

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

**COMBINED RESPONSE AND REPLY BRIEF
FOR APPELLANTS**

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INTRODUCTION AND SUMMARY

In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Congress 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 (2005) ("House Report"). Among those provisions are the measures challenged here, which preclude attorneys from urging their clients to take on additional debt in contemplation of

bankruptcy, see 11 U.S.C. § 526(a)(4), and require certain disclosures in attorney advertisements, id. § 528(a)(4), (b)(2). As we established in our opening brief, the district court erred in striking down section 526(a)(4) on its face, and plaintiffs' arguments on cross-appeal are equally without merit.

Section 526(a)(4) prohibits an attorney from advising a debtor "to incur more debt in contemplation of such person filing a case under this title." As plaintiffs do not dispute, Congress enacted this provision in recognition of the fact that debtors frequently "load up" with new debt on the eve of bankruptcy in an effort to game the bankruptcy system. Plaintiffs do not suggest that an attorney's encouragement to amass new debt for such a purpose is protected by the First Amendment. Instead, they contend that the statute should be struck down because, in their view, section 526(a)(4) must be read expansively to encompass not only advice to engage in abusive conduct, but also advice to incur "any debts where a bankruptcy filing is considered, regardless of whether the intended course of action is fraudulent or perfectly legal." Br. 7 (emphasis added).

That interpretation is neither required by the statutory text nor consistent with Congress's purposes in the 2005 Act. Congress did not prohibit all attorney advice regarding new debt prior to bankruptcy; it prohibited attorneys from encouraging their clients to run up additional debt "in contemplation of"

filing a bankruptcy petition. That choice of words is significant: as our opening brief explains (at 23-29), the phrase "in contemplation of" bankruptcy has a well-recognized connotation of abusive purpose. See, e.g., Black's Law Dictionary 336 (8th ed. 2004) (explaining that the phrase "contemplation of bankruptcy" typically connotes "action designed to thwart the distribution of assets in a bankruptcy proceeding"). Congress's placement of this provision in the context of other measures that are plainly addressed to abusive conduct by bankruptcy attorneys further underscores the error of plaintiffs' interpretation. Plaintiffs cannot properly insist that the Court adopt the broadest possible reading of the statute in order to sustain their facial challenge.

On cross-appeal, plaintiffs renew their claims that the advertising disclosure requirements in section 528 violate the First Amendment, and that the "debt relief agency" provisions as a whole are unconstitutionally vague on their face. The district court correctly rejected both contentions.

As plaintiffs do not dispute, Congress enacted section 528 in response to evidence of aggressive lawyer advertisements that promised to wipe out debts, halt foreclosures, and prevent repossessions, yet failed to mention that any such relief would require a petition for bankruptcy. The disclosures provided in section 528 are narrowly drawn to address the problem identified

by Congress, and they burden no more speech than necessary to advance the government's substantial interest in preventing consumers from being misled into filing for bankruptcy relief inadvertently or without adequate consideration of the consequences. Plaintiff McBride's suggestion that section 528 compels him to make false or misleading statements is itself demonstrably false.

Plaintiffs' "vagueness" claim is yet farther afield. Congress did not violate the Constitution by enacting a regulation of bankruptcy professionals that uses terms intimately familiar to such professionals. Plaintiffs' various efforts to conjure ambiguities in the statutory language do not provide a proper basis for invalidating a federal statute on its face.

Finally, pressing an argument that plaintiffs themselves elected not to renew (and have thus waived) on appeal, amicus urges the Court to hold that bankruptcy attorneys are categorically exempt from the professional conduct regulations in the 2005 Act. That interpretation disregards Congress's explicit purpose in the Act to adopt "professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." House Report at 17 (emphasis added). It also founders on the plain text of the statute, which makes the "debt relief agency" provisions applicable to "any person" who provides

paid "legal representation" to consumer debtors – a category that unmistakably includes bankruptcy attorneys.

ARGUMENT

I. SECTION 526(a)(4) CONSTITUTIONALLY PROHIBITS BANKRUPTCY ATTORNEYS FROM ENCOURAGING THEIR CLIENTS TO ABUSE THE BANKRUPTCY SYSTEM.

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

Congress enacted section 526(a)(4) to address a specific and recurring type of abuse under the Bankruptcy Code. As discussed at length in our opening brief (at 14-21), Congress has long been aware that debtors can abuse the protections of the Bankruptcy Code by "loading up" with new debt in anticipation of filing a bankruptcy petition. See House Report at 15 (expressing concern over the continued ability of debtors to "knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief"); S. Rep. No. 98-65, at 9 (1983) (noting special problem posed by "'loading up' in contemplation of bankruptcy"); Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. I, at 11 (July 1973) (concluding 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").

In hearings preceding the 2005 Act, Congress heard evidence that "misconduct by attorneys and other professionals" had been "consistently identified" by the U.S. Trustee Program as a source of abusive bankruptcy filings. See House Report at 5 (citation omitted). Other witnesses, including bankruptcy judges, informed Congress that these problems were likely to be exacerbated by the new "means testing" provisions in the 2005 legislation, which create an incentive for unethical attorneys to encourage their clients to run up additional debt on the eve of bankruptcy in order to obtain a full discharge of their debts under chapter 7. See Gov. Br. at 18-20. It was to address such abusive practices that Congress enacted section 526(a)(4).

None of this is controverted. Plaintiffs do not argue that Congress intended section 526(a)(4) to sweep more broadly, let alone that Congress actually sought to thwart, in the district court's words, "lawful actions in contemplation of bankruptcy that benefit the debtor and creditors." 350 B.R. at 916. Nor do plaintiffs deny that Congress can properly restrict attorneys from encouraging their clients to abuse the Bankruptcy Code: plaintiffs do not suggest that attorneys enjoy a categorical First Amendment privilege to advise their clients to subvert the bankruptcy process.

Instead, plaintiffs' contention is that, irrespective of Congress's intent, section 526(a)(4) must be read expansively to

encompass not only advice to engage in abusive conduct, but also advice to incur "any debts where a bankruptcy filing is considered, regardless of whether the intended course of action is fraudulent or perfectly legal." Br. 7 (emphasis added).

This gets matters exactly backwards. Plaintiffs are not entitled to insist upon the broadest possible interpretation of section 526(a)(4) in order to secure its invalidation. It is a "cardinal principle" of statutory 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); see, e.g., Apache Survival Coalition v. United States, 21 F.3d 895, 903 (9th Cir. 1994). It does not matter for these purposes that plaintiffs assert a First Amendment overbreadth claim. Indeed, "[f]acial 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)).

B. Plaintiff's Sweeping Interpretation Of Section 526(a) (4) Is Neither Required By The Text Of The Statute Nor Consistent With Congress's Purposes.

Plaintiffs' interpretation of section 526(a) (4) is plainly not compelled by the terms of the statute. Section 526(a) (4) does not prohibit all attorney advice regarding debt incurred prior to bankruptcy, as plaintiffs repeatedly assert. Rather, Congress provided that attorneys may not encourage their clients to run up new debt "in contemplation of * * * filing a case under this title." 11 U.S.C. § 526(a) (4) (emphasis added).

That choice of phrase is significant. As we explained in our opening brief, the phrase "in contemplation of" bankruptcy carries a recognized connotation of abusive purpose. See Black's Law Dictionary 336 (8th ed. 2004) (explaining that the phrase "contemplation of bankruptcy" typically connotes "action designed to thwart the distribution of assets in a bankruptcy proceeding"); Gov. Br. 23-26. Indeed, Congress has previously employed the same phrase in the same sense in discussing abuses of the bankruptcy laws. See, e.g., S. Rep. No. 98-65, at 9 (describing the phenomenon of "'loading up' in contemplation of bankruptcy," in which "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)); Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, Part 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).¹

This interpretation is reinforced by the statutory context in which Congress 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

¹ The federal courts themselves have commonly described pre-petition debts amassed for improper purposes as debts incurred "in contemplation of" bankruptcy. See, 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"); 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.").

Plaintiffs urge that these cases involved statutes dealing with fraud. Br. 6-7. But as plaintiffs themselves acknowledge, incurring debt with the intent that it be discharged in bankruptcy is fraudulent. Br. 8; see also, e.g., Uniform Fraudulent Transfer Act §§ 4-5 (1984). It was hardly unreasonable for Congress to expect that, in this context, courts would construe a statute targeting actions taken by debtors "in contemplation of" bankruptcy as directed to abusive practices.

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). Plaintiffs urge that these sister provisions should be disregarded because the literal language of section 526(a)(4) “is not so limited to malfeasance.” Br. 10. But it is a “fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” Paul Revere Ins. Group v. United States, 500 F.3d 957, 962 (9th Cir. 2007) (quoting Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc)). Given Congress’s singular focus in section 526(a) on abusive conduct by bankruptcy attorneys, it is apparent that Congress did not enact, as the fourth item in this list, a sweeping prohibition on lawful and ethical attorney advice.

Moreover, plaintiffs make no attempt to reconcile their reading of section 526(a)(4) with the other textual indicia of Congress’s intent discussed in our opening brief. We explained, for example, that plaintiffs’ unbounded interpretation of the phrase “in contemplation of” would render the second half of section 526(a)(4) superfluous: if, as plaintiffs insist, the “in contemplation of” language embraces any debt incurred for any purpose, it would have been unnecessary for Congress separately to forbid attorneys from advising debtors to incur debt to pay

the attorney's own legal fees. See Gov. Br. 25-26. Similarly, we explained that the principal remedy for a violation of section 526(a)(4) is a suit against the attorney for the debtor's "actual damages," 11 U.S.C. § 526(c)(2), a term that presupposes that the debtor has been injured by the attorney's advice. Gov. Br. 27-28. Plaintiffs offer no response to these arguments, which underscore that Congress did not prohibit ordinary ethical attorney advice.

Plaintiffs' expansive interpretation of section 526(a)(4) should therefore be rejected as inconsistent with the text and structure of the 2005 Act. At a minimum, it is clear that plaintiffs' reading is not the only plausible construction of the statute. Under principles of constitutional avoidance, no more is required to reject plaintiffs' arguments. "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act." Rust v. Sullivan, 500 U.S. 173, 190 (1991) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).

C. Section 526(a)(4) Provides A Bankruptcy-Specific Rule Of Professional Conduct That Constitutionally Precludes Attorneys From Encouraging Debtors To Abuse The Bankruptcy Code.

Understood as a narrow prohibition against advising debtors to run up additional debt in order to subvert the bankruptcy

process, there is little doubt that section 526(a)(4) satisfies the First Amendment.

Plaintiffs do not contend that they enjoy a First Amendment right to encourage their clients to file abusive bankruptcy petitions, or to load up on new debt prior to bankruptcy with the intent that the debt be discharged. As the Supreme Court stressed in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), attorneys are not merely agents of their clients but are also officers of the courts, and for that reason may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." Id. at 1071. The Court in Gentile quoted with approval Justice Stewart's dispositive concurrence in In re Sawyer, 360 U.S. 622 (1959), in which he rejected the notion "that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct," because "[a] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. * * * Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." Id. at 646-47 (Stewart, J., concurring in judgment); see Gentile, 501 U.S. at 1071. See also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (sustaining a restriction on attorney solicitation because the

government "bears a special responsibility for maintaining standards among members of the licensed professions"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (the government's interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'").

Plaintiffs do not dispute that, under the principles discussed in Gentile, Congress can lawfully regulate the professional conduct of bankruptcy attorneys, including by imposing sanctions for unethical advice. Rather, plaintiffs insist that section 526(a)(4) is not a regulation of professional conduct at all, and that Gentile is thus inapplicable. Br. 10-11. That contention is difficult to fathom. Congress expressly described the "debt relief agency" provisions of the 2005 Act as "professionalism standards for attorneys." See House Report at 17 (debt relief agency provisions "strengthen[] professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases"). Section 526(a)(4) simply provides a bankruptcy-specific rule of conduct akin to Model Rule of Professional Conduct 1.2(d), which states that an attorney may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Accord Oregon R. Prof. Conduct 1.2(c). Restrictions of this kind do not

violate the First Amendment. Indeed, Rule 1.2(d) has been applied to precisely the conduct that section 526(a)(4) addresses. 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).

Plaintiffs argue that Congress could not have intended section 526(a)(4) as an ethical rule because the relevant conduct is already prohibited by state bar rules. Br. 8. This contention encapsulates the error of plaintiffs' argument. The fact that state bar rules already prohibit attorney advice to abuse the Bankruptcy Code is pertinent only because it underscores that Congress broke no new constitutional ground in adopting a federal rule to the same effect. Congress undoubtedly has the power to provide uniform rules of conduct for attorneys in the federal bankruptcy courts, irrespective of state law. Cf. U.S. Const., Art. I, § 8, cl. 4. Moreover, section 526 supplies a new federal cause of action for aggrieved debtors to recover their "actual damages" from unethical attorney advice. See 11 U.S.C. § 526(c). The First Amendment does not bar Congress from regulating legal practice in the federal courts in this manner, any more than it prohibits states from authorizing malpractice claims against attorneys based on the content of their advice.

Plaintiffs further urge that the principles discussed in Gentile are inapplicable because that case involved public statements by an attorney in advance of a criminal trial, rather than "private, confidential speech between attorney and client." Br. 11. That distinction, however, cuts against plaintiffs here. Whatever protections may apply to public speech by attorneys on matters of public interest, it is when lawyers serve "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes," Cohen v. Hurley, 366 U.S. 117, 124 (1961), that the government's interest in preventing unethical attorney conduct reaches its zenith. See Gentile, 501 U.S. at 1071; Ohralik, 436 U.S. at 460.²

Nor is there any merit to plaintiff's characterization of section 526(a)(4) as an impermissible "content-based restriction on protected speech." Br. 11. Ethical rules governing attorneys and other professionals are typically content-based. Model Rule 1.2(d), which precludes attorneys from advising clients to engage in fraud, is no less a content-based restriction on speech, but

² Plaintiffs mistakenly rely on Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), in urging that advice from lawyers to clients is entitled to maximum protection. Br. 5. The Court in that case stressed that, although "[t]here are circumstances in which we will accord speech by attorneys * * * the strongest protection our Constitution has to offer," the "standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation." 515 U.S. at 634, 635. Accordingly, the Court rejected a First Amendment challenge to a bar rule restricting direct-mail solicitations by lawyers. Id. at 635.

plaintiffs do not suggest that rule is unconstitutional. The district court therefore erred in striking down section 526(a)(4) on its face as "content based." 350 B.R. at 915 n.5.

Indeed, the district court's facial invalidation of section 526(a)(4) was improper on any ground: as we noted in our opening brief, the statute is undoubtedly constitutional in many of its applications, even on the district court's own broad reading. See Gov. Br. 32-34. Plaintiffs do not deny the inadequacy of the district court's analysis on this score. In particular, plaintiffs do not attempt to defend the district court's invalidation of section 526(a)(4) in its entirety, without discussing (or even mentioning) the portion of the statute that precludes attorneys from advising clients to incur yet more debt in order to pay the attorney's own fees. See 11 U.S.C. § 526(a)(4); Gov. Br. 33-34.³

³ In addition, as we explained in our opening brief, plaintiff McBride lacks standing to challenge section 526(a)(4), and the district court erred in enjoining the statute as applied to him. See Gov. Br. 34-35. McBride asserts that he has standing because he "meets the statutory definition of debt relief agency." Br. 16. But that fact alone is not sufficient. Section 526(a)(4) applies only to debt relief agencies who advise clients "in contemplation of * * * filing a case under this title." 11 U.S.C. § 526(a)(4); see also ibid. ("preparing for or representing a debtor in a case under this title"). In the complaint, however, McBride alleges that he does not "represent clients in bankruptcy matters nor does he file petitions for relief under the Bankruptcy Code." ER50 (compl. ¶ 12). He therefore lacks standing to challenge section 526(a)(4).

II. THE ADVERTISING DISCLOSURE REQUIREMENTS OF SECTION 528 ARE NARROWLY TAILORED TO ADDRESS A PROBLEM SPECIFICALLY DOCUMENTED BY CONGRESS.

On cross-appeal, plaintiff McBride renews his challenge to 11 U.S.C. § 528, which requires bankruptcy attorneys and other “debt relief agencies” to disclose in their advertisements the fact that they assist clients in filing for bankruptcy. McBride contends that this requirement “compels [him] to make an untrue and misleading statement in advertisements,” and thus violates his First Amendment rights. Br. 17.

The district court rightly dismissed this claim. See 350 B.R. 919-21. Section 528 provides a narrowly tailored disclosure requirement that is designed to protect consumer debtors by preventing a particular type of deception documented by Congress. McBride’s “compelled speech” claim should accordingly be rejected.

A. Congress Enacted Section 528 In Response To Misleading Attorney Advertisements That Promised Debt Relief But Failed To Explain That A Bankruptcy Petition Was Required.

In bankruptcy reform hearings preceding the 2005 legislation, Congress heard evidence of “increasingly aggressive lawyer advertising” that offered to make consumers’ debts “disappear,” yet failed even to “mention bankruptcy.” See Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, Hearing on H.R. 975 Before House Judiciary Comm., 108th Cong. 55 (2003). One retailer testified that some of his customers, who

have been misled by such lawyer advertisements, "do not even understand that they have filed for bankruptcy." Bankruptcy Reform Act of 1999 (Part II), Hearing on H.R. 833 Before House Judiciary Comm., 106th Cong. 123 (1999). Indeed, as Congress was aware, the Federal Trade Commission ("FTC") had issued a consumer alert in 1997 warning that many debt-relief advertisements offering to "wipe out" consumer debts, or to "stop credit harassment, foreclosures, [and] repossessions," regularly failed to disclose that such "relief may be spelled b-a-n-k-r-u-p-t-c-y." See Bankruptcy Reform Act of 1998 (Part III), Hearing on H.R. 3150 Before House Judiciary Comm., 105th Cong. 90, 90-92 (1998) ("FTC Alert"). The result was that consumers were unwittingly being lured into filing for bankruptcy without an adequate appreciation of the consequences. Id. at 92. The FTC Alert remains in effect today.⁴

To address these problems, Congress enacted 11 U.S.C. § 528, which requires debt relief agencies to "clearly and conspicuously disclose in any advertisement * * * directed to the general public" that the advertised services "are with respect to bankruptcy relief under this title." Id. § 528(a)(3). In particular, in any advertisement offering "bankruptcy assistance" services, including any advertisement purporting to offer relief

⁴ See <http://www.ftc.gov/bcp/online/pubs/alerts/bankrupt.shtm> (last visited Feb. 20, 2008).

from "credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt," a debt relief agency must:

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

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

Id. § 528(b)(2); see also id. § 528(a)(3)-(4); id. § 101(4A) (definition of "bankruptcy assistance").

As the district court recognized, this limited disclosure requirement is well within Congress's authority to enact, regardless whether it is analyzed under the general principles applicable to commercial speech regulations, see Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), or under the more lenient standards applicable to mandatory disclosures of factual and other uncontroversial information in advertisements, see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650-52 (1985) (upholding state rule requiring attorney advertisements to disclose that "clients might be liable for significant litigation costs even if their lawsuits were unsuccessful"). See 350 B.R. at 920 (concluding that section 528 "passes constitutional muster" under either the Zauderer or the Central Hudson test).

Section 528 requires bankruptcy attorneys to identify themselves truthfully as “debt relief agencies” under the Bankruptcy Code, and to disclose that their advertised services do in fact relate to bankruptcy. As in Zauderer, plaintiffs’ “constitutionally protected interest in not providing [such] factual information in [their] advertising is minimal,” 471 U.S. at 651, and there is little doubt that the disclosure requirement is reasonably related to the government’s interest in preventing the deception of consumer debtors. Nor does section 528 “burden substantially more speech than necessary” to further the government’s legitimate interests. United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993). Indeed, as the district court noted, the statute restricts no speech at all. 350 B.R. at 921; see Zauderer, 471 U.S. at 651 (emphasizing that “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech”).

Moreover, the disclosure requirement in section 528 is directed precisely to the problem targeted by Congress: ensuring that persons who advertise bankruptcy-related services make clear that their services may in fact involve filing for bankruptcy. This targeted requirement advances the government’s substantial interest in preventing the problem identified by the FTC Alert: deceptive advertisements that promise to “wipe out” debts or prevent foreclosures, but fail to disclose that such “relief may

be spelled b-a-n-k-r-u-p-t-c-y.” See FTC Alert, 105th Cong. at 92. As the FTC Alert explains, such advertisements have the potential to mislead consumers into filing for bankruptcy without adequately considering the implications. See ibid. (warning that “bankruptcy stays on your credit report for 10 years, and can hinder your ability to get credit, a job, insurance, or even a place to live”). It is well within Congress’s authority to require reasonable disclosures in attorney advertisements to prevent such deception. See generally Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977) (states may require attorney advertisements to include a “warning or disclaimer * * * so as to assure that the consumer is not misled”).

B. Section 528 Does Not Compel McBride To Make False Or Misleading Statements In Advertisements.

McBride contends, however, that the disclosures required by section 528 are “flatly false” as applied to him. Br. 18. Asserting that he does not actually “help people file for bankruptcy relief,” Br. 18, McBride argues that section 528 violates his First Amendment rights by requiring him to state: “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).

This contention fails in multiple respects. First, McBride’s insistence that he does not help clients file for bankruptcy is difficult to reconcile with the declaration that he filed in district court, in which McBride states that he does

"advise some clients and potential clients that they should file bankruptcy" and that "I find it necessary to sometimes advise clients to incur new debt prior to a planned bankruptcy." ER-17 (¶¶ 4, 6).⁵ Congress did not violate the First Amendment by requiring attorneys who advertise bankruptcy services of this kind to state that they "help people file for bankruptcy relief." Indeed, the distinction that McBride now attempts to draw – between helping clients with "excessive debt obligations" on the one hand and "help[ing] people file for bankruptcy relief" on the other, see Br. 18 – is precisely the sort of circumlocution that Congress determined to be deceptive to consumer debtors. See § 528(b)(2) (referring to advertisements for assistance with "excessive debt").

In any event, the disclosures in section 528 apply only to the extent that an attorney actually advertises "bankruptcy assistance services" to the public, and need only be included in "such advertisement[s]." 11 U.S.C. § 528(a)(3)-(4); id. § 528(b)(2). McBride thus has no obligation to state that he "helps people file for bankruptcy relief" except to the extent that he affirmatively advertises his bankruptcy services to the general public.

⁵ At the same time, plaintiffs' complaint alleges that McBride "does not represent clients in bankruptcy matters nor does he file petitions for relief under the Bankruptcy Code." ER50.

Moreover, as the district court recognized, section 528 permits attorneys to use their own "substantially similar" disclosure in lieu of the particular statement provided in the statute. 350 B.R. at 920; see 11 U.S.C. § 528(a)(4); id. § 528(b)(2)(B). To the extent McBride advertises bankruptcy assistance services, therefore, he is free to modify the required statement to reflect his actual practices, so long as he makes clear that his services "are with respect to bankruptcy relief" under the Bankruptcy Code. See 11 U.S.C. § 528(a)(3). Nor does section 528 prevent McBride from providing additional explanation or details regarding the services he offers. The statute merely requires attorneys "to insert a two-line admonition into certain advertisements," 350 B.R. at 921, in order to ensure that debtors are not misled into filing for bankruptcy. Nothing about this requirement offends the First Amendment. See Zauderer, 471 U.S. at 650 (disclosure requirements do not "prevent attorneys from conveying information to the public," but "only require them to provide somewhat more information than they might otherwise be inclined to present").

III. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' CONTENTION THAT THE "DEBT RELIEF AGENCY" PROVISIONS OF THE 2005 ACT ARE UNCONSTITUTIONALLY VAGUE ON THEIR FACE.

Plaintiffs' cross-appeal also challenges the district court's dismissal of their claim that the "debt relief agency" provisions of the 2005 Act, 11 U.S.C. §§ 526-528, are

unconstitutionally vague. The debt relief agency provisions apply to “any person who provides bankruptcy assistance to an assisted person.” 11 U.S.C. § 101(12A). An “assisted person,” in turn, is “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$164,250.”⁶ Id. § 101(3). Plaintiffs urge that the Bankruptcy Code does not define terms such as “value,” “nonexempt property,” and “primarily consumer debts” with sufficient precision, and that consequently the entire statutory scheme is unconstitutionally vague on its face. Br. 25.

The district court was plainly correct to reject this contention.⁷ See 350 B.R. at 921-22. A statute violates the Constitution if it is so vague that “it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” Hill v. Colorado, 530 U.S. 703, 732

⁶ Cf. 11 U.S.C. § 104 (adjustment of dollar figures for inflation).

⁷ The district court did not hold, as plaintiffs contend, that plaintiffs lack standing to assert a facial vagueness claim: the court rejected that claim on the merits. See 350 B.R. at 922. Rather, the court referred to standing and ripeness only to underscore the point that plaintiffs cannot invalidate a federal statute on its face merely by speculating about circumstances in which disagreement about the meaning of statutory terms might arise. See, e.g., id. at 921 (rejecting plaintiffs’ speculative arguments as “an abstract challenge that is not ripe for review and does not demonstrate facial unconstitutionality”); ibid. (“Again, this needs an as applied challenge”); id. at 922 (“In a facial challenge, plaintiffs fail to show [that] the lack of absolute precision in the definitions encourages arbitrary enforcement.”).

(2000). The "debt relief agency" provisions of the 2005 Act easily exceed that constitutional threshold. Terms such as "value," "nonexempt," and "primarily consumer debts" are accessible to any person of ordinary intelligence and, in any event, reflect concepts with which bankruptcy practitioners and other "debt relief agencies" will be intimately familiar. An entire provision of the Bankruptcy Code is devoted to defining "exempt" property, see 11 U.S.C. § 522, and the same provision expressly defines "value" for purposes of appraising such property, see id. § 522(a)(2). In this and countless other regards, attorneys such as plaintiffs must be conversant in the language of debts, asset value, and exemptions simply to assist their clients in filing bankruptcy petitions. See, e.g., 11 U.S.C. § 521(a)(1)(B) (debtor's debt and asset schedules); 11 U.S.C. § 707(b)(4)(C)-(D) (duty of bankruptcy attorney to investigate veracity of debtor's debt and asset schedules). If that were not enough, the federal reporters are thick with judicial decisions elaborating the meaning of these concepts.

Indeed, while plaintiffs assert that "attorneys cannot know if their client is an assisted person because of the vagueness of the Bankruptcy Code," Br. 26, the declarations that plaintiffs filed in district court demonstrate their own facility with the statutory terms. See ER-13 (Olsen declaration) ("I routinely advise clients and potential clients that have less than \$150,000

in nonexempt assets."); ER-17 (McBride, same); ER-19 (Swartz, same).

Against this background, plaintiffs cannot seriously contend that the 2005 Act is so vague that a reasonable person cannot understand what conduct it addresses. Congress used terms of common understanding in the field to define the obligations of bankruptcy professionals; it was not required to achieve scientific exactitude. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). See Gospel Missions of America v. City of Los Angeles, 419 F.3d 1042, 1047-48 (9th Cir. 2005); California Teachers Ass'n v. State Bd. of Education, 271 F.3d 1141, 1151-54 (9th Cir. 2001).

Nor are plaintiffs entitled to invalidate a federal statute on its face by speculating about circumstances in which the statutory terms might be ambiguous. See Br. 26-31. As the Supreme Court has explained, "[t]here is little doubt that imagination can conjure hypothetical cases in which the meaning of these terms will be in nice question." American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950). But "speculation about possible vagueness in hypothetical situations

not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" Hill, 530 U.S. at 733 (quoting United States v. Raines, 362 U.S. 17, 23 (1960)). Plaintiffs are free to bring as-applied challenges if and when the circumstances they imagine actually arise. See 350 B.R. at 921-22.

IV. CONGRESS ENACTED THE "DEBT RELIEF AGENCY" PROVISIONS OF THE 2005 ACT TO REGULATE ATTORNEYS AS WELL AS OTHER BANKRUPTCY PROFESSIONALS.

Finally, plaintiffs urged in the district court that, as a statutory matter, the "debt relief agency" provisions of the 2005 Act do not apply to bankruptcy attorneys. The district court expressly rejected that contention, see 350 B.R. at 911-12, and plaintiffs have not renewed it on appeal. Indeed, they have taken the opposite view.⁸ Nonetheless, amicus now urges the Court to hold that bankruptcy attorneys are exempt from all of the professional conduct regulations established by the 2005 Act. See Brief of Nat'l Ass'n of Consumer Bankruptcy Attorneys ("NACBA Br.") at 3-10.

This Court ordinarily "do[es] not consider on appeal an issue raised only by an amicus." Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993). That principle has particular force here: plaintiffs themselves have waived the issue, and amicus has filed

⁸ See Br. 16 (urging that plaintiff McBride, an attorney, "meets the statutory definition of a debt relief agency and is, therefore, subject to the restrictions of Section 526(a)(4).").

its own facial challenge to the 2005 Act in which its arguments can be addressed in the ordinary course of litigation. See No. 3:06-cv-00729-CFD (D. Conn.).

In any event, the argument advanced by amicus reflects a fundamental misunderstanding of the language and purpose of the statutory scheme. Congress defined the term “debt relief agency” to include “any person” who, for a fee, “provides any bankruptcy assistance to an assisted person.” 11 U.S.C. § 101(12A). “Bankruptcy assistance,” in turn, includes “providing information, advice, counsel, document preparation, or filing * * * with respect to a case or proceeding under this title,” including in particular “appearing in a case or proceeding on behalf of another” or “providing legal representation.” Id. § 101(4A) (emphasis added). By its plain terms, therefore, the statute encompasses “any person” who “counsel[s],” “appear[s] in a case or proceeding on behalf of,” or provides “legal representation” to a consumer debtor in exchange for a fee – a category that unmistakably includes bankruptcy attorneys.

Congress chose this definition for a reason. As we explained in our opening brief (at 18-21), Congress was concerned not merely with abuses by debtors, but also with abuses committed by – and at the encouragement of – debtors’ professional representatives in the bankruptcy system. For example, the House Report accompanying the 2005 Act cited a study that “consistently

identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals." House Report at 5 (2005) (quoting Darling & Redmiles, Protecting the Integrity of the System: the Civil Enforcement Initiative, 21 Am. Bankr. Inst. J. 12 (Sept. 2002)). Similarly, in adopting the advertising disclosure requirements in 11 U.S.C. § 528, Congress heard evidence of "increasingly aggressive lawyer advertising" that offered to make consumers' debts "disappear," but failed to explain that such relief would require a petition for bankruptcy. See 108th Cong. 55 (2003). As part of "a comprehensive package of reform measures," therefore, Congress enacted the debt relief agency provisions of the 2005 Act to "strengthen[] professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." House Report at 2, 17 (emphasis added).

Amicus makes no attempt to reconcile its arguments with this declaration of congressional intent, and its efforts to derive a contrary purpose from the text of the statute fail at every turn.

Amicus urges, for example, that the definition of "debt relief agency" does not expressly refer to lawyers or attorneys. NACBA Br. 4-5. The definition does, however, use the term "bankruptcy assistance," which in turn explicitly includes "legal representation." 11 U.S.C. § 101(4A). Congress was not required to state, in addition, that a statute regulating persons who

provide "legal representation" encompasses the very persons who provide such representation. See Heintz v. Jenkins, 514 U.S. 291, 294-95, 298 (1995) (lawyers who engage in debt collection are "debt collectors" under the Fair Debt Collection Practices Act, even though the statute does not specifically refer to lawyers or the practice of law); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975) (noting the "heavy presumption against implicit exemptions," and accordingly refusing to construe the Sherman Act to exempt lawyers).

Amicus speculates that Congress intended the phrase "providing legal representation" to refer only to the unauthorized practice of law. NACBA Br. 6. That contention disregards not only the statutory text, which contains no such limitation, but also Congress's explicit intent in the 2005 Act, which was to provide rules of professional conduct "for attorneys and others who assist consumer debtors with their bankruptcy cases." House Report at 17 (emphasis added).⁹

⁹ The opinion on which amicus relies, In re Attorneys and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005), is hardly authority to the contrary. That opinion was issued sua sponte by the bankruptcy judge, unconnected to any pending case or proceeding, and without allowing the government any opportunity to submit briefing or argument. The government appealed to the district court, which held that the bankruptcy judge's opinion was unappealable precisely because it was not an actual order in a pending case. See In re Attorneys and Debt Relief Agencies, 353 B.R. 318, 322-23 (S.D. Ga. 2006).

Amicus further contends that interpreting the 2005 Act to encompass lawyers would impermissibly invade the authority of state governments to regulate the bar. NACBA Br. 8-9. This assertion is baseless. It cannot seriously be disputed that Congress may provide rules for the conduct of attorneys practicing in the federal courts, including in the federal bankruptcy courts. See, e.g., 28 U.S.C. § 1927; Fed. R. Civ. P. 11; Fed. R. Bankr. P. 9011; cf. Chambers v. NASCO, Inc., 501 U.S. 32 (1991). Indeed, federal law commonly supplies rules of professional conduct for attorneys in regulatory areas that, like bankruptcy, reflect uniquely federal concerns. See, e.g., 15 U.S.C. § 7245, 17 C.F.R. Part 205 (Securities and Exchange Commission); 31 U.S.C. § 330, 31 C.F.R. Part 10 (Internal Revenue Service); 35 U.S.C. § 2(b)(2)(D), 37 C.F.R. Part 10 (Patent and Trademark Office).

Amicus's reliance on the preemption savings clause in section 526(d) is misplaced for similar reasons. NACBA Br. 7-8. Section 526(d) provides that nothing in the 2005 Act shall "be deemed to limit or curtail the authority * * * of a State * * * to determine and enforce qualifications for the practice of law under the laws of that State." 11 U.S.C. § 526(d)(2)(A). The provisions that plaintiffs challenge create substantive rules of conduct for debt relief agencies in the federal bankruptcy system; the Act does not purport to regulate state bar admission

or other "qualifications for the practice of law." In fact, section 526(d) expressly distinguishes between restrictions on conduct and qualifications for legal practice, preempting state rules of conduct "to the extent" they are inconsistent with the federal debt relief agency requirements, see 11 U.S.C.

§ 526(d)(1), while leaving undisturbed state bar admission requirements, see id. § 526(d)(2)(A). The preemption savings clause merely ensures that nothing in the 2005 Act will limit the ability of the states to decide who may become members of their respective bars.

Finally, amicus wrongly suggests that, notwithstanding the plain text of the statute, this Court may exclude attorneys from the scope of the 2005 Act under the rubric of constitutional avoidance. NACBA Br. 10. As an initial matter, amicus's interpretation would "avoid" far more than plaintiffs' constitutional arguments: its reading would exempt bankruptcy attorneys not merely from section 526(a)(4) and from the advertising disclosure requirements in section 528, but also from the many other professional conduct regulations in the 2005 Act whose constitutionality is not in dispute. See, e.g., 11 U.S.C. § 526(a)(1) (requirement to perform all promised services); id. § 527 (requirement to provide written notice of debtors' rights and obligations in bankruptcy); id. § 528(a)(1)-(2) (requirement to prepare a written contract with clear notice of applicable

fees). Congress enacted these measures precisely to prevent the “abuse of debtors by their own lawyers,” In re Irons, 379 B.R. 680, 687 (Bankr. S.D. Tex. 2007), and amicus does not suggest that these provisions by themselves present any constitutional difficulty.

More fundamentally, the avoidance canon permits – indeed, requires – a court to adopt any permissible construction of a statute that avoids a serious constitutional question, but it does not permit a court to disregard an unambiguous expression of congressional intent. Congress enacted the debt relief agency provisions to establish “professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases.” House Report at 17 (emphasis added). Amicus cannot invoke the doctrine of avoidance to frustrate that purpose.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court with respect to the constitutionality of 11 U.S.C. § 526(a)(4), and in all other respects affirm.

Respectfully submitted,

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**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 **7,387 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 21st day of February, 2008, 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 electronic mail and Federal Express overnight delivery upon the following counsel:

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