

Nos. 07-35616, 07-35762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC 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

BRIEF FOR APPELLANTS

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

KARIN J. IMMERGUT
United States Attorney

MARK B. STERN
(202) 514-5089

MARK R. FREEMAN
(202) 514-5714

Attorneys, Appellate Staff
Civil Division, Room 7228
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION..	1
STATEMENT OF THE ISSUE	2
STATEMENT OF THE CASE..	2
STATEMENT OF FACTS.	3
A. Statutory Background..	3
B. Facts and Prior Proceedings.	6
SUMMARY OF ARGUMENT..	9
STANDARD OF REVIEW.	13
ARGUMENT.	13
CONGRESS CONSTITUTIONALLY REGULATED THE CONDUCT OF BANKRUPTCY PROFESSIONALS BY PRECLUDING THEM FROM ENCOURAGING CLIENTS TO ABUSE THE BANKRUPTCY SYSTEM BY TAKING ON ADDITIONAL DEBT IN CONTEMPLATION OF FILING A PETITION.	13
I. The 2005 Act Addresses Abuses Of The Code By Debtors Who Incur New Debt In Anticipation Of Bankruptcy And By Attorneys Who Encourage Clients To Engage In Such Conduct.	14
A. Abuses Of The System By Debtors Incurring Additional Debt In Contemplation Of Bankruptcy.	14
B. Abuses Of The System By Lawyers And Other Bankruptcy Professionals..	18
II. Section 526(a) (4) Constitutionally Restricts Attorneys From Encouraging Clients To Take On Additional Debt In Contemplation of Bankruptcy..	21

A.	The First Amendment Does Not Prohibit Restrictions On Attorney Advice To Engage In Improper Conduct.. . . .	21
B.	Section 526(a) (4) Precludes Lawyers From Encouraging Debtors To Abuse The Bankruptcy System.	23
C.	Section 526(a) (4) Should Not Be Construed More Broadly Than Necessary To Achieve Congress's Purposes.. . . .	29
III.	The District Court Failed To Apply Basic Principles of Overbreadth Analysis.	32
IV.	Plaintiff McBride Lacks Standing To Challenge Section 526(a) (4)..	34
	CONCLUSION.	36
	STATEMENT OF RELATED CASES	
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	
	STATUTORY ADDENDUM	

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<u>Apache Survival Coalition v. United States</u> , 21 F.3d 895 (9th Cir. 1994)	30
<u>Attorney Grievance Commission of Maryland v. Culver</u> , 381 Md. 241 (2004)	22, 29
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973)	31, 33
<u>Conrad, Rubin & Lesser v. Pender</u> , 289 U.S. 472 (1933)	25
<u>Duncan v. Walker</u> , 533 U.S. 167 (2001)	26
<u>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council</u> , 485 U.S. 568 (1988)	30
<u>Gentile v. State Bar of Nevada</u> , 501 U.S. 1030 (1991)	22, 35
<u>Grogan v. Garner</u> , 498 U.S. 279 (1991)	17
<u>Hersh v. United States</u> , 347 B.R. 19 (N.D. Tex. 2006)	8, 29
<u>In re Aiello</u> , 284 B.R. 756 (Bankr. E.D.N.Y. 2002)	17
<u>In re Charles</u> , 334 B.R. 207 (Bankr. S.D. Tex. 2005)	17, 28
<u>In re Eashai</u> , 87 F.3d 1082 (9th Cir. 1996)	15, 16
<u>In re Mercer</u> , 246 F.3d 391 (5th Cir. 2001) (en banc)	16, 24
<u>In re Price</u> , 353 F.3d 1135 (9th Cir. 2004)	17, 18

<u>In re Rathbun,</u> 309 B.R. 901 (Bankr. N.D. Tex. 2004)	17
<u>Katie A. ex rel Ludin v. Los Angeles County,</u> 481 F.3d 1150 (9th Cir. 2007)	13
<u>Klein v. San Diego County,</u> 463 F.3d 1029 (9th Cir. 2006)	33
<u>Marrama v. Citizens Bank,</u> 127 S. Ct. 1105 (2007)	17
<u>Members of City Council v. Taxpayers for Vincent,</u> 466 U.S. 789 (1984)	33
<u>Milavetz, Gallop & Milavetz P.A. et al. v. United States,</u> 355 B.R. 758 (D. Minn. 2006)	8
<u>NLRB v. Jones & Laughlin Steel Corp.,</u> 301 U.S. 1 (1937)	30
<u>Ohralik v. Ohio State Bar Association,</u> 436 U.S. 447 (1978)	34
<u>Olsen v. Gonzales,</u> 350 B.R. 906 (D. Or. 2006) 7, 8, 10, 22, 23, 25, 29, 31, 32, 33	
<u>Olsen v. Gonzales,</u> 368 B.R. 886 (D. Or. 2007)	9
<u>Planned Parenthood v. Casey,</u> 505 U.S. 833 (1992)	7
<u>United States v. Esparza-Ponce,</u> 193 F.3d 1133 (9th Cir. 1999)	31
<u>United States v. Fox,</u> 95 U.S. 670 (1877)	24
<u>United States v. Lujan,</u> 504 F.3d 1003 (9th Cir. 2007)	13
<u>United States v. Menasche,</u> 348 U.S. 528 (1955)	26
<u>United States v. Wenner,</u> 351 F.3d 969 (9th Cir. 2003)	26

Zauderer v. Office of Disciplinary Counsel,
 471 U.S. 626 (1985) 7

Zelotes v. Martini,
 352 B.R. 17 (D. Conn. 2006) 8

Statutes:

Bankruptcy Abuse Prevention and Consumer
 Protection Act of 2005, Pub. L. No. 109-8,
 119 Stat. 23 (2005) 2, 3, 16, 18

11 U.S.C. § 101(3) 4
 11 U.S.C. § 101(4A) 3, 4
 11 U.S.C. § 101(12A) 3

11 U.S.C. § 523(a)(2)(C) 14

11 U.S.C. § 526 2, 4
 11 U.S.C. § 526(a)(1) 25
 11 U.S.C. § 526(a)(2) 25
 11 U.S.C. § 526(a)(3) 25
 11 U.S.C. § 526(a)(4) passim
 11 U.S.C. § 526(c)(2) 6, 27
 11 U.S.C. § 526(c)(3) 6
 11 U.S.C. § 526(c)(3)(B) 27
 11 U.S.C. § 526(c)(5) 6, 27

11 U.S.C. § 527 2, 4

11 U.S.C. § 528 2, 4

11 U.S.C. § 707 4
 11 U.S.C. § 707(b) 4, 14, 17
 11 U.S.C. § 707(b)(1) 17, 18, 28
 11 U.S.C. § 707(b)(2)(A) 19
 11 U.S.C. § 707(b)(3) 18, 28
 11 U.S.C. § 707(b)(4)(A) - (B) 28
 11 U.S.C. § 707(b)(4)(C) - (D) 4, 5, 20, 21, 28

18 U.S.C. § 152(7) 24

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

Legislative Materials:

H.R. Rep. No. 109-31, pt. 1 (2005), reprinted in
 2005 U.S.C.C.A.N. 88 3, 4, 10, 16, 17, 18, 19, 20, 22

S. Rep. No. 98-65 (1983). 15, 32

Bankruptcy Reform Act of 1999 (Part II), Hearing
before House Judiciary Comm., 106th Cong. 30 (1999)
 (testimony of Judge William Brown).. 20

Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150
before House Judiciary Comm., 105th Cong. 25 (1998)
 (testimony of Judge Randall Newsome).. 20

Report of the Commission of the Bankruptcy
Laws of the United States, H.R. Doc. No. 93-137
 Part I (July 1973).. 15, 31

Rules:

Fed. R. App. P. 4(a)(1)(B). 1

Fed. R. Civ. P. 25(d).. 1

Other Authorities:

ABA Model Rules of Prof. Conduct 1.2(d).. 22

 Oregon R. Prof. Conduct 1.2(c).. 22

 Washington R. Prof. Conduct 1.2(d).. 22

Black's Law Dictionary (8th ed. 2004).. 24

Darling & Redmiles, Protecting the Integrity
of the System: the Civil Enforcement Initiative,
 Am. Bankr. Inst. J. 12 (Sept. 2002). 18

Random House Dictionary Unabridged (2d ed. 1987). 24

Webster's Third New International Dictionary (1993).. 24

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 07-35616, 07-35762

ERIC 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;¹
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

BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. ER50.² The district court entered final judgment on July 13, 2007. ER6. Defendants filed a timely notice of appeal on July 24, 2007. ER3; see Fed. R. App. P. 4(a)(1)(B). Plaintiffs filed a timely notice of cross-appeal on

¹ Pursuant to Fed. R. Civ. P. 25(d), Attorney General Michael B. Mukasey has been substituted for Alberto Gonzales as defendant-appellant.

² "ER" denotes a citation to appellants' excerpts of record.

September 6, 2007. ER1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether 11 U.S.C. § 526(a)(4), which precludes attorneys and other bankruptcy professionals from advising clients to take on additional debt in contemplation of filing a bankruptcy petition, violates the First Amendment.

STATEMENT OF THE CASE

As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), Congress established certain minimum standards of professional conduct for attorneys and other bankruptcy professionals who provide services to consumer debtors in exchange for a fee. See 11 U.S.C. §§ 526-528. Among other requirements, Congress provided that attorneys may not advise their clients to take on additional debt in contemplation of filing a bankruptcy petition. 11 U.S.C. § 526(a)(4).

Plaintiffs are two attorneys who represent consumer debtors in bankruptcy and a third attorney who sometimes counsels clients regarding debt. Shortly after the 2005 Act became effective, plaintiffs filed this facial challenge to the Act's professional conduct regulations. Although the district court rejected most of plaintiffs' constitutional claims, it struck down section 526(a)(4) under the First Amendment. These appeals followed.

STATEMENT OF FACTS

A. Statutory Background

1. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Congress enacted "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. 109-31, pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89 ("House Report"). Described by Congress as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," id. at 3, the Act both modifies the substantive standards for bankruptcy relief and adopts a variety of new measures intended to curb abusive practices that Congress concluded had come to pervade the bankruptcy system.

As part of this reform package, Congress established certain minimum standards of professional conduct for attorneys and other bankruptcy professionals – collectively termed "debt relief agencies" – who provide for-profit services to consumer debtors. See 11 U.S.C. § 101(12A) (definition of "debt relief agency").³

³ The term "debt relief agency" includes "any person" who, for a fee, "provides any bankruptcy assistance to an assisted person." 11 U.S.C. § 101(12A). "Bankruptcy assistance," in turn, is defined to include "providing legal representation." Id. § 101(4A). An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose

(continued...)

Misleading and unethical practices by such professionals, Congress determined, had become a substantial cause of abusive bankruptcy petitions, which can jeopardize a debtor's opportunity to obtain relief. See 11 U.S.C. § 707(b) (dismissal of consumer petitions for abuse). Indeed, 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, at 5 (citation omitted). Congress responded in the 2005 Act by "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." Id. at 17.

2. The new standards enacted by Congress are principally set forth in 11 U.S.C. §§ 707 and 526-528.⁴ Section 707, as amended by the 2005 Act, now requires bankruptcy attorneys to make their 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). The legislation further requires the debtor's attorney to certify that the

³(...continued)
nonexempt property is less than \$164,250." Id. § 101(3); cf. id. § 104(a) (adjustment of dollar figures).

⁴ For the Court's convenience, these provisions are reproduced in full in an addendum to this brief.

petition does not constitute an "abuse" under section 707(b).

See *ibid.*

Sections 527 and 528 set forth several interrelated disclosure requirements. Section 527 requires debt relief agencies to provide specific notices to clients, including a description of the different types of relief available in the bankruptcy system. Section 528(a) similarly requires debt relief agencies to provide clients with written contracts that clearly explain the services that will be provided and the fees that will apply, while section 528(b) requires debt relief agencies to make related disclosures in their advertisements to the public.

Finally, section 526 lays down four basic rules of professional conduct. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising an assisted person 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, the benefits that will accrue, or the risks that may be entailed in filing for bankruptcy. And section 526(a)(4), the provision at issue in this appeal, 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).

The primary remedy for violations of these sections is a civil action by the debtor, or by the relevant state attorney general, to recover actual damages to the debtor. See 11 U.S.C. § 526(c)(2) & (c)(3). A bankruptcy court may impose an "appropriate civil monetary penalty" if it finds intentional violations of these provisions or a clear and consistent practice of violations. Id. § 526(c)(5).

B. Facts and Prior Proceedings

1. Plaintiffs Eric Olsen and Kevin Swartz are attorneys who represent consumer debtors in bankruptcy. ER50. A third plaintiff, Jason McBride, is also an attorney and occasionally counsels clients regarding debt relief, but "does not represent clients in bankruptcy matters nor does he file petitions for relief under the Bankruptcy Code." Ibid.

Shortly after the 2005 Act became effective, plaintiffs filed this facial constitutional challenge to the "debt relief agency" provisions of the Act. Their complaint alleged that the professional conduct regulations in sections 526(a)(1) and (a)(4), as well as the disclosure obligations in sections 527 and

528, violate the First Amendment. ER52-53. Plaintiffs also asserted that the "debt relief agency" provisions as a whole are unconstitutionally vague under the Fifth Amendment. ER53.

2. On the government's motion, the district court dismissed plaintiffs' First Amendment challenge to section 526(a)(1), finding nothing unconstitutional in the Act's requirement that bankruptcy attorneys perform all services promised to debtors. See Olsen v. Gonzales, 350 B.R. 906, 916-917 (D. Or. 2006) (ER21-47). The court likewise rejected plaintiffs' "compelled speech" claims regarding the disclosure requirements in sections 527 and 528, noting that the Supreme Court has repeatedly upheld statutes requiring professionals to disclose basic factual information to their clients. Id. at 917-920 (citing, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 881-883 (1992), and Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)). In addition, the court dismissed plaintiffs' Fifth Amendment vagueness claim. Id. at 921-922.

The district court refused, however, to dismiss plaintiffs' challenge to section 526(a)(4), declaring that the provision is "overly restrictive in violation of the First Amendment." Id. at 916. The court recognized that, in precluding attorneys from encouraging their clients to take on additional debt on the eve of bankruptcy, the provision "does strike at actual opportunistic abuses." Ibid. Nevertheless, the court believed that section

526(a)(4) is "not sufficiently narrow to achieve the legitimate interest of preventing abuse in the bankruptcy system" because, on the court's reading, the statute "also ensnares advice regarding lawful actions in contemplation of bankruptcy that benefit the debtor and creditors." Ibid.

The district court explained that "'sometimes taking on more debt could be the most financially prudent option for someone considering bankruptcy,'" such as "'refinancing [a debt] at a lower rate to reduce payments and forestall or even prevent entering bankruptcy,'" or "'taking on secured debt such as a loan on an automobile that would survive bankruptcy and also enable the debtor to continue to get to work and make payments.'" 350 B.R. at 916 (quoting Hersh v. United States, 347 B.R. 19, 24 (N.D. Tex. 2006), appeal docketed, No. 07-10226 (5th Cir.)).⁵ Thus, the court concluded, "'section 526(a)(4) prevents lawyers from giving clients their best advice.'" Ibid.

The district court subsequently granted plaintiffs' motion for summary judgment. Olsen v. Gonzales, 368 B.R. 886 (D. Or. 2007) (ER8-11).

⁵ In addition to the court below, district courts in three other circuits have declared section 526(a)(4) invalid on essentially the same grounds. Appeals from those decisions are now pending. See Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006), appeal docketed, No. 07-10226 (5th Cir.); Zelotes v. Martini, 352 B.R. 17 (D. Conn. 2006), appeal docketed sub nom. Zelotes v. Adams, No. 07-1853 (2d Cir.); Milavetz, Gallop & Milavetz P.A. et al. v. United States, 355 B.R. 758 (D. Minn. 2006), appeal docketed, No. 07-2405 (8th Cir.).

3. The district court entered final judgment in July 2007. ER6. The court issued a declaratory judgment that section 526(a)(4) violates the First Amendment. ER6. In addition, the court permanently enjoined the government from enforcing 11 U.S.C. § 526(a)(4) against plaintiffs Olsen and Swartz in the Districts of Oregon and Washington, or against plaintiff McBride in the District of Oregon. ER6. On plaintiffs' remaining claims, the court entered judgment in favor of the government.

These appeals followed.

SUMMARY OF ARGUMENT

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides a range of measures designed to curb abuses of the bankruptcy system, both by debtors and by the professionals who represent them. A principal concern of the legislation was to address the recurring problem of debtors' purposefully incurring new debt in contemplation of filing a bankruptcy petition in order to take advantage of the Bankruptcy Code's discharge provisions or otherwise manipulate its protections. Among other measures, the 2005 Act restricts the ability of debtors to discharge such debt and expands the authority of bankruptcy courts to dismiss petitions for abuse of the bankruptcy system, including in cases in which debtors abuse the Code by taking on additional debt in contemplation of filing a petition.

At the same time, Congress also enacted a series of provisions designed to “strengthen[] professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases.” H.R. Rep. No. 109-31, pt. 1, at 17. The 2005 Act thus seeks to enhance standards of professional conduct in the bankruptcy bar by imposing a duty on bankruptcy attorneys to certify that the petitions filed by their clients do not constitute an abuse of the Code, and by authorizing bankruptcy courts to impose sanctions for violations of that duty.

Section 526(a)(4), at issue here, complements this duty by precluding attorneys from advising their clients “to incur more debt in contemplation of” filing a petition for bankruptcy relief. 11 U.S.C. § 526(a)(4). As the district court recognized, section 526(a)(4) advances Congress’s “legitimate interest of preventing abuse in the bankruptcy system,” and the statute “does strike at actual opportunistic abuses.” 350 B.R. at 916.

The district court did not suggest that debtors may properly run up additional debt on the eve of bankruptcy in order to manipulate the bankruptcy system, or that attorneys are constitutionally entitled to encourage them to do so. Indeed, rules of professional conduct for attorneys commonly prohibit advice to engage in fraudulent or improper conduct. Nevertheless, the district court concluded that section 526(a)(4)

is fatally overbroad, holding that the provision encompasses even advice to engage in conduct consistent with the Bankruptcy Code and the client's legitimate interests.

That reading extends section 526(a)(4) far beyond Congress's purposes. In precluding attorneys from urging their clients to take on additional debt "in contemplation of" a bankruptcy filing, Congress was concerned only with debt purposefully accumulated in order to manipulate the bankruptcy system, such as to secure a more advantageous discharge or to circumvent the requirements for chapter 7 relief. That interpretation follows from the text, structure, and legislative history of the provision, which make clear that Congress's purpose in section 526(a) was to ensure that attorneys and other "debt relief agencies" do not become the affirmative engines of bankruptcy abuse. Nothing in the statute warrants the district court's assumption that section 526(a)(4) would restrict a lawyer from offering candid advice on the legality of a debtor's proposed course of conduct, or that it would prohibit an attorney from urging a client to take actions consistent with the Bankruptcy Code and the client's best interests.

Indeed, the principal remedies provided by Congress for violations of section 526(a)(4) – suits for "actual damages" suffered by the debtor – presuppose that the client has, in fact, been injured by the attorney's advice. As these remedies

reflect, section 526(a)(4) is directed to the very kind of abusive accumulation of additional debt that can trigger penalties against the debtor under the Code, including dismissal of the petition or denial of a discharge. The statute has no application to good-faith advice to engage in conduct consistent with the Code and the client's interests.

In any event, the district court erred in adopting the broadest possible interpretation of section 526(a)(4) without regard to congressional intent. A statute should be construed to avoid, rather than to invite, constitutional difficulties. The district court failed to address – or even consider – narrower interpretations that would have avoided the constitutional difficulties it postulated.

In addition, the district court's analysis departed from basic principles of overbreadth analysis. The court did not question that the statute would be constitutional in many of its applications, even under the court's own broad reading. The court articulated no basis for nonetheless striking down the statute on its face under the First Amendment. The district court's error in this regard is highlighted by its willingness to invalidate section 526(a)(4) in its entirety, without discussing or separately analyzing the portion of the statute that precludes an attorney from advising a debtor to incur additional debt in order to pay the attorney's own fees.

STANDARD OF REVIEW

This Court reviews challenges to the constitutionality of a federal statute de novo. United States v. Lujan, 504 F.3d 1003 (9th Cir. 2007). A district court's interpretation of a federal statute is likewise reviewed de novo. Katie A. ex rel Ludin v. Los Angeles County, 481 F.3d 1150, 1157 (9th Cir. 2007).

ARGUMENT

CONGRESS CONSTITUTIONALLY REGULATED THE CONDUCT OF BANKRUPTCY PROFESSIONALS BY PRECLUDING THEM FROM ENCOURAGING CLIENTS TO ABUSE THE BANKRUPTCY SYSTEM BY TAKING ON ADDITIONAL DEBT IN CONTEMPLATION OF FILING A PETITION.

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to curb a variety of abusive practices by consumer debtors and their professional representatives. One major concern of the legislation was to address the recurring problem of debtors' attempting to exploit the Bankruptcy Code's discharge provisions, or otherwise manipulate the bankruptcy system, by purposefully accumulating additional debt prior to filing a petition for relief. Among other reforms, the 2005 Act expanded the authority of the bankruptcy courts to dismiss petitions for such abuses, see generally 11 U.S.C. § 707(b), and required attorneys affirmatively to certify that no basis exists for deeming their clients' petitions abusive.

Section 526(a)(4) complements these reforms by precluding bankruptcy professionals from encouraging their clients to abuse the bankruptcy system by taking on additional debt in contemplation of filing a bankruptcy petition. Because this provision is a permissible regulation of professional conduct that does not impinge upon the First Amendment rights of attorneys or their clients, the judgment of the district court should be reversed.

I. The 2005 Act Addresses Abuses Of The Code By Debtors Who Incur New Debt In Anticipation Of Bankruptcy And By Attorneys Who Encourage Clients To Engage In Such Conduct.

A. Abuses Of The System By Debtors Incurring Additional Debt In Contemplation Of Bankruptcy.

Congress has long been aware that the relief afforded by the bankruptcy laws creates a perverse incentive for debtors to amass additional debt in contemplation of obtaining a discharge. Congress has repeatedly expressed its view that such conduct poses a fundamental threat to the Code's twin goals of affording debtors a fresh start while providing an orderly and equitable system of resolving creditors' claims.

For example, when Congress enacted 11 U.S.C. § 523(a)(2)(C), which creates 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." S. Rep. No. 98-65, at 9 (1983). 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.; see also In re Eashai, 87 F.3d 1082, 1092 (9th Cir. 1996). Indeed, 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." Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. I, at 11 (July 1973).

In adopting the 2005 Act, Congress expressed concern that these 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.” H.R. Rep. No. 109-31, pt. 1, at 15 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 101 (“House Report”). Accordingly, Congress took a series of new steps in the 2005 Act to combat the problem of debts incurred in contemplation of bankruptcy – for example, by reducing the threshold amounts at which certain types of eve-of-bankruptcy debts, such as cash advances, become presumptively fraudulent and therefore nondischargeable. See Pub. L. No. 109-8, § 310, 119 Stat. at 84 (amending 11 U.S.C. § 523(a)(2)(C)). As this Court has previously noted, one of the factors that courts consider in determining whether a such an eleventh-hour debt should be deemed fraudulent is “[w]hether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made.” In re Eashai, 87 F.3d at 1087; see also In re Mercer, 246 F.3d 391, 408 (5th Cir. 2001) (en banc) (“whether, prior to card-use, an attorney was consulted about bankruptcy”).

Congress also greatly expanded the authority of the bankruptcy courts to dismiss petitions for abuse of the bankruptcy system, including in cases in which debtors abuse the Code by purposefully incurring additional debt in contemplation of filing a petition. Even before the 2005 legislation, a bankruptcy court was authorized to dismiss a petition for “substantial abuse” under former 11 U.S.C. § 707(b)(1). See,

e.g., In re Price, 353 F.3d 1135 (9th Cir. 2004). Moreover, it was established that, under the “substantial abuse” standard, a debtor’s purposeful accumulation of debt in contemplation of bankruptcy could justify dismissal. See In re Price, 353 F.3d at 1139-40 (describing factors relevant to a finding of substantial abuse, including “[w]hether the debtor has engaged in eve-of-bankruptcy purchases”); see also, e.g., In re Charles, 334 B.R. 207, 222 (Bankr. S.D. Tex. 2005) (“It is settled law that a debtor’s good faith should be questioned if the debtor makes purchases in contemplation of a bankruptcy case.”); In re Rathbun, 309 B.R. 901, 904 (Bankr. N.D. Tex. 2004); In re Aiello, 284 B.R. 756, 761 (Bankr. E.D.N.Y. 2002).⁶

In the 2005 Act, Congress reduced the threshold finding required under 11 U.S.C. § 707(b) for a bankruptcy court to dismiss a debtor’s petition as abusive, from “substantial abuse” to merely “abuse,” see House Report at 48, and it repealed the statutory presumption in favor of granting the relief sought by the debtor, see id. at 49; Pub. L. No. 109-8, § 102, 119 Stat. at 27. Congress further underscored that, in determining whether a petition should be dismissed for abuse, a bankruptcy court should

⁶ As the Supreme Court recently explained in the context of chapter 13 debtors, bad faith pre-petition conduct by a debtor justifies dismissal of the petition because such a debtor “is not a member of the class of ‘honest but unfortunate debtor[s]’ that the bankruptcy laws were enacted to protect.” Marrama v. Citizens Bank, 127 S. Ct. 1105, 1111 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)).

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). At the same time, Congress authorized any party in interest – including, for example, unsecured creditors aggrieved by a debtor’s eleventh-hour accumulation of new debt – to file a motion for such relief. See id. § 707(b)(1). Under prior law, only the United States Trustee, or the court on its own motion, could seek to dismiss a petition as abusive. See, e.g., In re Price, 353 F.3d at 1138.

**B. Abuses Of The System By Lawyers
And Other Bankruptcy Professionals.**

Congress also responded in the 2005 Act to evidence that attorneys and other bankruptcy professionals often played a critical role in abuse of the bankruptcy system. Citing data collected by the U.S. Trustee Program, the House Report noted that the study “consistently identified” among the sources of abuse “misconduct by attorneys and other professionals” and “problems associated with bankruptcy petition preparers.” House Report at 5 (quoting Darling & Redmiles, Protecting the Integrity of the System: the Civil Enforcement Initiative, Am. Bankr. Inst. J. 12 (Sept. 2002)).

The need to address misconduct by bankruptcy professionals was made particularly urgent by the “principal consumer bankruptcy reform” in the 2005 legislation, which was the

adoption of a "means testing" mechanism intended to restrict debtors who have the ability to repay at least some of their debts from obtaining a complete discharge under chapter 7. See House Report at 48; see also id. at 3 (describing means testing as the "heart" of the 2005 Act's reform provisions). Under the new means-testing provision, a debtor's petition for complete relief under chapter 7 is presumed to be abusive if the debtor's income exceeds his unsecured debts by a certain ratio. See 11 U.S.C. § 707(b)(2)(A). The effect of the means test is to ensure that debtors who have the ability to repay a portion of their debts are channeled into chapter 13, which provides an opportunity for a structured repayment plan.

As Congress recognized, however, the means test exacerbates the incentive for debtors to manipulate the system by "loading up" on debt in contemplation of filing a petition, because a higher debt ratio can allow an otherwise borderline debtor to avoid the burdens of a chapter 13 repayment plan and obtain a complete and immediate discharge under chapter 7. Concern was expressed at the congressional hearings that attorneys would respond to the means test by counseling 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." Thus, "[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].” Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong. 25 (1998) (testimony of Judge Randall Newsome); see also Bankruptcy Reform Act of 1999 (Part II), Hearing before House Judiciary Comm., 106th Cong. 30 (1999) (testimony of Judge William Brown).

Congress addressed these problems in the 2005 Act by “strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases” in return for a fee. House Report at 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 she believes the petition is warranted by the facts, that she has no reason to believe the debtor’s schedules are incorrect, and that she has determined that the petition does not constitute an “abuse” under section 707(b). See ibid. Congress thus effectively required bankruptcy

attorneys to warrant that their clients' pre-petition conduct and financial circumstances – including any assumption of debt in contemplation of bankruptcy – do not provide grounds for dismissal of the petition as abuse of the bankruptcy system.

Section 526(a) complements these requirements by precluding attorneys and other “debt relief agencies” from deceiving their clients or advising them to abuse the bankruptcy system. Thus, section 526(a)(2) prohibits attorneys from encouraging clients to make false statements in a bankruptcy proceeding, and section 526(a)(3) bars attorneys from misrepresenting the risks and benefits of seeking bankruptcy relief. Similarly, section 526(a)(4), at issue here, precludes attorneys from encouraging their clients to abuse the bankruptcy system by taking on additional debt in contemplation of filing a bankruptcy petition.

II. Section 526(a)(4) Constitutionally Restricts Attorneys From Encouraging Clients To Take On Additional Debt In Contemplation of Bankruptcy.

A. The First Amendment Does Not Prohibit Restrictions On Attorney Advice To Engage In Improper Conduct.

The district court did not suggest that the First Amendment bars Congress from restricting attorneys from encouraging their clients to abuse the bankruptcy system. Indeed, it is established that attorneys, like other professionals, are subject to a variety of restrictions in urging their clients to undertake action. See, e.g., ABA Model Rules of Prof. Conduct R. 1.2(d)

("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but 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"); accord Oregon R. Prof. Conduct 1.2(c); Washington R. Prof. Conduct 1.2(d).

Regulations of professional ethics of this kind do not violate the First Amendment. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071-76 (1991) (discussing the standards governing regulation of attorney speech). Although the district court did not regard section 526(a)(4) as a regulation of professional conduct, see 350 B.R. at 915 n.5, Congress clearly understood the regulation in this manner. See House Report at 17 (describing new provisions as "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases"). Moreover, the statute addresses conduct that has been held to fall squarely within the scope of Model Rule 1.2(d). See Attorney Grievance Comm'n of Maryland v. Culver, 381 Md. 241, 275-76 (2004) (attorney violated Rule 1.2(d) by advising a client to obtain credit card loans with the intent that the debt be discharged in bankruptcy).

B. Section 526(a) (4) Precludes Lawyers From Encouraging Debtors To Abuse The Bankruptcy System.

1. The district court interpreted the statute far more broadly. The court recognized that Congress's purpose was to "prevent[] abuse in the bankruptcy system," and it acknowledged that the restriction in section 526(a) (4) "does strike at actual opportunistic abuses." 350 B.R. at 916. Nevertheless, without analysis of the statutory text, the district court further held that the provision "also ensnares advice regarding lawful actions in contemplation of bankruptcy that benefit the debtor and creditors." Ibid. The district court thus assumed that section 526(a) (4) would apply to attorney advice that is consistent both with the client's interests and with the policies of the Bankruptcy Code.

Reading the statute in this manner expands its scope far beyond Congress's purpose to prevent abuse and manipulation of the bankruptcy system. By providing that a debt relief agency shall not advise a client "to incur more debt in contemplation of such person filing a case under this title," § 526(a) (4) (emphasis added), Congress addressed only advice to a debtor to accumulate additional debt for the purpose of manipulating the bankruptcy system, such as by "loading up" on new debt in order to obtain a more advantageous discharge or circumvent the means test.

That conclusion follows from the plain language of the statute. The phrase "in contemplation of" bankruptcy carries a recognized connotation of abusive intent. See Black's Law Dictionary 336 (8th ed. 2004) (defining "contemplation of bankruptcy" as "the 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"); see also, e.g., United States v. Fox, 95 U.S. 670, 672 (1877) ("To legislate for the prevention of frauds * * * when committed in contemplation of bankruptcy, would seem to be within the competency of Congress."); In re Mercer, 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc) (describing "loading up" as the practice of "incurring card debt in contemplation of bankruptcy"); id. at 421 (referring to "a dishonest but patient debtor who intends to incur card-debt in contemplation of discharge"); cf. 18 U.S.C. § 152(7) (prohibiting the fraudulent transfer or concealment of property "in contemplation of a case under title 11").⁷ In other contexts involving different statutory policies, the same phrase may reflect the broad scope assumed here by the district court. E.g., Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 478 (1933)

⁷ See also Webster's Third New International Dictionary 491 (1993) (defining "contemplation" to mean, inter alia, "the act of intending or considering a future event"); Random House Dictionary Unabridged 438 (2d ed. 1987) ("contemplate" means, inter alia, "to have as a purpose; intend").

(interpreting bankruptcy provision regarding attorney compensation). In this context, however, it is apparent that Congress employed the phrase for its recognized connotation of conduct intended to manipulate the outcome of a bankruptcy proceeding.

That Congress intended to address abusive conduct is also clear from the statutory context in which it placed the provision. Section 526(a)(4) is one of four subsections of section 526(a). The other three subsections indisputably provide rules of professional conduct designed to protect debtors from abusive practices by bankruptcy attorneys and other debt relief agencies. See 11 U.S.C. § 526(a)(1) (debt relief agencies must perform all promised services); id. § 526(a)(2) (prohibiting debt relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief); id. § 526(a)(3) (prohibiting debt relief agencies from misrepresenting to debtors the services to be provided or the costs or benefits of filing for bankruptcy relief). Against this background, the district court plainly erred in construing the fourth subsection to prohibit not only abusive advice, but also “advice regarding lawful actions in contemplation of bankruptcy that benefit the debtor and creditors.” 350 B.R. at 916.

The district court’s reading, moreover, would render the second half of section 526(a)(4) superfluous. In addition to the

restriction on advice to incur new debt "in contemplation of" a bankruptcy petition, section 526(a)(4) precludes debt relief agencies from advising debtors "to incur more debt * * * to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for representing a debtor in a case under this title." 11 U.S.C. § 526(a)(4). If, as the district court apparently believed, Congress intended the phrase "in contemplation of" bankruptcy to encompass any debt incurred in anticipation of bankruptcy, including necessary debts incurred for non-abusive purposes, Congress would have had no reason to add the additional restriction against advising a debtor to incur debt to pay his bankruptcy attorney. As the Supreme Court has emphasized, it is the duty of the courts "to give effect, if possible, to every clause and word of a statute." Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)); United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003). Here, the separate restriction against advising debtors to incur new debt to pay attorney fees was necessary because the "in contemplation of" provision addresses only advice to engage in abusive conduct.⁸

⁸ As noted below, although the district court struck down section 526(a)(4) in its entirety, the court failed to discuss (or even mention) the statute's separate prohibition on advice to incur debt to pay plaintiffs' own fees. See infra Part III.

2. The remedial provisions of the statute underscore the error of the district court's interpretation. Congress's intent in section 526(a)(4) was to protect consumer debtors from active encouragement by their representatives to engage in abusive conduct that could result in the dismissal of their petition or other sanctions. Consistent with that intent, 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. See id. § 526(c)(2); see also id. § 526(c)(3)(B) (authorizing suits by state attorney general to recover "actual damages" on debtor's behalf). The power of the bankruptcy court to impose an "appropriate civil penalty" is limited to cases of intentional violations and patterns of misconduct. See id. § 526(c)(5). Congress's emphasis in these provisions on the debtor's "actual damages" presupposes that the debtor has been injured by the attorney's conduct: advice that is in the debtor's best interests and fully consistent with the Bankruptcy Code does not trigger any remedial provision.

Quite apart from section 526(a)(4), moreover, attorneys themselves face sanctions under the Bankruptcy Code for actively encouraging their clients to accumulate additional debt in order to facilitate a bankruptcy filing, because the 2005 Act requires attorneys to certify that the petitions filed by their clients

are not abusive. As discussed above, the Act imposed a new duty on every bankruptcy attorney make a reasonable investigation into the factual basis for the debtor's petition (including a reasonable inquiry into the veracity of the debtor's debt and asset schedules) and to certify that, in the attorney's judgment, the petition will not be subject to dismissal for abuse. See 11 U.S.C. § 707(b)(4)(C)-(D); see also id. § 707(b)(4)(A)-(B) (authorizing civil monetary penalties against attorneys who make false certifications). At the same time, Congress lowered the standard for dismissing a petition as abusive, and it made clear that a bankruptcy court, in determining whether to grant such a motion, should consider whether the debtor has acted in bad faith. Id. §§ 707(b)(1), 707(b)(3); cf. In re Charles, 334 B.R. 207, 222 (Bankr. S.D. Tex 2005) ("It is settled law that a debtor's good faith should be questioned if the debtor makes purchases in contemplation of a bankruptcy case."). Under these circumstances, a bankruptcy attorney plainly could not encourage a client to incur new debts just to buttress an anticipated bankruptcy filing. Section 526(a)(4) provides the debtor with remedies against attorneys who engage in such abusive conduct and jeopardize the debtor's right to relief.

3. Section 526(a)(4) therefore has no application to the hypothetical conduct that troubled the district court. An attorney would be free to advise a client to refinance her debts

at a lower rate to prevent bankruptcy, 350 B.R. at 916,⁹ or to take on secured debt to buy an automobile that would “enable the debtor to continue to get to work and make payments,” ibid. (quoting 347 B.R. at 24), providing that the debtor made all necessary disclosures to the lender. In neither case would the attorney be advising the debtor to incur additional debt for the purpose of abusing the bankruptcy system. Cf. Culver, 381 Md. at 275-76 (attorney violated Rule 1.2(d) by advising a client to obtain credit card loans with the intent that the debt be discharged in bankruptcy). Congress’s concern in section 526(a)(4) was not to proscribe ordinary legal advice, but to prevent attorneys and other bankruptcy professionals from becoming the affirmative engines of bankruptcy abuse, thereby both undermining the policies of the Code and jeopardizing their clients’ petitions for relief.

C. Section 526(a)(4) Should Not Be Construed More Broadly Than Necessary To Achieve Congress’s Purposes.

In any event, the district court erred in adopting the broadest possible reading of the statute without regard to whether it was required by the statutory language and congressional intent. It is a “cardinal principle” of statutory

⁹ The district court failed to explain why merely 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).

interpretation that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Indeed, “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court’s] plain duty is to adopt that which will save the act.” Apache Survival Coalition v. United States, 21 F.3d 895, 903 (9th Cir. 1994) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

The district court departed from this principle in failing to adopt – or even address – any narrower reading of section 526(a)(4) that would avoid the constitutional difficulties that it postulated. If the district court believed that the avoidance canon was inapplicable because plaintiffs have asserted a First Amendment overbreadth challenge, it was mistaken: “Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.” United States v. Esparza-Ponce, 193 F.3d 1133, 1137 (9th Cir. 1999) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

The district court did not suggest that its sweeping interpretation of section 526(a)(4) was consistent with

Congress's purposes in the 2005 legislation. To the contrary, the court acknowledged that Congress enacted the provision to "prevent[] abuse in the bankruptcy system." 350 B.R. at 916. That purpose is indeed unmistakable: as already discussed, section 526(a)(4) is just one of many measures in the 2005 Act – including the remaining three subsections of section 526(a) – aimed at preventing abuses of the bankruptcy system by debtors and their professional representatives.

Against this background, it is apparent that Congress intended the phrase "to incur more debt in contemplation of" bankruptcy in section 526(a)(4) to refer to the recognized problem of debtors' purposefully accumulating new debt in an effort to abuse the protections of the Bankruptcy Code. Cf. Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. I, at 11 (observing 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" (emphasis added)); S. Rep. No. 98-65, at 9 ("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." (emphasis added)). That interpretation both comports with the statutory text and accomplishes Congress's purposes in the 2005 Act.

The district court erred in failing to adopt this narrower interpretation and thereby avoid the constitutional difficulties posed by its far broader construction.

III. The District Court Failed To Apply Basic Principles of Overbreadth Analysis.

The district court also erred in invalidating section 526(a)(4) on its face,¹⁰ without regard to basic principles of overbreadth analysis and without discussing (or even mentioning) the statute's separate restriction against advising debtors to incur more debt to pay the attorney's own fees.

Even outside the context of ethical rules governing attorneys and other closely regulated professions, a statute may not be invalidated on its face solely because of concerns allegedly raised by some of its potential applications. "Because a facial overbreadth challenge is a strong remedy, 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.'" Klein v. San Diego County, 463 F.3d 1029, 1038 (9th Cir. 2006) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984)). "Rather, the

¹⁰ Plaintiffs do not seek as-applied relief. See 350 B.R. at 914 (noting "there is no as applied challenge here"). The district court issued an unqualified declaratory judgment "that 11 U.S.C. § 526(a)(4) violates the First Amendment of the Constitution," and enjoined enforcement of the statute against plaintiffs in the Districts of Oregon and Washington, without regard to the factual context. ER6 (final judgment).

Supreme Court has required that the overbreadth 'not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" Ibid. (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)) (emphasis in original).

Here, the district court recognized that, even under its own reading of the statute, section 526(a)(4) would be constitutional in many of its applications. See 350 B.R. at 916 (recognizing that the statute "does strike at actual opportunistic abuses"). The court did not explain why it nevertheless believed facial invalidation was warranted, even assuming that the court was compelled to interpret the statute to cover instances in which an attorney's advice to incur additional debt is fully consistent with the Bankruptcy Code and the client's best interests.

The district court's error is highlighted by its invalidation of section 526(a)(4) in its entirety. As previously noted, the statute includes a separate provision that precludes an attorney from advising a debtor to incur additional debt in order to pay the attorney's own fees. See 11 U.S.C. § 526(a)(4) ("A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt * * * to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for representing a debtor in a case under this title."). The district court's willingness to strike down section 526(a)(4) on its face, without addressing

the constitutionality of this separate provision, underscores the court's failure to recognize the nature of the issues presented by this facial challenge and to adopt a reading of the statute that avoids constitutional questions to the extent possible.

In any event, the district court's sub silentio invalidation of the attorney-fee provisions of section 526(a)(4) cannot withstand scrutiny. Congress plainly possesses the authority to prevent bankruptcy attorneys from abusing their positions as officers of the court and "trusted agents of their clients," Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978), in order to obtain preferential treatment for themselves in the bankruptcy process. An attorney who encourages a debtor to incur new (and almost certainly unsecured) debt in order to pay the attorney's own fees is effectively urging the debtor to exploit the bankruptcy system to shift the cost of the lawyer's services onto unsuspecting creditors. Nothing in the First Amendment prevents Congress from forbidding such deceptive practices by members of the bankruptcy bar, and the statute is narrowly tailored to that goal. See Gentile, 501 U.S. at 1071.

IV. Plaintiff McBride Lacks Standing To Challenge Section 526(a)(4).

Finally, there was no basis for the district court to enjoin enforcement of section 526(a)(4) against plaintiff McBride, who does not represent consumer debtors in bankruptcy and consequently has no standing to challenge the constitutionality

of the statute. By its plain terms, section 526(a)(4) applies only to attorneys and other debt relief agencies who advise clients "in contemplation of such person filing a case under this title" or in "preparing for or representing a debtor in a case under this title." 11 U.S.C. § 526(a)(4). According to the complaint, however, plaintiff McBride "does not represent clients in bankruptcy matters nor does he file petitions for relief under the Bankruptcy Code." ER50 (compl. ¶12). McBride therefore lacks standing to challenge section 526(a)(4), and the district court erred in enjoining enforcement of the statute with respect to him. ER6.

CONCLUSION

For the foregoing reasons, the judgment of the district court with respect to the constitutionality of 11 U.S.C. § 526(a)(4) should be reversed.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

KARIN J. IMMERGUT
United States Attorney

MARK B. STERN
(202) 514-5089
MARK R. FREEMAN
(202) 514-5714
Attorneys, Appellate Staff
Civil Division, Room 7228
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

DECEMBER 2007

STATEMENT OF RELATED CASES

There are no related cases of which we are aware.

Mark R. Freeman

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and, according to the count of Corel Wordperfect 12, contains 7,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospace typeface using Corel Wordperfect 12 with Courier New font of no more than 10.5 characters per inch (12 point font).

Mark R. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2007, I caused copies of the foregoing brief to be filed with the Court by Federal Express overnight delivery, and caused copies to be served by Federal Express overnight delivery upon the following counsel:

Keith D. Karnes, Esq.
Olsen, Olsen & Daines, LLC
1599 State St.
Salem, OR 97301
(503) 362-9393

Mark R. Freeman