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Nos. 08-1119 and 08-1225

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

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

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, Congress enacted regulations governing the professional conduct of any "debt relief agency," a term that Congress defined to include "any person who provides any bankruptcy assistance" to a consumer debtor for valuable consideration, with enumerated exceptions. 11 U.S.C. 101(12A). Section 526(a)(4) of Title 11 provides that a "debt relief agency" may not advise a debtor "to incur more debt in contemplation of" filing a bankruptcy petition. Section 528 of Title 11 requires "debt relief agencies" to include certain disclosures in advertisements to the public of bankruptcy-related services. The questions presented are as follows:

1. Whether an attorney who provides bankruptcy assistance to a consumer debtor in return for valuable consideration, and who does not fall within one of the listed exceptions, is a "debt relief agency" under the Bankruptcy Code.

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

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

4. Whether the advertising-disclosure requirements of Section 528 violate the First Amendment.

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OPINIONS BELOW

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

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the government's petition in No. 08-1225.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 5, 2008 (Pet. App. 47a). The petition for a writ of certiorari in No. 08-1119 was filed on March 5, 2009. On February 20, 2009, Justice Alito extended the government's time within which to file a petition for a writ of certiorari to and including April 6, 2009, and the petition in No. 08-1225 was filed on April 3, 2009. The petitions for writs of certiorari were granted on June 8, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech." The pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

This case involves a pre-enforcement challenge under the First Amendment to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or 2005 Act), Pub. L. No. 109-8, 119 Stat. 23. The 2005 Act established certain minimum standards of professional conduct for "debt relief agencies." The district court held that two of those provisions violate the First Amendment and that the statutory term "debt relief agency" does not encompass licensed attorneys. Pet. App. 29a-44a.

The court of appeals reversed in part. The court held that attorneys may be "debt relief agencies" under the

2005 Act, and it upheld the statute's advertising-disclosure requirements. Pet. App. 3a-10a, 15a-21a. By a divided vote, however, the court held that the statutory provision restricting debt relief agencies from advising their clients to take on new debt "in contemplation of" bankruptcy violates the First Amendment. *Id.* at 10a-15a; see *id.* at 22a-28a (Colloton, J., concurring in part and dissenting in part).

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

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

assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The 2005 Act added or enhanced a variety of regulations on bankruptcy professionals' conduct. Those regulations are intended to protect the clients and prospective clients of bankruptcy professionals, the creditors of clients who do enter bankruptcy, and the bankruptcy system. The regulations require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system. See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D).

Many of the regulations apply to "debt relief agenc[ies]" generally. Under the Bankruptcy Code's definition, "any person" becomes a debt relief agency by providing "any bankruptcy assistance" for a fee to a consumer debtor, known as an "assisted person."[2] 11 U.S.C. 101(12A). "Bankruptcy assistance" includes, inter alia, "advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. 101(4A).[3]

Section 526 of Title 11 sets out four basic rules of professional conduct for debt relief agencies, each of which protects clients against specific unethical prac-

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[2] An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than" an inflation-adjusted sum, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

[3] The 2005 Act establishes five specific exceptions to the definition of "debt relief agency" for in-house preparers, tax-exempt nonprofits, creditors, banks, and copyright owners. 11 U.S.C. 101(12A)(A)-(E).

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

> A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. 526(a)(4).

Section 528 includes several disclosure requirements that apply when a debt relief agency advertises its services to the general public. First, advertisements that promote either "bankruptcy assistance services" or "the benefits of bankruptcy" must make clear that the services or benefits "are with respect to bankruptcy relief under [the Bankruptcy Code]." 11 U.S.C. 528(a)(3); see 11 U.S.C. 528(b)(1) (defining what advertisements are covered). Second, advertisements that promote "assistance with respect to" certain consumer debt or credit problems must disclose that the assistance "may involve" filing for bankruptcy relief. 11 U.S.C. 528(b)(2)(A). Third, advertisements in either of these two categories must also include either a specified disclaimer—"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy

Code."—"or a substantially similar statement." 11 U.S.C. 528(a)(4) and (b)(2)(B).[4]

The principal remedy for violations of Sections 526 and 528 is a civil action by the debtor to recover his "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). For violations of Section 526, the statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). For intentional or recurring violations of that provision, the bankruptcy court may also impose an injunction or "an appropriate civil penalty," either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Petitioners are a law firm, two of the firm's attorneys, and two prospective clients. J.A. 37a-38a. They filed this action against the United States, seeking a declaratory judgment that the attorney respondents are not obligated to comply with several of the BAPCPA's provisions regulating debt relief agencies' professional conduct, including Section 526(a)(4) and the advertising-disclosure provisions of Section 528. Petitioners contended that licensed attorneys are not "debt relief agenc[ies]" within the meaning of the statute, even if they provide bankruptcy-related advice to debtors. They also argued that, to the extent the statute encompasses licensed attorneys, the challenged provisions violate the First Amendment. Pet. App. 2a.

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

The district court denied the government's motion to dismiss, Pet. App. 29a-44a, and then granted summary judgment for petitioners, *id.* at 45a. The district court held that Section 526(a)(4) and the advertising-disclosure requirements of Section 528 violate the First Amendment. *Id.* at 33a-41a. The court further held, apparently in the alternative, that attorneys do not fall within the statutory definition of "debt relief agency." *Id.* at 41a-43a.

3. The government appealed, contending that attorneys unambiguously fall within the definition of "debt relief agency" and that the district court's constitutional holdings were premised on a misreading of the statute. In particular, the government explained that the phrase "in contemplation of" bankruptcy in Section 526(a)(4) has a long historical pedigree in bankruptcy law: in this context, the phrase is properly construed to forbid only advice encouraging a client to take on new debt on the eve of bankruptcy with the intent of abusing the bankruptcy system. The government further contended that, to the extent the term "in contemplation of" is ambiguous, the doctrine of constitutional avoidance supports the government's narrow reading of the term, which avoids the overbreadth that the district court perceived.

4. The court of appeals affirmed in part and reversed in part. The court unanimously held that attorneys may fall within the definition of "debt relief agency," and it reversed the district court's invalidation of the advertising disclosure requirements in Section 528. The court held by a divided vote, however, that Section 526(a)(4) as applied to attorneys violates the First Amendment. See Pet. App. 1a-28a.

a. The court of appeals first concluded that attorneys for consumer debtors may fall within the definition of "debt relief agency." Pet. App. 3a-10a. The court noted that Congress had specifically defined both "debt relief agency" and several terms used in the definition of "debt relief agency." *Id.* at 4a-5a. Those definitions "sweep[] broadly," the court concluded, "and clearly cover[] the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision." *Id.* at 9a. The court noted that Congress had adopted five specific exceptions to the definition of "debt relief agency," none of which covered petitioners. *Ibid.* The court of appeals also concluded that constitutional-avoidance considerations could not justify petitioners' reading of the term "debt relief agency" because that reading was foreclosed by the statute's plain language. *Id.* at 8a.

b. The court of appeals rejected petitioners' constitutional challenge to Section 528's disclaimer requirements. Pet. App. 15a-21a. The court concluded that, because Section 528 regulates potentially misleading commercial advertising by imposing disclosure requirements, it is not subject to any of the forms of heightened scrutiny that apply to restrictions on commercial speech. *Id.* at 18a (citing *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 n.14 (1985)). Applying the *Zauderer* standard, the court held that Section 528 is "directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy." *Id.* at 19a. The court noted that the statements contained in the required disclaimer are "factually correct" because attorneys subject to the require-

ment are "debt relief agenc[ies]" as the Code uses that term. *Id.* at 20a. The court of appeals also observed that, because the statute permits the substitution of a "substantially similar" disclaimer, any attorney who does not actually assist with bankruptcy filings can "tailor" the disclosure statement to assuage any concern about its accuracy. *Id.* at 20a n.12.

c. The court of appeals further held, over Judge Colloton's dissent, that Section 526(a)(4) violates the First Amendment. Pet. App. 10a-15a; see *id.* at 22a-28a (Colloton, J., concurring in part and dissenting in part). The court rejected the government's proposed narrowing construction of the statute. The court concluded that, under what the majority described as the only permissible interpretation of the statute's "plain language," Section 526(a)(4) prohibits debt relief agencies from advising consumer clients "to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Id.* at 12a. The court stated that "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws." *Id.* at 13a.

Based on that broad construction, the court of appeals held that Section 526(a)(4) is unconstitutionally overbroad. Pet. App. 12a-15a. The court explained that advice to take on new debt just before bankruptcy will sometimes be legitimate. As examples, the court observed that "it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments," or to purchase a car to ensure "dependable transportation * * * to and from work." *Id.* at 13a-14a. The court further posited that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. The

court concluded that the First Amendment prohibits regulation of such legitimate advice and that Section 526(a)(4) is therefore "unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons." *Id.* at 15a.[5]

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

First, Judge Colloton observed that the phrase "in contemplation of bankruptcy" is a term with a long history and "has been construed * * * to mean actions taken with the intent to abuse the protections of the bankruptcy system." Pet. App. 25a; see *id.* at 25a-26a (collecting authorities). Second, Judge Colloton pointed out that the remedies for a violation of Section 526(a)(4) "emphasize actual damages," and he reasoned that a debtor who follows his attorney's bankruptcy advice is

[5] The court of appeals did not identify the precise constitutional standard under which petitioners' challenge should be evaluated. Petitioners had argued that strict scrutiny should apply, while the government had contended that Section 526(a)(4) is a reasonable regulation of attorneys' professional conduct that is to be reviewed more deferentially under the standard announced in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). The court acknowledged that the government had a "legitimate interest" in prohibiting advice that would assist debtors in abusing the bankruptcy system. Pet. App. 12a. But the court held that, on its reading of Section 526(a)(4), the statute was insufficiently connected to that interest and therefore was unconstitutional under either strict scrutiny or the *Gentile* standard. *Id.* at 12a-13a.

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

5. The court of appeals denied the government's petition for rehearing en banc by a vote of 6-5. See Pet. App. 47a.

SUMMARY OF ARGUMENT

I. Attorneys are not exempt from the definition of "debt relief agency" under the Bankruptcy Code. The definition encompasses "any person" who provides specified services to specified clients, subject to five specific exceptions. None of those exceptions includes attorneys, either expressly or by implication. 11 U.S.C. 101(12A). Attorneys therefore are debt relief agencies if they provide the specified clients with the specified services, known as "bankruptcy assistance." *Ibid.* Indeed, "bankruptcy assistance" is expressly defined to include certain services that can *only* be performed by lawyers, such as providing "legal representation" or

"appearing in a [bankruptcy] case" on behalf of a consumer debtor. 11 U.S.C. 101(4A). That language would be surplusage if attorneys were categorically ineligible to be debt relief agencies. And the legislative history confirms that Congress was targeting abusive conduct *by attorneys* in bankruptcy cases.

Petitioners contend, on various theories, that their reading must prevail in the absence of an express reference to "attorneys" in the statute. But the statute's application to attorneys is clear. In light of the broad statutory definition of "debt relief agency" and the unmistakable inclusion of legal services within the scope of "bankruptcy assistance," the absence of the term "attorney" from the definitions is immaterial. When a person provides the services specified, he falls within the coverage of the statute, regardless of whether he possesses a law license. Nor, contrary to petitioners' arguments, does this natural reading of the statute create any absurd results.

In any event, there is no reason to adopt a clear statement rule, as petitioners suggest, in interpreting the term "debt relief agency." Congress's regulation of debt relief agencies does not infringe on any traditional power of the States; federal laws, agencies, and courts (including this Court) have long regulated the conduct of attorneys and other professionals within federal spheres of interest, such as bankruptcy. And the doctrine of constitutional avoidance provides no reason to adopt petitioners' proposed construction of the statute. That construction itself would not fully cure the constitutional problem petitioners perceive, and it would exempt attorneys from a variety of client-protection measures to which there is *no* constitutional objection. The Court therefore should reject petitioners' proposed in-

terpretation even if it finds that the statute does not plainly cover lawyers.

II. Section 526(a)(4) is not unconstitutionally overbroad. The court of appeals' decision to the contrary rested on its view that the statute prohibits advice "to incur any additional debt when the assisted person is contemplating bankruptcy." Pet. App. 12a (emphasis omitted). But the statute does not use the temporal term "when" at all; rather, it uses the phrase "in contemplation of [bankruptcy]," a phrase that has long been read to incorporate an element of intent to abuse the bankruptcy laws. Read in accordance with that long history, Section 526(a)(4) prohibits only advice to take on debt with an intent to abuse the bankruptcy laws, such as advice to charge a vacation, concert tickets, or some similar purchase to a credit card, knowing that the purchaser will enjoy the full benefit of the purchase and then shed most or all of the debt in bankruptcy.

The structure and legislative history of the statute confirm that Congress regulated only *abusive* bankruptcy advice. The problem that Congress sought to combat was the phenomenon of "loading up" on debt with the intent of gaining relief through bankruptcy. That purpose is manifest in the other provisions Congress adopted to limit eligibility for a complete discharge under Chapter 7 of the Bankruptcy Code; indeed, those provisions create incentives to take on more debt to affect the eligibility determination. Section 526(a)(4) is properly read as a reasonable and targeted way of combating those incentives. Surrounding provisions of the statute, which specify other rules of professional conduct and provide remedies for clients injured by the unethical advice, confirm the correctness of this reading.

The court of appeals rejected this construction in a single terse reference to the "plain language" of the statute. Pet. App. 12a. Petitioners likewise insist that Section 526(a)(4) should be read more broadly—unconstitutionally broadly. But petitioners must establish not only that their reading of Section 526(a)(4) is the better one (which they cannot), but that it is the *only* plausible one. In light of the long history of the key phrase that Congress used and the history and structure of the statute, petitioners cannot rebut "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *E.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (citation omitted).

Adopting the correct interpretation of Section 526(a)(4) eliminates the overbreadth that the court of appeals perceived. By narrowly prohibiting attorneys from advising clients to commit acts that are criminal, fraudulent, or (at a minimum) abusive of the federal judicial system, Section 526(a)(4) parallels a long-accepted principle of legal ethics that has been enshrined in state law for decades. This Court has established that attorneys in judicial proceedings may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile* v. *State Bar*, 501 U.S. 1030, 1071 (1991). Attorneys representing clients at the bar of a federal bankruptcy court owe a professional obligation to the tribunal not to counsel their clients to take action that directly subverts the bankruptcy system. The First Amendment does not excuse attorneys from that obligation, nor does it prevent Congress from providing federally enforceable remedies for clients harmed by their attorneys' breach of that obligation.

III. The court of appeals correctly upheld the advertising-disclosure requirements of Section 528. Disclosure requirements applied to commercial speech receive more deferential scrutiny than do restrictions on the content of commercial advertising. As this Court has squarely held, a requirement that attorney advertising include specified factual disclosures need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985). Petitioners' reliance on cases involving forced political speech and outright restrictions on truthful commercial speech therefore is unavailing: *Zauderer* sets out the controlling standard here.

The advertising-disclosure requirements readily satisfy that standard. Congress documented the problem it sought to combat: misleading attorney advertisements that offered to provide relief from debt, a halt to foreclosure, and the like, without adequately disclosing that obtaining these forms of relief requires filing for bankruptcy and suffering the attendant consequences. Congress was entitled to determine that such advertisements are misleading unless they properly disclose that the benefits touted entail a bankruptcy filing.

Petitioners contend that the two-sentence disclaimer specified in the statute is misleading and, therefore, unconstitutional. But petitioners principally object to including the phrase "debt relief agency," a statutorily defined term whose natural *and* legal meanings encompass consumer bankruptcy attorneys. Requiring debt relief agencies to identify themselves as such is entirely accurate and proper. Petitioners may well desire to call themselves "attorneys" in their advertising, but nothing in Section 528 precludes them from doing so, or from

providing any additional information they wish. Indeed, Congress also specified that debt relief agencies may vary the text of the prescribed disclosure and use any "substantially similar statement." 11 U.S.C. 528(a)(4) and (b)(2)(B). Accordingly, Section 528 is constitutional on its face.

Petitioners also argue, for the first time in this litigation, that *their* advertising is not misleading and does not require any disclaimer. But petitioners' past advertisements are not in the record, nor are their plans for future advertising. This late-raised as-applied challenge therefore provides no basis to disturb the judgment of the court of appeals.

ARGUMENT

I. THE BAPCPA'S "DEBT RELIEF AGENCY" PROVISIONS ENCOMPASS ATTORNEYS AS WELL AS OTHER BANKRUPTCY PROFESSIONALS

Petitioners contend (Br. 12-35) that the BAPCPA's "debt relief agency" regulations do not apply to licensed attorneys. As the court of appeals recognized, that argument is foreclosed by the plain language of the statute. Pet. App. 3a-10a; accord *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 749-752 (5th Cir. 2008) (same), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009).

A. Attorneys Who Provide "Legal Representation" Or Other "Bankruptcy Assistance" To Consumer Debtors Are "Debt Relief Agencies"

1. Attorneys who provide paid legal representation to consumer debtors in bankruptcy proceedings are "debt relief agencies" under a straightforward reading of the pertinent statutory definitions. See *Burgess* v.

United States, 128 S. Ct. 1572, 1577 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (quoting *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Subject to five enumerated exceptions that make no reference to attorneys, Congress defined the term "debt relief agency" to include "any person" who, for a fee, "provides any bankruptcy assistance to an assisted person." 11 U.S.C. 101(12A). "Assisted person[s]" include consumer debtors. 11 U.S.C. 101(4A); see note 2, *supra*. "Bankruptcy assistance" means:

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, *advice*, *counsel*, document preparation, or filing, or attendance at a creditors' meeting or *appearing in a case or proceeding on behalf of another* or *providing legal representation* with respect to a case or proceeding under this title.

11 U.S.C. 101(4A) (emphases added). The term "debt relief agency" thus encompasses "any person" who "advi[ses]," "counsel[s]," "appear[s] in a [bankruptcy] case or proceeding on behalf of," or provides "legal representation with respect to a [bankruptcy] case" to, a consumer debtor in exchange for a fee.

Bankruptcy attorneys fall within that definition when they perform one or more of the specified services for the specified type of client. "[A]ny person" is a capacious term that encompasses any attorney. See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 832 (2008) ("any" is naturally read to have an expansive meaning); 11 U.S.C. 101(41) (broad definition of "person"). And the services defined as bankruptcy assistance are often

provided by lawyers. Indeed, because *only* attorneys can provide "legal representation" or "appear[] in a [bankruptcy] case" on behalf of a consumer debtor, see, *e.g.*, 11 U.S.C. 110(e)(2)(A) (bankruptcy petition preparers may not provide legal advice), petitioners' reading of the term "debt relief agency" would render those aspects of the statutory definition superfluous.[6] That alone is a sufficient reason to reject petitioners' construction. See, *e.g.*, *TRW Inc.* v. *Andrews,* 534 U.S. 19, 31 (2001); *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998).

In light of those unambiguous textual indicia, the absence of the word "attorney" from the definition of "debt relief agency" is immaterial. A debt relief agency is defined by the services it performs and the clients for whom it performs them, and "any person" who performs those services may qualify. See 11 U.S.C. 101(4A) and (12A), 110(a). Analogously, the Fair Debt Collection Practices Act does not specifically refer to lawyers or the practice of law, but it defines a "debt collector" as "any person" who engages in the debt collection busi-

[6] One amicus brief suggests that the phrase "legal representation" refers to the "unauthorized practice of law" by non-attorneys such as bankruptcy petition preparers. NACBA Br. 34. That is an unnatural reading: a person becomes a "debt relief agency" by providing "legal representation" (or other "bankruptcy assistance") only if he is not already a debt relief agency by virtue of being a bankruptcy petition preparer. See 11 U.S.C. 101(12A). Thus, the reference to "legal representation" (or other "bankruptcy assistance") is relevant only to persons other than bankruptcy petition preparers, such as attorneys. See 11 U.S.C. 110(a)(1) (attorneys are not bankruptcy petition preparers). Moreover, bankruptcy petition preparers are already prohibited from offering "legal advice" or signing documents on behalf of any debtor; those prohibitions, and the bankruptcy court's authority to enforce them, are altogether separate from the "debt relief agency" provisions. See 11 U.S.C. 110(e)(2), (i), (j) and (k).

ness, 15 U.S.C. 1692a(6), and this Court has held that attorneys are debt collectors "whenever they meet the general 'debt collector' definition." *Heintz* v. *Jenkins*, 514 U.S. 291, 295 (1995). Indeed, the Court in *Heintz* held that any reading of the term "debt collector" that would exempt lawyers *per se* was "outside the range of reasonable interpretations of the [statute's] express language." *Id.* at 298. Accord, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787-788 (1975) (noting the "heavy presumption against implicit exemptions," and accordingly refusing to construe the Sherman Act to exempt lawyers). To construe the BAPCPA term "debt relief agency" to exclude lawyers would be even more unwarranted, because that term is defined by reference to services some of which *only* lawyers can perform.

2. The BAPCPA's definition of "debt relief agency" is subject to five exceptions, none of which mentions attorneys, and none of which encompasses attorneys as a class. Rather, the exceptions apply to employees of regulated entities, tax-exempt nonprofits, creditors, banks, and copyright owners. See 11 U.S.C. 101(12A)(A)-(E). As the court of appeals observed, Congress's decision to include five carefully tailored exceptions from the definition of "debt relief agency" but not to make an exception for attorneys strongly implies that no such exception was intended. Pet. App. 9a; see *Hersh*, 553 F.3d at 751; accord, *e.g.*, *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 90-91 (1995).

Petitioners contend (Br. 19-23) that two of the exemptions *implicitly* suggest that the term "debt relief agency" does not encompass attorneys. Neither exemption can bear the weight petitioners place on it. The exclusion of "any person who is an officer, director, employee, or agent of a person who provides [bankruptcy]

assistance," 11 U.S.C. 101(12A)(A), ensures that a regulated attorney's administrative assistant or process server is not separately required to comply with the notice and disclosure provisions of the statute.[7] The exclusion for creditors, which applies only "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), makes clear that an attorney acting solely in her capacity as a creditor of the debtor (*e.g.*, a divorce lawyer to whom the debtor owes fees) is not required to comply with the debt relief agency provisions of the Act. That exemption says nothing about whether attorneys are covered when they provide bankruptcy assistance.

3. The relevant legislative history confirms the plain meaning of the statutory text. The abuses of the bankruptcy system that Congress sought to address in the 2005 Act included abuses committed by—and at the encouragement of—debtors' professional representatives.

[7] Petitioners note (Br. 19-20) that the exemption for "an officer, director, employee, or agent" does not exempt a partner; they assert that lawyers often practice in partnerships; and they argue that, if law firms were covered by the "debt relief agency" definition, Congress would necessarily have included "partners" in the list of exempted employees. But the absence of an exemption for partners does not suggest that partnerships are excluded from the term "any person," because principals (such as partners) differ from employees, agents, officers, and directors in relevant respects. A law firm (or other business entity) is *itself* a debt relief agency if its attorneys or other personnel provide the specified services to consumer debtors under the firm's name, and as a matter of partnership law that designation may well have consequences for the partners. It is therefore unsurprising that Congress did not exempt principals who have the title "partner." In any event, petitioners' premise is flawed: law firms are often organized as corporations or other non-partnership entities, and indeed, the petitioner firm is a corporation, not a partnership. J.A. 37a.

The House Report cited a study by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals." *House Report* 5 (quoting Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: The Civil Enforcement Initiative*, Am. Bankr. Inst. J., Sept. 2002, at 12 (Darling & Redmiles)). Similarly, in adopting the advertising disclosure requirements in 11 U.S.C. 528, Congress heard evidence of "increasingly aggressive lawyer advertising" that offered to make consumers' "debts disappear," but failed to explain that such relief would require a petition for bankruptcy having significant consequences for the debtor's ability to obtain credit in the future. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, and the Need for Bankruptcy Reform: Hearing on H.R. 975 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 55 (2003) (*2003 Hearings*) (statement of Dean Sheaffer, National Retail Federation). Congress responded by enacting the debt relief agency provisions of the 2005 Act to "strengthen[] professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases." *House Report* 17 (emphasis added).

B. Construing The Term "Debt Relief Agency" To Encompass Attorneys Does Not Lead To Absurd Results

Petitioners contend (Br. 24) that treating attorneys as debt relief agencies would lead to "absurd" results. For the most part, the supposed absurdities repackage petitioners' claims of unconstitutionality, see *id.* at 24, 28, and may be rejected for the same reasons, see pp. 27, 28-46, 64-68, *infra*. In addition, however, petitioners

argue that an attorney who represents small creditors in bankruptcy cases could be deemed a "debt relief agency" on the theory that a creditor with debts consumer of his own may be an "assisted person." A "debt relief agency" must include in its public advertising the sentence "We help people file for bankruptcy relief under the Bankruptcy Code," or "a substantially similar statement." 11 U.S.C. 528(a)(4). Petitioners contend (Br. 24) that if an attorney represents a client who appears as a creditor in a bankruptcy proceeding but whose own unrelated consumer debts bring the client within the statutory definition of "assisted person," the attorney's public advertising must state that he "help[s] people file for bankruptcy relief," even if the attorney does not actually provide such assistance and the statement is consequently untrue.

The premise of petitioners' argument is mistaken. A creditor in a bankruptcy proceeding is not an "assisted person" within the most natural reading of that statutory term, even if the creditor owes debts of his own. An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than" an inflation-adjusted sum, currently $164,250. 11 U.S.C. 101(3); see note 2, *supra*. Nothing in the bankruptcy laws depends on whether a creditor's own debts are "primarily * * * consumer debts," or on the value of a creditor's "nonexempt property." Indeed, the very concept of "exempt" property presupposes a bankruptcy filing by the person whose assets are at issue. See 11 U.S.C. 522(b) (describing the property that "an individual *debtor* may exempt from [the] property of the estate") (emphasis added). The natural inference is that the term "assisted person" is limited to debtors in actual or potential bankruptcy pro-

ceedings and does not encompass creditors in such proceedings who happen to owe unrelated debts.[8]

In any event, petitioners do not suggest that the BAPCPA's "debt relief agency" provisions will produce absurd results as applied to petitioners themselves or to bankruptcy lawyers generally—only that the provisions cannot sensibly be applied to bankruptcy attorneys who represent creditors exclusively. And if the term "assisted person" is read to encompass certain creditors in bankruptcy proceedings, construing the term "debt relief agency" to exclude lawyers will not eliminate the anomalous consequences that petitioners identify, because non-attorneys who assist such creditors in bankruptcy cases and advertise their services are also required to make the disclosure mandated by Section 528(a)(4). For those reasons too, the absurdities petitioners purport to fear are best avoided not by reading attorneys out of the term "debt relief agency," but by construing the term "assisted person," in accordance

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[8] Additional evidence in the statute confirms that creditors are not "assisted persons." Section 527, for example, requires debt relief agencies to provide "assisted persons" with information relevant only to debtors, see 11 U.S.C. 527(b), and expressly cross-references provisions applicable only to debtors, see, *e.g.*, 11 U.S.C. 527(a)(1) (instructing debt relief agencies to provide assisted persons with the "notice required under section 342(b)(1)," a provision that applies only to "individual[s]" who "commence[] * * * a case under this title"). Likewise, the written-contract provisions of Section 528 provide that a contract must be signed within five days "after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but *prior to such assisted person's petition under this title being filed*." 11 U.S.C. 528(a)(1) (emphasis added). The legislative history confirms that common-sense understanding. See *House Report* 17 (explaining that Congress enacted the debt-relief-agency provisions of BAPCPA to "strengthen[] professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases").

with Congress's evident intent, as limited to debtors in actual or potential bankruptcy proceedings.

C. The Application Of The BAPCPA To Attorney Conduct Does Not Intrude On Any Traditional State Prerogative

Petitioners suggest (Br. 33-34) that construing the term "debt relief agency" to encompass attorneys would "displace" the role of States in an area they have traditionally regulated. Petitioners contend on that basis (Br. 35) that this Court should require a clear statement of intent to cover attorneys, and that the BAPCPA's definition of "debt relief agency" does not contain the requisite clear statement because it "does not even mention the word 'attorney.'" Those arguments are misconceived.

First, construing the term "debt relief agency" to encompass lawyers does not bar the States from regulating attorney conduct performed in connection with actual or potential bankruptcy proceedings. To the contrary, state law that is not inconsistent with the BAPCPA is expressly saved from preemption. 11 U.S.C. 526(d)(1). A statute allowing concurrent regulation of attorney conduct does not raise any concern that might call for a clear-statement rule.

Second, the BAPCPA's regulation of bankruptcy attorneys is of a piece with a long history of federal regulation of lawyers who practice before federal tribunals or in areas of uniquely federal concern. *E.g.*, 11 U.S.C. 105(a) (recognizing bankruptcy courts' authority to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process"); 11 U.S.C. 329 (requiring bankruptcy lawyers to surrender certain unreasonable fees); Fed. R. Bankr. P. 9011(c);

see 28 U.S.C. 1927; Fed. R. Civ. P. 11(c); Fed. R. App. P. 46(c); Sup. Ct. R. 8.1; see also *Goldsmith* v. *United States Bd. of Tax Appeals*, 270 U.S. 117, 121-123 (1926) (upholding an Article I tribunal's authority to admit lawyers and accountants to practice and prescribe qualifications for admission); 15 U.S.C. 7245 (providing for the Securities and Exchange Commission to issue "minimum standards of professional conduct for attorneys appearing and practicing before the Commission"); 31 C.F.R. 10.20 *et seq*. (rules for practice before the Internal Revenue Service); 37 C.F.R. 10.20 *et seq*. (Patent and Trademark Office Code of Professional Responsibility). See generally *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980) ("The power of a court over members of its bar is at least as great as its authority over litigants."). Federal rules of practice in an area of direct federal interest can even preempt state unauthorized-practice laws, see *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379, 400 n.43, 403 (1963), a step Congress did not deem necessary here, see 11 U.S.C. 526(d)(2)(A). Bankruptcy is a subject of particular federal concern, see U.S. Const. Art. I, § 8, Cl. 4, and there is nothing improper or unusual in Congress's decision in BAPCPA to regulate attorney conduct that threatens the integrity of the bankruptcy system.

Third, even if a clear-statement requirement applied in this setting, it would be satisfied here. Section 101(4A)'s inclusion of "legal representation" as a service that triggers debt-relief-agency status eliminates any reasonable doubt that attorneys are covered, even though that definitional provision does not contain the term "attorney" or "lawyer." A clear-statement rule is not a magic-words requirement; the requisite clear statement may even come from reading multiple provi-

sions together, so long as the meaning is unambiguous. See *BFP* v. *RTC*, 511 U.S. 531, 546 (1994) ("The Bankruptcy Code can of course override by implication when the implication is unambiguous."); cf. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 76 (2000).

D. The Canon Of Constitutional Avoidance Provides No Basis For Construing The Term "Debt Relief Agency" To Exclude Attorneys

Petitioners further contend that the Court should construe the term "debt relief agency" to exclude attorneys in order to avoid constitutional difficulties. Petitioners correctly state (Br. 31) the general proposition that the avoidance canon permits—indeed, requires—a court to adopt any permissible construction of a statute that avoids a serious constitutional question. See generally pp. 43-46, *infra*. That principle, however, provides no sound basis for departing from the BAPCPA's explicit definition of "debt relief agency."

First, by referring to "legal representation" and other services specific to attorneys, Congress has foreclosed petitioners' purported saving construction, which would render those terms superfluous. See pp. 17-18, *supra*. The avoidance canon is a tool for choosing among permissible constructions; it is not a basis for adopting a construction that the statute unambiguously precludes. See, *e.g.*, *HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002); *Miller* v. *French*, 530 U.S. 327, 341 (2000). The text of the statute and its "legislative history and purpose," *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986), make clear that the term "debt relief agency" encompasses lawyers who perform the relevant bankruptcy-related services.

Second, construing the term to exclude attorneys would not avoid the constitutional questions. Petitioners' constitutional challenges go to the statute's substantive requirements, not directly to the inclusion of attorneys. On petitioners' theory, for example, Section 528(b)(2) is unconstitutional as applied to bankruptcy petition preparers as well, because "no person" would voluntarily refer to himself as a "debt relief agency" in his advertising. Pet. Br. 88. Adopting petitioners' reading of "debt relief agency" therefore would not avoid the constitutional questions that petitioners identify; it would postpone them only until a non-attorney plaintiff filed a similar suit.

Third, petitioners' construction would undermine the efficacy of other statutory provisions whose constitutionality is not in question. See, *e.g.*, 11 U.S.C. 526(a)(1) (debt relief agencies may not fail to perform services they promised to undertake); 11 U.S.C. 527(a)(2) (debt relief agencies must provide their clients with certain admonitions about the requirements of the bankruptcy process). Application of those requirements to attorneys raises no serious constitutional concern. But petitioners' interpretation of the 2005 Act would make all BAPCPA regulation of "debt relief agencies" inapplicable to lawyers. That would disserve Congress's intent to establish "professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases." *House Report* 17 (emphasis added).

II. SECTION 526(a)(4) IS NOT UNCONSTITUTIONALLY OVERBROAD

The court of appeals erred in holding that Section 526(a)(4) violates the First Amendment. The court interpreted Section 526(a)(4) to prohibit attorneys from

advising debtors to incur "any" additional debt prior to bankruptcy. Pet. App. 13a. In the court's view, "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws." *Ibid.* In so holding, the court rejected the government's proposed narrowing construction of Section 526(a)(4) in a single sentence, asserting that the statute's "plain language" precludes any construction other than an unconstitutionally overbroad one. *Id.* at 12a.

Both the court's statutory premise and its constitutional conclusion are flawed. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). As the text, structure, and purposes of Section 526(a)(4) demonstrate, Congress forbade only advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors. The First Amendment does not prevent Congress from regulating the professional conduct of bankruptcy attorneys in this manner. Because Section 526(a)(4) may reasonably be read in a manner that preserves its constitutional validity, the judgment of the court of appeals should be reversed.

A. Section 526(a)(4) Regulates Advice To Incur New Debt For The Purpose Of Abusing The Bankruptcy Code Or Defrauding Creditors

1. The court of appeals ignored the historical meaning of the phrase "in contemplation of bankruptcy"

a. The court of appeals concluded that Section 526(a)(4) "broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted per-

son) to incur any additional debt when the assisted person is contemplating bankruptcy." Pet. App. 12a (emphasis omitted). Section 526(a)(4), however, does not use the temporal language "*when* the assisted person is contemplating bankruptcy." Rather, the statute forbids attorneys from advising clients "to incur more debt *in contemplation of* [bankruptcy]." 11 U.S.C. 526(a)(4) (emphasis added). As Judge Colloton observed, "the phrase 'in contemplation of' has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system." Pet. App. 25a; see *Hersh*, 553 F.3d at 758 (Congress's use of the phrase "in contemplation of" bankruptcy "suggests that the statute is directed at situations in which a debtor intends to abuse the bankruptcy system").

Black's Law Dictionary, for example, defines "contemplation of bankruptcy" as "[t]he thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*." *Black's Law Dictionary* 336 (8th ed. 2004) (emphasis added). That understanding of the term goes back more than a century and a half, to both American and English authorities examining whether particular transfers made just before bankruptcy were in fact made "in contemplation of bankruptcy." See *Black's Law Dictionary* 257 (2d ed. 1910) (citing cases). Those authorities read the phrase as incorporating an element of intent to frustrate the bankruptcy law, not simply an awareness that a bankruptcy was impending.

Members of Congress have used the term "in contemplation of bankruptcy" in the same manner. See, *e.g.*, S. Rep. No. 65, 98th Cong., 1st Sess. 9 (1983) (*1983*

Senate Report) (describing the problem of "[e]xcessive debts incurred within a short period prior to the filing of the petition" as "'loading up' in contemplation of bankruptcy"); *ibid.* ("In many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent."); *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. I, at 11 (1973) (*Bankruptcy Commission Report*) ("[T]he most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge.").

b. Of the cases treating "in contemplation of bankruptcy" as incorporating an element of abusive purpose, most have involved preferential transfers—*i.e.*, payments made on the eve of bankruptcy to one or more favored creditors. Such transfers are generally contrary to the bankruptcy-law principle that all similarly situated creditors should share proportionately in the bankrupt's remaining assets. See, *e.g.*, 11 U.S.C. 547(b). Some early bankruptcy statutes in this country and in England provided that transfers "in contemplation of bankruptcy" were void. Interpreting those statutes, several courts held that they required proof of intent to violate the bankruptcy laws' framework for protecting creditors—*i.e.,* an "intention of giving a preference in contemplation of bankruptcy." *Jones* v. *Howland*, 49 Mass. (8 Met.) 377, 386 (1844); accord *In re Pearce*, 19 F. Cas. 50, 53 (D. Vt. 1843) (No. 10,873) (concluding that an act was done "in contemplation of bankruptcy" if a person did it "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*.") (emphasis added); see also *Paulding* v. *Chrome Steel Co.*, 94 N.Y. 334, 338, 340-341 (1894) (interpreting state law that voided transfers "in contemplation of the insolvency of [the] company").

As the court explained in *Jones*, the indispensable element under those statutes was the debtor's "design" or "view to give [the transferee] a preference over the general creditors." 49 Mass. (8 Met.) at 385, 386. The court drew on English decisions establishing that principle. See *id.* at 384 (construing "'the meaning of those words' (in contemplation of bankruptcy)" as requiring an "'intent to defeat the general distribution of effects which takes place under a commission of bankrupt'") (quoting *Morgan* v. *Brundrett*, 5 Barn. & Ad. 289, 296, 110 Eng. Rep. 798, 801 (K.B. 1833) (Parke, J.)); *id.* at 385 (an act made in contemplation of bankruptcy "must be intended in fraud of the bankrupt laws") (quoting *Fidgeon* v. *Sharpe*, 5 Taunt. 539, 545-546, 128 Eng. Rep. 800, 802-803 (C.P. 1814) (Gibbs, C.J.)).

In many of the above cases, the debtor had made a payment to a favored creditor on the eve of bankruptcy, and the question was whether he had done so with the abusive purpose of preventing the equal distribution of assets that the bankruptcy system seeks to achieve. Section 526(a)(4), conversely, is directed at the amassment of additional debt (rather than the distribution of the debtor's existing assets) on the eve of bankruptcy. In both instances, the debtor intends to disfavor a sub-

set of creditors by taking advantage of the bankruptcy system.[9]

c. In light of that history, Congress's use of the phrase "in contemplation of [bankruptcy]" suggests a focus on the accumulation of debt with intent to abuse the bankruptcy system or defeat the bankruptcy laws. For example, advising a debtor to obtain unsecured credit on the eve of bankruptcy and then to dissipate it on purchases (*e.g.*, a vacation or lavish banquet) that do not become part of the bankruptcy estate, knowing that the bankruptcy discharge will allow her to avoid repayment of the debt, is an abuse of the bankruptcy system.

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[9] Petitioners assert (Br. 60-61) that this Court gave a different reading to the phrase "in contemplation of bankruptcy" in *Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472 (1933), but in fact, that case, too, involved a statute intended to combat abuse of the bankruptcy system, and the Court interpreted the statute in accord with that purpose. Congress had granted bankruptcy courts the authority to reexamine transfers of property made to a debtor's attorney "in contemplation of the filing of a petition," and to direct that any "excess" payment be returned to the estate for the benefit of creditors—a means of combating the same sort of preferential conveyances as in the cases discussed above. 11 U.S.C. 96(d) (1928). The debtor's attorney objected to turning over an excessive eve-of-bankruptcy payment, and the only question before the Court was whether, "as [a] matter of law," the payment was precluded from being "in contemplation of bankruptcy" because the debtor was pursuing other options in addition to bankruptcy. 289 U.S. at 478-479. The Court saw no such limitation and confirmed the factual finding that the debtor had been contemplating bankruptcy when it had made the excessive payment to its attorneys. See *ibid.* Thus, even if the Court could be said to have construed the statutory term comprehensively, rather than merely to have rejected artificial limitations on it, its holding is consistent with the discussion above, because the Court sustained recouping the payment as abusive. Moreover, in that case the Court did not construe the statute in light of the doctrine of constitutional avoidance or hold that its construction was the only reasonable one.

Cf. *Attorney Grievance Comm'n* v. *Culver*, 849 A.2d 423, 443-444 (Md. 2004) (attorney violated state ethics rules by urging a client to obtain new credit cards and new cash advances with the intent of discharging the debt in bankruptcy). Similarly, advising a debtor to take on additional debt as a way of circumventing the Bankruptcy Code's means testing mechanism is an attempt to defeat the bankruptcy laws. As discussed more fully below, eligibility for a Chapter 7 discharge often turns on a means test that examines the amount by which the debtor's income exceeds his statutorily allowed expenses, including expenses for secured debt. See pp. 35-37, *infra*. If a client is presumed ineligible under this means test, an unscrupulous attorney who advises the client to take on additional debt as a way of becoming eligible for a complete discharge under Chapter 7 is abusing the bankruptcy system. Section 526(a)(4) prohibits an attorney or other debt relief agency from advising debtors to engage in such manipulative conduct.

2. The legislative history of Section 526(a)(4), and its place in the larger statutory scheme, confirm that it targets abusive practices and does not broadly encompass all advice to incur new debt at a time when bankruptcy is imminent

a. Congress has long been aware that the relief afforded by the bankruptcy laws creates a perverse incentive for debtors to amass additional debt with the expectation of obtaining a discharge. Congress has also recognized that this practice poses a fundamental threat to the Bankruptcy Code's twin goals of affording debtors a fresh start while providing an orderly and equitable system of resolving creditors' claims.

As early as 1973, Congress was informed that "the most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge." *Bankruptcy Commission Report* 11. A decade later, Congress enacted 11 U.S.C. 523(a)(2)(C) (1988), which created a presumption that certain eve-of-bankruptcy debts are not dischargeable. The accompanying Senate Report emphasized that "[e]xcessive debts incurred within a short period prior to the filing of the petition present a special problem: that of 'loading up' in contemplation of bankruptcy." *1983 Senate Report* 9. The report explained that "[a] debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property," noting that "[i]n many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent." *Ibid.* As the report concluded, "[n]ot only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation. During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts." *Ibid.*

Congress has enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections. Even before the 2005 Act, Congress authorized bankruptcy courts to dismiss a petition for "substantial abuse," 11 U.S.C. 707(b) (2000), which could include the debtor's purposeful accumulation of debt in contemplation of bankruptcy. *E.g.*, *Price* v. *United*

States Tr. (In re Price), 353 F.3d 1135, 1139-1140 (9th Cir. 2004). Congress also precluded debtors from obtaining a discharge for debts arising from the fraudulent acquisition of money or credit, 11 U.S.C. 523(a)(2)(A) (2000), and as noted above, it provided that certain categories of debts are presumed nondischargeable if they are incurred on the eve of bankruptcy, 11 U.S.C. 523(a)(2)(C) (2000).

b. When Congress enacted the BAPCPA in 2005, the House Committee expressed concern that those earlier measures had not adequately restricted the ability of debtors to "knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." *House Report* 15. Accordingly, Congress strengthened each of the aforementioned protections against bankruptcy abuse. See, *e.g.*, BAPCPA § 310, 119 Stat. 84 (11 U.S.C. 523(a)(2)(C)). In particular, Congress greatly expanded the bankruptcy courts' authority to dismiss petitions or deny relief for "abuse" of the bankruptcy system, including in cases in which debtors purposefully incur additional debt in contemplation of filing a petition. See BAPCPA § 102, 119 Stat. 27 (11 U.S. 707(b)); *House Report* 48-49. Among other reforms, Congress permitted dismissal of a petition based on a less stringent showing of abuse, see § 102(a)(2)(B)(i)(III), 119 Stat. 27 (11 U.S.C. 707(b)(1)); authorized "any party in interest" to file a motion to dismiss for abuse (except in some cases involving lower-income debtors), see 11 U.S.C. 707(b)(1) and (6); and repealed the pre-existing presumption in favor of granting the relief sought by the debtor, see 11 U.S.C. 707(b) (2000). See generally *House Report* 49.

Congress also made another significant change that underscored the need for direct regulation of attorneys

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

Under the means test, a debtor's petition for complete relief under Chapter 7 is presumed to be abusive if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See 11 U.S.C. 707(b)(2)(A)(i) and (iii).[10] If the court finds a petition to be abusive under this standard, it can dismiss the debtor's case or, with the debtor's consent, convert it to Chapter 13, which involves a repayment plan. 11 U.S.C. 707(b)(1). The means test, however, exacerbates the incentive for debtors to manipulate the system by "loading up" on certain debt in contemplation of filing, because payments on secured debts that qualify under Section 707(b)(2)(A)(iii) offset the debtor's monthly income under the formula. Increasing the amount of such payments may therefore reduce the difference between the debtor's income and his allowable expenses, and thus

[10] If the presumption does not apply, or if it is rebutted, the petition may still be dismissed for abuse: in those circumstances, the 2005 Act directed that bankruptcy courts consider "whether the debtor filed the petition in bad faith" and whether "the totality of the circumstances * * * of the debtor's financial situation demonstrates abuse." 11 U.S.C. 707(b)(3).

allow the debtor to remain eligible for a complete and immediate discharge of unsecured debt under Chapter 7.

Congress was accordingly concerned that the introduction of the means test would give attorneys an incentive to counsel their clients to take on additional debt before filing for bankruptcy. As one bankruptcy judge testified, "[t]he more debt that is incurred prior to filing, the more likely the debtor will qualify for chapter 7." *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. I, at 25 (1998) (*1998 Hearings*) (statement of Judge Randall J. Newsome). Thus, the bankruptcy judge testified that, "[p]erverse as it may seem, I can envision debtor's counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford (at least until the bankruptcy is filed) as a way of increasing their deductions under [the means test]." *Ibid.*; see also *Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. Pt. II, at 30 (1999) (*1999 Hearings*) (statement of Judge William Brown). And as discussed above, see p. 21, *supra*, Congress credited evidence compiled by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals [and] problems associated with bankruptcy petition preparers." *House Report* 5 (quoting Darling & Redmiles 12).

c. Congress responded to these concerns by "strengthening professionalism standards for attorneys and

others who assist consumer debtors with their bankruptcy cases" in return for a fee. *House Report* 17. Under the amended provisions of the Code, an attorney who represents a consumer debtor in filing a bankruptcy petition must make her own reasonable investigation into the circumstances giving rise to the debtor's petition, including a specific inquiry into the veracity of the debtor's debt and asset schedules. See 11 U.S.C. 707(b)(4)(C)-(D). By signing the petition, the attorney personally certifies that the debtor's petition "is well grounded in fact," 11 U.S.C. 707(b)(4)(C)(ii)(I); that the attorney has "no knowledge * * * that the information in the schedules filed with such petition is incorrect," 11 U.S.C. 707(b)(4)(D); and that the debtor's petition "does not constitute an abuse" under Section 707(b), 11 U.S.C. 707(b)(4)(C)(ii)(II). Congress thus effectively required bankruptcy attorneys to warrant that their clients' prepetition conduct and financial circumstances—including any assumption of debt in contemplation of bankruptcy—do not provide grounds for dismissal of the petition as an abuse of the bankruptcy system.

As the foregoing discussion demonstrates, Congress enacted the BAPCPA to protect creditors and the bankruptcy system from abusive eve-of-bankruptcy conduct. That overall statutory focus reinforces the conclusion that the phrase "in contemplation of [bankruptcy]" in Section 526(a)(4) should be construed, in accordance with its historically accepted meaning, as limited to advice that debtors incur additional debt to abuse the bankruptcy system or defeat the administration of the bankruptcy laws. See *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a stat-

ute must be read in their context and with a view to their place in the overall statutory scheme.").

d. Section 526(a)(4) is one of four subsections of Section 526(a). The other three subsections establish rules of professional conduct that are clearly designed to protect debtors from abusive practices by their attorneys and other debt relief agencies. See 11 U.S.C. 526(a)(1) (requiring debt relief agencies to perform all promised services); 11 U.S.C. 526(a)(2) (prohibiting debt relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief); 11 U.S.C. 526(a)(3) (prohibiting debt relief agencies from misrepresenting to debtors the costs or benefits of bankruptcy). The placement of Section 526(a)(4) as the fourth item in this list strongly implies that Congress likewise intended that provision to target abusive conduct by debt relief agencies.[11]

The BAPCPA's remedial provisions similarly belie petitioners' contention that Section 526(a)(4) prohibits debt relief agencies from advising debtors to incur additional debt in circumstances where such conduct would be lawful and prudent. As the Fifth Circuit observed, the principal remedy for a violation of Section 526(a)(4) is a suit against the attorney to recover the debtor's "actual damages," as well as restitution of any fees paid by the debtor. *Hersh*, 553 F.3d at 759-760 (citing 11 U.S.C. 526(c)). "Congress's emphasis on actual damages for violations of section 526(a)(4) strongly suggests that Congress viewed that section as aimed at advice to debtors which if followed would have a significant risk of

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[11] Similarly, Section 526(c) establishes a malpractice remedy against any debt relief agency whose "intentional or negligent failure to file any required document" causes the client to suffer dismissal or conversion of her bankruptcy case. 11 U.S.C. 526(c)(2)(B).

harming the debtor." *Id.* at 760. By contrast, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." Pet. App. 27a (Colloton, J., concurring in part and dissenting in part). "The remedial focus of § 526 thus bolsters the proposition that § 526(a)(4) was aimed only at advice given by a debt relief agency that is designed to abuse the bankruptcy process." *Ibid.*[12]

3. A federal rule of professional conduct in this setting serves an important function

Amici NACBA et al. assert (Br. 18-20) that reading Section 526(a)(4) as an ethical rule of this nature would render the provision "superfluous," because the Bankruptcy Code already penalizes debtors when they engage in abusive bankruptcy conduct and attorneys are already subject to state-law ethical obligations. That reasoning is flawed.

To be sure, the client who takes the attorney's unethical advice may well suffer adverse consequences under bankruptcy law, including having her petition dismissed. 11 U.S.C. 707(b)(2) and (3). Congress determined, however, that when such a consequence results from an attorney's misconduct, remedies should lie against the attorney—including compensation for the client. See 11 U.S.C. 526(c)(2)(A). Invalidation of Section 526(a)(4)

[12] Amici NACBA et al. observe (Br. 22) that Section 526(c)(3) permits not only recovery of actual damages, but also disgorgement of fees, when a client can establish that a debt relief agency has "intentionally or negligently failed to comply with any provision of [Section 526]." But even though actual damages are not required in every case, Section 526's emphasis on private enforcement of the statute, by the clients themselves, serves to confirm that Congress expected that violations would harm clients.

would render that remedy unavailable with respect to a significant category of improper attorney advice.

Although an attorney who engages in the conduct that Section 526(a)(4) prohibits may be subject to discipline by a state bar, providing a federal remedy under the Bankruptcy Code serves important purposes. First, the Code creates a uniform nationwide standard, appropriate to bankruptcy practice. Second, 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. 11 U.S.C. 526(c)(2). State bar rules rarely if ever are privately enforceable. Third, the Code permits the federal court to enjoin an attorney from violating Section 526 again in any State or district, 11 U.S.C. 526(c)(3)(A) and (5)(A), whereas an unethical practitioner who has been sanctioned under the law of one jurisdiction may continue to provide unethical advice in another. Indeed, a practitioner in a particular bankruptcy court may not even be licensed by that State's bar. See, *e.g.*, *Rittenhouse* v. *Delta Home Improvement, Inc. (In re Desilets)*, 291 F.3d 925, 930-931 (6th Cir. 2002).

4. Section 526(a)(4) does not cover petitioners' examples of appropriate debt counseling or the provision of information concerning a client's legal options

For the reasons set forth above, Section 526(a)(4) does not cover the hypothetical scenarios that troubled the court of appeals. See Pet. App. 13a-14a (postulating two situations in which "it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt" before bankruptcy, and speculating that "[f]actual scenarios other than these few hypothetical situations no doubt exist").

Contrary to the court's interpretation, an attorney would be free to advise a client to refinance her home mortgage at a lower rate to prevent bankruptcy, provided all appropriate disclosures were made to the lender.[13] See *id.* at 13a. Likewise, an attorney could lawfully advise a client to incur "additional secured debt" to purchase a reliable automobile and thereby ensure her ability to get to work, assuming again that appropriate disclosures were made. See *id.* at 14a. In neither case would the attorney be advising the debtor to incur unnecessary debt for the purpose of abusing the bankruptcy system. See *Hersh*, 553 F.3d at 761. The similar examples cited by petitioners (Br. 48-53) are outside the scope of the statute for the same reason.

Petitioners also suggest (Br. 41) that Section 526(a)(4) unconstitutionally prohibits attorneys from "participat[ing] in a discussion with the client weighing the pros and cons of a client's pending decision to incur more debt." That contention reflects a misreading of the statutory text, even assuming it refers only to discussions of "loading up" on debt in contemplation of bankruptcy. Section 526(a)(4) does not bar discussions *about* incurring new debt (however abusive the transaction might be), but only affirmative advice "*to incur* more debt in contemplation of" filing a petition for bankruptcy. 11 U.S.C. 526(a)(4) (emphasis added).[14]

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[13] The court of appeals did not explain its apparent assumption that refinancing an existing debt—that is, exchanging one loan for another with the same principal balance but a different interest rate or repayment period—would constitute incurring "more debt" within the meaning of Section 526(a)(4).

[14] 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).

Rules governing legal practice commonly distinguish between discussion of options and affirmative advice or encouragement. For example, while the ABA Model Rules of Professional Conduct provide that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," the same rule states that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Model Rules of Prof'l Conduct R. 1.2(d). The commentary to Model Rule 1.2 underscores the point: "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." *Id.* R. 1.2, cmt. 9. Section 526(a)(4)'s use of the phrase "advise * * * *to incur* more debt" captures the same distinction between discussion and affirmative encouragement. Cf. *Webster's Third New International Dictionary* 32 (1993) (defining "advise" to mean, *inter alia*, "counsel" or "recommend").

B. The Court of Appeals Disregarded Basic Principles Of Constitutional Avoidance

To the extent that the proper interpretation of Section 526(a)(4) is open to question, the court of appeals was not justified in adopting the broadest possible interpretation of the provision and then declaring it unconstitutional as so construed. Federal courts construe federal statutes to avoid, not invite, constitutional difficulties. *Boos* v. *Barry*, 485 U.S. 312, 331 (1988). Particularly in the context of a First Amendment overbreadth challenge, where the plaintiff contends that a statute is

invalid even though it may be legitimately applied in some or many circumstances, the federal courts have not only "the *power* to adopt narrowing constructions," but "the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Id.* at 330-331 (emphasis added); see also, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").[15] In this case, however, the court of appeals held Section 526(a)(4) unconstitutional without adverting to the doctrine of constitutional avoidance or explaining why its broad interpretation of Section 526(a)(4) was the *only* available reading of the statute. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("*[E]very* reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (emphasis added; citation omitted).

This Court has repeatedly applied saving constructions to avoid invalidating Acts of Congress far less amenable to a narrowing interpretation. In *Boos*, the Court considered a First Amendment overbreadth challenge to a statute that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and

[15] Petitioners argue (Br. 31-35) that the Court should construe the term "debt relief agency" to avoid the same constitutional overbreadth objection. As discussed at pp. 26-27, *supra*, however, petitioners' proposed construction is foreclosed by the statutory definition of the term "debt relief agency," and it would seriously undermine numerous regulations of debt relief agencies that are unquestionably constitutional. By contrast, the phrase "in contemplation of [bankruptcy]" is not defined and can reasonably be read to avoid constitutional problems, particularly in light of the interpretation that phrase has historically been given in the bankruptcy context.

refuse to disperse after having been ordered so to do by the police." 485 U.S. at 329 (citation omitted). The Court acknowledged that "[s]tanding alone, this text is problematic * * * because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330. Nevertheless, citing the federal courts' "duty to avoid constitutional difficulties" when a narrowing "construction is fairly possible," the Court construed the statute to apply "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'"—a limitation unstated in the statutory text but necessary to ensure the validity of the Act. *Id.* at 330-331 (citation omitted). See also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.*, 485 U.S. at 576-578. Here, the interpretation of Section 526(a)(4) that was advanced by the government and endorsed by the dissent below, and that the Fifth Circuit adopted in *Hersh*, see 553 F.3d at 754, is consistent with the text of that provision and with the BAPCPA's overall structure and purposes. The court of appeals erred in refusing to adopt it.

Petitioners contend (Br. 64-66) that adopting a narrowing construction, instead of reading the statute to its broadest extent (and then striking it down as overbroad), would create a problem of "vagueness" and would therefore "chill" lawful advice. As explained above, however, 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. See pp. 28-40, *supra*. The impropriety of those practices is already well-established, and even if it were not, any attorney signing a bankruptcy petition must already certify that the petition "does not constitute an abuse under [11 U.S.C. 707(b)(1)]." 11

U.S.C. 707(b)(4)(C)(ii)(II). That certification requires familiarity with longstanding precedent interpreting the Bankruptcy Code's references to "abuse" and "substantial abuse." See, *e.g.*, *Price*, 353 F.3d at 1139-1140.[16] Thus, attorneys are already required to be on notice of the practices that are treated as abusive under the Bankruptcy Code; Section 526(a)(4) simply bars attorneys from encouraging their clients to commit one such abusive practice.

C. Section 526(a)(4) Is Consistent With The First Amendment

If Section 526(a)(4) is given the limiting construction described above, the provision easily satisfies the First Amendment. The advice that Section 526(a)(4) covers is subject to reasonable regulation in the service of the government's valid interests in protecting the bankruptcy system and its participants from unethical conduct.

1. A licensed attorney's ethical obligations to the bench and the profession sometimes require her to exercise a degree of restraint in what she advocates and how. "'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo, J." *Gentile* v. *State Bar*, 501 U.S. 1030, 1066 (1991) (quoting *In re Rouss*, 221 N.Y. 81, 84 (1917), cert.

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[16] Indeed, amici NACBA et al. acknowledge (Br. 19) the substantial commonality between the required certification and the conduct that Section 526(a)(4) prohibits on the government's reading. Contrary to amici's contentions, however, the government's reading does not make Section 526(a)(4) superfluous: the certification provides some protection against abusive *filings*, whereas Section 526(a)(4) specifically prohibits a certain type of unethical *advice* that may or may not lead to an abusive filing. Section 526(a)(4) also prescribes different, more client-protective remedies. Compare 11 U.S.C. 526(c)(2), with 11 U.S.C. 707(b)(4)(B).

denied, 146 U.S. 661 (1918)). As the Court held in *Gentile*, attorneys are not merely self-interested actors and agents of their clients, but also licensed officers of the courts. For that reason, attorneys may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.* at 1071; see *Goldfarb*, 421 U.S. at 792 (the government's interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'"). "This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies." *Gentile*, 501 U.S. at 1082 (O'Connor, J., concurring).

In articulating those principles, the Court in *Gentile* broke no new ground. Rather, the Court explained that five Justices in *In re Sawyer*, 360 U.S. 622 (1959), had agreed that "lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile*, 501 U.S. at 1071. Justice Stewart's controlling concurrence in *Sawyer* rejected the notion "that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct," because "[a] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice." 360 U.S. at 646 (Stewart, J., concurring in the result). Justice Stewart concluded that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.* at 646-647. Four other Members of the Court agreed. See *id.* at 666-669 (Frankfurter, J., dissenting). See also *Ohralik* v. *Ohio*

State Bar Ass'n, 436 U.S. 447, 460 (1978) (sustaining a restriction on attorney solicitation because the government "bears a special responsibility for maintaining standards among members of the licensed professions"); *In re Primus*, 436 U.S. 412, 422 (1978); *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961) ("[L]awyers must operate * * * as assistants to the court in search of a just solution to disputes.").

2. Respondents are incorrect in contending (Br. 66-67) that Section 526(a)(4), in its application to respondents' provision of legal advice, is subject to strict scrutiny rather than to the *Gentile* standard. There is no basis on which to distinguish bar members' obligations when practicing in bankruptcy court, or when counseling debtors who are considering the initiation of bankruptcy proceedings, from Gentile's obligations as a practitioner in the Nevada trial court. Bankruptcy is a judicial function performed by judicial officers appointed and supervised by the Article III judiciary. A bankruptcy petition both invokes the "core * * * federal bankruptcy power" to undertake "the restructuring of debtor-creditor relations," and also potentially brings related adversary proceedings within the bankruptcy court's jurisdiction. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). And bankruptcy courts generally have the same implicit powers as other federal courts to admit and discipline attorneys and otherwise enforce "submission to their lawful mandates," *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821)). See, *e.g.*, *Price* v. *Lehtinen* (*In re Lehtinen*), 564 F.3d 1052, 1058 (9th Cir. 2009), petition for cert. pending, No. 09-113 (filed July 24, 2009); *Jones* v. *Bank of Santa Fe (In re Courtesy Inns, Ltd.)*, 40 F.3d

1084, 1089 (10th Cir. 1994); see also *Marrama* v. *Citizens Bank*, 549 U.S. 365, 375-376 (2007).

An attorney who advises or otherwise assists in an abuse of the bankruptcy system breaches his obligations to the tribunal and to the judicial system. The fairness and public reputation of bankruptcy proceedings are directly harmed when the bankruptcy discharge is misused to gain an improper benefit at an unsecured creditor's expense, or when the standards of eligibility for the discharge are gamed by taking on new and unnecessary debt on the eve of bankruptcy. Cf. *Marrama*, 549 U.S. at 375 (bankruptcy court's authority "'to prevent an abuse of process'" is "surely adequate" to order a halt to "action prejudicial to creditors") (quoting 11 U.S.C. 105(a)).

Contrary to petitioners' contention (Br. 75-76), the principles announced in *Gentile* are not limited to attorney conduct in connection with criminal litigation. Although Gentile's unethical conduct included public statements about a pending criminal matter, the ethical rule he violated related to any "adjudicative proceeding," 501 U.S. at 1033 (opinion of Kennedy, J.) (quoting Nev. Sup. Ct. R. 177(1)), and the Court's opinion drew on cases from the civil as well as criminal context, see *id.* at 1071, 1073-1074. The considerations that were held to justify the ethical rule there—preventing improper considerations from influencing the outcome of the proceeding or tainting the venire—were not limited to criminal trials or to trial-level proceedings. See *id.* at 1075; cf. *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009).

Petitioners' reliance (Br. 35-36, 43) on *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), is misplaced. The statute at issue in *Velazquez* conditioned the receipt

of federal funds on an attorney's agreement not to challenge the validity of state or federal welfare laws. *Id.* at 538. The provision did not purport to regulate attorney ethics or avoid client abuses, but rather prevented attorneys from making "all the reasonable and well-grounded arguments necessary for proper resolution of the case." *Id.* at 545. Section 526(a)(4), by contrast, prevents attorneys from *subverting* the bankruptcy process and jeopardizing their clients' interests by encouraging abuses of the Bankruptcy Code.

3. Section 526(a)(4) is constitutional under the *Gentile* standard. As the Fifth Circuit explained in *Hersh*, Section 526(a)(4) provides a bankruptcy-specific analogue to Rule 1.2(d) of the Model Rules of Professional Conduct, which states that an attorney may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent." 553 F.3d at 756 (citation omitted). Versions of that rule are in effect throughout the Nation, including in petitioners' home State. Rule 1.2(d) has never been challenged under the First Amendment, much less held to violate it. *Ibid.*[17] Indeed, the court of appeals acknowledged that Section 526(a)(4) is supported by a legitimate government inter-

[17] *Culver* illustrates the application of Rule 1.2(d) to the kind of advice that Section 526(a)(4) prohibits. In *Culver*, the client expressed concern about taking on more debt. Attorney Culver not only "advised her to obtain more credit cards and take cash advances on the cards to pay his fees," but also "explained *that she would not have to repay that money* because he would represent her to have the debts discharged in bankruptcy." 889 A.2d at 429 (emphasis added). He even gave her an application for a credit card. *Id.* at 444. The state court unanimously concluded that because the client could not repay the debt and "the bankruptcy discussions were in the context of present intent to avoid repaying the debt," Culver had committed a fraudulent act in violation of Rule 1.2(d). *Ibid.*

est; the court's conclusion that the statute was nonetheless unconstitutional depended on its adoption of petitioners' overly broad reading of the statute's scope. See Pet. App. 12a.

Amicus American Bar Association (ABA) suggests (Br. 10-11 & n.15) that Section 526(a)(4) is infirm because Congress has not barred *debtors* from assuming more debt in contemplation of bankruptcy. That argument lacks merit, for several reasons. First, in some cases covered by Section 526(a)(4), the client's conduct will itself be illegal. See, *e.g.*, *Hersh*, 553 F.3d at 755 ("Taking out loans without intending to repay them may also be considered theft under state law."); see also 18 U.S.C. 157 (bankruptcy fraud statute); 1 *Collier on Bankruptcy* ¶ 7.07[1][a] at 7-121 (Dec. 1996) (*Collier*) ("Misrepresenting one's financial status, presumably to profit by inducing others to extend goods or services on credit, seems to qualify."). In those cases, the attorney unquestionably has no First Amendment right to advise the client to engage in that conduct. Neither an attorney nor any other individual has a constitutional right to participate in the commission of a crime. Offers to engage in unlawful activity "enjoy no First Amendment protection." *Williams*, 128 S. Ct. at 1841; see also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-389 (1973) (same rule applies to unlawful activity that is not criminally proscribed). An attorney's recommendation that a client incur additional debt in order to defraud creditors is not constitutionally protected "abstract advocacy of illegality"; it is "speech * * * that is intended to induce or commence illegal activities." *Id.* at 1842; see also *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-448 (1969) (per curiam).

In other cases, the client may not be susceptible to prosecution because he lacks the requisite intent. Cf. *Culver*, 849 A.2d at 429. Even in that situation, however, the government has a strong interest in preventing the rendering of professional advice that could lead to the subversion of the bankruptcy system. Cf. *Roadway Express*, 447 U.S. at 765 (relying on the "well-acknowledged inherent power of a court" to remedy and prevent "abusive litigation practices") (citation omitted). That is especially so in a context like this one, in which the sole reason why the client is not guilty of a crime may well be that he has relied on advice from counsel to undertake a particular course of action, which itself may be sufficient to defeat the intent element. See 1 *Collier* ¶ 7.07[1][d] at 7-130 (June 2004) (advice of counsel may be a defense to bankruptcy fraud). The ABA's position would insulate attorneys from liability by virtue of their very success in insulating their clients. That double-fisted protection for abusive bankruptcy practices cannot be constitutionally required.

Attorneys have long been subject to discipline, or to malpractice liability, for recommending courses of action that are unethical even if not illegal (or tortious). For instance, an attorney may be disciplined for involvement in concealing assets, even if the concealment does not satisfy all of the elements of an unlawful fraudulent conveyance. *In re Kenyon*, 491 S.E.2d 252, 254 (S.C. 1997) ("We do not have to find fraudulent conveyances—only fraudulent or dishonest conduct."); accord *In re Conduct of Hockett*, 734 P.2d 877, 882-883 (Or. 1987).

The authority to impose discipline for unethical conduct is on particularly strong ground where, as here, the attorney's improper advice affects not only the client, but the judicial system to which the attorney owes a pro-

fessional obligation. See *Gentile*, 501 U.S. at 1075-1076 (describing the "substantial state interest" in "protect[ing] the integrity and fairness of a State's judicial system" against prejudicial conduct by "officers of the court," who "have a duty to protect its integrity"). Thus, for example, attorneys may be sanctioned for advising their clients to engage in various unethical conduct (such as hiring a lawyer strategically to force a judge's recusal) that the client may lawfully undertake but that is prejudicial to the administration of the legal system. See *McCuin* v. *Texas Power & Light Co.*, 714 F.2d 1255, 1264-1266 (5th Cir. 1983) ("Lawyers are not permitted to do everything for a client that he would stoop to do himself had he but their knowledge."); *Grievance Adm'r* v. *Fried*, 570 N.W.2d 262, 264, 267 (Mich. 1997). The same principle applies here: rules of professional conduct "may demand some adherence to the precepts of [the judicial] system in regulating [attorneys'] speech as well as their conduct" when that speech, if acted upon, directly undermines that system. *Gentile*, 501 U.S. at 1074.[18]

D. The Court Of Appeals Failed To Apply Basic Principles Of Overbreadth Analysis

Because "invalidating a law that in some of its applications is perfectly constitutional * * * has obvious harmful effects," this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the stat-

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[18] The same First Amendment standard logically applies to the work of bankruptcy petition preparers, who owe equivalent professional obligations to the tribunal that will adjudicate the petitions they prepare. See 11 U.S.C. 110(h)-(k) (providing for discipline of bankruptcy petition preparers).

ute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. The court of appeals failed to adhere to that principle when it struck down Section 526(a)(4) as applied to attorneys without giving proper weight to the statute's admittedly legitimate applications.

As shown above, Section 526(a)(4) may validly be applied to a significant category of unethical attorney advice. Against that legitimate sweep, the court below hypothesized two instances of legitimate, ethical advice to accumulate new debt on the eve of bankruptcy: buying a car and refinancing a mortgage. Pet. App. 13a-14a. The court speculated that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. On that slim and concededly "hypothetical" basis, the majority held the statute unconstitutional as applied to *all* attorney conduct, including the abusive practices at which Section 526(a)(4) was directly aimed.

That approach was misconceived. As explained above, Section 526(a)(4) as properly construed does not cover the hypothetical examples discussed by the court. See pp. 41-42, *supra*. But even if some situations could be hypothesized in which Section 526(a)(4) prohibits attorney speech without a constitutionally adequate justification, that is no basis for invalidating all applications of the provision to attorneys, as the court of appeals did here. As Judge Colloton observed, "a facial challenge resting on a 'few hypothetical situations' * * * is unlikely to justify invalidating a statute in *all* of its applications, because 'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" Pet. App. 24a (quoting *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800

(1984)). That correct understanding of overbreadth analysis precludes invalidation of Section 526(a)(4).

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CHALLENGE TO THE ADVERTISING-DISCLOSURE REQUIREMENTS OF 11 U.S.C. 528

Petitioners' challenge to the advertising-disclosure requirements of 11 U.S.C. 528 is likewise without merit. Those requirements apply only to publicly disseminated offers to perform bankruptcy-related services for a fee; they impose no restriction on what advertisers may say; and they mandate the inclusion of only a brief disclaimer whose substance is factually accurate and whose precise wording may be varied as needed. Applying the First Amendment standard that governs commercial advertising disclaimers, the court of appeals correctly concluded that Section 528's modest disclosure requirements are "reasonably and rationally related to the government's interest in preventing the deception of consumer debtors." Pet. App. 19a.

A. Disclosure Requirements In Commercial Advertising Must Bear A "Reasonable Relationship" To A Valid State Interest

1. Attorney advertisements are quintessential commercial speech. See, *e.g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995) (*Went For It*); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1976). While this Court has invalidated categorical bans on advertisements of legal services, *Bates* v. *State Bar*, 433 U.S. 350 (1977), it has recognized that attorney advertising and other forms of solicitation may be regulated without triggering the requirements of strict scrutiny. See, *e.g.*, *Went For It*, 515 U.S. at 623-624. In addition, the Court

has drawn a sharp distinction between commercial-speech regulations that *preclude* an advertiser from communicating a truthful commercial message, see, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *Edenfield* v. *Fane*, 507 U.S. 761 (1993), and disclosure requirements, which simply mandate the inclusion of *additional* information that helps to prevent deception of the public. The Court has held that disclosure requirements are subject to more deferential scrutiny than are outright restrictions on advertising content. See *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650-652 (1985); see also *In re R.M.J.*, 455 U.S. 191, 201 (1982); *Bates*, 433 U.S. at 384 (States may require attorney advertisements to include a "warning or disclaimer * * * so as to assure that the consumer is not misled").

That distinction is particularly significant in the context of advertising to promote legal advice and related services, such as bankruptcy assistance, because of the difficulty consumers have in evaluating both the promotion and the provision of these services. The Court has recognized this difficulty on numerous occasions. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates*, 433 U.S. at 383; see *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 n.25 (noting that lawyers "do not dispense standardized products" but "render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising"). Disclosure requirements are an important part of the solution to the problem. Even when striking down

outright restrictions on advertising, the Court has emphasized that the government "retains the power to correct omissions that have the effect of presenting an inaccurate picture." *Bates*, 433 U.S. at 375. Under the First Amendment, "the preferred remedy is more disclosure, rather than less." *Ibid.*

Because of the lesser burden imposed by disclosure provisions, this Court has prescribed a standard of review less searching than the intermediate-scrutiny analysis it has applied to content prohibitions in the attorney-advertising context. The leading decision is *Zauderer*, which involved an Ohio attorney disciplined for violating a variety of bar rules related to advertising. The Court upheld a disclosure requirement analogous to Section 528, see 471 U.S. at 650-652, even as it struck down several other bar rules that affirmatively restricted speech, see *id.* at 632-633, 639.

Ohio required attorneys who advertise their willingness to represent clients for a contingency fee to include a statement concerning whether the fee arrangement would require the client to pay court costs even in the event of a loss. The Court specifically rejected the argument that the State was required to demonstrate that Zauderer's "advertisement, absent the required disclosure, would be false or deceptive," that "the disclosure requirement directly advances the relevant governmental interest," or that the requirement "constitutes the least restrictive means of doing so." 471 U.S. at 650. Such arguments, the Court explained, "overlook[] material differences between disclosure requirements and outright prohibitions on speech." *Ibid.* The Court further explained that, "in virtually all [its] commercial speech decisions" up to that point, it had "emphasized that because disclosure requirements trench much more

narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651 (quoting *R.M.J.*, 455 U.S. at 201).

Accordingly, the Court in *Zauderer* held that disclosure requirements applicable to attorney advertising need only be "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651; accord *id.* at 656 (Brennan, J., concurring in part, concurring in the judgment in part and dissenting in part) (agreeing, "[w]ith some qualifications," that "a State may impose commercial-advertising disclosure requirements" that satisfy that reasonable-relationship standard). The Court concluded that the challenged state bar rule "easily pass[ed] muster under this standard" because "[t]he State's position"—that contingent-fee advertising is deceptive if it does not clarify the client's liability for costs—was "reasonable enough to support [the disclosure] requirement." *Id.* at 652-653.

2. Petitioners fundamentally misconceive these governing principles. For example, petitioners compare (Br. 76-77) the disclosure requirements of Section 528 to the kind of forced political speech at issue in *Wooley* v. *Maynard*, 430 U.S. 705 (1977) ("Live Free or Die" motto), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (Pledge of Allegiance). "[T]he interests at stake in this case," however, are simply "not of the same order." *Zauderer*, 471 U.S. at 650-651. As in *Zauderer*, Congress in enacting Section 528 did not seek "to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" but merely prescribed what disclaimers will ensure that a particular class of "commercial advertising"

is not misleading. *Id.* at 651 (quoting *Barnette*, 319 U.S. at 642). In the latter context, the Court explained, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.*[19]

Petitioners are likewise mistaken in contending (Br. 90-94) that Section 528 must be analyzed under the framework of intermediate scrutiny set out in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). This Court rejected the identical argument in *Zauderer*. Although the Court applied the *Central Hudson* standard in analyzing and invalidating Ohio's affirmative restrictions on attorney advertisements (such as the State's prohibition on the use of even truthful, nonmisleading illustrations), *Zauderer*, 471 U.S. at 632-633, 639, the Court specifically declined to analyze the disclosure requirement under the same principles, explaining that there are "material differences between disclosure requirements and outright prohibitions on speech," *id.* at 650. The Court further explained that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 652 n.14. The court of appeals in this case was therefore correct in analyzing Section 528 under the

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[19] Petitioners (Br. 77, 79, 83) and amici NACBA et al. (Br. 27-28) are similarly wrong in relying on *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). The Court in *Riley* struck down a disclosure requirement outside the context of commercial advertising, while reiterating that "[p]urely commercial speech is more susceptible to compelled disclosure requirements." *Id.* at 796 & n.9 (citing *Zauderer*, *supra*).

disclosure principles discussed in *Zauderer* rather than under *Central Hudson*. See Pet. App. 18a.[20]

B. Section 528 Is A Reasonable Means Of Combating A Documented Risk Of Consumer Deception

Section 528 is a reasonable response to the problem Congress identified: advertising that promotes debt-relief services without disclosing that those services entail a bankruptcy filing and its attendant consequences. By using either the statutory disclaimer or a permissible alternative ("a substantially similar statement") in their public advertising, debt relief agencies make clear the nature of the services they are offering. Under the governing *Zauderer* standard, Section 528 is constitutional.

1. Section 528 responded to "increasingly aggressive lawyer advertising"

In hearings preceding the 2005 Act, Congress heard evidence of "increasingly aggressive lawyer advertising"

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[20] In any event, Section 528 would survive First Amendment scrutiny even under the *Central Hudson* standard. See Pet. App. 19a n.11 (citing *Olsen* v. *Gonzales*, 350 B.R. 906, 920 (D. Or. 2006), appeal pending, No. 07-35616 (9th Cir. filed July 24, 2007)). Section 528 "targets a concrete, nonspeculative harm." *Went For It*, 515 U.S. at 629. Indeed, as the court of appeals recognized, the statute is "directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy." Pet. App. 19a. The requirement of a two-line disclosure does not "burden substantially more speech than necessary to further the government's legitimate interests." *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 430 (1993). Indeed, as already noted, the statute restricts no speech at all, but merely requires the disclosure of factually correct information. See *Olsen*, 350 B.R. at 921. As this Court observed in *Zauderer*, petitioners' "constitutionally protected interest in *not* providing [such] factual information in [their] advertising is minimal." 471 U.S. at 651.

for bankruptcy services that offered to make consumers' debts "disappear" but failed even to "mention bankruptcy." *2003 Hearings* 55. One retailer testified that some of his customers had been misled by such attorney advertisements and "d[id] not even understand that they ha[d] filed for bankruptcy." *1999 Hearings* 123 (statement of Michael Moore, National Retail Federation). In 1997, the Federal Trade Commission (FTC) warned that many debt-relief advertisements offering to "[w]ipe out" consumer debts, or to "[s]top credit harassment, foreclosures, [and] repossessions," regularly fail to disclose that such "relief may be spelled b-a-n-k-r-u-p-t-c-y." *1998 Hearings* Pt. III, at 90-92. The FTC observed that such advertisements have the potential to mislead consumers into filing for bankruptcy without knowledge or appreciation of the consequences. See *id.* at 92 (warning that "bankruptcy stays on your credit report for 10 years, and can hinder your ability to get credit, a job, insurance, or even a place to live").[21]

The legislative record contains sample advertisements that gave Congress ample reason for concern. Print advertisements for law firms included such large-print headlines as "Stop Worrying About Your Bills For The New Year" and "ATTENTION: TOO MUCH DEBT?!" *1998 Hearings* Pt. III, at 93, 94. Such advertisements prominently asserted that the law firm could "Consolidate and Lower Your Bills" or that "*Federal Law Provides For*: (A) Consolidation (one low monthly

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[21] An updated version of the 1997 FTC alert was issued in 2008 and remains in effect today. See Division of Consumer & Bus. Educ., FTC, *FTC Consumer Alert: Advertisements Promising Debt Relief May Be Offering Bankruptcy* (May 2008) <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt015.shtm>.

payment) (B) Liquidation (eliminate debts)." *Ibid.* References to the form of relief from debt that the firms would pursue were oblique at best, such as a star footnote referring to "U.S. Bankruptcy law," *id.* at 94, and a statement that the "forms of consolidation" include "court-assisted consolidation, like Chapter 13 bankruptcy," *id.* at 93.

Despite a legislative record extending over at least three hearings and several years, petitioners assert (Br. 92) that Congress did not identify a "substantial" interest in protecting the targets of such advertisements because the evidence did not "actually demonstrate that any consumer has been, in fact, deceived by this advertising." This Court held in *Zauderer*, however, that such a showing is not required: "When the possibility of deception is as self-evident as it is in this case, we need not require the [government] to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" 471 U.S. at 652-653 (quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965)) (alterations in original); cf. *Hersh*, 553 F.3d at 766 (noting that "the government has a compelling interest in ensuring that those who enter bankruptcy know what it entails") (citing *House Report* 4). The evidence in the legislative record was sufficient for Congress reasonably to conclude that advertisements promising debt relief while downplaying the role of bankruptcy are inherently misleading. Cf. *Zauderer*, 471 U.S. at 653.

2. Section 528 addresses the identified problem directly and flexibly

In enacting Section 528, Congress responded directly to the deceptive practices that the FTC and others had identified. Section 528 requires debt relief agencies to "disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public" that the advertised services "are with respect to bankruptcy relief under this title." 11 U.S.C. 528(a)(3). In particular, if a debt relief agency's public advertisement offers "bankruptcy assistance services" (*ibid.*), or "indicat[es] that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt" (11 U.S.C. 528(b)(2)), the advertisement must include either the statutorily approved statement ("We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.") or a "substantially similar statement." 11 U.S.C. 528(a)(4) and (b)(2)(B).

The solution that Congress devised—a two-line statement that identifies an attorney or other covered person as a "debt relief agency" under governing law and explains that the offered services include "help[ing] people file for bankruptcy relief under the Bankruptcy Code"—"is reasonably and rationally related to the government's interest in preventing the deception of consumer debtors." Pet. App. 19a. Indeed, as the court of appeals explained, Section 528 is "directed precisely at the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services to the general public make clear that their services do in fact involve filing for bankruptcy." *Ibid.* Section 528 per-

forms the modest but important function of enabling consumers to recognize advertisements promoting bankruptcy services for what they really are.

3. The Section 528 disclosures are factual in nature and are not misleading

The disclosure requirements imposed by Section 528(a)(4) and (b)(2)(B) apply only to persons who are "debt relief agenc[ies]" within the meaning of the BAPCPA. See 11 U.S.C. 528(a) and (b)(2). The disclosures that those provisions specify—*i.e.*, "We are a debt relief agency" and "We help people file for bankruptcy relief under the Bankruptcy Code"—are factually accurate and create no potential danger that potential customers will be misled as to the functions that the advertiser performs. As in *Zauderer*, petitioners' "constitutionally protected interest in *not* providing [such] factual information in [their] advertising is minimal." 471 U.S. at 651.

a. Section 528(a)(4)'s disclosure requirements apply only to persons who are "debt relief agenc[ies]" within the meaning of Section 101(12A). As applied to such persons, the statement "We are a debt relief agency" is by definition an accurate description of the advertiser's legal status. As a matter of ordinary English usage, moreover, the term "debt relief agency" accurately describes the persons subject to the disclosure requirement. Under the BAPCPA, that term is limited to persons who provide "bankruptcy assistance to an assisted person" or who act as "bankruptcy petition preparer[s]." 11 U.S.C. 101(12A); see 11 U.S.C. 101(4A) (definition of "bankruptcy assistance"). Persons who perform those functions are naturally understood to provide "debt relief." And they are "agencies" in the accepted sense in

which that word is used to describe service-oriented businesses—*e.g.*, travel agencies, advertising agencies, employment agencies, modeling agencies, and public relations agencies.[22]

Petitioners urge (Br. 88) that consumer bankruptcy attorneys "are entitled to call themselves 'attorneys' in their advertising." As the court of appeals recognized, however, nothing in the BAPCPA prevents them from doing so. See Pet. App. 20a ("[N]othing in the Code prevents [petitioners] from identifying themselves in their advertisements as both attorneys and debt relief agencies."). In enacting Section 528, Congress has not "prevent[ed] attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650.

Relying on *R.M.J.*, *supra*, petitioners argue (Br. 88) that Section 528 is nonetheless invalid because "attorneys should not be compelled to use any label * * * other than one of their own choosing that is accurate and not deceptive." *R.M.J.*, however, involved a *prohibition* on attorneys' using any phrase other than those on an approved list to describe their legal practice. 455 U.S. at 194-196. Here, by contrast, petitioners are free to advertise their practice in any manner they please, pro-

[22] Amici NACBA et al. contend (Br. 26), based on a declaration submitted in other litigation by an NACBA member, that potential clients have expressed concern that a "debt relief agency" might be thought a government agency. As the record in that case shows, the author of that declaration bears considerable responsibility for the problem he encountered, as he advertised on his website that he has been "designated as a Federal Debt Relief Agency by an Act of Congress and the President of the United States." C.A. App. at 62, *Connecticut Bar Ass'n* v. *United States*, No. 08-4797-cv (2d Cir. argued Sept. 24, 2009).

vided they also comply with the basic disclosure requirements in Section 528.[23]

b. Petitioners do not dispute the accuracy of the second half of the statutory disclaimer, *i.e.*, that the person sponsoring the advertisement "help[s] people file for bankruptcy relief under the Bankruptcy Code." See Pet. Br. 87 (asserting that petitioners already mention bankruptcy in their advertising). Rather, they contend that the statement is required even in contexts in which it does not serve the core congressional purpose; they speculate, for example, that some law firms will be debt relief agencies by virtue of representing debtors, but will also wish to advertise to creditors that they perform services listed in Section 528(b)(2). But even as applied to that hypothetical and presumably narrow class, the required disclaimer is not misleading, much less inaccurate.[24] In these circumstances, it simply provides some extraneous information.

Petitioner's argument suggests, at most, that Section 528's purposes could have been achieved had Congress defined somewhat more narrowly the category of advertisements for which the specified disclosures are required. But as the Court held in *Zauderer*, the standard of review in this context is not whether the statute is

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[23] Petitioners have not asserted that the requirement to include the short disclaimer in their advertising is burdensome for reasons other than the content of the disclaimer. Cf. *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-147 & n.11 (1994) (disclaimer required to accompany the term "specialist" was so unduly detailed that no one would use it on a business card or letterhead, thus effectively prohibiting the use of the term "specialist" in those contexts).

[24] The record does not reflect that petitioners themselves advertise any legal services beyond representing debtors in bankruptcy. See J.A. 38a-39a.

narrowly tailored, but only whether it is "reasonably related to the State's interest"—here (as in *Zauderer*) the interest in preventing deception of consumers. See 471 U.S. at 651 n.14 ("reject[ing] [the] contention that [the Court] should subject disclosure requirements to a strict 'least restrictive means' analysis," because disclosure requirements are themselves less restrictive than other regulations); see also *Went For It*, 515 U.S. at 632 ("[T]he 'least restrictive means' test has no role in the commercial speech context.").

Moreover, Congress had valid reasons for making the disclosure requirement contingent on the content of the advertisement rather than on the advertiser's own characterization of the target audience. Advertisements frequently tout more than one service, see, *e.g.*, *1998 Hearings* Pt. III, at 95 (advertisement for bankruptcy, divorce, and personal injury representation), and the advertiser has only limited ability to choose or predict in advance who will see its communications. Congress reasonably concluded that advertisements offering "assistance with respect to * * * mortgage foreclosures [or] eviction proceedings," 11 U.S.C. 528(b)(2), may well implicate the same interests as advertisements promoting debt relief, because consumers desperate to stave off foreclosure or eviction may be attracted by the automatic stay of proceedings that a bankruptcy filing triggers. See *1998 Hearings* Pt. III, at 92 (FTC alert noting that ads may promote the ability to "'STOP credit harassment [or] foreclosures'" or to "'Keep Your Property.'"). In any event, law firms and other entities that do not provide bankruptcy assistance services to assisted persons for compensation are not "debt relief agenc[ies]" and therefore are not covered by Section 528; that threshold eligibility determination will rule out

many of petitioners' hypothetical applications to creditors' counsel.[25]

4. By its terms, Section 528 permits debt relief agencies to alter the wording of the required disclosures

Quibbles over the fit between the statutory disclaimer language and particular hypothetical situations are ultimately not relevant in this pre-enforcement challenge, which asserts that Section 528's disclaimer requirements are unconstitutional as applied to *all* attorneys. And if the statutory disclosures inaccurately describe the services that a particular debt relief agency performs, Section 528 establishes a mechanism by which the inaccuracy can be avoided. Any "substantially similar statement" may be substituted for the language set out in the statute. 11 U.S.C. 528(a)(4) and (b)(2)(B). Thus, if a particular debt relief agency engages in the type of public advertising that triggers the disclosure requirements (see 11 U.S.C. 528(a)(3) and (b)(2)), but nevertheless avoids ever "help[ing] people file for bankruptcy relief under the Bankruptcy Code," that debt relief agency presumably could tailor the disclaimer that it would include in its advertisements. The statutory option to customize the disclaimer further ameliorates any concern about the requirement's potential applications to hypothetical outlier cases.

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[25] As explained above, a creditor is not an "assisted person," and representing creditors does not make an attorney a "debt relief agency." See pp. 22-24, *supra*. The assertion by amici NACBA et al. (Br. 28-30) that the disclaimer is "affirmatively false" rests on the misreading of "assisted person" as including creditors.

C. Petitioners Cannot Avoid Section 528's Disclosure Requirements By Asserting That Their Own Advertising Is Not Deceptive

Petitioners contend (Br. 87) that Section 528(a)(4) and (b)(2)(B) are unconstitutional as applied to their own advertising because that advertising is not deceptive and therefore does not raise the concerns that prompted Congress to act.[26] That assertion has no support in the record. Petitioners brought this action as a pre-enforcement challenge to Section 528, and they did not submit any past or future advertisements into evidence. Neither their petition for a writ of certiorari nor their brief in the court of appeals advanced the theory that they are entitled to an as-applied exemption from Section 528(a)(4) and (b)(2)(B) based on the non-deceptive content of their own prior advertising. See Pet. 22-30; Pet. C.A. Br. 41-50.

In any event, the Court in *Zauderer* specifically rejected the contention that the disclosure requirement challenged in that case would be unconstitutional unless the particular "advertisement, absent the required disclosure, would be false or deceptive." 471 U.S. at 650. To combat the deceptive practices of attorneys who promote the benefits of bankruptcy relief without the necessary explanation, Congress required all debt relief agencies who engage in specified forms of public advertising to comply with the basic disclosure requirements of Section 528(a)(4) and (b)(2)(B). That legislative judgment

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[26] Petitioners assert that they "do not state in their advertisements that they can 'wipe out' unpaid bills, make debts 'disappear,' or 'stop credit harassment, foreclosures, or repossessions' *without mentioning that these things are accomplished through bankruptcy*," and that their advertisements "specifically mention 'bankruptcy' multiple times." Br. 87 (emphasis added).

is both reasonable and consistent with the First Amendment.[27]

The as-applied challenge that petitioners belatedly assert is especially ill-conceived because Section 528 allows regulated parties to substitute a "substantially similar statement" for the statement that the advertiser "help[s] people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. 528(a)(4) and (b)(2)(B). See p. 68, *supra*. If the references to bankruptcy in petitioners' advertisements are suitably prominent (unlike, for example, the use of a star footnote in the advertisement appearing in the legislative history, see p. 62, *supra*), then petitioners may be able to satisfy Section 528's requirements with only modest changes to their advertising, or even none at all. Petitioners' new as-applied challenge logically depends on the proposition that their own advertisements contain references to bankruptcy that are clear enough to satisfy Congress's concerns, but are not "substantially similar" to the statement that petitioners "help people file for bankruptcy relief under the Bankruptcy Code." Petitioners have not suggested what such advertisements would look like, let alone shown that their own advertisements fall within this hypothetical category. And they assuredly have not shown how adopting the Section 528 formulation or "a substantially similar statement" would meaningfully curtail their ability to advertise their services. This Court therefore should uphold the statutory disclosure requirements.

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[27] This Court also granted certiorari on the question whether Section 528 violates the Due Process Clause. 08-1119 Pet. ii. Petitioners have not separately argued that issue and have accordingly abandoned it.

CONCLUSION

The judgment of the court of appeals should be reversed as to Section 526(a)(4) and in all other respects affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

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

Definitions

In this title the following definitions shall apply:

* * * * *

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

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

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

* * * * *

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

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—

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

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

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

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

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

* * * * *

2. 11 U.S.C. 110 provides in pertinent part:

Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section—

(1) "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attor-

ney, who prepares for compensation a document for filing; and

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

* * * * *

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

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

(B) The legal advice referred to in subparagraph (A) includes advising the debtor—

(i) whether—

(I) to file a petition under this title; or

(II) commencing a case under chapter 7, 11, 12, or 13 is appropriate;

(ii) whether the debtor's debts will be discharged in a case under this title;

(iii) whether the debtor will be able to retain the debtor's home, car, or other property after commencing a case under this title;

(iv) concerning—

(I) the tax consequences of a case brought under this title; or

(II) the dischargeability of tax claims;

(v) whether the debtor may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;

(vi) concerning how to characterize the nature of the debtor's interests in property or the debtor's debts; or

(vii) concerning bankruptcy procedures and rights.

* * * * *

3. 11 U.S.C. 526 provides:

Restrictions on debt relief agencies

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

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

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

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

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

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

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

(c)(1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

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

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

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

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

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

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

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

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

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

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under

Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may—

(A) enjoin the violation of such section; or

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

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

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

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

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

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

4. 11 U.S.C. 528 provides:

Requirements for debt relief agencies

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

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

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

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

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall—

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

(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

5. 11 U.S.C. 707 provides in pertinent part:

Dismissal of a case or conversion to a case under chapter 11 or 13

* * * * *

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or

(II) $10,000.

(ii)(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chroni-

cally ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documenta-

tion of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

* * * * *

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

* * * * *