their clients with professional independence, and serve their roles as independent advocates. To fully vindicate this right of "freedom of mind," attorneys cannot be forced either to refrain from providing beneficial advice to their clients about lawful activities, *Velazquez*, 531 U.S. at 546-49, or become the "courier" of some governmentally approved orthodoxy. *See Wooley*, 430 U.S. at 717; *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 790-91, 796-97 (1988) ("The First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it" and that the concept of "freedom of speech" necessarily comprises "the decision of both what to say and what *not* to say"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

One nuanced exception to an attorney's right to be free from governmental compulsion to convey a particular message arises where the attorney engages in commercial speech in the form of advertising his or her services. Although the First Amendment does not permit a State to prohibit all attorney advertising, *Bates*, 433 U.S. at 383 ("advertising by attorneys may not be subjected to blanket suppression"), it does allow a

State some latitude in regulating the content of these advertisements. The State's ability to impose content-based regulations on attorney advertising, however, depends on the context of the advertising in question. As is relevant here, the Court's precedents distinguish two different situations governed by distinct standards of review.

In the first instance, where an attorney elects voluntarily to advertise in a particular way, the State may require the attorney to make certain content-based disclosures in the advertisements to avoid statements that are deceptive or misleading. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651-59 (1985) (State may compel disclosure in attorney's advertizing of certain "purely factual and uncontroversial information about the terms under which his services will be available," including whether, if the representation is undertaken on a contingency-fee basis, the client will be liable for the attorney's "costs" even though the attorney may not charge a "fee" if the matter is unsuccessful).

In contrast, in the absence of deceptive or misleading advertising by the attorney, the State may not force the attorney to adhere to prescribed content-based forms of advertising disclosures. *In re R.M.J.*, 455 U.S. 191, 205 (1982) (where the attorney's advertising was not deceptive or untruthful, State could not require attor-

ney to use certain stock phrases to describe his practice areas); *see also Riley*, 487 U.S. at 795 (stating that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of that speech," and that such compulsions must be viewed as "a content-based regulation of speech").

As the Court has explained, "regulation – and imposition of discipline – are permissible where the *particular advertising* is inherently likely to deceive or where the record indicates that a *particular form or method* of advertising has in fact been deceptive." *In re R.M.J.*, 455 U.S. at 202 (emphasis supplied). In contrast, where the advertising is non-deceptive and truthful, the State's ability to regulate its content is more circumscribed. As the Court has stated, "[a]lthough the potential for deception and confusion is particularly strong in the context of advertising professional services," any "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.* at 203; *see also Riley*, 487 U.S. at 798 (applying "exacting First Amendment scrutiny" to compelled disclosure by professional fundraisers); *Zauderer*, 471 U.S. at 644 (rejecting "prophylactic rule" that was broader than necessary to punish attorney for portion of advertisement that was truthful and not misleading).

As these contrasting precedents demonstrate, the regulation of specific forms of potentially *deceptive* advertisements occupies a fundamentally different sphere from the regulation of truthful, non-deceptive advertising. Although a State may have a strong interest in compelling certain disclosures to ameliorate the former, it generally lacks a legitimate interest in dictating the content of the latter. Thus, it is unsurprising that the Court has articulated a different First Amendment standard governing each of these two very different settings.

To begin with, where an attorney elects to advertise in a particular way (e.g., to advertise that he takes cases on a contingency fee basis and that, if the case is not successful, the client is not obligated to pay any "fees"), and the State concludes that certain disclosures must be made in that *particular type* of advertising to prevent deception (e.g., that the client must also be told whether the client will still be obligated to pay the attorney's "costs" if the matter is unsuccessful), the Court has stated that the State's regulation need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651.

In contrast, where the attorney's advertisements are truthful and non-deceptive (e.g., the attorney states truthfully that he practices in the area of "real estate" law), the Court has held that

the State, in order to impose a regulation that interferes with the content of the advertising message (e.g., requiring the attorney to state that he practices "property" law), "must assert a substantial interest and the interference with speech must be in proportion to the interest served." *In re R.M.J.*, 455 U.S. at 203 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980)). Further, the State's "[r]estrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*

In other words, in order to regulate the content of truthful, non-deceptive advertising, the State must satisfy the requirements of "intermediate scrutiny." *See Florida Bar*, 515 U.S. at 623-24 (stating that, although "the government may freely regulate commercial speech that concerns unlawful activity or is misleading," in contrast "commercial speech that falls into neither of those categories," including truthful, non-deceptive attorney advertising, must satisfy the requirements of "intermediate scrutiny" under *Central Hudson*); *Zauderer*, 471 U.S. at 641-645 (Court reviewed regulation of portion of attorney's advertisement that was truthful and not misleading under *Central Hudson* standard).

With respect to sections 528(a)(4) and 528(b)(2)(B), the proper standard to apply in this

case is intermediate scrutiny under *Central Hudson*. The Government contends that Congress enacted sections 528(a)(4) and 528(b)(2)(B) to address a particular type of advertising that Congress deemed to be deceptive. Specifically, the Government contends that Congress targeted advertising that offers to "wipe out" debts, or make them "disappear," or to "stop credit harassment, foreclosures, or repossessions," where the ad fails to disclose that the means for accomplishing these things is through bankruptcy. *See* Res. 8th Cir. Br., at 42. In this case, however, although petitioner attorneys engage in advertising, they do not engage in the kind of advertising the Government describes. Nevertheless, assuming that attorneys may be "debt relief agencies," section 528 applies to *all* advertisements that an attorney offers to "assisted persons" concerning "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures" and the like, regardless of whether the particular ad in any way resembles the kind of advertising the Government contends Congress deemed to be problematic. In particular, section 528 requires all advertising encompassed within its broad scope to include the following compelled statement: "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)(B).

Under the First Amendment, any compulsion of this kind is unwarranted with respect to peti-

tioners' truthful, non-deceptive advertising that has nothing to do with the kind of advertising the Government claims Congress deemed to be deceptive. *In re R.M.J.*, 455 U.S. at 205; *see also Riley*, 487 U.S. at 800 (rejecting "the prophylactic, imprecise, and unduly burdensome rule the State has adopted" requiring certain disclosures by professional fundraisers to reduce "alleged donor misperception"); *Zauderer*, 471 U.S. at 644 (rejecting broad "prophylactic rule" prohibiting portion of attorney's advertisement where portion had "none of the vices that allegedly justify the rule"). Worse, the specific statement that section 528 directs is itself confusing, inherently misleading, arguably pejorative, and, in some contexts in which it is required to be made, simply untrue.

Applying *Central Hudson* here, sections 528(a)(4) and 528(b)(2)(B) fail to meet its requirements. Although petitioners' advertising constitutes "commercial speech," it is protected because it concerns lawful activity (e.g., offering bankruptcy law services) and is not misleading (i.e., is truthful and not deceptive; and does not offer to "wipe out" debts, or make them "disappear," or "stop credit harassment, foreclosures, or repossessions" without disclosing that the means for accomplishing these things is through bankruptcy). *In re R.M.J.*, 455 U.S. at 203 ("Truthful advertising related to lawful activities is entitled to the protections of the First

Amendment."). In addition, the Government cannot demonstrate a substantial interest in regulating petitioners' truthful and non-deceptive advertising under section 528. Finally, the regulation is not narrowly drawn, but rather sweeps far beyond the scope of the problem the Government articulates, and likewise does not further any substantial interest of the Government.

Alternatively, even if sections 528(a)(4) and 528(b)(2)(B) are analyzed under the more relaxed standard applicable to deceptive advertising, these provisions are still unconstitutional. Section 528 is not "reasonably related to the State's interest in preventing deception of consumers." Apart from straying far beyond the purported problem that gave rise to its enactment, section 528 itself requires confusing and misleading statements. A regulation that requires attorneys to mislead cannot pass muster under any First Amendment benchmark.

Because the court below failed to apply the correct legal standard in this case, and because application of either the *Central Hudson* or *Zauderer* tests demonstrates that sections 528(a)(4) and 528(b)(2)(B) are unconstitutional, its judgment regarding the constitutionality of section 528 must be reversed.

A. Petitioners' Advertising is Truthful and Non-Deceptive; It Is Not of the Kind Congress Deemed to be Misleading; and Sections 528(a)(4) & (b)(2)(B) Require Compelled Disclosures that Are Confusing and Misleading.

The Government argued below that Congress' purpose in enacting section 528 was to remedy a particular, and fairly narrow, problem. Specifically, as noted, the Government contends that some lawyers advertised that they could make a consumer's debts "disappear," or could "wipe out" unpaid bills, or could "stop credit harassment, foreclosures, or repossessions" without mentioning that the method for accomplishing these things was through bankruptcy. *See* Res. 8th Cir. Br., at 42. The Government argues that the failure to mention "bankruptcy" in these ads is deceptive because consumers could be misled into thinking that they could cure their financial problems without filing for bankruptcy, and the Government concludes that Congress enacted section 528 to remedy this deception. *See id.* The Government contends that section 528 is constitutional because it serves this end.

The greatest (but by no means singular) difficulty with the Government's argument is that section 528 is not limited to addressing the problem the Government identifies. Instead of apply-

ing to a particular type of advertising alleged to be deceptive, it sweeps broadly to encompass perfectly truthful, non-deceptive advertising that has none of the vices the Government contends serve as the statute's animating source. This is impermissible. *See Zauderer*, 471 U.S. at 641-645.

By their terms, sections 528(a)(4) and 528(b)(2)(B) compel any person who provides "bankruptcy assistance" to "assisted persons" to identify themselves as a "debt relief agency" in *any* advertisement to the general public – whether potentially deceptive or not – discussing "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures," "eviction proceedings," and the like, and further requires the person to state: "We help people file for bankruptcy relief under the Bankruptcy Code." Critically, section 528 compels this disclosure regardless of (1) whether the compelled statement is truthful in the context in which it is being made; or (2) whether or not the advertisement states that the attorney is offering to "wipe out" a consumer's debts, make them "disappear," "stop credit harassment, foreclosures, repossessions" or the like, without mentioning that the method for accomplishing any of these things is bankruptcy relief. 11 U.S.C. §528(a)(4).

Like many lawyers, petitioner attorneys engage in some advertising of their services. For

example, they maintain a website available to the general public identifying, among other things, the bankruptcy law services they perform. *See* http://www.milavetzlaw.com/Practice Areas/Bankruptcy.asp (discussing the firm's bankruptcy law services). They do not state in their advertisements that they can "wipe out" unpaid bills, make debts "disappear," or "stop credit harassment, foreclosures, or repossessions" without mentioning that these things are accomplished through bankruptcy. Yet, section 528 treats petitioners *as though* they engage in the kind of advertising the Government contends is deceptive. Accordingly, the statute purports to compel them to state in their perfectly truthful and non-deceptive advertising: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

Because their advertisements exhibit none of the vices the Government claims underlie the enactment of sections 528(a)(4) and 528(b)(2)(B), there is no reason petitioner attorneys should be forced to make this statement. This is all the more so with respect to the stock phrase "We help people file for bankruptcy relief under the Bankruptcy Code" because, in their advertisement of bankruptcy services, petitioners already explain what their services encompass, and already specifically mention "bankruptcy" multiple times.

Further, requiring attorneys to call themselves "debt relief agencies" conveys no meaningful information and, at best, is confusing. Among other things, the label begs the unanswerable question: "agency of whom?"

More troubling, the label "debt relief agency" can be viewed as pejorative because forcing the kind of odd self-identification that section 528 requires has the effect of segregating one group of attorneys from the rest. In essence, it is a form of compelled self-branding. Attorneys who advise "assisted persons" about bankruptcy law are entitled to call themselves "attorneys" in their advertising, not something unrecognizable like "debt relief agency."

It is no answer to say that, in addition to calling themselves "debt relief agencies," attorneys may also identify themselves in their advertising as "attorneys." Apart from the fact that attorneys should not be compelled to use any label in the first place other than one of their own choosing that is accurate and not deceptive, *In re R.M.J.*, 455 U.S. at 205, the label "debt relief agency" is also inherently misleading. Without the compulsion of section 528, no person would ever call him- or herself a "debt relief agency," or pay to have such a label disseminated through any advertising medium.

In addition, in the area of commercial advertising, "[t]he listener's interest is substantial." *Bates*, 433 U.S. at 364. Individuals seeking legal advice generally wish to speak with attorneys, not something called a "debt relief agency." It is perfectly conceivable that someone wishing the independent advice of an attorney about such sensitive matters as personal financial difficulty would be put off by the idea of visiting a "debt relief agency." The label adds nothing of benefit for the consumer of legal services, and detracts from the accuracy and clarity of the advertising message. Moreover, because they are inherently confusing and misleading, the disclosures that section 528 directs are inconsistent with applicable ethical rules regulating attorney advertising. *See* Model Rules of Prof'l Conduct R. 7.1 (2007) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."); *accord* Minnesota Rules of Prof'l Conduct R. 7.1 (2007).

The indiscriminate manner in which section 528 compels its disclosures is also fraught with potential to mislead for yet another reason. Petitioner attorneys do not represent debtors exclusively. They provide a range of legal services to a variety of clients, including creditors. Joint

App. 60a. Yet, if they engage in any advertising of any particular services to *creditors*, and include in that advertising any reference that these services involve "mortgage foreclosures" or "eviction proceedings," section 528(b)(2)(B) directs that petitioners must still state "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(b)(2)(B). Where the advertisement is directed to creditors, this kind of disclosure makes no sense.

Similarly, if petitioner attorneys were to advertise that they represent homeowners in foreclosure proceedings wholly apart from bankruptcy, they would still have to include the compelled statement in their advertisement even though the advertisement truthfully would have nothing to do with bankruptcy and would involve only defending state law foreclosure suits. This result also makes no sense, and section 528(b)(2)(B) is inherently misleading in this context.

B. Sections 528(a)(4) and 528(b)(2)(B) Cannot Satisfy The Requirements of Intermediate Scrutiny under *Central Hudson*.

Under *Central Hudson*, in order to regulate truthful, non-deceptive attorney advertising, the Government "must assert a substantial interest

in support of its regulation." *Florida Bar*, 515 U.S. at 624; *see also Zauderer*, 471 U.S. 641. In addition, the Government "must demonstrate that the restriction on commercial speech directly and materially advances that interest." *Florida Bar*, 515 U.S. at 624. Finally, "the regulation must be narrowly drawn." *Id.* (citation and marks omitted). The Government cannot meet these requirements.

1. The Government Lacks a Substantial Interest in Regulating Petitioners' Advertising.

When the Court applies intermediate scrutiny, it will not "supplant the precise interest put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Here, the Government postulates a single reason behind section 528 – to regulate the particular form of advertising discussed above to prevent consumers from being deceived into believing that an attorney could make their debts "disappear" and the like without filing for bankruptcy. This interest, of course, is entirely irrelevant because petitioner attorneys do not engage in the kind of advertising the Government describes, yet are subject to regulation under section 528.

Further, the only "evidence" the Government has cited in support of its contention that anyone has actually been deceived by the kind of adver-

tising discussed above is that "one retailer testified that some of his customers, who were misled by such lawyer advertisements, 'did not even understand that they had filed for bankruptcy.'" Res. 8th Cir. Br., at 42. Although the Government may have an interest in preventing deception of this limited magnitude, its interest, based on this meager testimony, is not demonstrably "substantial."

The Government also cites a Federal Trade Commission consumer alert warning that debt-relief ads proposing to "wipe out" consumer debts and the like often failed to disclose that the method for accomplishing this was through bankruptcy. *Id.* The alert does not actually demonstrate that any consumer has been, in fact, deceived by this advertising in the manner the Government contends. The Government's interest is not substantial. Even if it were, the Government cannot satisfy the other requirements of *Central Hudson*.

2. The Government Cannot Demonstrate that Its Regulation Directly and Materially Advances Its Interest.

In order to satisfy the second prong of the *Central Hudson* standard, the Government must demonstrate that the regulation at issue "advances the Government's interest in 'a direct and material way.'" *Rubin v. Coors Brewing Co.*, 514

U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 767)). The Government's burden "is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770. Rather, in order to sustain the restriction, the Government must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771; *see also Florida Bar*, 515 U.S. at 625-26.

In *Florida Bar*, the evidence of the harm supporting the State's purported interest in restricting attorney solicitations to the victims of accidents for a thirty day period following the accident included unrefuted statistical analysis, surveys, and an "anecdotal record" that the Court described as "noteworthy for its breadth and detail." *Florida Bar*, 515 U.S. at 627. Even so, a bare majority of the Court found it sufficient to satisfy the second element of *Central Hudson*.

In contrast, in *Edenfield*, the evidence of the harm supporting the State's purported interest was slim, at best. Lacking sufficient evidence, the Court invalidated the restriction. In this case, the evidence of the harm the Government offers in support of upholding section 528's compelled disclosures is almost as slim, and certainly well shy of the barely sufficient mark in *Florida Bar*.

Moreover, the Government has failed to demonstrate that the compelled disclosures required by section 528 has or can alleviate the harm it identifies. This is especially difficult given that the compelled disclosures are themselves confusing and inherently misleading. The Government has failed to satisfy its burden.

3. Section 528 Is Not Narrowly Drawn.

The Government also cannot satisfy the last element of the *Central Hudson* standard. As discussed above, section 528 is not narrowly tailored to address the particular harm the Government identifies. On the contrary, it is framed in exceptionally broad terms, and encompasses not only any allegedly deceptive advertising, but also advertising that is truthful and not misleading.

The Government points to a specific type of advertising that it contends Congress determined was deceptive. The legislature could have readily drawn a far narrower statute targeting that specific kind of advertising. Congress, however, did not do so, and section 528 fails the third element of *Central Hudson*.

C. Alternatively, Sections 528(a)(4) and 528(b)(2)(B) Cannot Satisfy the More Relaxed Requirements Applicable to Deceptive Advertising.

Finally, even under the approach the Court applied in *Zauderer* to the portion of the attorney's advertisement in that case that was deceptive, section 528 does not pass constitutional muster. With respect to misleading advertising, the Court determined that a State's regulation need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Sections 528(a)(4) and 528(b)(2)(B) do not satisfy even this relaxed standard for two basic reasons.

First, the sections are not "reasonably related" to the Government's interest in preventing the deception it identifies because the sections impose an undue burden vastly disproportionate to the harm they seek to mitigate. Second, the sections are not "reasonably related" to the Government's interest because they compel confusion and deception. A regulation that requires attorneys to mislead cannot pass muster under any First Amendment benchmark. In sum, there is nothing reasonable about the provisions.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below concluding that attorneys are debt relief agencies. Alternatively, the Court should affirm the decision below that section 526 is unconstitutional, and reverse the determination below that section 528 is constitutional.

Respectfully submitted,

Alan S. Milavetz
Chad Wm. Schulze
Walter Hodynsky
MILAVETZ, GALLOP & MILAVETZ, P.A.
6500 France Avenue South
Edina, MN 55435
(952) 920-7777

Thomas F. Miller
Thomas F. Miller, P.A.
1000 Superior Blvd, Suite 303
Wayzata, MN 55391
(952) 404-3896

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
Alexander R. Bilus
Michael J. Newman
Joshua Richards
Justin C. Danilewitz
Kate O'Keeffe
Francesco P. Trapani
Evan Posner
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999

Michael Docherty
4600 West 77th Street
Edina, MN 55435
(952) 897-6646

Counsel for Petitioners

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STATUTORY APPENDIX

11 U.S.C. § 101. 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 $164,250.

(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.

(5) The term "claim" means--

> **(A)** right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(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 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 as-

sisted 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.

Statutory Appendix

11 U.S.C. § 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section--

> **(1)** "bankruptcy 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; and
>
> **(2)** "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

……

(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

> **(2)(A)** A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

……

11 U.S.C. § 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 526. 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 Bank-ruptcy 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.

11 U.S.C. § 527. Disclosures

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide--

> **(1)** the written notice required under section 342(b)(1); and
>
> **(2)** to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that--
>
> > **(A)** all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;
> >
> > **(B)** all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

> **(C)** current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after rea-sonable inquiry; and
>
> **(D)** information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You

will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.".

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--

> **(1)** how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;
>
> **(2)** how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

11 U.S.C. § 528. Requirements for debt relief agencies

(a) A debt relief agency shall--

> **(1)** not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--
>
> > **(A)** the services such agency will provide to such assisted person; and
> >
> > **(B)** the fees or charges for such services, and the terms of payment;
>
> **(2)** provide the assisted person with a copy of the fully executed and completed contract;
>
> **(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 relief under the Bankruptcy Code." or a substantially similar statement.

(b)(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes--

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(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--

(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and

(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.