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

REPLY BRIEF FOR PETITIONERS

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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.

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

Section 101(12A) defines the phrase "debt relief agency" to mean a person who provides "bankruptcy assistance" to an "assisted person." 11 U.S.C. §101(12A). The phrase does not expressly reference "attorneys" and, contrary to the Government's assertion, the text, legislative history, and purpose of the statute do not demonstrate any "clear" intent to include "attorneys" within its scope.

The legislative reports accompanying an early version of the text of section 101(12A) indicated that the proposed phrase "debt relief *counselling* [sic] agency" would include "attorneys." Before passing the legislation in 2005, however, Congress amended the proposed text in 1999 to delete the word "counselling," and thereafter *dropped* any reference to "attorneys" in the 2001, 2003, and 2005 legislative reports explaining the meaning of the amended phrase. If anything, these legislative moves support the conclusion that Congress did *not* intend to include attorneys within the scope of "debt relief agency."

Also contrary to the Government's argument, the legislative record does not otherwise unambiguously demonstrate that Congress intended to

address "abuse" by "attorneys." The Government references a study cited in one house report and the statement of a creditor who testified at a hearing. Gov't Br. 21. Neither reference, however, establishes a significant pattern of bankruptcy abuse generally, let alone specific abuse by attorneys. In contrast, the report that Congress commissioned prior to the 2005 amendments to review the bankruptcy system concluded that most bankruptcy filings are not abusive. *See Bankruptcy: The Next Twenty Years*, National Bankruptcy Review Commission Final Report 83 (Oct. 20, 1997); *see also* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong. 11 (1973).

The Government points out that, as a textual matter, "attorneys" are not specifically "excepted" from the definition of "debt relief agency." Gov't Br. 11. This observation, however, merely begs the threshold question of whether they are fairly included within the scope of the defined term in the first place. The Government contends that "attorneys" must be included because the term "bankruptcy assistance" referenced in the definition of "debt relief agency" includes functions that attorneys perform, such as "legal representation." *Id.* Contrary to the Government's suggestion, the term "bankruptcy assistance" is not defined in straightforward fashion to mean "legal represen-

tation." It is defined in a convoluted manner to mean "any goods or services sold or otherwise provided…with the express or implied purpose of providing" information, advice, or a variety of other services related to bankruptcy, including "legal representation." 11 U.S.C. §101(4A). This convoluted definition is an oddity that demands a more exacting explanation than the simplistic one the Government offers. Consistent with the statute's text, apparent purpose, and other indicators, the phrases "debt relief agency" and "bankruptcy assistance" most naturally encompass persons who are non-lawyers but who nonetheless either provide services that are similar to those that attorneys provide in the bankruptcy context–such as bankruptcy petition preparers–or who engage in the unauthorized practice of law.

Resisting this conclusion, the Government argues that the phrase "debt relief agency" must include attorneys because otherwise the various salutary regulations mandated in sections 526, 527, and 528–including those that are not challenged here–would not apply to attorneys. Gov't Br. 27 (e.g., debt relief agencies must not fail to provide promised services and must advise their clients about the requirements of obtaining bankruptcy relief). The Government's concern is misplaced. As applied to attorneys, these provisions essentially duplicate already existing state law requirements. *See* Pet. Br. 44-45 (outlining

state law requirements). The same cannot be said, of course, for non-attorneys who are not subject to the same state regulations, but who nonetheless provide "bankruptcy assistance." To avoid confusing regulatory redundancy, the most plausible interpretation of the statutory scheme is that Congress sought to impose its requirements on those who were not already regulated in a comprehensive way–i.e., non-lawyers who provide "bankruptcy assistance" to "assisted persons."

Contrary to the Government's position, this case is an ideal candidate for application of the rule that, before the Court will accept an interpretation of a statute that trenches seriously on an area of traditional state regulation, it will require that Congress' expression of its intent be "clear and manifest." Pet. Br. 12-13. The Government does not deny that the regulation of the legal profession is an area traditionally reserved to the States. Moreover, the Government's argument that Congress has occasionally enacted laws that regulate bankruptcy lawyers misses the point. Gov't Br. 24-25. In those laws, Congress expressly directed its regulations to "attorneys." *See, e.g.*, 11 U.S.C. §329. Consistent with this convention, if Congress had intended the phrase "debt relief agency" to include "attorneys," it naturally would have said so expressly in section 101(12A). It did not. Further, the other laws the Government invokes do not con-

flict with state requirements regulating the legal profession; the ones at issue here do.

This case also presents an ideal candidate for application of the "cardinal" principle that, if "fairly possible," the Court will construe a statute to avoid addressing its constitutionality. The Government argues that this canon does not apply on the theory that, once again, it is "clear" from the text, legislative history, and purpose of the relevant statutory provisions that Congress intended to include attorneys within the scope of "debt relief agency." Gov't Br. 26. The Government's use of the term "clear" is surely in error. Indeed, all things considered, the more plausible interpretation of the statute is that Congress did *not* intend the term "debt relief agency" to encompass "attorney."

Also unpersuasive is the Government's assertion that avoiding the constitutional issues raised here would only postpone them for a future case. The Court's precedents reveal that the Government's argument is no reason to disregard the canon; the Court has previously avoided questions that might arise in the future. Further, the Government does not identify any potential case involving non-lawyers looming on the horizon and, as a practical matter, one may never arise. In this instance, the Court may conclude that attorneys are not included within the scope of section 101(12A) to avoid confronting

the constitutionality of sections 526(a)(4) and 528(a)(4) & (b)(2)(B). On the other hand, as discussed more fully below, if the Court finds that these statutes violate the First Amendment, it should conclude that they are unconstitutional.

A. The Phrase "Debt Relief Agency" Is Best Construed to Exclude Attorneys.

The Government does not deny the oddity of labeling attorneys "debt relief agencies." No attorney would ever voluntarily refer to himself in this awkward and misleading way. Nor would any client naturally think to seek legal counsel from such an entity. The Government's interpretation of the phrase as "clearly" including attorneys is thus facially suspect. It is further problematic because including attorneys within the scope of the phrase generates effects at odds with the overall statutory scheme.

When Congress amended the Bankruptcy Code in 2005, it increased significantly the cost and complexity of ordinary bankruptcy proceedings. Now more than ever, debtors require the counsel of skilled bankruptcy lawyers to help them navigate the process. Yet under the Government's interpretation of the phrase "debt relief agency," skilled attorneys would be *discouraged* from providing this assistance because of

the restrictions and burdens that the Code now places on "debt relief agencies."

This effect is not hypothetical. One bar association report states that, because some courts have interpreted the phrase "debt relief agency" to include "attorneys," "[m]any lawyers have stopped providing advice or representing individuals in bankruptcy matters entirely rather than render legal advice under these restrictions and risk incurring…undue regulatory interference…" ABA 2009 Report with Recommendation #10B at 5 (Policy adopted Aug. 2009), *available at* http://www.abanet.org/leadership/2009/annual/daily_journal/Ten_B.pdf. The report concludes that this has had "a serious negative impact on the availability of legal counsel in bankruptcy-related matters." *Id.*; *see also* Andrew P. MacArthur, *Pay To Play: The Poor's Problems in the BAPCPA*, 25 Emory Bankr. Dev. J. 407, 483 (2009) ("The BAPCPA harms the poor both procedurally and substantively. The additional fees and increased paperwork it requires, combined with its tendency to reduce the number of available attorneys, make it more difficult for the poor to access the bankruptcy system.").

The Government's interpretation is thus implausible. Absent the clearest textual directive, it should not be presumed that, at the same time Congress increased the need for skilled legal representation in bankruptcy cases in order to "pro-

tect" consumer debtors, it simultaneously greatly diminished the ability of these debtors to obtain it. For this reason, as well as all the others stated in petitioners' opening brief, if Congress had intended to include "attorneys" within the scope of "debt relief agency," it surely would have mentioned "attorneys" somewhere in the statutory text. The fact that Congress did not do so should be taken to mean that it did not intend the inclusion.

The Government contends that the absence of the word "attorney" from the definition of "debt relief agency" is immaterial in light of other textual indications that Congress meant to include attorneys. Gov't Br. 18. Among other flaws, this argument ignores the fact that Congress added the defined term "attorney" as part of the same amendments that added the defined phrase "debt relief agency" to the Code, and that Congress carefully and expressly chose to include another defined term, "bankruptcy petition preparer," within the scope of "debt relief agency," but did not do so with respect to "attorneys." Presumably, had Congress intended to include attorneys under this definition, it would have been at least as careful in doing so as it was with bankruptcy petition preparers.

The Government cites two cases where attorneys were found to be included in statutes that did not expressly mention them. Gov't Br.

18-19. Neither case, however, involved the anomalies that such inclusion presents in this case, nor questions of constitutional dimension. In addition, both cases involved evidence of congressional intent to include attorneys not present here.

For example, in *Heintz v. Jenkins*, the Court concluded that attorneys who collect debts through litigation could be "debt collectors" under the Fair Debt Collection Practices Act. 514 U.S. 291 (1995). In that case, however, Congress had repealed a provision in an earlier version of the statute that had expressly *excluded* attorneys from the definition of "debt collectors." By implication, the repeal of the exclusion suggested Congress' intent to include attorneys. *Id.* at 294-95. In this case, there is no similar legislative signal demonstrating Congress' intent to include attorneys. In fact, the *opposite* signal exists.

As noted, when Congress considered amending the Bankruptcy Code in 1998, it proposed adding the defined phrase "debt relief *counselling* [sic] agency" to section 101. H.R. 3150, 105th Cong. §113(a)(3) (1998) (emphasis supplied). The house report accompanying this proposed legislation explained that the phrase "debt relief *counselling* agency" would apply "to attorneys as well as to non-attorneys, such as petition preparers." H.R. REP. No. 105-540, at 77 (1998). Subsequently, however, in 1999, Congress

amended the proposed text to delete the word "counselling," leaving the phrase as it is currently formulated: "debt relief agency." 11 U.S.C. §101(12A). Thereafter, in explaining the meaning of the amended phrase "debt relief agency," each of the 2001, 2003, and 2005 house reports *omitted any explicit reference to "attorneys,"* but maintained an explicit reference to "bankruptcy petition preparer[s]." *See* H.R. REP. No. 107-3, at 42 (2001) ("Section 226(a)(3) defines a 'debt relief agency' as any person (including a bankruptcy petition preparer) who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration."); H.R. REP. No. 108-40, at 174 (2003) (same); *and* H.R. REP. No. 109-31, at 65 (2005) (same).

These legislative moves are significant. The amendment of the text, together with the express omission of attorneys in the subsequent accompanying explanatory legislative reports in 2001, 2003, and 2005, suggests that Congress did not intend the amended phrase to include what it omitted–attorneys.

The Government argues that if Congress had intended to exclude attorneys from the scope of "debt relief agency," Congress would have listed "attorneys" among the various exceptions in the definition of the phrase. Gov't Br. 19. The Government, however, misapprehends the nature of

the exceptions delineated in the statute and what these exceptions reveal. As the Government concedes, the officers and directors of a law firm organized as a corporation would find shelter under the enumerated exceptions, but the partners of a law firm organized as a partnership would not. Gov't Br. 20 n.7. It is clear that Congress understood that law firms are often organized as partnerships. 11 U.S.C. §101(4). Moreover, corporations act through their officers and directors no more or less than partnerships act through their partners. There is no plausible reason why Congress would have provided shelter for the former but not the latter, other than that Congress did not intend debt relief agencies to encompass attorneys. Among other things, it makes no sense that a partner in a law firm who never personally provides "bankruptcy assistance" to an "assisted person" nonetheless may be a "debt relief agency," but an officer of a corporation responsible for directing the corporation's affairs cannot be.

The statute also excludes from the scope of "debt relief agency" a "creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor." 11 U.S.C. §101(12A)(C). Attorneys assisting debtors in bankruptcy often become creditors of the debtor as legal fees accrue and, thus, would often fall under this exception, at least in the chapter

13 context. The Government attempts to diminish this anomaly by contending that, for example, the exception applies to an attorney who provides assistance in a divorce "acting solely in her capacity as a creditor" and is therefore not subject to the requirements of debt relief agencies. Gov't. Br. 20. But an attorney providing merely divorce representation would not be providing "bankruptcy assistance" in the first place and, thus, would not be subject to the requirements of a debt relief agency. The exemption would be entirely superfluous if it applied only in the manner the Government advocates.

Contrary to the Government's contentions, reading the phrase "debt relief agency" to include attorneys would otherwise lead to absurd results. As discussed in petitioner's opening brief, including attorneys as debt relief agencies would prevent attorneys from legitimately advising a client to incur debt where such advice would be in the client's best interest and would condition the kind of advice that attorneys could give debtors on the client's relative wealth. Pet. Br. 26-27. Further, because the definition of "assisted person" is broadly defined to encompass any client "whose debts consist primarily of consumer debts and the value of whose non-exempt property is less than" the statutorily defined minimum, including attorneys as debt relief agencies would require attorneys who represent creditors that qualify as "assisted persons" to misrepre-

sent that they "help people file for bankruptcy relief." 11 U.S.C. §101(3); 11 U.S.C. §528(a).

The Government argues that creditors are not "assisted persons" on the theory that creditors do not hold "exempt" property. Gov't Br. 22. The Government is mistaken. Property may be "exempt" either under the Bankruptcy Code or, more commonly, under applicable state law. The Code expressly recognizes this. 11 U.S.C. §522(b)(3). Further, "creditors" who hold claims against a particular debtor are also frequently "debtors" with respect to their *own* creditors. The Government's semantic argument is unsound and finds no shelter in the text of the statute.

In order to avoid the anomalies that petitioners identify, the Government purports to establish the "plain" meaning of the text by selectively rewriting its provisions. The statute, however, cannot bear the weight of the Government's gloss.

B. Treating Attorneys as Debt Relief Agencies Would Intrude on a Traditional Area of State Regulation and Congress' Intent To Do So Is Not "Clear and Manifest."

The regulation of attorneys falls within the traditional domain of State sovereignty. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). Where, as here, the Government argues that Congress intended to intrude into such an area, the Government must point to a congressional intent that is "clear and manifest." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543-44, 546 (1994) ("[W]here the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation"); *see also Kelly v. Robinson*, 479 U.S. 36, 49 (1986) ("when the Federal Government…radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947)).

The Government contends that "there is nothing improper or unusual in Congress' decision in BAPCPA to regulate attorney conduct that threatens the integrity of the bankruptcy system." Gov't Br. 25. This assertion, however,

is once again question-begging and beside the point. Absent a clear statement of Congress' intent, courts will not presume that Congress has actually elected to regulate the profession.[1] The 2005 amendments to the Code do not provide the "explicit" intent necessary to infringe on the States' traditional power to regulate attorneys.

C. The Canon of Constitutional Avoidance Should Be Applied to Exclude Attorneys from the Definition of Debt Relief Agencies.

The Government contends that the canon of constitutional avoidance should be used only to choose between competing permissible constructions of a statute, and not to adopt "a construction that the statute unambiguously precludes." Gov't Br. 26. The Government's premise–that the statute unambiguously precludes petitioner's interpretation–is flawed. In truth, it is "fairly possible" to construe the statute as excluding attorneys from the scope of debt relief agencies, and thus, Congress has not "foreclosed peti-

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[1] Likewise, the Government's reliance on Section 526(d)(1) is misplaced. Even if the 2005 amendments do not "bar the States from regulating attorney conduct," Gov't Br. at 24, it is still an intrusion in an area traditionally left to the States. As such, a "clear and manifest" congressional intent to intrude is required.

tioner's purported saving construction," as the Government maintains. Gov't Br. 26.

The Government argues that the canon of constitutional avoidance is inapplicable here because excluding attorneys as debt relief agencies would not eliminate the constitutional issues that might still confront non-attorneys. Gov't Br. 27. The Court's precedents demonstrate, however, that the Court may apply the canon even if other constitutional questions may remain or may arise at a later time. For example, in *Northwest Austin Mun. Util. Dist. Number One v. Holder*, a municipal utility district in Texas challenged section 5 of the Voting Rights Act, which requires all changes in state election procedures to be approved by a three-judge panel in the federal district court in Washington, D.C. if the body seeking to make the changes is in a state that falls within certain criteria, based on historical data as to voter registration and turnout. 129 S. Ct. 2504, 2509 (2009); 42 U.S.C. §1973c(a). The utility district applied for an exemption from the requirements but was denied when the district court found that an exemption was only available to states or political subdivisions, and that the utility district was neither. *Id.* at 2510. The utility district then sought a determination that it was eligible for an exemption or, in the alternative, that the statute was unconstitutional.

The Court noted that the constitutionality of the statute was questionable in that it "imposes substantial federalism costs" and that "[s]ome of the conditions that [it] relied upon in upholding [the] statutory scheme in [prior cases] [had] unquestionably improved." *Id.* at 2511 (internal quotations and citations omitted). Rather than decide these issues, however, the Court applied the canon of constitutional avoidance and ruled that the utility district was eligible for the exemption. *Id.* at 2516-17 ("Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.").

Further, the Government contends that petitioner's construction would undermine the intent of Congress to establish "professional standards for attorneys and others who assist consumer debtors with their bankruptcy cases" by exempting attorneys from all provisions of the 2005 amendments, even those that present no constitutional questions. Gov't Br. 27. The Government gives as examples section 526(a)(1), which requires debt relief agencies to perform all services they promise to undertake, and section 527(a)(2), which requires debt relief agencies to make certain disclosures to debtors with regard to the bankruptcy process.

The Government's contention ignores the fact that attorneys are already subject to state-established ethical standards that are inapplicable to non-attorney debt relief agencies. Attorneys are already required to give their clients competent and diligent representation and to communicate to clients all information necessary to make fully informed decisions; thus, applying section 526(a)(1) and 527(a)(2) to attorneys is duplicative and unnecessary. *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.").

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

Both courts below concluded correctly that section 526(a)(4) violates the First Amendment for two separate reasons: (1) the provision is

substantially overbroad because it proscribes a substantial amount of good faith advice; and (2) the provision is a content-based speech restriction that does not withstand strict scrutiny. The Government's arguments do not undermine either of those conclusions. Accordingly, the Eighth Circuit's holding that section 526(a)(4) is unconstitutional should be affirmed.

A. Section 526(a)(4) Is Unconstitutionally Overbroad Because It Proscribes a Substantial Amount of Good Faith Advice to "Incur Additional Debt."

By its terms, section 526(a)(4) proscribes a substantial amount of good faith advice regarding the incurrence of debt and how to pay for an attorney and is therefore substantially overbroad. The Government maintains that section 526(a)(4)'s prohibition should be given a "narrowing construction," but the Government's interpretation is not supported by the text of section 526(a)(4), its structure or legislative history, or the historical meaning of the "in contemplation of" phrase. Tellingly, the Government itself cannot come up with a consistent narrowing formulation–as discussed more fully below, its brief suggests no less than three separate alternatives. *Compare* Gov't Br. 28 *with id.* at 32 *and id.* at 38. In addition, the "in contemplation of" phrase modifies only half the provision (i.e., the "incur debt" portion, but not the "pay an attor-

ney" portion) and, thus, cannot possibly save the entirety of the statute from unconstitutionality. Accordingly, even if section 526(a)(4) applies to attorneys (which it does not), the Court should still reject the Government's insupportable narrowing attempt and hold that section 526(a)(4) violates the First Amendment.

1. The plain language of section 526(a)(4) broadly applies to a substantial amount of good faith advice.

The Eighth Circuit held correctly that section 526(a)(4)'s prohibition applies "broadly" to good faith advice, and that its "blanket prohibition" is "substantially overbroad." Pet. App. A-29, A-32; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 793 (8th Cir. 2008). The Government does not directly address the broad ambit of section 526(a)(4)'s plain language. Although the Government claims that the section does not proscribe a "substantial" amount of protected speech, Gov't Br. 54, it does so only by ignoring both petitioners' examples and the plain sweep of the statutory provision in favor of advancing its insupportable "narrowing construction."

By its plain terms, section 526(a)(4) prohibits *any* advice "to an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a" bankruptcy case "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" title 11 of the U.S. Code. Nothing in section 526(a)(4) permits (or even suggests) an interpretation that would render the prohibition applicable to only *some* kinds of advice.

Similarly, nothing in the Government's brief undermines petitioners' argument that if Congress had intended to curb only "abusive" advice, it could and would have done so expressly, and would not have relied on the "in contemplation of" phrase to fill any perceived gaps. For example, section 329 of the Bankruptcy Code regulates certain payments to an attorney for services rendered "in contemplation of" bankruptcy. 11 U.S.C. §329. Critically, section 329 does not rely on the neutral phrase "in contemplation of" appearing in the provision to establish what the statute proscribes. Rather, it explicitly and separately provides for the cancellation or disgorgement of excessive compensation. 11 U.S.C. §329(b). The neutral phrase "in contemplation of" simply cannot carry the weight the Government would have it bear.

2. Section 526(a)(4) is not susceptible to a "narrowing construction" based on "historical" analysis.

Leapfrogging the issue of *plain* meaning, the Government seeks refuge in what it characterizes as the *historical* meaning of the "in contemplation of" phrase. The historical meaning the Government attributes to the phrase, however, is not supported by the authority upon which it relies.

The Government begins with *Black's Law Dictionary*. Gov't Br. 29. It focuses upon the eighth edition's statement that the phrase "contemplation of bankruptcy" is "*often coupled with* action designed to thwart the distribution of assets in a bankruptcy proceeding." *Id.* (quoting *Black's Law Dictionary* 336 (8th ed. 2004)) (emphasis altered). This statement in and of itself is fatal to the Government's point. As demonstrated in petitioners' opening brief, when Congress intends the neutral "in contemplation of" phrase to be associated with some kind of proscribed conduct, it identifies the proscribed conduct *expressly and independently* from the neutral "in contemplation of" phrase. Pet. Br. 62-63. Uncoupled from explicitly proscribed abusive conduct, the "in contemplation of" phrase simply has no independent proscriptive content, and certainly the Government does not demonstrate

that it does or what, exactly, the prospective content might be.

The Government's own examples drawn from various legislative histories illustrate this point.[2] For example, the Government cites the phrase "'*loading up*' in contemplation of bankruptcy," and "*a credit buying spree* in contemplation of bankruptcy." Gov't Br. 30 (emphasis supplied). It is, of course, the phrases "loading up" and "credit buying spree" that suggest abusive intent. By itself, engaging in some activity merely "in contemplation of" bankruptcy–e.g., hiring a bankruptcy attorney; filling out forms; moving into a less expensive home–suggests nothing nefarious.

The historical cases that the Government cites likewise do not establish the gloss the Government wishes to superimpose on the "in contemplation of" phrase. For example, in *Buckingham v. McLean*, this Court stated, in construing section 2 of the Bankruptcy Act of 1841, that "there is no ground upon which this act can be deemed fraudulent unless it was done in contemplation of bankruptcy *and with intent to give*

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[2] It is important to note that the Government's examples are drawn from random references to scattered legislative histories of acts that are not at issue in this case, and that the legislative history of the 2005 amendments contains no use nor explanation of the term "in contemplation of."

a preference…" 54 U.S. 151, 171 (1851) (emphasis supplied). Once again, the proscribed abusive conduct–intent to give a preference–was stated expressly and separately from the "in contemplation of" phrase. *See also Jones v. Howland*, 49 Mass. 377, 385 (1844). If it were self-evident that the phrase "in contemplation of" meant some self-evidently improper conduct, the Court's addition of the qualifier "and with an intent to give a preference" would have been unnecessary. Only with the addition of that qualifier can the abusive conduct be identified.

Likewise, in *In re Pearce*, the court held that a fraudulent transfer was one in which

> the debtor, in making the transfer, though he did it voluntarily and while in fact insolvent, acted in contemplation of bankruptcy, that is, in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects*, which takes place under a proceeding in bankruptcy.

19 F. Cas. 50, 53 (D. Vt. 1843) (emphasis supplied). Here, too, the "in contemplation of" element is insufficient on its own to convey the abusive nature of the transaction, requiring addi-

tional explanation.[3] The same is true of *Fidgeon v. Sharpe*, 128 Eng. Rep. 800, 803 (CCP 1814) ("The rule appears to me to be this: any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view to give a preference to a particular creditor, is void.") (internal quotations omitted).

Finally, the Government fails to refute petitioners' argument concerning *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472 (1933), which considered the meaning of the "in contemplation of" phrase under the prior Bankruptcy Act. The Government mostly buries its discussion of *Pender* in a footnote and insists that *Pender* demonstrates the equivalence of "in contemplation of" with "abuse." *See* Gov't Br. 32 n.9. *Pender*, however, says nothing of the sort. The fact that the Court sustained the disgorgement of an excessive payment that was made "in contemplation of bankruptcy" is, of course, neither here nor there. The payment was not abusive simply be-

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[3] Likewise, the section at issue in many of the cases the Government cites—section 2 of the Bankruptcy Act of 1841—did not use the "in contemplation of" phrase in isolation. Instead, it proscribed in relevant part payments "made or given by any bankrupt in contemplation of bankruptcy and for the purpose of giving any…person, any preference or priority over the general creditors of such bankrupts." Act of Aug. 19, 1841, ch. 9, §2, 5 Stat. 442 (repealed 1843).

cause it was made "in contemplation of" bankruptcy. It was abusive because it was excessive.[4]

3. The Government's proffered legislative history does not supply a means to "narrow" the scope of section 526(a)(4) to "abusive" advice of some kind, but rather demonstrates the implausibility of the Government's construction.

As noted, the Government offers examples of the use of the "in contemplation of" phrase in legislative histories in support of its narrowing exercise. Gov't Br. 34. As also noted, however, one problem with these examples is that they are not drawn from the legislative history of section 526(a)(4). It is thus difficult to understand how these examples have any bearing on the statutory provision at issue in this case.

Attempting to overcome this obstacle, the Government urges that "Congress has long been

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[4] The Government argues that *Pender* dealt with "a means of combating the same sort of preferential conveyances" as in the other cases it cites. Gov't Br. 32, n. 9. As the Court itself explained, however, *Pender* was not a preference case because the "class of cases to which" section 60d of the Bankruptcy Act "refers is *not* that of preferences or of fraudulent conveyances." *Pender*, 289 U.S. at 475 (emphasis supplied); *see also In re Wood*, 210 U.S. 246, 253 (1908).

aware" of the possibility of bankruptcy abuse. Gov't Br. 33. Building on this truism, the Government then acknowledges that "Congress has enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections." Gov't Br. 34; *see also id.* at 34-35 (citing 11 U.S.C. §§523(a)(2)(A); 523(a)(2)(C); 707(b)). This admission, however, proves too much. Congress' explicit prohibition of specific kinds of "abuse" in other sections of the Code, but not in section 526(a)(4), demonstrates that Congress knows how to be explicit in identifying "abuse" when it wants to and, by implication, did not wish to limit the prohibition in section 526(a)(4) to "abusive" advice.

The Government contends that, prior to the 2005 amendments, the Code "had not adequately restricted the ability of debtors" to engage in abuse, and that Congress therefore adopted the amendments to achieve its unfinished goals. Gov't Br. 35. Once again, however, the "evidence" the Government offers in support of that proposition consists merely of amendments to *pre-existing* anti-abuse provisions, along with the newly adopted "means test." *See id.* at 35-37. Glaringly absent is any legislative history that directly elucidates Congress' intent in enacting section 526(a)(4). In truth, the legislative history offers no support for the Government's effort to "narrow" the provision.

4. The Government's contextual argument does not support its "narrowing construction."

The Government makes the contextual argument that, because the three preceding subsections of 526(a) "are clearly designed to protect debtors from abusive practices by their attorneys," section 526(a)(4) should be similarly construed. Gov't Br. 39. Problematically, however, none of section 526(a)'s other subsections reveal a unified theory of "abusive" conduct that might be imported into section 526(a)(4). For example, it is difficult to understand how the prohibition contained in section 526(a)(1) regarding the failure to deliver promised services has anything to offer in terms of revealing what might constitute "abusive" advice regarding the incurrence of debt.

Moreover, the Government mistakenly assumes that the remedial provisions of section 526(c)(2), which provide a cause of action for assisted persons to reclaim from "debt relief agencies" their "actual damages," necessarily means that such damages will inevitably be the product of "abuse" or "bad intent." *See* 11 U.S.C. §526(c)(2). In fact, that remedy is available for even good faith acts of the "debt relief agency." *See id.* §§526(c)(2)(A)-(C). In other words, the actions of the "debt relief agency" need not be strictly "abusive" for the "actual damages" rem-

edy to remain available. Accordingly, this also does not support the Government's profferred narrowing construction.

5. A federal rule of professional conduct applicable to attorneys would be superfluous.

In response to the argument that the application of section 526(a)(4) to attorneys would duplicate existing remedies for "abusive" conduct, the Government maintains that section 526(a)(4) is different because it creates a federal private right of action for an "assisted person" who may be the victim of such abuse, and consequently, "[i]nvalidation of Section 526(a)(4) would render that remedy unavailable with respect to a significant category of improper attorney advice." Gov't Br. 40-41. The Government is mistaken.

A private right of action against attorneys for abusive conduct already exists in the form of a state common law cause of action for legal malpractice. *See, e.g.*, *Gonzalez v. Arana*, No. 94-2059, 1995 WL 32644 at *1 (1st Cir. 1995) (unpublished). Thus, the existing remedy is not purely "discipline by a state bar," as the Government suggests, but also private enforcement.

The policy interests that the Government claims the federal regulation advances are, similarly, already furthered by existing state

schemes. More important, the Government marshals no Congressional findings attesting to the inadequacy of the status quo. For example, the Government states that "the Code creates a uniform nationwide standard, appropriate to bankruptcy practice." Gov't Br. 41. The Government does not explain, however, why the existing standards adopted in the American Bar Association's Model Rules of Professional Conduct, and widely accepted by the states, do not achieve precisely the same "uniform nationwide standard." *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent…"); Minnesota Rules of Prof'l Conduct R. 1.2(d) (same); *see also* Gov't Br. 50 ("Versions of [Rule 1.2(d)] are in effect throughout the Nation, including in petitioners' home State.").

The Government states that "the Code gives a client a private right of action against an unethical attorney who has violated Section 526(a)(4), and it encourages such actions in the public interest by providing for fee-shifting," and says further that "[s]tate bar rules rarely if ever are privately enforceable." Gov't Br. 41. But, as noted, state common law malpractice actions do the same thing.

The Government states further that, while section 526(a) permits a federal court to issue an

injunction to enjoin a bankruptcy lawyer from repeating alleged abuse in another jurisdiction, "an unethical practitioner who has been sanctioned under the law of one jurisdiction may continue to provide unethical advice in another." *Id.* This is not true, however, of existing state regulation in Minnesota or elsewhere. *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 8.5(a) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."); Minnesota Rules of Prof'l Conduct R. 8.5(a) (same).

In short, there is essentially no need for the federal regulation of "abusive" conduct in the manner the Government suggests. On the assumption that Congress does not ordinarily regulate redundantly, this observation further undercuts the Government's assertion that some "narrow" form of regulation is what Congress implicitly had in mind when it enacted section 526(a)(4).

B. In Any Event, a "Narrowing Construction," Even if Possible, Would Merely Substitute a Problem of Substantial Overbreadth for One of Vagueness.

The Government assumes, mistakenly, that it was possible for the Eighth Circuit to have avoided section 526(a)(4)'s unconstitutionality through a narrowing construction. *See* Gov't Br. 43. But even if "the proper interpretation of Section 526(a)(4) is open to question" (and it is not), dodging the substantial overbreadth problem by narrowing the scope of section 526(a)(4) to "abusive" advice simply creates a different kind of constitutional difficulty: vagueness.

The Government's sole response to this problem is to sidestep it almost entirely. It acknowledges petitioners' argument, *see* Gov't Br. 45, but responds only with the following *non sequitur*: "As explained above,…the government's construction of Section 526(a)(4) as limited to a particular set of abusive practices is firmly tethered to the text, history, and purpose of the statute." *Id.* Nothing, however, in the Government's bald recitation of the "text, history, and purpose" of section 526(a)(4) lends any real content to its theory that the section is limited to "abusive" advice. More important, nothing inherent in the label "abusive" illustrates what it actually means.

The Government's proposed "pruning" of section 526(a)(4)–limiting its prohibition to "abusive" advice–is inherently and unavoidably vague. The Government itself cannot pin down its own standard, offering no less than three potential variations: (1) "advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors," Gov't Br. 28; (2) "accumulation of debt with intent to abuse the bankruptcy system or defeat the bankruptcy laws," *id.* at 32; and (3) "advice that debtors incur additional debt to abuse the bankruptcy system or defeat the administration of the bankruptcy laws," *id.* at 38. As amicus NACBA well argues, "[t]he problem is that the Government has plucked the term 'abuse' from thin air. It is not defined by the Act, and it does not (unlike existing ethical rules and statutory provisions) enjoy an operating history and background understanding." NACBA Br. 20.

The relevant vagueness problem is further illustrated by the Government's own statement of the alleged "conduct" element of its version of section 526(a)(4)–which introduces yet another general concept ("encouragement") that appears nowhere in the statutory scheme: "The statute unambiguously requires affirmative encouragement to incur more debt, although that encouragement might be communicated in a variety of ways (both direct and indirect)." Gov't Br. 42

n.14. For a practicing bankruptcy attorney (or anyone of average intelligence), it is virtually impossible to understand what this actually means. It thus "fails to apprise persons of ordinary intelligence of the prohibited conduct." *City of Chicago v. Morales*, 527 U.S. 41, 90 (1999) (Scalia, J., concurring); *see also id.* at 56 ("'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits…'") (Stevens, J.).

The inevitable chilling effect that this sort of vague standard creates is clear. As petitioners have argued, section 526(a)(4) is likely, as a practical matter, to prevent attorneys from even discussing with debtors the topic of what debts the debtors may legally incur. The Government counters that rules of professional responsibility guide attorneys in navigating the sometimes fine line between *advocating* illegal conduct and merely *advising* of the legal consequences of potentially illegal conduct. *See* Gov't Br. 42-43. Section 526(a)(4), however, does not adopt or incorporate any of this guidance. As a result, reference to it is of no assistance in saving the statute.

Finally, petitioners argued, *see* Pet. Br. 52 n.9, and the Government did not rebut, that it will often be difficult for an attorney to know

whether an "assisted person" is in fact an "assisted person" at the time he seeks advice from the attorney. Without this knowledge, an attorney cannot know which regime he is operating under–state law ethical rules that compel him to give unfettered advice, or section 526(a)(4) which ties his hands. Not surprisingly, conscientious lawyers have left the field of bankruptcy law altogether. The statute is unconstitutional.

C. Alternately, Section 526(a)(4) Creates an Unconstitutional Content-based Speech Restriction that Cannot Withstand Either Strict Scrutiny or the Court's *Gentile* Standard.

The Government does not challenge petitioners' description of section 526(a)(4) as a content-based restriction on speech. Nor, in relying on *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), does the Government challenge petitioners' argument that, if strict scrutiny applies (as it does), section 526(a)(4) fails its requirements. Instead, apart from invoking *Gentile*, the Government relies almost exclusively on its claim that section 526(a)(4) can be narrowed to avoid unconstitutionality. As demonstrated above, however, the Government's narrowing gloss is unsound. Thus, if *Gentile* does not apply to save the statute, the Government effectively concedes that section 526(a)(4) is unconstitutional.

As explained in petitioners' opening brief, *Gentile* does not apply here. Among other reasons, *Gentile* involved a clash of constitutional values not implicated in this case. Pet. Br. 75. But even if *Gentile* applies, the Government does not demonstrate that its requirements are satisfied. Apart from offering its flawed "narrowing construction" theory, the Government does not even attempt to articulate how section 526(a)(4) imposes "only narrow and necessary limitations on lawyers' speech" to protect an important governmental interest. Section 526(a)(4) thus cannot pass constitutional muster under either strict scrutiny or *Gentile*.

III. The Compelled Speech Requirements of Section 528 Are Unconstitutional.

The law of the First Amendment is not a law of mechanistic categorizations. It is a law of principles. Exalting form over substance, and pandering to labels, the Government contends that this controversy is a "disclosure" case. Gov't Br. 55-56. It then insists that all "disclosure" cases–apparently regardless of whether what is required to be "disclosed" is itself misleading or inaccurate–are reviewed under a deferential form of rational basis analysis. *Id.* If this is a "disclosure" case, however, it is so only in a most strained and attenuated way. Forcing lawyers to label themselves "debt relief agencies" discloses nothing meaningful to the public, and is no more

than an opaque, unwanted, pejorative, and inherently misleading form of self-branding.[5]

Likewise, compelling lawyers to add the phrase "we help people file for bankruptcy relief" in all the myriad circumstances enumerated in section 528, and regardless of the purpose or content of the relevant advertising message, is at best excessive, and most often useless or misleading. Even the Government concedes that this disclosure will sometimes be "extraneous." Gov't Br. 66. The Government's concession, of course, is an exaggerated understatement that serves only to underscore the scope of the problem at hand.

For example, it is difficult to understand why, in the context of advertising services related to "mortgage foreclosures" having nothing to do with bankruptcy proceedings, a lawyer or law firm that also happens to be a "debt relief agency" because it otherwise provides "bankruptcy assistance" to "assisted persons" must nonetheless state in its foreclosure advertisements that it "help[s] people file for bankruptcy relief." 11 U.S.C. §528(b)(2). It is likewise difficult to understand how the lawyer or law firm might tailor the mandated "disclosure" in this

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[5] The Government's observation that the label "debt relief agency" is akin to calling oneself a "modeling agency" does nothing to alleviate this problem. Gov't Br. 65.

illustration to fit the circumstance, yet still render the disclosure "substantially similar" to the statutory formulation, given that the required disclosure and the advertisement have nothing to do with each other.

In truth, this case is properly a "compelled speech" case, and, in any event, under the Court's precedents, should be reviewed under standards of more exacting scrutiny than the watered-down analysis the Government promotes. The required "disclosures" are not "warnings" or "disclaimers." Nor are they "purely factual and uncontroversial"–far from it. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). In reality, they are opaque and frequently counterfactual and, as a result, are far more likely to distract and confuse the public than illuminate anything material about the lawyer's services–thus heightening rather than minimizing First Amendment concerns. *See id.*

Because of the compelled nature of the "disclosures" required under section 528 and their effect, the section is properly reviewed under at least the stricter standards of the Court's *Central Hudson* criteria. *See Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 142 (1994); *In re R.M.J.*, 455 U.S. 191, 203 (1982). Applying the relevant criteria, the Government must demonstrate, among other things, that section 528 is "narrowly drawn" to advance a "substantial in-

terest." The Government, however, does not even attempt to meet this burden, and for obvious reasons.

The Government postulates that the purpose of section 528 is to address a very narrow, specific problem: advertisements that promise to "make…debts 'disappear'" without specifying that the means is through bankruptcy relief. Gov't Br. 60-61. Quite clearly, however, Congress easily could have drafted a "disclosure" statute narrowly tailored to address this specific problem. Instead, it drafted a statute that purports to regulate virtually all advertising by lawyers who provide "bankruptcy assistance" regardless of whether or not the advertisement presents the problem the Government identifies. The breadth of the statute alone, in relation to the problem the Government identifies, belies the Government's claim that section 528 is properly a "disclosure" provision, let alone one narrowly tailored to address the problem the Government cites.

In addition, even if the Court's "reasonably related" analysis in *Zauderer* were to control, this offers the Government no shelter. As the Court has stated in applying the "reasonably related" standard, "[w]e recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected speech." *Zauderer*, 471 U.S. at 651.

This case, of course, involves precisely such an unjustified and unduly burdensome "disclosure" obligation. Lawyers faced with having to make misleading and unwanted disclosures in their advertising are likely simply to forego advertising altogether. In this way, section 528 effectively operates more like a ban than a restriction. *See Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (laws that impose financial burdens on speech are suspect because they raise "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *see also New York Times v. Sullivan*, 376 U.S. 254, 266 (1964). In all events, because section 528 requires "disclosures" that are inherently useless, misleading, inaccurate, and pejorative, it should not be found to pass muster under *any* First Amendment standard.

A. The Correct Standard Is No Less Than the Criteria of *Central Hudson*.

The Government argues that *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) does not supply the correct standard for this compelled commercial disclosure case on the theory that *In re R.M.J.*, 455 U.S. 191 (1982), which applied the *Central Hudson* test, is only applicable to speech *suppression* cases, not those involving *compelled* speech. *R.M.J.*, however, is not so easily cast aside. Mo-

reover, as the Court has indicated, the distinction between compelled speech and suppressed speech is not necessarily significant or dispositive. *See Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 796 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance"); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views"). Indeed, in certain contexts, compelled speech may be even more problematic than compelled silence, and this case presents precisely such a context.

It is true that, in *R.M.J.*, the regulation at issue prohibited attorneys from advertising other than in certain narrowly confined ways. In particular, the rule required the attorney in question to describe his practice as "property law" rather than "real estate law," and also to provide no other description. Thus, in a sense, the regulation in *R.M.J.* was more limiting than section 528, which allows attorneys to put other information in their ads in addition to the required statements. But this is a distinction without a relevant difference. The basic point of *R.M.J.* remains that the attorney faced a choice of advertising in the way the rule mandated or not

advertising at all. The same is true here. More important, this case is actually far more problematic than *R.M.J.* There, the required description "property law" was not inherently misleading or opaque; the attorney simply wished to describe his practice using a different label, and the Court agreed that he could. In contrast, the branding requirements of section 528 are in material respects inherently useless, misleading, inaccurate, and pejorative. If anything, this case presents an even more compelling candidate than *R.M.J.* for application of the *Central Hudson* criteria.

As the Court made clear in *R.M.J.*, "[a]lthough the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." 455 U.S. at 203. As the Court explained further, the restrictions "must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995). Section 528 clearly fails this test.

This case is also analogous to the Court's precedent in *Ibanez*. There the Florida Board of Accountancy reprimanded an attorney for her use of two professional designations–Certified

Public Accountant (CPA) and Certified Financial Planner (CFP)–in her advertising in connection with her law practice, specifically in her yellow pages listing, and on her letter head and business cards. *Ibanez*, 512 U.S. at 138. Recognizing that the attorney's CPA and CFP designations were truthful and not misleading, this Court, applying *Central Hudson*, ruled that the Board could not restrict their use in her advertising. *Id.* at 149.

Once again, the Court reasoned that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* at 142. Once again, section 528 fails this standard. Critically, the main focus of the Court's analysis in *Ibanez* was not that the regulation at issue involved the "suppression of speech" rather than "compelled speech." Rather, it was that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id*. at 143 (quoting *Zauderer*, 471 U.S. at 646). Section 528, of course, fails to do this, and the Government cannot cure its deficiencies with semantics.

B. The Government Has Failed to Meet Its Burden.

As the Court has explained, "[i]t is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983)). The record in this case reveals that petitioner law firm and petitioner attorneys engage in a broad variety of advertising in newspapers, telephone directories, television, radio, and the internet. JA 38a-39a. Just as they cannot be subject to a complete ban on advertising, *Bates*, 433 U.S. at 383, they should also not be subject to a restriction that requires compelled "disclosures" in their advertising that are not "narrowly drawn" to serve a "substantial" governmental interest.

The Government complains that petitioner law firm and petitioner attorneys did not include copies of their advertisments in the record. Gov't Br. 69-70. The Government's opportunity to lodge this evidentiary objection, however, expired long ago and was not presented, preserved, or argued on appeal. More important, the Government's complaint inverts its burden: it is for the Government to prove that section 528 properly applies to the advertising activities of petitioner law firm and petitioner attorneys, not the

other way around. Given that the Government has never even alleged that petitioners' advertisements are anything other than truthful and non-misleading, it is too late for it to complain that this has not been proven. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (observing that "[t]here is no claim in this case that there is anything unlawful or misleading about the contents of respondents' publications" and, therefore, "[i]t was proper…to judge the validity of the city's prohibition under the standards set forth in *Central Hudson*").

As noted, an important effect of section 528 is to present a simple but chilling choice: either advertise with the disclosures that section 528 directs, or refrain from advertising at all. Here the Government makes no allegation that petitioner law firm or petitioner attorneys engage in the kind of advertising that the Government contends Congress was concerned about in enacting section 528. The question is whether they may nonetheless be subject to the statute's restrictions. The answer is that they may not.

For decades, the Court has held that commercial speech is protected in some measure under the First Amendment. *Va. State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (statutory ban on advertising prescription drug prices violated the First Amendment). This protection of commer-

cial speech is "justified principally by the value *to consumers* of the information such speech provides." *Zauderer*, 471 U.S. at 651 (emphasis supplied); *see also Va. State Bd. of Pharmacy*, 425 U.S. at 770. For this reason, petitioners have alleged not only that section 528 is unconstitutional as applied to certain attorneys, but that it also violates the public's right to receive information from attorneys. Sec. Am. Compl. ¶¶ 1, 10, 21, 37, *Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 05-CV-2626 (D. Minn. Dec. 15, 2006) [Dkt. No. 34].

The Court recognized this point in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561-62 (1980). Commercial speech is protected because it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* Indeed, "[t]he First Amendment's concern for commercial speech is based on the *informational* function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that *do not accurately inform the public about lawful activity*. The Government may ban forms of communication *more likely to deceive the public than to inform it*…" *Id.* at 563 (citations omitted) (emphasis supplied). In this case, as applied to petitioners, it is section 528's compelled commercial disclosures that (1) are more likely to deceive

than to inform, and (2) are not narrowly tailored. As such, they are invalid.

C. Section 528 Is Unconstitutional Under *Zauderer*.

Even if the Court were to apply the "reasonably related" standard of *Zauderer* rather than the criteria of *Central Hudson*, section 528 is still unconstitutional. Importantly, as a predicate to its articulation of the "reasonably related" standard, the Court in *Zauderer* explicitly "recognize[d] that *unjustified or unduly burdensome* disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651 (emphasis supplied); *see also Ibanez*, 512 U.S. at 146-47 (applying the "unjustified or unduly burdensome" standard). Implicitly, unjustified or unduly burdensome disclosure requirements do not meet the "reasonably related" standard based on their unjustified or unduly burdensome nature. In this case, the challenged requirements of section 528 are unjustified or unduly burdensome because they are vastly disproportionate to the harm they seek to mitigate, and impose requirements that are opaque, unwanted, pejorative, and inherently misleading.

In *Zauderer*, the Court justified the "reasonably related" standard by stating that disclosure requirements "only require [appellant] to

provide somewhat *more* information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650-51 (emphasis supplied). In contrast, the compelled disclosures in this case are quite different. *Zauderer* characterized the compelled disclosure at issue as "a requirement that appellant include in his advertising *purely factual and uncontroversial information* about the terms under which his services will be available." *Id.* at 651 (emphasis supplied). Not so here. In *Zauderer*, the Court justified the standard principally "by the value to consumers of the information such speech provides," and reasoned that therefore "appellant's constitutionally protected interest in *not* providing any particular *factual* information in his advertising is minimal." *Id.* at 651 (emphasis supplied). Section 528, however, compels disclosure of opaque, misleading, unwanted, and pejorative information. As a result, its value to consumers is nil, and certainly petitioners' interest in not providing false and misleading information in their advertising is high. Inasmuch as the concern giving rise to the *Zauderer* standard is "preventing deception of consumers," section 528, which compels misinformation, is plainly "unjustified or unduly burdensome," and as such, violates the First Amendment. *Id.*

Although the Government argues that section 528's "substantially similar" clause provides enough flexibility for attorneys to clarify the na-

ture of their practice such that the speech would no longer be false and misleading, this approach creates its own vagueness problem. What constitutes "substantially" similar? In addition, in order to be accurate in many instances, the statement would have to be substantially *dis*similar to the statutory directive. *See* Pet. App. A-12; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 767 n.5 (D. Minn. 2005). The Government's "substantially similar" argument cannot save the statute.

In this case, the harm caused by section 528's compelled commercial disclosure requirement is obvious–compelled disclosure of largely useless and often misleading information. This result is unjustified and unduly burdensome, and therefore section 528 does not pass the "reasonably-related" test. Indeed, the requirements of section 528 are so unsound that they must necessarily offend the First Amendment under *any* of the Court's standards.

CONCLUSION

For the foregoing reasons, as well at those stated in petitioners' opening brief, 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,

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