No. 08-1119

IN THE
Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent(s).

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

BRIEF FOR AMICUS CURIAE

THE COMMERCIAL LAW LEAGUE OF AMERICA SUPPORTING PETITIONER

William H. Schorling
Counsel of Record
BUCHANAN INGERSOLL & ROONEY, P.C.,
50 S. 16th St., Suite 3200
Philadelphia, PA 19102
(215) 665-8700

Attorneys for Amicus Curiae Commercial Law League of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE OF PROFESSIONAL CONDUCT

OTHER AUTHORITIES

INTEREST OF THE AMICUS

Pursuant to Supreme Court Rule 37.3, the Commercial Law League of America ("CLLA"), as *amicus curiae*, respectfully submits this brief, with the consent of the parties, in support of Petitioner's challenge to the constitutionality of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), PL 109-08, as applied to lawyers.[1] The CLLA, founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and reorganization. Its membership, which includes attorneys from large and small firms and bankruptcy judges representing virtually every state, consists of representatives of divergent interests in

---

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

bankruptcy cases.[2] As recognized by the Petitioners, applying the provisions of the Bankruptcy Code relying on the term "debt relief agencies" to attorneys would severely restrict the availability of competent representation to consumer debtors. The provisions' extremely broad scope also affects the interests of the membership of the CLLA by compromising the representation of non-debtors, including creditors.

Although the CLLA members represent all interests in the bankruptcy forum (e.g., debtors, trustees, creditors, committees), the CLLA's extensive experience with unsecured creditors provides it with a different perspective from that of the Petitioners. The CLLA submits this brief to support the Petitioners and to focus on the interests of attorneys who represent creditors, an area particularly within the expertise of the CLLA. To the extent an attorney may be a "debt relief agency," the challenged provisions impair the

---

[2] Neither this brief nor the decision to file this brief should be interpreted to reflect the views of any judicial member of the CLLA. No judicial member participated in the endorsement of the views in this brief nor was it circulated to any judicial member prior to filing.

constitutional rights of attorneys, including members of the CLLA, and their clients. Even if the challenged provisions apply only to debtors' attorneys, the regulations are not in the interest of creditors. Creditors' interests are best served if debtors are fully and accurately informed and receive complete and unfettered advice from their attorneys.

SUMMARY OF ARGUMENT

The term "debt relief agency" as defined in the BAPCPA does not include attorneys. If "debt relief agency" includes attorneys, the inclusion of attorneys who represent creditors who are "assisted persons" produces a result that is untenable and should be rejected.

If this Court concludes that attorneys who represent creditors fall within the statutory definition of "debt relief agency," and therefore must consider whether the application of the BAPCPA provisions to attorneys can withstand constitutional scrutiny, the CLLA requests that the Court include in its consideration the impact of those provisions on attorneys who represent creditors and hold sections 526(a)(4) and 528(a)(4) & (b)(2)(B) unconstitutional. If

section 526(a)(4) applies to creditors' attorneys who represent assisted persons, it would prohibit the attorney from providing accurate and complete counsel to his or her client concerning conduct which is not illegal. For example, the attorney could not counsel the creditor client to incur debt to pay the filing fee to file an involuntary petition or to pay the attorney's fees to represent the client in the bankruptcy. If section 528 applies to creditors' attorneys, it would require an attorney who represents creditors who are assisted persons to include false and misleading statements in the attorney's advertising including that the attorney is a debt relief agency and helps people file for bankruptcy relief under the Bankruptcy Code.

ARGUMENT

I. THE BAPCPA PROVISIONS DO NOT APPLY TO ATTORNEYS

The government has taken the position that all attorneys who provide "bankruptcy assistance to an assisted person" are debt relief agencies as defined by section 101(12A) of the BAPCPA, 11 U.S.C. § 101(12A). *See* Res. 8th Cir. Br. at 49 - 50. As argued by the Petitioners, the plain

meaning of section 101(12A)'s definition of "debt relief agency" omits reference to attorneys and therefore should be read to exclude attorneys from the scope of the term. *See* Pet. Br., at 16-17. Assuming, as the government has argued, attorneys are within the scope of section 101(12A), the express language of section 101(12A) would apply to any attorney engaged by a debtor, creditor or any other non-debtor party. Pet. App. A-23. While the remainder of section 101(12A) does provide five exceptions, no exception exempts attorneys, let alone attorneys who only provide bankruptcy assistance to creditors. The section's language does not distinguish between representation of a debtor versus representation of a creditor. *Id.*

If, as the Government argues, attorneys are debt relief agencies, then counsel for a creditors' committee, whose constituents could include individuals, and class action plaintiffs may be a "debt relief agency." Again, the definition of "bankruptcy assistance" is broad enough to apply to advice given by counsel for the plaintiffs and for the creditors' committee. Similarly, counsel for a retirees' committee under section 1114 of the Bankruptcy Code represents clients with claims for retirement and healthcare benefits. *See* 11 U.S.C.

§ 1114. Many, if not most of the retirees, would fit within the definition of an "assisted person" rendering the retirees' committee's counsel a "debt relief agency."

Reference to the terms "bankruptcy assistance" and "assisted person" does not exclude non-debtor representation from the scope of section 101(12A). Conspicuously absent from the definition of "bankruptcy assistance" is any reference to a debtor, let alone a specific type of representation. The plain language provides no basis to find that services provided to non-debtor parties are excluded from the scope of "bankruptcy assistance."

Similarly, the plain language of the definition of "assisted person" is not limited to persons who have filed for bankruptcy relief or who are contemplating filing for bankruptcy. *See, e.g.,* Pet. Br., at 23. Section 101(3) defines "assisted person" to mean "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250." 11 U.S.C. § 101(3). The term's scope is sufficiently broad to encompass not only persons who are presently debtors, but also any person who may potentially become a debtor, creditors of a debtor, and persons

who are potential creditors of potential debtors. *See In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 Am. Bankr. L.J. 191, 206-07 (Spring 2005).

If the government's interpretation is adopted, the plain language of the terms "assisted person" and "bankruptcy assistance" fails to exclude non-debtor attorneys from the meaning of "debt relief agency." Therefore, the conduct of attorneys representing creditors would be subject to the regulations governing debt relief agencies leading to absurd results. Such a result demonstrates that the government's interpretation is not reasonable and should be rejected.

II. SECTION 101(12A) SHOULD BE INTERPRETED TO EXCLUDE ATTORNEYS FROM ITS SCOPE

As the Petitioners argue, attorneys may be excluded from the definition of "debt relief agency" by relying on the plain language of sections 101(12A), 101(3) and

101(4A). *See, e.g.,* Pet. Br., at 13 *et seq.* Despite being a defined term under the Bankruptcy Code, section 101(12A) does not incorporate "attorney" in its language or in the language of any of its related definitions. *See, e.g.*, 11 U.S.C. § 101(4) (defining the term "attorney"). As argued by the Petitioners and as held by the district court, the constitutional infirmities of sections 526 and 528 may be remedied by excluding attorneys from the scope of the term "debt relief agency." *See* Pet. Br., at 13 *et seq.*; Pet. App. A-15; *see also In re Attorneys at Law*, 332 B.R. at 69 (holding that attorneys were expressly omitted from the definition of "debt relief agency").

In accord with the district court's opinion below, the bankruptcy court in the Southern District of Georgia ruled *sua sponte* that the definition of "debt relief agencies" set forth in section 101(12A) does not include attorneys. *See In re Attorneys at Law*, 332 B.R. at 71 (ruling that "attorneys regularly admitted to the Bar of this Court or those admitted *pro hac vice* are not covered by the provisions of the Code regulating debt relief agencies"). The court recognized that section 101(12A) omits reference to attorneys despite the fact the term "attorney" is a separately defined term under section 101(4). *Id.* at 69.

The court concluded by negative inference that attorneys should therefore be excluded from the definition of "debt relief agency." *Id.* at 68-69.

Alternatively, if the plain language is not sufficient to limit the scope of "debt relief agency," canons of statutory construction require that attorneys be excluded from the term. As discussed by the Petitioners, sections 526 and 528 would superimpose federal rules of professional conduct upon attorneys. *See* Pet. Br., at 34. Attorneys will be forced to adopt practices to assure that they do not violate sections 526 and 528. For example, until attorneys have the necessary information to make the determination of a client's status, attorneys must treat every new individual client as an "assisted person" and limit the representation of that client in order to avoid violating the requirements imposed upon debt relief agencies. Thus, if creditors' attorneys are debt relief agencies, the attorneys must inquire about the assets and debts of their individual creditor clients, information that is sensitive and typically unrelated to the representation, before rendering full and complete counsel. In the absence of such practices, attorneys will risk inadvertently violating these sections.

If attorneys are included in "debt relief agencies," they may be subject to inconsistent obligations under the BAPCPA and State ethics rules. By requiring creditors' attorneys to make the false and misleading statements to their current and prospective clients required under section 528(a)(4) & (b)(2)(B) and prohibiting them from giving lawful advice under section 526(a)(4) , attorneys are forced to choose between (1) complying with the BAPCPA; or (2) complying with state rules of professional conduct. *See, e.g.,* Pet. Br., at 46.

Further, including attorneys in "debt relief agencies" will create confusion among consumers. As reasoned by the district court, there is a distinct difference between attorneys who provide bankruptcy advice and parties who are not attorneys that provide some assistance to prospective debtors. Pet. App. A-11-A-12. Lawyers are "officers of the court", requiring adherence to certain rules to which others are not subject . *See, e.g., In re Sawyer,* 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) ("He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense.") As the district court observed, "[t]here are many non-trivial differences between an attorney's

services to his or her clients, and services non-lawyers are permitted to offer." Pet. App. A-11-A-12. Attorneys who consult with clients regarding bankruptcy issues provide comprehensive services. They investigate all aspects of a client's circumstances, research legal issues, and provide legal advice and representation. Non-lawyers do not and cannot provide such comprehensive services. Thus, the requirement that parties so dissimilarly placed must use the same mandated disclosure statement is likely to cause consumer confusion rather than clarify bankruptcy service advertisements.

By arguing that attorneys may be designated "debt relief agencies," the government's interpretation necessitates an outcome that is patently absurd especially as it would apply to creditors' attorneys. Accordingly, the Court should reject the government's interpretation and exclude all attorneys from the scope of section 101(12A). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-11 (1989); *Gleason v. Thaw*, 236 U.S. 558, 560 (1915). In the alternative, if attorneys are debt relief agencies, creditors' attorneys should be excluded in order to avoid the absurd results discussed above.

Finally, as argued by Petitioners, the concept of "debt relief agency" should be construed so as not to include attorneys to avoid reaching the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B). Pet. Br. at 31-35. As is discussed in the sections that follow, the arguments apply with greater force to creditors' attorneys.

III. IF APPLIED TO CREDITORS' ATTORNEYS, SECTION 528 IMPOSES UNCONSTITUTIONAL LIMITATIONS ON PROTECTED SPEECH

As is more fully set forth by the Petitioners, the compelled statements required by section 528 fail each of the four prongs of the *Central Hudson* test. *See* Pet. Br., at 83 *et seq.*, *citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). All attorneys' advertising of bankruptcy services is not deceptive and the section does not advance a substantial government interest. Even if such a government interest does exist, the section is overbroad because it applies to all attorneys regardless of the nature of their practice. By forcing an attorney, particularly a creditors' attorney, to include the disclosures, section 528 renders such an attorney's

communications false and misleading. For these reasons, section 528 abridges commercial speech rights and should be found unconstitutional.

A. The Government Cannot Demonstrate A Substantial Interest Justifying The Regulation

As argued by the Petitioners, and as applied to attorneys and non-debtors' attorneys in particular, section 528 will compel attorneys to utter false and misleading statements. *See* Pet. Br., at 86 *et seq*. The advertisements of non-debtor attorneys are rendered false and misleading by the inclusion of the government's message. Regulated advertising includes bankruptcy assistance with respect to typical creditor remedies such as mortgage foreclosures and eviction proceedings. *See* 11 U.S.C. § 528(b)(2) (applying to advertisements with respect to "credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt..."). The section requires attorneys who represent assisted persons who are creditors or who are landlords in eviction proceedings to include in their advertising directed to the

general public that their services may involve bankruptcy relief and that the attorney helps people file for bankruptcy. As applied to a creditors' attorney's advertising, the disclosure would not be true. In addition, the creditors' attorney would have to state that the attorney was a "debt relief agency", a statement that would be accurate under the statute but would be misleading within the common understanding of the potential clients to whom the advertising is directed.

Even though a creditor's attorney may never represent a debtor, section 528 requires non-debtor attorneys to include the false statement: "We help people file for bankruptcy relief under the Bankruptcy Code." Similarly, the same attorneys would have to clearly and conspicuously advertise that the services may involve bankruptcy relief even when the services would not. Under the standards articulated by this Court, the government can never show that it has an interest in deceiving, misleading or creating confusion in the minds of citizens. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985) ("The State is not entitled to interfere with that access by

denying its citizens accurate information about their legal rights.").[3]

In addition and as recognized by the Petitioners, by requiring an attorney to issue a false or misleading statement, compliance with section 528 would subject attorneys to possible penalties under State rules of professional responsibility,[4] whereas non-compliance will subject the attorneys to penalties under section 526(c) .[5] *See* Pet. Br., at 89 *et seq*.

---

[3] The court below observed that creditors' attorneys could comply with section 528 by including a substantially similar disclosure. Pet. App. A-37-A-38 n.12. However, any disclosure by a creditors' attorney that was accurate and not misleading would stretch "substantially similar" past the breaking point. Creditors' attorneys do not provide debt relief and they do not help people file for bankruptcy.

[4] Minnesota Rule of Professional Conduct 7.1, states in full: "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: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; ...." Minn. Rule of Prof'l Conduct R. 7.1 (2007).

[5] Section 526(c) provides for civil liability for violations of sections 526, 527 and 528. Section 526(c) authorizes penalties that include disgorgement of attorneys' fees, payment of costs relating to an

B. Section 528 Is Not Narrowly Tailored To Directly Advance A Substantial Government Interest

By failing to exclude non-debtors' attorneys, section 528 is not narrowly tailored. *See Central Hudson*, 447 U.S. at 566 (striking down a ban on promotional advertising by electrical utilities because despite the government's interest in conserving energy, less restrictive means were available to further that interest); Pet. Br., at 94. Even assuming an interest of the government exists to require debtors' attorneys to include the disclosures, said interest cannot justify application of the section to non-debtors' attorneys. Because of its indiscriminate application, section 528 does not directly advance any interest, let alone a substantial government interest.

Statutes may be written to exclude unintended parties from their application. For example, the Fair Debt Collection Practices Act (the "FDCPA") regulates the conduct of debt collectors. "Debt collector" is

---

enforcement action and civil penalties that may be imposed sua sponte. *See* 11 U.S.C. § 526(c)(2), (c)(3)(C) & (c)(5)(B), respectively.

a defined term under the FDCPA. The section defining "debt collector" begins:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692(a)(6) (emphasis added). Limiting "debt collector" to entities whose "principal purpose" is debt collection or to persons who "regularly collect" debts, Congress limited the FDCPA's statutory class. *See, e.g., Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir. 2000) (recognizing that the FDCPA excludes from the definition of "debt collector" creditors who collect debts on their own behalf); *Schroyer v. Frankel*, 197 F.3d 1170, 1176 (6th Cir. 1999). Congress could have similarly limited "debt relief agency" to persons who regularly represent consumer debtors or whose principal purpose is to assist consumers in filing bankruptcy cases.

IV. SECTION 526(A)(4) VIOLATES RIGHTS PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

Section 526(a)(4) constitutes a content-based restriction on speech protected by the First Amendment and is thus subject to strict judicial scrutiny. The government's construction of this section would render it unlawful for an attorney to advise a client who is an assisted person to incur debt to pay fees to an attorney or petition preparer or to charge for services performed in connection with preparing or representing a debtor under this title. The Petitioners correctly observe that the plain language of the statute does not provide a basis for the government's narrow interpretation. *See* Pet. Br., at 67. By prohibiting all attorneys from advising their clients "to incur more debt in contemplation of such person filing a case under this title," the statute necessarily implicates the representation of non-debtors, i.e. by including counsel representing petitioning creditors in an involuntary bankruptcy filing. As a content-based regulation, the government cannot demonstrate that the regulation (1) advances a compelling government interest and (2) is

narrowly tailored. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994).

A. Section 526(a)(4) Does Not Advance A Compelling Government Interest

Unfettered attorney advice is necessary to the proper exercise of judicial power. As the Supreme Court has made clear, restricting the scope of legal advice "distorts the legal system by altering the traditional role of attorneys" and is a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001). By disabling the traditional role of an attorney, the BAPCPA interferes with the proper functioning of the judiciary and therefore constitutes an impermissible abridgement of the judicial power. *See, e.g,* Pet. Br., at 42-43.

There is no policy justification for prohibiting any attorney, but especially one representing a creditor, from providing the advice that section 526(a)(4) prohibits. The Bankruptcy Code already provides for those situations where the debtor is "gaming the system" or otherwise engaging in behavior

that is impermissible. *See, e.g.*, Pet. Br., at 62-63. With respect to creditors' attorneys, however, section 526(a)(4) is even less defensible. For example, section 526(a)(4) would include advice given by an attorney to a creditor relating to the filing of an involuntary petition. The filing of the involuntary petition may increase the creditor client's recovery if the involuntary petition results in a larger dividend to the client because it stops the debtor from dissipating the debtor's assets. By restricting the advice an attorney may provide, Congress effectively restricts the strategies an attorney may pursue on behalf of the attorney's client which in turn restricts the relief a court may fashion. *See Velazquez*, 531 U.S. at 545-46.

B. Section 526(a)(4) Is Not Narrowly Tailored

Not all conduct implicated by advice banned by section 526(a)(4) is illegal nor does it run afoul of other provisions of the Bankruptcy Code. As the Petitioners correctly observe, there is nothing inherently improper about incurring debt on the eve of bankruptcy. *See* Pet. Br., at 48 *et seq*. "For example, there may be instances where it is advisable for a client to obtain a mortgage, to

refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time." Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (Summer 2005). Such advice is in creditors' interests because, if followed, it is likely to increase the payout to creditors. Similarly, an attorney representing a creditor may counsel a client to borrow money to pay the filing fee in connection with filing an involuntary bankruptcy petition against a debtor of the client or to pay the attorney's fee in connection with representation of the client in filing an involuntary petition or in protecting the client's claim in a bankruptcy case. Filing an involuntary petition may benefit the creditor client by stopping the debtor from dissipating assets. The attorney's representation may maximize the creditor client's recovery in the bankruptcy. Such conduct is not fraudulent or illegal under any law, including any provision of the Bankruptcy Code. However, under section 526(a)(4) as interpreted by the Government, an attorney who advises an assisted person who is the attorney's client in regard to such lawful activities will subject the attorney to possible penalty under section 526(c). There

can be no legitimate government interest in prohibiting attorneys from counseling their clients in regard to lawful matters. *See Grayned*, 408 U.S. at 114 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct.").

[continued]

CONCLUSION

For the foregoing reasons, the Commercial Law League of America respectfully requests that the Court 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,

AMICUS CURIAE,
COMMERCIAL LAW
LEAGUE OF AMERICA

William H. Schorling
Buchanan Ingersoll &
Rooney, P.C.
50 S. 16th St. Suite 3200
Philadelphia, PA 19102
Tel/Fax: (215) 665-8700/8760
Email:
william.schorling@bipc.com
Attorneys for the
Commercial Law League of
America

Dated: September 1, 2009