

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC W. OLSEN, KEVIN D. SWARTZ,
JASON C. MCBRIDE,

Plaintiffs/Cross-Appellants,

v.

MICHAEL B. MUKASEY, in his official capacity
as Attorney General of the United States of America;
ILENE LASHINSKY, in her official capacity
as United States Trustee,

Defendants- Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLAINTIFFS' RESPONSE AND OPENING BRIEF

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JURISDICTIONAL STATEMENT

The District Court of Oregon had jurisdiction over this case pursuant to 28 U.S.C. § 1331 because Plaintiffs are seeking relief from an unconstitutional statute.

The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The defendants in this case are officers of the United States of America. The final judgment dismissing this case was entered on July 13, 2007. Defendants filed their notice of appeal on July 24, 2007. Plaintiffs filed their notice of appeal on September 6, 2007.

ISSUES FOR REVIEW

1. Did the District Court properly conclude that Section 526(a)(4) of the Bankruptcy Code impermissibly restricts Plaintiffs' protected speech under the First Amendment by imposing a blanket prohibition on advising certain clients on incurring debt in advance of a bankruptcy filing or for payment of attorney fees?
2. Did the District Court err in dismissing Plaintiff McBride's claim under the First Amendment related to the advertising requirements of Section 528 of the Bankruptcy Code where the requirements compel untrue speech or mandate Plaintiff to supplement the statutory disclosures without narrowly drawn directives in the statute?

3. Did the District Court err by ruling that Plaintiffs lack standing to pursue their claim that 11 U.S.C. §§ 101, 526-528 are unconstitutionally vague in violation of Plaintiffs' Fifth Amendment rights to due process when these statutes implicate Plaintiffs' First Amendment rights, defendants have threatened to enforce these provisions against Plaintiffs and Plaintiffs have had enforcement actions and threatened enforcement actions in the past?

STANDARDS OF REVIEW

The determination of the Constitutionality of a statute is reviewed de novo. *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996), cert denied, 520 U.S. 1117 (1997).

Jurisdictional standing questions are reviewed de novo. *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 899 (9th Cir. 1998).

SUMMARY OF ARGUMENT

In 2005 Congress enacted the Bankruptcy Abuse and Consumer Protection Act. Within this act, Congress created restrictions on "debt relief agencies" ("DRA") in an attempt to curtail abuse of consumers. 11 U.S.C. § 526-528. Courts have disagreed about the application of the DRA amendments to attorneys. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758 (D. Minn. 2006), appeal docketed, No. 07-2405 (8th Cir.). The District Court ruled that

Plaintiffs are subject to the DRA amendments. *Olsen v. Gonzales*, 350 BR 906, 912 (D. Ore. 2006). These amendments in an attempt to limit abuse, regulate attorneys speech. Plaintiffs filed this challenge to the statute.

The District Court properly ruled that 11 U.S.C. § 526(a)(4) violates Plaintiffs' First Amendment rights because this section forbids Plaintiffs' lawful speech. The District Court correctly found that strict scrutiny was the proper standard of review. Even if the *Gentile* standard is proper, the statute is not narrowly tailored to pass this standard.

The District Court erred by ruling that Plaintiff Jason McBride's First Amendment rights are not violated by 11 U.S.C. § 528. This statute requires McBride to advertise himself as helping people file for bankruptcy relief despite the fact that he does not do so.

The District Court further erred when it ruled that Plaintiffs lack standing to pursue their claims that 11 U.S.C. § 526-528 violate the Fifth Amendment. These provisions are unconstitutional because a reasonable person cannot know who is an "assisted person" as defined by the Bankruptcy Code. Plaintiffs have standing because these sections chill Plaintiffs' speech. Plaintiffs further have standing because the defendants have threatened to enforce them against Plaintiffs.

ARGUMENT

I. Section 526(a)(4)¹ is an overly inclusive, content-based restriction on Plaintiffs' protected speech under the First Amendment.

Defendants challenge the District Court's judgment that Section 526(a)(4) is unconstitutional as offending the First Amendment. For the reasons that follow, the District Court properly struck down Section 526(a)(4). *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006).

A. The proper standard for constitutional review of Section 526(a)(4) is strict scrutiny.

In analyzing Section 526(a)(4), the Court must first determine the proper standard of constitutional review. The District Court properly used strict scrutiny to evaluate Section 526(a)(4). Strict scrutiny is appropriate as Section 526(a)(4) creates a content-based restriction on Plaintiffs' speech. Specifically, Section 526(a)(4) covers an entire subject (incurring debt obligations in contemplation of bankruptcy or payment of attorney fees) of advice and counsel to clients by Plaintiffs. This is a "plain regulation of speech" and must be reviewed under strict

¹Unless otherwise indicated, all references to the "Code" and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. Sections 101-1532, as enacted and promulgated after the effective date (October 17, 2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. 109-8, Apr. 20, 2005, 119 Stat. 23.

scrutiny. *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 355 B.R. 758, 764 (D. Minn. 2006).

While Congress may regulate professional speech in some circumstances, attorney speech in this context should be entitled to the “strongest protection our Constitution has to offer.” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). Providing otherwise legal advice that is in the best interest of the attorney’s client is just the type of speech deserving of such protection. Attorneys have an established duty to advise and zealously represent their clients. *Milavetz*, 355 B.R. at 765 citing *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001). By barring attorneys from advising a client to incur any kind of debt in contemplation of bankruptcy, Section 526(a)(4) impairs Plaintiffs’ ability to fully and adequately advise their clients, thereby infringing on their First Amendment rights.

Defendants argue, as they did in the District Court, that Section 526(a)(4) is an ethical rule that is limited to abusive or manipulative incursion of debts before filing a bankruptcy. Their argument relies on two points. Their first argument is that the express language of Section 526(a)(4) strikes only at debt incurred with abusive intent. Def. Br. 23-25. Second, they argue that the statutory scheme that surrounds Section 526(a)(4) suggests a reading that encompasses only abusive

conduct. Def. Br. 25-28. Neither of these arguments is availing for the following reasons.

B. The language of Section 526(a)(4) does not limit its application to only fraudulent or abusive incursions of debt before a bankruptcy filing.

First, the District Court properly concluded that the plain language of Section 526(a)(4) captures far more than only debt incurred abusively “in contemplation of” a bankruptcy filing. Indeed, every court that has considered the Defendants’ suggested reading has rejected it and concluded that the phrase “in contemplation of” bankruptcy, as used in Section 526(a)(4), includes all advice relating incurring debt where a bankruptcy filing is contemplated. See, e.g., *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); *Olsen*, 350 B.R. at 915 n.5; *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006); *Milavetz*, 355 B.R. at 764. Defendants’ proffered authority for their reading actually supports, rather than refutes, the District Court’s conclusion. The *Fox* opinion expressly recognized that Congress could regulate “frauds” committed in contemplation of bankruptcy. *United States v. Fox*, 95 U.S. 670, 672 (1877). The *Mercer* opinion relates to dischargeability under Section 523(a)(2)(A) of debts incurred by false pretenses, a false representation, or actual fraud. 246 F.3d 391, (5th Cir. 2001) (en banc). Likewise, 18 U.S.C. Section 152(7) is directed at fraudulent transfers or

concealment of property in contemplation of bankruptcy. The commonality in these authorities is not the phrase “in contemplation of” bankruptcy; rather, the common theme is the necessary predicate of fraudulent or abusive conduct combined with a contemplation of bankruptcy.

Section 526(a)(4) lacks any specific reference to “abusive” or “fraudulent” conduct. By its terms, the section prohibits a debt relief agency from “advis[ing] an assisted person or prospective assisted person to incur more debt in contemplation of” a bankruptcy filing. 11 U.S.C. § 526(a)(4). The most natural reading of this language, and that adopted by the District Court, is that a debt relief agency is prohibited from advising an assisted person or prospective assisted person from incurring any debts where a bankruptcy filing is considered, regardless of whether the intended course of action is fraudulent or perfectly legal. *Olsen*, 350 B.R. at 915-16. Plaintiffs do not dispute that the statute may indeed “strike at actual opportunistic abuses.” *Id.* at 916. However, the language also covers any number of “lawful actions in contemplation of bankruptcy that benefit the debtor and creditors.” *Id.*

Moreover, this challenge presents a question of the statute’s effect on Plaintiffs’ protected First Amendment speech. “Government action that stifles speech on account of its message, or that requires the utterance of a particular

message favored by the Government, contravenes th[e] essential [First Amendment] right[s]” of private citizens. *Milavetz*, 355 B.R. at 764 quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). As highlighted by the District Court, there are significant other justifications and purposes for incurring additional debt in contemplation of a bankruptcy filing. *Olsen*, 350 B.R. at 916. The two impermissible purposes highlighted by Defendants, “loading up” on credit card debt and gaming the means test, are already the subject of other regulatory provisions and represent only a subset of speech regulated by Section 526(a)(4). Def. Br. 23. See e.g., 11 U.S.C. §§ 523(a)(2)(C) (prohibiting certain debts incurred shortly before a bankruptcy filing), 707(b)(2)(C)-(D) (requiring that a debtor’s attorney certify that the filing does not constitute an abuse of Chapter 7, including the means test); 18 U.S.C. §§ 152-157 (providing criminal liability for fraud on the bankruptcy system); Oregon R. Prof. Conduct 1.2(c) (prohibiting a lawyer from advising or assisting a client in engaging in fraudulent conduct). Indeed, Defendants have presented authority for the penalization of attorneys for such conduct under state ethics rules. Def. Br. 22. As such, Section 526(a)(4) is not limited to fraudulent or abusive practices by its terms.

C. The other subsections of Section 526(a) highlight the blanket restriction imposed by Section 526(a)(4).

Second, Defendants urge that Section 526(a)(4) is properly understood in the context of the overall statutory scheme of BAPCPA. Specifically, they point to the other subsections of Section 526(a) for guidance. Under Defendants' reading, these provisions reinforce the interpretation of Section 526(a)(4) as strictly applying to abusive practices. This argument misses the mark.

The other three subsections of Section 526(a) provide additional regulations on the interactions between debt relief agencies and assisted persons. Certainly, statutory interpretation is a "holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood*, 484 U.S. 365, 371 (1988). However, the language used in these sections bear marked differences to the language of Section 526(a)(4). Section 526(a)(1) requires performance of promised services to an assisted person. As such, the provision regulates conduct, not speech, unlike Section 526(a)(4). Sections 526(a)(2) and 526(a)(3) certainly deal with speech by debt relief agencies, but contain language not present in Section 526(a)(4). Section 526(a)(2) prohibits statements that are "untrue and misleading." Section 526(a)(3) requires that a debt relief agency not "misrepresent" to any assisted person the services to be provided or the benefits and risks to the assisted person in a bankruptcy filing.

As discussed above, the language of Section 526(a)(4) is not so limited to malfeasance such as false or misleading statements or misrepresentations. As such, Section 526(a)(4) does not implicate such ethical precepts. *Milavetz*, 355 B.R. at 764.

D. The regulation considered in the *Gentile* case is fundamentally different than Section 526(a)(4).

This distinction is further borne out by the facts of the case relied upon by the Defendants, *Gentile v. State Bar of Nevada*. 501 U.S. 1030 (1991). The *Gentile* case involved public statements made by an attorney, Gentile, in advance of a criminal trial. 501 U.S. at 1032-33. These statements were made during a press conference held shortly after Gentile's client was indicted. *Id.* The Court concluded that the State Bar of Nevada could legitimately regulate an attorney's speech where such speech posed a "substantial likelihood of material prejudice." *Id.* at 1075. In reaching this conclusion, the Court was sufficiently satisfied that certain extrajudicial statements made by attorneys could influence the outcome of a trial or prejudice the jury pool. *Id.* The Court recognized that such speech would interfere with the right to a fair trial, a fundamental interest under the Constitution. *Id.*

In contrast, Section 526(a)(4) concerns the regulation of private, confidential speech between attorney and client. Plaintiffs seek to give otherwise lawful, ethical advice to their clients regarding incurring debt pre-petition. Section 526(a)(4) is not limited to “fraudulent” or “abusive” incursions of debts, but rather any debt incurred “in contemplation of” bankruptcy. In contrast, *Gentile* involved not just any public statement, but only a public statement that was likely to result in material prejudice to the administration of justice. As such, Section 526(a)(4) must be reviewed under strict scrutiny.

E. Section 526(a)(4) is over-inclusive and cannot survive strict scrutiny.

As determined by the District Court, Section 526(a)(4) is a content-based restriction on protected speech and is therefore subject to strict scrutiny. *Olsen*, 350 B.R. at 915 n.5. Strict scrutiny requires that the regulation be narrowly tailored to promote a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). A restriction on professional speech must represent the least restrictive means to advancing the government’s interest. See *Sable Comm. Of Cal, Inc. v. Sable*, 492 U.S. 115, 126 (1988); *N.A.A.C.P. v. Button*, 371 U.S. 415, 439-44 (1963); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) *cert. denied* 540 U.S. 946 (2003) (all applying

strict scrutiny to professional speech). Section 526(a)(4) fails to meet this standard and is unconstitutional.

The language of Section 526(a)(4), as discussed above, encompasses far more than abusive or fraudulent incurring of debt. It “prevents lawyers from advising clients to take lawful actions,” and it “prevent[s] advice to take prudent actions.” *Olsen*, 350 B.R. at 916 quoting *Hersh*, 347 B.R. 19. As has been detailed in the trial court decisions interpreting Section 526(a)(4), referenced above, there are a number of lawful and prudent reasons for an assisted person to incur debt in contemplation of a bankruptcy filing. These include refinancing a mortgage loan to obtain a better interest rate, taking on an automobile loan in order to acquire reliable transportation, maximizing the use of available exemptions, and to pay for filing fees or attorneys fees. *Olsen*, 350 B.R. at 916. Section 526(a)(4) prohibits Plaintiffs from offering advice regarding any of these actions. This provision thus affects a “serious and fundamental restriction on advocacy of attorneys.” *Velazquez*, 531 U.S. at 534.

F. Even under the *Gentile* standard, Section 526(a)(4) is unconstitutional.

Even if the Court were to apply the test used the *Gentile* case, Section 526(a)(4) still lacks the necessary narrow tailoring to pass constitutional muster.

Under the *Gentile* test, the Court must balance Plaintiffs' First Amendment interests against the government's interest in regulating the activity in question. *Gentile*, 501 U.S. at 1075. In addition, should the government's interest prevail, the challenged legislation must be narrowly tailored to the proffered interests. *Id.* at 1076.

As stated above, the regulation reviewed in *Gentile* contained a restrictive provision that limited the application of the regulation to specific types of speech. In *Gentile*, the regulation only limited speech of a kind that would have a "substantial likelihood of material prejudice" on a pending case. 501 U.S. at 1034.

The speech restriction in Section 526(a)(4) contains no such restriction. It is a blanket restriction on any advice on incurring debt because of a planned bankruptcy. Defendants' reasoning that the language of the statute itself and its context is limiting enough is simply wrong. There exist plausible, legal reasons for incurring debt in contemplation of bankruptcy, and the restriction of Plaintiffs' ability to provide legal advice on this matter offends the First Amendment.

Plaintiffs submit for this reason, and the reasons stated above, the restriction on speech imposed by Section 526(a)(4) is unconstitutional.

G. The doctrine of constitutional avoidance is inapplicable as Section 526(a)(4) is subject to only one interpretation.

The Defendants also argue that the District Court failed to consider that Section 526(a)(4) could be interpreted without implicating constitutional concerns. They reason that because Congress approached the issue as one of abuse prevention, the regulation may read within such terms. This assumes, however, that Section 526(a)(4) is ambiguous as it is subject to more than one plausible interpretation. Such an assumption is seriously belied by the fact that no court that has considered Section 526(a)(4) has come to interpret its provisions in the manner suggested by Defendants. See *Hersh*, 347 B.R. 19 (N.D. Tex. 2006); *Olsen*, 350 B.R. at 915 n.5; *Zelotes*, 352 B.R. 17 (D. Conn. 2006); *Milavetz*, 355 B.R. at 764. As discussed above, the District Court understood Congress's objective in enacting Section 526(a)(4), yet struck down the provision as overly restrictive in violation of Plaintiffs' First Amendment rights.

The District Court's ruling was based on the plain language of Section 526(a)(4). Where the language of a statute is clear and unambiguous, courts are to follow its dictates. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Defendants, in their brief, point to disparate aspects of legislative history covering various congressional sessions to suggest that Congress was concerned

about (a) “loading up” on credit card debt on the eve of a bankruptcy filing and (b) strengthening professionalism standards. Def. Br. 15, 17, 19-20, 22. These references suggest a number of objectives in amending the Bankruptcy Code under BAPCPA, but do not suggest a defined congressional intent behind Section 526(a)(4).

Instead, Defendants’ efforts amount to a wholesale re-casting of the statute and the addition of terms that are not present in the statute’s text. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If Congress had intended to limit the application of Section 526(a)(4) to advice concerning only fraudulent or abusive practices, it could have stated so in the text of the statute. As it did not, the District Court properly interpreted Section 526(a)(4).

H. Plaintiff McBride has standing to challenge Section 526(a)(4).

Defendants also assert that Plaintiff McBride lacks standing to challenge Section 526(a)(4). They read the restrictions in Section 526(a)(4) as applying only to a debt relief agency that will represent the prospective assisted person in the planned bankruptcy case. The language of Section 526(a)(4) is not so limited.

Section 526(a)(4) regulates the conduct of debt relief agencies. A debt

relief agency is “any person who provides any bankruptcy assistance to an assisted person in return for money or other valuable consideration.” 11 U.S.C. § 101(12A). “Bankruptcy assistance” includes any services provided for the purpose of providing advice or counsel regarding a bankruptcy case. 11 U.S.C. § 101(4A). Plaintiff McBride is an attorney that advises and counsels clients regarding possible bankruptcy filings and the effect of a bankruptcy discharge on support obligations. ER-17. McBride charges an hourly fee to his clients for such advice. *Id.* These clients routinely have less than \$150,000 in nonexempt assets. *Id.* These facts establish that McBride meets the statutory definition of a debt relief agency and is, therefore, subject to the restrictions of Section 526(a)(4). McBride has offered advice to such clients prior to the effective date of the DRA amendments that would be prohibited by Section 526(a)(4) and has reason to believe that any violation of Section 526(a)(4) will subject him to prosecution. *Id.*

As such, McBride meets the requirements for standing. The District Court properly enjoined Defendants’ enforcement of Section 526(a)(4) against McBride.

II. The advertising requirements of Section 528 compel speech from Plaintiff McBride in violation of his First Amendment Rights.

As a debt relief agency, McBride is also subject to the advertising restrictions of Section 528. That section requires that any debt relief agency

include the following statement in any advertisement of bankruptcy assistance services: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” 11 U.S.C. § 528(b)(2)(B). As McBride does provide bankruptcy assistance, as defined in the Code, but does not help people file petitions for relief under the Code, the requirement compels McBride to make an untrue and misleading statement in advertisements. Such compelled speech violates McBride’s First Amendment rights.

The District Court dismissed McBride’s First Amendment claim because it determined that Section 528 meets the standard for constitutionality under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) or *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)². Specifically, the District Court held that Section 528 advances the government’s interest in advancing accurate advertising and preventing deception of consumers. Further, the District Court held that McBride could make use of a

²The District Court noted that the *Zauderer* test may be more applicable factually to the present case. However, the Court then went on to apply the *Central Hudson* test to Section 528. The *Zauderer* case clearly involved commercial speech because it regulated disclosure of possible litigation costs. In light of the noncommercial nature of the required disclosures in Section 528, Plaintiffs assert that *Central Hudson* or the more restrictive analysis under strict scrutiny should apply.

“substantially similar statement” and therefore provide an accurate statement that would comply with Section 528. The District Court’s decision to dismiss McBride’s claim was incorrect and conflicts with the judgment of the *Milavetz* court. 355 B.R. at 767.

The required advertising language in Section 528 is flatly false when applied to McBride. The record establishes that McBride advises clients on creditor harassment and problems with excessive debt obligations, but he does not help people file for bankruptcy relief. The solution crafted by the District Court essentially leaves McBride in the position of a surrogate legislator. McBride must define his own language that complies with the statute, and is compelled to do so by threat of sanction. This is at odds with traditional First Amendment analysis, which places the burden of proving constitutionality on the government. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492, U.S. 469, 480 (1989). In this case, McBride is compelled to speak falsely (in derogation of his responsibilities as a licensed attorney) or speak under threat of sanction for inadequate compliance with the statute. Such a requirement cannot withstand First Amendment scrutiny.

Given the infirmity of Section 528 in this regard, the restriction is not narrowly drawn nor does it directly advance the government’s stated interests. The *Central Hudson* test requires the restrictions do so to pass constitutional

muster. 447 U.S. at 566. Section 528 broadly regulates a number of professionals involved in bankruptcy and insolvency matters, regardless of whether they actually file petitions under the Code. Nonetheless, these professionals must comply with the regulations despite their untrue and unclear language.

As such, the judgment of the District Court should be reversed as to McBride's claim related to Section 528.

III. The District Court erred by ruling that Plaintiffs lack standing to pursue their Fifth Amendment Claim.

The District Court erred by ruling that Plaintiffs lack standing to pursue the claim that the DRA amendments are unconstitutionally vague. Plaintiffs have standing because the vagueness has a chilling effect on speech. Plaintiffs further have standing because the defendants have threatened to enforce these provisions against Plaintiffs. Moreover, the DRA amendments are unconstitutionally vague because the restrictions proposed by the amendments and the standards for evaluating those effected by the restrictions (i.e. "assisted persons") are inadequate to allow a reasonable person to understand what speech is compelled or prohibited. Further, the DRA amendments encourage arbitrary and discriminatory enforcement.

A. The proper measure of standing of Plaintiffs' claim is standing due to the chilling effect of speech.

The District Court ruled the Plaintiffs lack standing because inter alia, "the injury or threat of injury must be both real and immediate, not conjectural or hypothetical," *Olsen*, 350 BR at 913 citing *O'Shea v. Littleton*, 414 U.S. 488, 494, (1974). Plaintiffs contend that the threat of injury is real and that they met all applicable burdens for any measurement of standing.

The Ninth Circuit has held, "a plaintiff may satisfy the standing requirement with facts showing it has foregone speech because of an actual and well-founded fear that the law will be enforced against it." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir. 2003).

Additionally, the Supreme Court has long recognized the difference between standing to challenge a free speech restriction and those claims that do not implicate free speech. Because the DRA amendments forbid certain speech and compel other speech to assisted persons, sections 526-528 fail the standard set out in *Hoffman Estates*, which states, "...the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test

should apply.” *Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

“Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415 U.S. 566, 571 (1974).

It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Smith v. California*, 361 U.S. 147, 151 (1959) (internal citations omitted).

The District Court has ruled that, “[p]laintiffs lack standing on this issue because it is simply not concrete at this point.” *Olsen* at 921. However, the Supreme Court has ruled that a vague statute that inhibits free speech should be challenged on its face. “There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the

dissemination of ideas.” *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Because the Plaintiffs are seeking declaratory relief based on the vague nature of statutes which chill speech and otherwise implicated free speech, Plaintiffs have standing to bring their claims.

B. Assuming Plaintiffs’ standing is not due to chilled speech, Plaintiffs have standing to pursue their claim because defendants threatened to enforce these provisions against Plaintiffs.

The District Court ruled that, “there has been no threatened enforcement of the BAPCPA against plaintiffs.” *Olsen* 350 B.R. at 913. This is a factual question that was not raised by the parties or the Court prior to dismissal pursuant to Fed. R. Civ. Pro. 12(b)(6). Further, the defendants have threatened to enforce these provisions. Clifford J. White III, Director of the Executive Office for the United States Trustees U.S. Department of Justice stated in public testimony, “[t]he BAPCPA provides new tools for the Program to combat bankruptcy fraud and abuse * * * [The U.S. Trustees] ***protect consumer debtors who are victimized by attorneys, petition preparers, and others. *** [The U.S. Trustee’s enforcement includes] monetary sanctions against attorneys who fail to fulfill their obligations

to their debtor clients³.”

The only new tools established by BAPCPA that can be used against attorneys who fail to fulfill their obligations to their debtor clients are 11 U.S.C. § 526-528. Therefore, Plaintiffs have standing because the United States Trustees by their own admission are prosecuting attorneys for violations of the debt relief agency provisions of the code.

Additionally, Plaintiffs have a long history with the United States Trustee’s office that allows the Plaintiffs to submit evidence as to how the Defendants have prosecuted bankruptcy code violations in the past. ER-13, 14, 17, 19, 20. Defendants past action in conjunction with 28 U.S.C. §§ 583 and 586 establish that it is more likely than not that the U.S. Trustee will enforce the BAPCPA amendments against Plaintiffs. The statute that creates the Office of the U.S. Trustee requires Defendants to “faithfully execute his duties.” 28 U.S.C. § 583. Defendants duties include the requirement to “perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe.” 28 U.S.C. § 586(a)(5). Title 11 allows the U.S. Trustee to bring a motion for failure to comply

³ Available at http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony061206.pdf page 3.

with the debt relief agency provisions. 11 U.S.C. § 526(c)(5).

Plaintiffs further have an ethical obligation to abide by the requirements of the code⁴. Because Plaintiffs are officers of the Court and have a duty to abide by the rules, Plaintiffs are being forced to choose between giving undesired speech to those who may not be assisted persons or face civil enforcement of the debt relief agency provisions, disgorgement and disciplinary proceedings.

However, the District Court dismissed Plaintiffs' claims without Plaintiffs having any opportunity to address the standing issue. Defendants did not raise standing in their motion to dismiss. In fact, their motion was based on Fed. R. Civ. Pro. 12(b)(6), not Fed. R. Civ. Pro. 12(b)(1).

While the District Court dismissed Plaintiffs' claim under Fed. R. Civ. Pro. 12(b)(6) it did so without giving Plaintiffs the opportunity to submit facts that would establish that defendants are threatening to enforce these provisions against Plaintiffs.

C. The DRA amendments are unconstitutionally vague in a manner that implicates Plaintiffs' First Amendment rights because a reasonable person cannot know what conduct is forbidden.

The DRA amendments are designed to prevent abuse of the bankruptcy

⁴ Oregon Rule of Professional Conduct 3.4(c).

system. However, Congress chose to regulate attorneys' speech instead of conduct as the mechanism to control the perceived abuse⁵. However, the DRA amendments leave Plaintiffs guessing about the critical terms in the definition of an assisted person. Congress did not define "primarily consumer debts," "value," or "nonexempt."

The DRA amendments are unconstitutionally vague. The amendments define an "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." Therefore, the DRA amendments compel and forbid speech based on the determination of the value of a client's nonexempt assets. For instance, if the client is an assisted person, the attorney must inform the client that he or she may hire a bankruptcy petition preparer and execute a written contract within five days after providing any service among other required disclosures. 11 U.S.C. §§ 527-528. Further, the Code provides that Plaintiffs may not advise the assisted person to incur new debt in contemplation of filing bankruptcy. 11 U.S.C. § 526(a)(4).

⁵Section 526(a)(2) forbids "making a statement, counsel or advise"; 526(a)(4) forbids "advising"; Section 527 requires making disclosures; Section 528 requires statements in advertising.

However, attorneys cannot know if their client is an assisted person because of the vagueness of the Bankruptcy Code. The Code fails to define “primarily consumer debts” or “value.” The terms that Congress chose when enacting these provisions are not those that would create a mathematical formula to determine whether the client has more of less than \$150,000 in nonexempt assets.

Section 101(8) defines “consumer debt” as “debt incurred by an individual primarily for a personal, family, or household purpose.” Therefore, within the definition of “primarily consumer debt,” Congress twice uses the word “primarily” without a definition.

To highlight this difficulty, Plaintiffs point out that courts disagree on the meaning of these essential terms. Plaintiffs recognize that judicial decisions do not always appear to create a uniform national standard and Plaintiffs are not seeking a remedy for this. However, the statutory construction of the Code is one that creates so many ambiguities that courts differ very vastly on legal definitions. This is further complicated by the fact that plaintiffs then have to make complicated factual determinations about how much an item is worth.

Courts disagree about what is “primarily consumer debt.” The Bankruptcy Code is silent on whether “primarily” means majority, plurality, or something else. “What constitutes ‘primarily’ for Section 707(b) purposes defies precise

definition.” *In re Restea*, 76 B.R. 728, 734 (Bankr. D.S.D. 1987).

“It has been noted, we believe correctly, that ‘primarily’ suggests an overall ratio of consumer to nonconsumer debts of over fifty percent. Furthermore, the consumer debts should be evaluated not only by amount, but by their relative number.” *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1998).

Other courts have held that consumer debt of greater than fifty percent is not “primarily” consumer debt. *Restea* 76 B.R. at 734, see also *In re Bell* 65 B.R. 575 (Bankr. E.D. Mich. 1986).

The courts that have ruled on this issue have not given a formula to determine who has “primarily consumer debts.” Abstract references to ratios and decisions that contradict each other leave Plaintiffs no guidance. Therefore, Plaintiffs can only guess how such a formulation should be created and applied.

Further, courts disagree about what is a “consumer debt.” While some courts have ruled that loans against real estate are not consumer debts. “Its legislative history indicates that, ‘[a] consumer debt does not include a debt to any extent that the debt is secured by real property.’” *Restea* 76 B.R. at 734.

Other courts disagree. “This argument stands the process of statutory interpretation on its head, resorting to legislative history without first considering the language of the statute.” *In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988).

The Bankruptcy Code gives no guidance for these matters and Plaintiffs are left to guess the answers. Therefore, the phrase “primarily consumer debt” is unconstitutionally vague.

Additionally, the term “value” offers an unclear standard. Section 522 defines “value” as fair market value. 11 U.S.C. § 522(a)(2). However, the code does not inform Plaintiffs which market to use to value the assets for application by the DRA amendments. The Supreme Court has acknowledged that there are several ways to value assets. *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

When valuing vehicles Kelly Blue Book and the National Automobile Dealers Association (NADA) guides list several values for the same asset, namely 1) wholesale, 2) retail and 3) private party. Further, Kelly Blue Book and NADA do not agree on the value of the same asset. See *In re Gray*, 285 B.R. 379, 382-384 (N.D. Tex. 2002). Since *Rash* Bankruptcy Courts still have different ways of valuing a vehicle⁶. The code does not state which method to choose, which guide to use, which market within a guide, leaving Plaintiffs to guess which will not

⁶See eg *In re McElroy*, 210 B.R. 833 (Bankr. D. Or. 1997); *In re Getz*, 242 B.R. 916 (B.A.P. 6th Cir. 2000); *In re Lyles*, 226 B.R. 854 (Bankr. W.D. Tenn. 1998); *In re Williams*, 224 B.R. 873 (Bankr. S.D. Ohio 1998); *In re Franklin*, 213 B.R. 781 (Bankr. N. D. Fla. 1997); *In re Renzelman*, 227 B.R. 740 (Bankr. W.D. Mo. 1998); *In re Russell*, 211 B.R. 12 (Bankr. E.D.N.C. 1997).

have them sanctioned for failing to make disclosures, or for advising their client to incur new debt in contemplation of filing bankruptcy.

The amendments are vague because some assets defy valuation. Vehicles are one of the more straightforward assets to value given the fact that there are guides published listing values. For example, Plaintiffs cannot know how to accurately value a life estate in real property, the equitable interest in a married debtor's assets who is filing a petition as an individual, or a redemption right in an asset that expires in 20 days. Further, some assets simply have an unknown value. When Plaintiffs interview a debtor who has been in a car accident, how do Plaintiffs value the potential recovery of the action against the other drivers?

Bankruptcy Courts as well as other courts litigate for years the value of assets. However, Plaintiffs must make this determination at least within 3 days of the initial consultation pursuant to 11 U.S.C. § 527(a)(2). If Plaintiffs make the incorrect determination they are subject to forfeiture of fees and other sanctions.

The problem of valuing assets and determining a client's status as an assisted person has a very short time line. If a client's assets are difficult to value, Plaintiffs are left to speculate as to whether they are required to execute a written contract within five days of their first meeting.

When a client with an indeterminate amount of assets is seeking immediate bankruptcy help, the attorney will need time to value the assets. Plaintiffs are then left to execute a written contract or face sanctions for failing to do so. Upon entering into the agreement Plaintiffs must perform all of the services contained in the agreement. See 11 U.S.C. § 526(a)(1). However, the attorney cannot know which services to agree to perform without knowing the value of the client's assets. Further, there are eligibility requirements for bankruptcy which the attorney may not be able to ascertain prior to executing the agreement. See 11 U.S.C. § 109.

The District Court stated, “[v]aluation of exemptions is no different under the BAPCPA than prior to its enactment.”

However, the valuation of exemptions did not implicate Plaintiffs First Amendment rights prior to the DRA amendments. The Supreme Court has ruled, “[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Therefore, because a reasonable person cannot know what conduct is forbidden or required by the DRA amendments, and the vagueness compels or forbids speech, Plaintiffs have standing and the DRA amendments are unconstitutionally vague.

D. The DRA amendments are unconstitutionally vague because the amendments leave Plaintiffs to ad hoc treatment by those enforcing the statutes.

“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Rayned v. City of Rockford*, 408 U.S. 104, 108-109, (1972).

Due to the fact that reasonable attorneys may come to different conclusions about the value of assets and therefore come to different conclusions about who is an assisted person, Plaintiffs are subject to ad hoc and discriminatory treatment. The United States Trustee and a judge enforcing any of the DRA provisions, can easily sanction Plaintiffs for failing to comply with the provisions when Plaintiffs reasonably believe that their client is not an assisted person.

The problem of arbitrary enforcement it highlighted by the exemption of “reasonably necessary amounts.” Some exemption statutes allow “reasonably necessary” amounts as exempt. See ORS 18.345(1)(i), ORS 18.345(1)(L) 11 U.S.C. § 522(d)(10)(D), 522(d)(10)(E).

Plaintiffs cannot know what the United States Trustee or a judge would deem a “reasonably necessary amount.” Therefore, Plaintiffs are subject to the ad hoc determination of what another’s determination of reasonableness. As such, the DRA amendments are unconstitutionally vague.

CONCLUSION

This Court should affirm the District Court’s ruling that 11 U.S.C. § 526(a)(4) violates Plaintiffs’ First Amendment rights to free speech. This Court should reverse the District Court’s ruling that McBride’s First Amendment rights are not violated by 11 U.S.C. § 528. This Court should further reverse the District Court’s ruling that Plaintiffs lack standing to pursue their Fifth Amendment claims, and give instructions to the District Court to grant Plaintiffs’ requested relief as to the DRA provisions.

DATED January 22, 2008.

Keith D. Karnes OSB # 03352
Douglas R. Ricks OSB # 04402
Attorneys for Plaintiffs

STATEMENT OF RELATED CASES

Plaintiffs are unaware of any related cases in this Circuit. However, other Circuits are considering these related cases: *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006), appeal docketed, Nos. 07-10226 & 07-10265 (5th Cir.); *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006), appeal docketed, No. 07-1853 (2d Cir.); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758 (D. Minn. 2006), appeal docketed, No. 07-2405 (8th Cir.).

DATED January 22, 2008.

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Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Numbers: 07-35616, 07-35762.

I certify that: (check appropriate option(s))

1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

Proportionately spaced, has a typeface of 14 points or more and contains 6,839 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

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January 22, 2008
DATE

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