# 08-4797-CV(l)
# 08-5901-CV(con)
# 09-0015-CV(xap)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT BAR ASSN, NATIONAL ASSN OF CONSUMER BANKRUPTY ATTY, CHARLES A. MAGLIERI, EUGENE S. MELCHIONNE, WAYNE A. SILVER, IRA B. CHARMOY, JEFFREY M. SKLARZ, GERALD A. ROISMAN, BROWN & WELSH PC, ANITA JOHNSON,

*Plaintiffs-Appellants-Cross-Appellees*,

*v.*

UNITED STATES OF AMERICA, ERIC HOLDER, U.S. ATTORNEY GENERAL, DIANA G. ADAMS, as ACTING USA TRUSTEE,

*Defendants-Appellees-Cross Appellants*.

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

**BRIEF OF PLAINTIFFS-APPELLANTS CONNECTICUT BAR ASSOCIATION AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, ET AL.**


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Appellants the Connecticut Bar Association, the National Association of Consumer Bankruptcy Attorneys, and Brown & Welch, P.C. state that they are nongovernmental corporate entities that have no parent corporations and do not issue stock.

The remaining Appellants are natural persons.

/s/ Jonathan S. Massey
Attorney for Plaintiffs-Appellants

Dated: February 25, 2009

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## STATEMENT OF THE JUDGMENT APPEALED FROM

The Final Judgment of the District Court (Hon. Christopher R. Droney, U.S. District Judge, District of Connecticut) (JA97-98)[1] is unreported. The District Court's Ruling on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss ("Order") (JA70-96) is reported at 394 B.R. 274 (Sept. 9, 2008).

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is an appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1), from the District Court's Final Judgment of November 7, 2008, insofar as it denied in any respect the injunctive relief sought by Plaintiffs and dismissed any of Plaintiffs' claims. The District Court had federal question jurisdiction over the case pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2), because the Complaint alleged violations of the First and Fifth Amendments to the Constitution and because the United States is a defendant.

## STATEMENT OF ISSUES PRESENTED

1. Whether the mandatory written notice provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or "the Act"), codified in the Bankruptcy Code at 11 U.S.C. § 527, violates the First Amendment, if the Act is construed as applying to bankruptcy attorneys.

---

[1] References to the Joint Appendix in this case are styled "JA ___."

2. Whether the advertising rules of BAPCPA, codified at 11 U.S.C. § 528(a)(3), (a)(4), and (b)(2), violate the First Amendment, if the Act is construed as applying to bankruptcy attorneys who assist clients in filing for bankruptcy under the Code.

3. Whether the executed-contract requirement of BAPCPA, codified at 11 U.S.C. § 528(a)(1) and (a)(2), violates the First Amendment, due process, and the right of access to courts, if the Act is construed as applying to bankruptcy attorneys.

4. Whether the challenged provisions of BAPCPA should be construed as not applying to bankruptcy attorneys under the plain language of the statute, the Rule of Construction enacted in BAPCPA, and the doctrine of constitutional avoidance.

## STATEMENT OF THE CASE

This appeal involves a federal constitutional challenge to provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or "the Act"), codified in the Bankruptcy Code at 11 U.S.C. §§ 526, 527 and 528. These provisions (which are included in the Statutory Addendum following this brief) impose various restrictions on the speech and activities of a newly minted category of entities defined by the statute as "debt relief agencies." The Government construes bankruptcy attorneys as falling within the category of "debt

relief agencies." So construed, the provisions violate the First and Fifth Amendments to the United States Constitution. In the U.S. District Court for the District of Connecticut (the "District Court"), Plaintiffs moved for preliminary injunctive relief, and the Government moved to dismiss.

On September 9, 2008, the District Court issued its Ruling on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss. The Court granted in part and denied in part Plaintiffs' motion for a preliminary injunction. *First,* the Court enjoined the Government from enforcing 11 U.S.C. § 526(a)(4) as it applies to attorneys on the ground that its prohibition on advising clients to incur debt in advance of filing for bankruptcy violates the First Amendment. (Order at 10-15) (JA 79-84). Thus, the Court denied Defendants' motion to dismiss the Plaintiffs' challenge to § 526(a)(4). In so ruling, the District Court reached the same conclusion regarding the unconstitutionality of § 526(a)(4) as another Judge in the District of Connecticut, whose decision is currently on appeal to this Court. *See Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2007), appeal pending, No. 07-1853-CV (2d Cir.).

*Second,* the District Court granted the Defendants' motion to dismiss the Plaintiffs' challenge to (and denied Plaintiffs' motion for preliminary injunction with respect to) 11 U.S.C. § 527, which requires debt relief agencies to provide

their clients written notices about a variety of details of the bankruptcy process. (Order at 15-19) (JA 84-88).

*Third,* the District Court granted Plaintiffs' motion for a preliminary injunction and enjoined Defendants from enforcing 11 U.S.C. §§ 528(a)(3) and (a)(4), which require debt relief agencies to include certain statements in their advertising. The Court enjoined the Government from enforcing Sections 528(a)(3) and (a)(4) as applied to attorneys representing clients other than consumer debtors filing for bankruptcy, and it denied Defendants' related motion to dismiss those claims. However, the Court granted Defendants' motion to dismiss Plaintiffs' challenge to 11 U.S.C. §§ 528(a)(3) and (a)(4) as applied to attorneys representing consumer debtors filing for bankruptcy. (Order at 22-27) (JA 91-96), and it denied Plaintiffs' motion for preliminary injunction in that respect.

*Fourth,* the Court granted Defendants' motion to dismiss the Plaintiffs' challenge to (and denied Plaintiffs' motion for preliminary injunction with respect to) §§ 528(a)(1) and (a)(2), which require debt relief agencies to obtain executed written contracts from their bankruptcy clients within five business days of their initial consultation. (Order at 19-22) (JA 88-91).

After issuing its Order of September 9, 2008, the District Court directed the parties to propose a schedule for the balance of the case. On November 5, 2008,

the parties filed a proposed stipulated final judgment, which mirrored the terms of the District Court's Order of September 9, 2008. On November 7, 2008, the District Court entered the Final Judgment, "[u]pon consideration of the parties' Joint Stipulation dated November 5, 2008, and for the reasons stated in this Court's Ruling on Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss." (JA 97).

## STATEMENT OF FACTS

The nine Plaintiffs in this lawsuit fall into three groups: (1) two bar associations, the Connecticut Bar Association (CBA) and the National Association of Consumer Bankruptcy Attorneys (NACBA), which bring suit on behalf of their members and their members' clients; (2) several individual bankruptcy attorneys, a family law attorney, and a creditors' law firm, who bring suit on behalf of themselves and their clients; and (3) an individual client who has suffered as a result of the challenged provisions of BAPCPA.

The Plaintiffs include experienced attorneys familiar with the practical realities of the bankruptcy system and the real-world impact of the unconstitutional statutory provisions at issue in this appeal. Many Americans face bankruptcy as a result of the recent economic downturn. Many of them are in crisis. They face personal and family tragedies – loss of a job, loss of a home, divorce, or serious illnesses. They are in dire need of complete and uncensored advice from

bankruptcy attorneys, to whom they must have unfettered access. This advice, and the ability of lawyers to guide their consumer clients through the complexities of the bankruptcy process, can make the difference between a satisfactory outcome and financial disaster. It is unconscionable, as well as unconstitutional, for the Government to interfere with the attorney-client relationship when it is most needed by ordinary consumers.

### A. Statutory Background.

The challenged statutory provisions of BAPCPA apply to a newly created statutory category of entities known as "debt relief agencies." A "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration," or who is a "bankruptcy petition preparer," a category separately defined by statute. 11 U.S.C. § 101(12A), 11 U.S.C. §§ 110(a)(1) & (2). An "assisted person" is defined as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." 11 U.S.C. § 101(3). This definition is not limited to individuals who are contemplating bankruptcy or even experiencing any financial difficulty. Rather, the definition is broad and it is limited only by reference to consumer debt and assets.

The statute defines "bankruptcy assistance" to mean "any goods or services sold or otherwise provided to an assisted person with the express or implied

purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another, or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A).

### 1. The Prohibition on Certain Advice in Section 526(a)(4).

Section 526(a)(4) provides that 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."

Section 526(a)(4) thus prohibits "debt relief agencies" from advising people to incur any debt "in contemplation of" filing for bankruptcy. This flat prohibition would include debts that are legal and desirable. For example, it often makes sense for debtors with unreliable cars to incur secured debt to purchase more reliable vehicles so they can consistently get to work and earn an income with which to pay their creditors. *See, e.g.,* Declaration of Eugene S. Melchionne, ¶ 11 ("Melchionne Decl.") (JA 39). Not only is incurring such debt lawful, it is generally beneficial for both debtors and creditors alike. In Chapter 13 proceedings, for example, such fully secured debt must normally be paid in full. In these and many other such cases, the debtors intend to repay the loan either during or after the bankruptcy,

and all the creditors benefit from the debtor's access to reliable transportation. Individuals in Chapter 13 proceedings also frequently incur debts for the payment of attorney's fees, and Chapter 13 plans provide for repayment of such debts.

There are many other examples when an individual might legally consider incurring debt before filing for bankruptcy. Where a client has an unpaid domestic support obligation, an attorney might advise a debtor prior to filing a petition for relief to take out a home equity line of credit or to refinance a home mortgage loan; to borrow from a 401(k) retirement fund; or to borrow from a family member who is aware that the client intends to file for bankruptcy and that the debt may be discharged.

Similarly, an attorney might advise a client lawfully to incur debt to pay taxes in order to avoid interest, penalties, and civil or criminal liability; to pay wage claims of employees in order to avoid criminal prosecution; to pay insurance premiums in order to avoid the devastating effects on debtors and their families from illness, accidents, natural disasters and so on (indeed, property insurance is often required during the pendency of the bankruptcy proceeding, *see* 11 U.S.C. § 1326(a)(4)); to pay for urgent medical care for the debtor or a family member; to pay for home repairs that are needed for health, welfare and safety of family members; or to pay for tuition for school. *See*, *e.g.*, Declaration of Charles A. Maglieri, ¶ 7 ("Maglieri Decl.") (JA 33-34).

Section 526(a)(4) does not contain any provision accommodating these valid reasons to incur debt. Nor does Section 526(a)(4) distinguish between incurring debt that will be paid in or after a bankruptcy case, and incurring debt that will not. In fact, incurring additional debt for fraudulent purposes is already nondischargeable and may give rise to criminal liability. 11 U.S.C. § 523(a)(2); 18 U.S.C. §§ 152-157. Advising a client to engage in any such unlawful conduct is already prohibited, regardless of BAPCPA. *See* 18 U.S.C. § 2 (imposing criminal liability for counseling an offense). Every state's rules of professional conduct already prohibit an attorney from advising a client to engage in unlawful or fraudulent conduct. *See*, *e.g.*, Connecticut Rules of Professional Conduct, R.1.2(d).

**2. The Written Notice Requirements in Section 527.**

Section 527 requires debt relief agencies to provide a number of written statements to all assisted persons to whom they provide bankruptcy assistance. It contains a laundry list of details about particular bankruptcy provisions, stern warnings about all that is required of a debtor, and admonitions about breaking the law and the penalties attached thereto. However, many of these mandatory statements are incorrect, misleading, gross oversimplifications, or inapplicable in many cases. If attorneys were deemed to be "debt relief agencies," as the

Government contends, they would be required to comply with this written notice requirement.

### 3. The Requirement to Include Certain Statements in Advertising in Sections 528(a)(3), (a)(4), and (b)(2).

If attorneys were included in the definition of "debt relief agency," as the Government contends, Sections 528(a)(3), (a)(4) and (b)(2) would compel them to include in certain advertising 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." 11 U.S.C. § 528(b)(2)(B), (a)(4).

The statute requires that this statement must be "clearly and conspicuously" displayed with respect to advertising "of bankruptcy assistance services or the benefits of bankruptcy directed to the general public." § 528(a)(4). The statute requires that the statement must also be "included" with respect to advertising directed at the general public "indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt." §528(b)(2)(B).

#### 4. The Requirement to Obtain a Written Contract Within Five Days in Sections 528(a)(1) and (a)(2).

Sections 528(a)(1) and (a)(2) require that debt relief agencies must, within five days of first providing any bankruptcy assistance services to an assisted person, "execute a written contract with such assisted person that explains clearly and conspicuously (A) the services [the agency] will provide to such assisted person; and (B) the fees or charges for such services, and the terms of payment." Section 528(a)(2) requires a debt relief agency to "provide the assisted person with a copy of the fully executed and completed contract."

If attorneys were deemed to be "debt relief agencies," Sections 528(a)(1) and (a)(2) would prevent them from communicating with clients and potential clients unless the clients executed written agreements within five days of receiving any information, advice or counsel. There is no exception for the client who needs extra time to consult with a trusted family member or friend.

### B. The District Court's Decision.

The District Court granted Plaintiffs' motion for preliminary injunction in part and denied it in part. The District Court began by holding that, under the "plain meaning" of BAPCPA (Order at 8) (JA 77), attorneys fall within the definition of "debt relief agencies." The Court acknowledged that "attorneys are not explicitly included in the definition of debt relief agencies" and that BAPCPA "likely" suffers from "imprecise drafting." (Order at 9) (JA 78). Indeed, the Court

observed that "'bankruptcy petition preparers' are included explicitly in the definition of debt relief agencies, and attorneys are expressly excluded from the definition of bankruptcy petition preparers." (Order at 8) (JA 77). Nonetheless, the District Court found that the broad definition of "bankruptcy assistance" included attorneys.

The District Court next considered the constitutionality of Section 526(a)(4), the provision that prohibits giving advice to incur additional debt in contemplation of bankruptcy. The Court held that the provision was invalid under the First Amendment, because it could not meet either the strict scrutiny standard for regulating speech or the less rigorous test set out in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). "Both tests require that the restrictions be narrow limitations on speech." (Order at 11) (JA 80). "Under either test, and assuming the government interests are legitimate, the Court finds that section 526(a)(4) is not sufficiently narrow and necessary to further these government interests." (*Id.*). The Court observed that Section 526(a)(4) is overinclusive: "it prohibits attorneys from advising their clients to incur any kind of debt prior to filing for bankruptcy, including debts that are legal and desirable in certain instances." (*Id.*). "[I]f the client intends to reaffirm the debt after filing bankruptcy, there is no prejudice to the bankruptcy process." (Order at 12) (JA 81). The Court also noted the ready availability of an obvious alternative: "If the government seeks to prevent

manipulation of the bankruptcy system, a more narrowly tailored approach would be to penalize those who take on certain types of debts, rather than prohibiting legal advice about permissible courses of action." (Order at 13) (JA 82).

The District Court rejected the Government's proposed "saving construction" of Section 526(a)(4) – that it prohibits only "advice aimed at allowing the debtor to take unfair advantage of debt discharge (by running up debt primarily because it will not be repaid), or to 'game' the means test (by acquiring enough debt to avoid the presumption of abuse)." (Order at 13-14) (JA 82-83). The Court dismissed this interpretation because "there is no indication in the statute that this prohibition is limited to advice to take on such fraudulent debt" and because "giving a client advice to take on illegal debt is already unethical." (Order at 14) (JA 83).

The District Court next considered the written notice requirement of Section 527. The Court held that the requirement could be constitutionally applied to attorneys, because it "advances a sufficiently compelling government interest and does not unduly burden the attorney-client relationship." (Order at 19) (JA 88). The Court did not point to any evidence of consumer confusion relating to the specific topics addressed by Section 527. Indeed, the Court conceded that some of the statements mandated by Section 527 would not be appropriate in every circumstance. Instead, "if the disclosures do not apply in a certain situation, or if a

generalized statement requires further information to be considered complete, the attorney can provide this explanation to the client." (Order at 18-19) (JA 87-88).

The District Court also addressed the advertising restrictions of Sections 528(a)(3), (a)(4), and (b)(2). The Court correctly held that these provisions were unconstitutional, as applied to attorneys representing clients other than consumer debtors filing for bankruptcy. In such circumstances, the Court noted, the second sentence of the required statement ("We help people file for bankruptcy relief under the Bankruptcy Code") would "in fact [be] a false statement – but the advertiser is nevertheless required to adopt it as its own view." (Order at 25) (JA 94). "Furthermore, as applied to attorneys for clients other than debtors, section 528 is not reasonably related to preventing consumer deception as (a) there is no evidence that bankruptcy advertisements by attorneys for clients other than debtors were ever deceptive, and (b) the disclosure's factual inaccuracy with respect to attorneys who do not represent debtors precludes any conclusion that such a statement could be reasonably related to preventing deception of non-debtor clients." (Order at 25) (JA 94).

Nevertheless, the District Court sustained the constitutionality of Sections 528(a)(3), (a)(4), and (b)(2) as applied to attorneys assisting clients in filing for bankruptcy under the Code. The Court concluded that, in such circumstances,

"section 528 does serve the government's interest in preventing deception." (Order at 26) (JA 95).

The District Court also upheld the mandatory contract requirement of Sections 528(a)(1) and (a)(2). The Court opined that "the contract requirement does not impose any restrictions on an attorney's freedom of speech, and is strictly an economic requirement and should thus be evaluated under a rational basis test." (Order at 20) (JA 89). The Court rejected Plaintiffs' claim that the provision imposes strict liability on attorneys for a contractual process over which they lack control, reasoning that "[a] client may only bring an action against an attorney if the attorney intentionally or negligently fails to comply with the provision." (Order at 21) (JA 90). The Court did not address the possibility of enforcement by state authorities pursuant to Section 526(c)(3).

## SUMMARY OF ARGUMENT

As construed by the Government, the statutory provisions at issue in this appeal require attorneys to tell their clients things about the bankruptcy process that are not true, or prohibit them from telling clients things that are true, or require attorneys to mouth statements that are at best gross oversimplifications of a complex process. In short, the challenged provisions are themselves misleading, or potentially misleading, and compound the risk of consumer confusion. If the First Amendment means anything, it should prevent the Government from distorting the

flow of information in the attorney-client relationship, which is already subject to intense regulation of any false or deceptive statements.

I. The mandatory written notice provision of Section 527 would be unconstitutional if it were applied to attorneys. The District Court erred by applying the "reasonable relationship" test of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Instead, the court should have applied full First Amendment scrutiny or, at the very least, the intermediate scrutiny applicable to commercial speech. In any event, the mandatory written notice provision fails every version of First Amendment scrutiny. There is no identified need or problem that could serve as a predicate for a regulation of speech. The written notice required by Section 527 contains factual inaccuracies and misleading statements. The undisputed record evidence (to which the District Court did not refer) confirms that the practical impact of Section 527 has been to heighten consumer confusion.

II. Sections 528(a)(3), (a)(4), and (b)(2) would also be unconstitutional as applied to attorneys because they compel the inclusion of the following misleading statement in advertising: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement." 11 U.S.C. § 528(b)(2)(B), (a)(4). The District Court correctly held that this requirement could not constitutionally be applied to attorneys representing

clients other than consumer debtors filing for bankruptcy. But the Court erred in upholding the requirement as applied to attorneys assisting clients in filing for bankruptcy under the Code. There is no credible evidence demonstrating the existence of any problem with pre-BAPCPA advertising by bankruptcy attorneys, and in any event the mandated statement would create a new source of confusion.

III. The five-day executed-contract requirement of Sections 528(a)(1) and (a)(2) would also be unconstitutional as applied to attorneys. The District Court erred by declining to apply any First Amendment scrutiny at all. The requirement would also impair the right of access to courts and violate due process because it imposes strict liability for an act over which the attorney lacks control.

IV. The provisions of BAPCPA should be construed as not applying to bankruptcy attorneys under the plain language of the statute, the Rule of Construction enacted by Congress, and the doctrine of constitutional avoidance.

Two other circuits have addressed BAPCPA, but neither of them enjoyed the full evidentiary record that is present in this appeal. In *Milavetz, Gallop & Milavetz v. United States*, 541 F.3d 785 (8th Cir. 2008), the Eighth Circuit held that Section 526(a)(4) was unconstitutional but sustained Sections 528(a)(4) and (b)(2) against constitutional challenge. In *Hersh v. United States*, 2008 WL 5255905 (5th Cir. Dec. 18, 2008), the Fifth Circuit upheld Section 526(a)(4), but only by substantially narrowing it under the doctrine of constitutional avoidance. The Fifth

Circuit also upheld the written notice requirements of Section 527, but only by interpreting it as conveying wide latitude to debt relief agencies in deciding how to comply with it. In short, the decisions outside this Circuit confirm the serious constitutional questions presented by BAPCPA.

## ARGUMENT

### I. The Mandatory Notice Provisions Of Section 527 Are Unconstitutional As Applied To Attorneys.

Section 527 requires debt relief agencies to provide a series of written statements to all assisted persons to whom they provide bankruptcy assistance. The District Court explained that "[s]tatutes compelling professionals to provide factually accurate disclosures are upheld if they are reasonably related to a government objective and are not unduly burdensome" (Order at 17) (JA 86), and it upheld Section 527 under that standard. The Court's holding was erroneous, for multiple reasons.

#### A. The District Court Applied The Wrong First Amendment Test.

The District Court erred by applying the "reasonable relationship" test of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Instead, the Court should have applied full First Amendment scrutiny or, at the very least, the intermediate scrutiny of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

The District Court erred by not applying undiluted First Amendment scrutiny. The statements mandated by Section 527 (as well as those mandated by Section 528), are not commercial speech, because they do not propose a commercial transaction. Rather, they relate to the operation of the bankruptcy system. Noncommercial speech does not lose its fully protected character simply because it appears in the commercial context. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988) (solicitation does not lose fully protected nature merely because it is "intertwined" with speech with commercial characteristics); *Bolger v. Youngs Drug Prod. Corp.,* 463 U.S. 60, 66-67 (1983) ("The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech."); *New York Times v. Sullivan,* 376 U.S. 254, 265-66 (1964) (paid newspaper ad entitled to full First Amendment protection); *Transportation Alternatives, Inc. v. City of New York*, 340 F.3d 72, 78-79 (2d Cir. 2003) (special event to promote bicycle use could not be regulated as commercial speech despite presence of commercial elements, such as Ben & Jerry's sponsorship).

Moreover, the test prescribed by *Zauderer* does not apply because the mandated notices are not purely factual and uncontroversial statements. *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 113 (2d Cir. 2001); cf. *Int'l Dairy*

*Foods Ass'n v. Amestoy,* 92 F.3d 67, 72-74 (2d Cir.1996) (applying *Central Hudson* to a compelled disclosure in a commercial speech context of an "accurate, factual statement"). The required language is not a "disclosure" of truthful commercial information as has been at issue in virtually every compelled commercial speech case to reach the Supreme Court. Indeed, it has the dangerous tendency to confuse its audience. See Part I-C, *infra*. This Court has made clear that *Zauderer* applies only where the "goal" of the statute is "consistent with the policies underlying First Amendment protection of commercial speech." *Sorrell,* 272 F. 3d at 115.

In any event, the mandatory written notice provision fails every variant of First Amendment scrutiny – *Zauderer*, intermediate scrutiny, or full First Amendment review.

### B. There Is No First Amendment Predicate to Justify the Written Notices Required by Section 527.

Even under the *Zauderer* standard, a disclosure requirement is not valid unless it is "reasonably related to the state's interest in preventing the deception of consumers" and "not unjustified or unduly burdensome." 471 U.S. at 651. Section 527 flunks that test.

The District Court did not identify any need or problem that could serve as a predicate for a regulation of speech under First Amendment. The Court did not make any finding or refer to any evidence of deception or consumer confusion

about bankruptcy. Nor did the Court find that information regarding bankruptcy issues would be unavailable in the absence of Section 527. At a minimum, the First Amendment requires a showing of an actual *problem* in order to justify a regulation of speech. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (intermediate First Amendment standard cannot be met by "various tidbits" including "anecdotal evidence" and "educated guesses").

Although the Supreme Court has examined the constitutionality of factual disclosure requirements as applied to professionals, it has never upheld such provisions in the absence of any evidence that the regulations were reasonably necessary to address a potential problem. In *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), for example, the Supreme Court *invalidated* a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions that were collected during the preceding year that were actually given to the charities for whom the fundraisers worked. The Court explained that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id.* at 796-97 (emphasis in original). The Court rejected any distinction between "compelled statements of

opinion" and "compelled statements of 'fact'": "either form of compulsion burdens protected speech." *Id.* at 797-98.

Similarly, in *Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136 (1994), the Court invalidated the punishment of a Certified Financial Planner ("CFP") under a state rule requiring CFPs to disclose in their advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State's "concern about the possibility of deception in hypothetical cases is not sufficient," *id.* at 145, and demanded actual evidence of harm. *Id.* at 145 n.10 ("Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled by the use of the CFP designation."). "Given the state of this record -- the failure of the Board to point to any harm that is potentially real, not purely hypothetical -- we are satisfied that the Board's action is unjustified." *Id.* at 146. *See also Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 100-01 (1990) (plurality opinion) (reversing attorney punishment for "specialist" claim on letterhead because there was "no contention that any potential client or person was actually misled or deceived," nor "any factual finding of actual deception or misunderstanding").

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), a plurality of the Supreme Court upheld a Pennsylvania law requiring

doctors to provide women seeking abortions with certain information about the procedure, the health risks, conditions surrounding the pregnancy, and availability of state-provided information, but only because the Court determined that the state had a "legitimate goal" of protecting the life of an unborn child and making sure that women make "mature and informed" decisions regarding abortions. *Id.* at 883. By contrast, in this case the Government has failed to establish a factual predicate for its regulation of speech.

And in *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985), the Court overturned a state court reprimand of an attorney for an advertisement that was neither false nor deceptive and sustained the reprimand only to the extent the advertisement omitted a disclosure that a client would be liable for costs in the event a contingent-fee lawsuit was unsuccessful. The Court noted the important constitutional protections accorded to attorney print advertising:

> [The attorney's] advertisement-and print advertising generally-poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive

> to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.

*Id*. at 642. The Court rejected the argument that the government may impose sweeping restrictions on attorney advertising without any showing that it is false or deceptive and indicated that the government was obliged to proceed with a scalpel rather than a sledgehammer – by "weed[ing] out accurate statements from those that are false or misleading," rather than by restricting speech generally. *Id.* at 644.

The Court held that disclosure requirements are permissible only to the extent they "are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651. The Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment." *Id.* The Court upheld the state's requirement that an attorney disclose a contingent-fee client's potential liability for costs only because it found that the possibility of deception was "self-evident" and that "substantial numbers of potential clients would be so misled" without the state's disclosure rule. *Id*. at 652.

This Court has followed the same approach. "[T] he failure . . . to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom [it]." *New York State Assoc. of Realtors v. Shaffer*, 27 F. 3d 834, 842 (2d Cir. 1994); *see also Harman v. City of New York*, 140 F.3d 111, 123 (2d Cir. 1998) (invalidating regulation of speech because "the City has not demonstrated that the asserted harms are real, rather than conjectural,"

and "the City cannot justify broad restrictions on First Amendment rights by supposition alone").

In *Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67 (2d Cir.1996) ("*IDFA*"), for example, this Court invalidated a Vermont statute requiring dairy manufacturers who used a synthetic growth hormone to disclose that fact in the label of their milk. This Court held that the State's asserted justifications for the statute -- "strong consumer interest and the public's 'right to know'" – were "insufficient to justify compromising protected constitutional rights." *Id.* at 73. This Court added: "We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product." *Id.* at 73. The Court also noted that, if the Government were not required to adduce a factual predicate for a mandatory disclosure rule, there would be no limit on its authority to impose such mandates:

> Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial

> governmental concern, the manufacturers cannot be compelled to disclose it.

*Id.* at 74. *IDFA* thus squarely holds that a disclosure requirement is unconstitutional in the absence of a documented governmental justification.

In *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104 (2d Cir. 2001), this Court rejected a First Amendment challenge to a state requirement that manufacturers include mercury warning labels on their products, but only because the state identified an important public "interest in protecting human health and the environment from mercury poisoning." *Id.* at 114. There was no question that the State was pursuing a "significant public goal," *id.* at 115; the only issue was a matter of tailoring.

The District Court's approach fails any form of First Amendment scrutiny. The Court recited a governmental interest and asserted that Section 527 ensured that "basic information will be made available to consumer debtors" (Order at 18) (JA 87), but its method of reasoning bordered on the tautological. The Court identified no existing problem of consumer confusion or lack of consumer information. There was, in fact, no showing of any need for Section 527 at all.

### C. The Section 527 Statements Are Not Factually Accurate.

The Court's decision was flawed for another reason: The statements required by Section 527 include information that is factually inaccurate and misleading. The District Court itself noted that "the plaintiffs argue that the disclosure

incorrectly states that filing fees are required to file a petition in bankruptcy court, which is not accurate in all situations (for example, when a court approves a waiver of the filing fee" pursuant to 28 U.S.C. § 1930(f)). (Order at 19 n.14) (JA 88).

Other inaccuracies abound. For example:

- The statement required by Section 527(b) provides that the purpose of the notice is to "hel[p] you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need." Yet to the extent it addresses what goes on in a bankruptcy case, Section 527 seriously misstates the law and suggests that an attorney's representation is only *sometimes* advisable. Hence, the statement would hinder, rather than help, a debtor.
- Section 527(a)(2) requires an attorney to state that "current monthly income, the amounts specified in section 707(b)(2) [], and, in a case under chapter 13 of this title [11 U.S.C. §§ 1301-30], disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry" even though in most cases a chapter 7 debtor need not state the amounts specified in section 707(b)(2) and a chapter 13 debtor does not determine disposable income in accordance with section 707(b)(2).
- Section 527(b) requires an attorney to tell his or her clients that they "may want help deciding whether to [reaffirm debts]" but fails to state that attorneys are the only ones authorized by law to provide such advice and misleads clients by implying that creditors or other nonattorneys can offer assistance in this process.
- Section 527(b) requires an attorney to tell his or her clients that they "may want help preparing [their] chapter 13 plan and with the confirmation hearing on [their] plan" but fails to state that attorneys are the only ones authorized by law to provide such help and suggests that nonattorney petition preparers can provide such help.
- Section 527(b) requires an attorney to tell his or her clients that "If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief" but fails to state that attorneys are the only ones authorized by law to provide such

information, and, indeed, implies that the client would be equally well off with "someone" other than an attorney.

- Section 527(b) refers to the trustee as a "court official" when in fact, the trustee is not employed by the Court, but is the "representative of the estate," normally selected by the Executive Branch. *See* 11 U.S.C. § 701.
- Section 527(b) requires an attorney to tell his or her clients "documents called a petition, schedules and statement of financial affairs, as well as in some cases a statement of intention need to be prepared correctly and filed with the bankruptcy court" but does not mention that the Bankruptcy Code requires that many additional documents, such as employer payment advices, also be filed with the Court.
- Section 527(b) requires an attorney to tell his or her clients that Chapter 13 cases require that they pay "what you can afford over 3 to 5 years" when in fact the Bankruptcy Code contains no minimum requirement as to the length of certain Chapter 13 repayment plans.
- Section 527(b) requires an attorney to tell his or her clients that Chapter 13 cases require that they pay "what you can afford over 3 to 5 years" when in fact the statute does not always take into account a Debtor's actual expenditures in calculating repayment ability, but rather, in some cases, uses unrelated guidelines promulgated by the Government.
- Section 527(b) requires an attorney to tell his or her clients that "If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief" -- thus suggesting, contrary to applicable law, that Chapter 9, Chapter 11, Chapter 12, or Chapter 15 relief may be "selected" by individuals not eligible for such relief.

Neither the Supreme Court nor this Court has ever upheld a mandatory disclosure requirement in a case like this, where the mandated statement itself contained inaccuracies. In *Sorrell*, for example, this Court noted that there was no

claim that the mandatory disclosure was inaccurate (272 F.3d at 114 n.4), and stressed that "[o]ur decision reaches only required disclosure of factual commercial information." *Id.* at 114 n.5. *Zauderer* warned that "unjustified or unduly burdensome disclosure requirements" would not likely pass First Amendment muster. 471 U.S. at 651. This case is the situation reserved in *Zauderer*.

The District Court reasoned that "if the disclosures do not apply in a certain situation, or if a generalized statement requires further information to be considered complete, the attorney can provide this explanation to the client." (Order at 18-19) (JA 87-88). But this reasoning is flawed. First, the District Court's reasoning effectively turns the First Amendment upside down. At minimum, under any standard of scrutiny, the Government bears the burden of proving that the mandatory language advances a legitimate interest. The Government cannot meet its burden simply by asserting that the mandatory language, while misleading and deceptive in its own right, can be clarified by additional statements that attorneys are free (but are under no legal compulsion) to make. In effect, the District Court put the onus on private attorneys to fix the problems created by the statute. "If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The District Court failed to follow that fundamental principle here.

Moreover, the Court failed to consider how such a confusing process of disclosure and then attorney correction would materially advance any legitimate governmental interest. An attorney who gives a client the mandated written notice, and then turns around and tells the client something else, is not likely to earn that client's trust. Indeed, too many members of the public already are wary of attorneys and suspect them of using legal mumbo-jumbo to earn hefty fees.

There is no need to speculate here about the counterproductive nature of Section 527. The undisputed record evidence (to which the District Court did not refer) provides a rich evidentiary illustration of the harmful impact of Section 527 on real lawyers in real situations with real clients.

Plaintiff Maglieri testified that Section 527 spawns consumer confusion and distrust:

> I go over the consultation agreement with the prospective client, and the disclosures. These disclosures make some very nervous. Others look at me glassy-eyed. I would never provide all this information to all my clients if I did not fear legal action under the new statute.

Maglieri Decl. ¶ 15 (JA 35-36). He added: "Most of the information is irrelevant most of the time, much of it is incorrect, and it is confusing to them." *Id.* (JA 36). "I must now spend an ordinate amount of time going over each item in the disclosure, explaining the inaccuracies, correcting misunderstandings, and trying to put them in their proper context. Needless to say this type of conversation does not

foster the trusting relationship that is necessary between lawyer and client." *Id.* ¶ 16 (JA 36).

Plaintiff Melchionne testified: "Uniformly, potential clients that come to see me are confused by the required disclosures of BAPCPA. I have stopped trying to explain all the inaccuracies in the disclosures because the few times that I tried this, the client's reactions were so negative that I lost the client. Additionally, there simply isn't enough time to do it during the consultation. I know that I am providing them with incorrect information, but if I am a debt relief agency, that is what the law requires me to do." Melchionne Decl. ¶ 21 (JA 41-42). He explained that the confusion caused by Section 527 has affirmatively harmed his clients:

> Section 527 requires me to tell my client that they do not need an attorney to file for bankruptcy even if I think that they really do need an attorney. This requirement has not only created confusion for potential clients but in some cases has caused irreparable harm to their ability to obtain a fresh start from the bankruptcy process. In these cases, potential clients have chosen to proceed without an attorney, but have failed to fully comply with the Code and as a result, they have had their cases dismissed.

Melchionne Decl. ¶ 22 (JA 42).

The President of the National Association of Consumer Bankruptcy Attorneys testified: "[i]f the [Debt Relief Agency] provisions are applicable to attorneys, they require our members to give inaccurate and misleading disclosures, causing confusion among clients which takes considerable time to clear up and

generally disrupts and interferes with our members' relations with their clients." Sommer Decl. ¶ 5 (JA 59); *see also* Silver Decl. ¶ 9 (JA 56).

The record also contains real-world evidence of a client's reaction to the mandatory written notice. Plaintiff Anita Johnson testified: "At our initial consultation with our attorney, we received a bunch of disclosures regarding bankruptcy that confused us and left us indecisive as to which direction to turn." Johnson Decl. ¶ 9 (JA 53). "[W]e were advised that we fall into a category of people called 'assisted persons.' I don't really understand what this means . . ." *Id.* at ¶ 4 (JA 52). She testified that she was "very disturbed" because she believed that "there is some knowledge that my attorney has which he is not allowed to tell me." *Id.* at ¶ 7 (JA 52). "I am both confused and concerned that my attorney is not being allowed to represent me fairly and completely. Additionally, I am worried that the government is interfering with or monitoring my relationship with my attorney." *Id.* at ¶ 8 (JA 53). In addition, the statement that bankruptcy does not require an attorney left her uncertain:

> [T]he disclosures we received stated that bankruptcy does not require an attorney. . . .My husband . . . asked me why we should pay an attorney if we could do it ourselves. But I was worried that our limited understanding of bankruptcy and 'street knowledge' would not be enough to allow us to proceed on our own. Additionally, I believe that turning to people who are not attorneys to help us with our

> bankruptcy would cause problems with our case if they did something wrong.

*Id.* at ¶ 10 (JA 53). In short, the written notice requirement increases confusion, sows distrust between attorneys and clients, and exacerbates the plight of consumers in bankruptcy.

Further, the District Court's assumption – that attorneys would be free to pick and choose which disclosures to make – is unrealistic and impractical. To be sure, the standardized statement in Section 527(b) must be provided only "to the extent applicable." *See* 11 U.S.C. § 527(b). But it will often be impossible for an attorney to determine, at the time the statements must be made, which statements are "applicable" to a particular client. Silver Decl. ¶ 10 (JA 57). ("The problem, of course, is that you cannot tell if someone falls into these categories when they walk through your door. It is only after investigation into their assets and liabilities that their status can be determined."). In addition, Section 527(a)(2) separately mandates the provision of inaccurate and misleading information to *all* clients – and it is not subject to the "extent applicable" proviso. *See, e.g.,* 11 U.S.C. § 527(a)(2) (debt relief agency must provide written notice inaccurately advising assisted persons that "current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry").

For all these reasons, the District Court erred in sustaining the constitutionality of the Section 527 written notice requirement.

### D. The *Hersh* Decision Is Not Persuasive.

In *Hersh v. United States*, 2008 WL 5255905 (5th Cir. Dec. 18, 2008), the Fifth Circuit opined that the First Amendment "protects an attorney's right not to provide her client with certain factual information," *id.* at *16, and it recognized that the mandatory disclosures of Section 527 contained information that was incorrect or oversimplified. *Id.* at *17-18. Nevertheless, the Court of Appeals sustained the constitutionality of Section 527. However, that decision does not assist the Government here.

First, this case, unlike *Hersh*, involves a full factual record documenting the real-world operation of Section 527 and its practical impact on speech and the attorney-client relationship.

Second, *Hersh* was able to uphold Section 527 only by construing it to confer extremely wide latitude on debt relief agencies in deciding how to comply. *Hersh* insisted that "the debt relief agency is free to expand upon, clarify, *or even express disagreement with* any of the provisions of the required statement." *Id.* at *17 (emphasis added); *see also id.* at *18 (reiterating that attorney may "even express disagreement"). The Fifth Circuit opined that the statute "provides great leeway for debt relief agencies deciding whether it is necessary to provide a client

with the statement *at all.*" *Id.* at *17 (emphasis added). *Hersh* also suggested that a debt relief agency could comply by handing a client the Section 527(b) statement "and explain that it may not be necessary." *Id.* The agency "may even alter the language of the statement to fit [its] preferences as long as the content remains 'substantially similar.'" *Id.* at *18.

In short, *Hersh* recognized the inaccuracies contained in the written notice and treated the "mandatory" statement as virtually optional. The interpretation of the statute adopted in *Hersh* does not appear consistent with the plain language of Section 527. Even if it is permissible, the Fifth Circuit's interpretation hardly bolsters the constitutionality of Section 527. Indeed, it places attorneys at greater risk because it provides little if any guidance as to the circumstances in which they are permitted to omit the statements contained in Section 527. The ambiguous and conclusory analysis in *Hersh* hardly offers a secure safe harbor.

Moreover, the Fifth Circuit's reasoning undermines any conceivable governmental interest. An effectively optional written notice rule can hardly be said to be reasonably related to an important interest in preventing deception, for presumably the paid petition preparers and other debt relief agencies most in need of governmental regulation will be least likely to make full and complete disclosures. Thus, *Hersh* only serves to underscore the constitutional infirmity of Section 527.

## II. The Advertising Requirements of Sections 528(a)(3), (a)(4), and (b)(2) Are Unconstitutional.

If attorneys were included within the definition of "debt relief agency," then Sections 528(a)(3), (a)(4), and (b)(2) would be unconstitutional because they compel the inclusion of the following misleading statement in advertising: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement." 11 U.S.C. § 528 (b)(2)(B), (a)(4).

The District Court correctly held that the advertising requirements of Sections 528(a)(3), (a)(4), and (b)(2) could not constitutionally be applied to attorneys representing clients other than consumer debtors filing for bankruptcy. But the Court erred in sustaining the constitutionality of Sections 528(a)(3), (a)(4), and (b)(2) as applied to attorneys assisting clients in filing for bankruptcy under the Code.

As a practical matter, the District Court's decision does not provide sufficient guidance for attorneys who represent both debtors and creditors. The decision raises the question whether representation of a single debtor would trigger the BAPCPA requirement for all advertisements.

In addition, the District Court's legal analysis was faulty. The District Court opined that "[t]he government cited evidence presented before Congress that some bankruptcy attorneys did not mention in their advertisements that their ability to

make 'debts disappear' derived from the use of the bankruptcy process." (Order at 26) (JA 95). "Although the two-line disclosure is not the least restrictive means, nor the most effective means of serving this interest, Congress could have reasonably decided it would prevent at least some consumer deception." *Id.*

For the reasons stated in Part I-A, *supra*, the District Court erred by applying the *Zauderer* test rather than full First Amendment scrutiny. As discussed in further detail below, the advertising requirement is not a "purely factual and uncontroversial" disclosure rule. *Sorrell*, 272 F.3d at 114.

In any event, the challenged provisions would not survive constitutional scrutiny under any variant of First Amendment review.

### A. There Is No First Amendment Predicate For The Advertising Requirements.

The District Court erred in finding that the Government had cited sufficient evidence to justify Sections 528(a)(3), (a)(4), and (b)(2) as applied to attorneys representing consumer debtors. As another district court has concluded, there is no credible evidence demonstrating the existence of any problem with pre-BAPCPA advertising by bankruptcy attorneys:

> Prior to section 528 of the Code, consumer bankruptcy attorneys advertised themselves truthfully as bankruptcy attorneys. Such advertising was not illegal, false, deceptive, or misleading.

*Olsen v. Gonzales*, 350 B.R. 906, 920 (D. Or. 2006), appeal pending.

The evidence before Congress does not prove otherwise. The evidence is scant enough, but the Government did not point to *any* credible evidence that attorney advertisements were deceptive or caused any kind of problem.

The first piece of legislative history cited by the Government in the District Court was a “Consumer Alert” issued by the Office of Consumer and Business Education of the Bureau of Consumer Protection of the Federal Trade Commission, which does not recite any evidence of deception, does not mention attorney advertising or attorneys at all. Rather, it describes “advertisements that offer a quick fix” and an accompanying press release addresses advertising by “bankruptcy mills,” not attorneys. Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Session 90-92 (1998); see Letter of August 16, 2004, from AFSA to FTC, reprinted at http://www.ftc.gov/os/comments/affiliate_marketing/04-13481-0025.pdf.

The FTC document states that advertising promising debt relief may be offering bankruptcy. But it does not even assert that any consumer has ever been misled or harmed by such advertising. Indeed, the essence of the document was a warning that there were downsides to filing for bankruptcy, although it also said that in some circumstances “bankruptcy may be the likely alternative.”

The Government also referred to specific examples of attorney advertising presented at congressional hearings. The first attorney ad stated: “At your FREE

consolidation review, we will cover all forms of consolidation to determine the one best for you, including consolidation loans, negotiations with creditors, and court-assisted consolidation, like *Chapter 13 bankruptcy*." The second ad provided: "[We] will discuss *bankruptcy* and non-bankruptcy options." See Hearing at 93-94 (emphases added). In other words, the examples of attorney advertising actually before Congress *did include reference to the bankruptcy process* – precisely the opposite of what the District Court opined.[2]

Hence, the First Amendment predicate for a regulation of speech is entirely absent.

### B. The Advertising Requirement Is Not Reasonably Related To The Asserted Interest.

Section 528 suffers from an additional flaw: the required statement in Section 528 is not reasonably related to any interest in preventing deception. The mandated statement says nothing about "making debts disappear." Indeed, nothing in BAPCPA outlaws the use of that phrase.

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[2] Another piece of legislative history cited by the Government involved nothing more than the speculative, hearsay assertion of a biased witness. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*, Hearing on H.R. 975 before House Judiciary Comm., 108th Cong., 1st Sess. 55 (2003) (statement of a retailer asserting that there are attorney ads that "do not even mention bankruptcy—they talk about 'restructuring' your finances. I question whether these aggressive advertisers inform their clients about the serious downsides of filing for bankruptcy.").

Instead, Section 528 creates a new source of confusion by requiring ads to include the statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." As applied to attorneys, the mandatory statement is factually inaccurate and misleading. Whether or not attorneys fall within the legal definition "debt relief agency" created by the statute, the relevant question – in the context of speech to "members of the public" who are "often unaware of the technical meanings" of legal terms – is how the words would be understood in "ordinary usage." *Zauderer*, 471 U.S. at 652. Whatever one thinks a "debt relief agency" might be, an attorney in private practice certainly does not qualify as one in the ordinary understanding of a consumer. Many consumers may think that a "debt relief agency" is a governmental agency. They will be mystified by the reference to lawyers as "debt relief agencies."

Further, to assert that an attorney is a "debt relief agency" is to suggest that she is no different from a non-attorney bankruptcy petition preparer or anyone else who provides bankruptcy assistance. This suggestion would create new types of consumer confusion. Attorneys provide legal advice and can represent debtors in court. They therefore differ dramatically from bankruptcy petition preparers and similar entities.

Section 528 fails to recognize the distinction between attorneys and petition preparers. The District Court itself noted that Section 528 differs from the more

tailored disclosure provisions that have been upheld in previous cases: "the required disclosure in section 528 differs from those in *Zauderer* and *National Electric*, as it requires each advertiser to publish the same disclosure, rather than to disclose specific facts relevant to a particular product or service." (Order at 25 n.17) (JA 94). Accordingly, Section 528 is not reasonably related to the asserted interest.

Again, there is no reason for speculation on the point. The undisputed record in this case establishes that the advertising provision will aggravate any deception rather than reducing it. As Plaintiff Attorney Melchionne testified, "The required language forces me to make statements that impede my ability to distinguish myself from nonattorneys or government agencies. In fact, some potential clients have expressed concern to me that the designation denotes that I am an agent for the federal government and that information which would otherwise be confidential might somehow be communicated to the government." Melchionne Decl. ¶ 20 (JA 41).

Henry Sommer, President of the National Association of Consumer Bankruptcy Attorneys (NACBA), testified: "[i]f the [Debt Relief Agency] provisions are applicable to attorneys, they require our members to advertise they are debt relief agencies, causing confusion about the distinction between our members and the nonattorney bankruptcy petition preparers who are classed as

debt relief agencies and who regularly cause problems for bankruptcy debtors through the unauthorized practice of law." Sommer Decl. ¶ 7 (JA 60).

Hence, far from preventing deception, the statute would foster it, by requiring advertising by attorneys to carry the inherently misleading label "We are a debt relief agency." "If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated." *Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080, 1082 (2002) (Thomas, J., joined by Ginburg, J., dissenting from denial of certiorari) (criticizing Eleventh Circuit decision upholding a compelled disclaimer requirement for dentist advertising).

The Eighth Circuit in *Milavetz* upheld the advertisement disclosure requirement of Section 528 against constitutional attack, but its decision is not persuasive here. Significantly, the Eighth Circuit did not have the benefit of the full factual record assembled in this case. In addition, the Eighth Circuit relied on the ability of attorneys to "identif[y] themselves in their advertisements as both attorneys and debt relief agencies." 541 F.3d at 797. But the Eighth Circuit's proposed solution is manifestly impractical. The District Court itself in this case recognized that any attempt by attorneys "to clarify the [required] statement in the remainder of their advertisements" "would be difficult and confusing in the limited context of an advertisement." (Order at 25 n.17) (JA 94). The issue of limited

space is real. One Plaintiff testified: "I was forced to make room in my Yellow Pages listing for the required language by eliminating other important information for potential clients." Melchionne Decl. ¶ 20 (JA 41). Expecting an attorney to devote further space to clarifications and elaborations is unrealistic.

For all these reasons, the advertising requirement violates the First Amendment.

## III. The Contract Provisions of Sections 528(a)(1) and (a)(2) Are Unconstitutional as Applied to Attorneys.

If applied to attorneys, Sections 528(a)(1) and (a)(2) would unconstitutionally restrict their ability to give legal advice and to practice their profession. If attorneys qualify as debt relief agencies, Section 528(a)(1) requires that they shall "not later than 5 business days after the first date on which [the attorney] provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, *execute* a written contract with such assisted person that explains clearly and conspicuously the services [the attorney] will provide to such assisted person; and the fees or charges for such services, and the terms of payment." 11 U.S.C. § 528(a)(1) (emphasis added). Section 528(a)(2) requires a debt relief agency to "provide the assisted person with a copy of the fully executed and completed contract."

Attorneys in many States, including Connecticut, are already required to provide their clients with written agreements in many situations. *E.g.*, *Gagne v.*

*Vaccaro*, 766 A.2d 416, 424-26 (Conn. 2001). The net effect of Sections 528(a)(1) and (a)(2) is to force attorneys to pressure their clients to sign agreements within five days of commencing legal services. Ironically, BAPCPA encourages the very sort of pressure tactics that solicitation rules are aimed at preventing. *E.g.*, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

Further, the provisions would apply regardless of the duration or nature of the relationship between the attorney and the client, regardless of whether the communication between lawyer and client was by telephone or in person, and regardless of the cost to the attorney or the cost, difficulty or reasonableness of the client executing the contract within the five-day specified time frame.

The District Court erred in holding that these requirements are permissible as applied to attorneys.

### A. The Contract Provision Interferes With Protected Attorney-Client Communications.

Sections 528(a)(1) and (a)(2) suffer from a fatal First Amendment defect. If applied to attorneys, the executed-contract provisions would restrict their speech in a way that is not reasonably related to any legitimate governmental interest.

The District Court declined to apply any First Amendment scrutiny at all. It insisted that "the contract requirement does not impose any restrictions on an attorney's freedom of speech, and is strictly an economic requirement and should thus be evaluated under a rational basis test." (Order at 20) (JA 89). The District

Court's holding is unsustainable and ignores the fact that BAPCPA operates to forbid attorneys from communicating with their clients in the absence of an executed agreement within five days after bankruptcy assistance services commence.

In a variety of contexts, the Supreme Court has recognized that imposing any requirement of prior affirmative consent (let alone a fully executed contract) before communication may continue constitutes a burden on protected speech. For example, in *Martin v. Struthers*, 319 U.S. 141 (1943), the Court invalidated a city ordinance that forbade door-to-door solicitation unless the residents of the household had affirmatively requested the solicitor to approach. Similarly, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court invalidated a requirement that the recipients of Communist literature notify the Post Office in advance that they wish to receive it. And in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Supreme Court struck down an affirmative opt-in rule for "patently offensive" cable programming. The Court opined that "[t]hese requirements have obvious restrictive effects" (*id.* at 754), even apart from the reluctance of customers to order offensive material for viewing. *Id.* The Court predicted that "[f]urther, the added costs and burdens that these requirements impose upon a cable system

operator may encourage that operator to ban programming that the operator would otherwise permit to run." *Id.*

The District Court's treatment of Sections 528(a)(1) and (a)(2) as economic regulations cannot be squared with *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988), where the Supreme Court held that a financial regulation of professional fundraisers could not be defended as a "merely economic" regulation having "only an indirect effect on protected speech." *Id.* at 789 n.5. The Court therefore struck down a rule limiting a professional fundraiser to a "reasonable" fee, even though by its terms the law did not ban any speech at all. *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (striking down on First Amendment grounds a statute regulating contracts between charities and professional fundraisers and forbidding such contracts if, after allowing a deduction for many of the costs associated with the solicitation, the fundraiser retained more than 25% of the money collected); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (invalidating local ordinance requiring charitable solicitors to use 75% of funds solicited for charitable purposes). The Court has frequently invalidated other laws that do not by their terms prohibit speech at all, but simply regulate activities having a connection to expression. *E.g., NTEU v. United States*, 513 U.S. 454, 469 (1995) (striking down a ban on honoraria because it decreased the "incentive" of

government employees to speak); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.,* 502 U.S. 105 (1991) (invalidating New York's "Son of Sam" law, which prevented criminals from profiting from publishing deals).

Hence, there is no rule of law limiting First Amendment review to laws that explicitly forbid speech. Rather, the Supreme Court has always looked to the practical effect of the law. For example, the ordinance invalidated in *Martin v. Struthers* did not expressly prohibit door to door solicitation. Rather, the ordinance made it unlawful "for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door . . . ." 319 U.S. at 142. The solicitor was free to distribute handbills; he or she simply could not ring or knock. In *Meyer v. Grant,* 486 U.S. 414, 424 (1988), the Court struck down a ban on the payment of petition circulators, not a rule restricting what they could say. In *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 912 (1982), the Court held that even generally applicable tort laws (which did not target speech at all) were unconstitutional as applied to an expressive boycott because of the "incidental effect on First Amendment freedoms."

The District Court speculated that "attorneys can simply require a client to sign a contract at the time services are provided. The contract need not be an agreement that the attorney will represent the client in bankruptcy proceedings, but

could simply be an initial fee agreement for consultation, and thus would not bind the client to a certain course of action." (Order at 21) (JA 90). But the real-world evidence shows that, in practical terms, the law has restricted a substantial amount of attorney-client communication. As Attorney Maglieri has testified, "Sometimes my clients are reluctant to sign [the representation agreement]. I have had a client say to me 'I'll sign it when I see you in a month.' If they don't sign it, there is nothing I can do about it. . . . Twenty percent of potential clients refuse to sign. . . . Despite my caution on this issue, I fear that I may be in violation of the law that requires me to 'execute a written contract with such assisted person' no later than five business days after this meeting. I cannot compel the individual to sign an agreement." Maglieri Decl. ¶ 14 (JA 35).

Attorney Melchionne has testified: "Despite my efforts to comply with the debt relief agency provisions, it is practically impossible to comply with the section that requires an executed written contract within 5 days of providing bankruptcy assistance to an assisted person. Within 24 hours of an initial consultation with a potential client, I send a retainer agreement to the individual. I may or may not ever get the retainer back. When I do get the signed retainer back, it is rarely within the required 5 days. . . . I just don't see how I can comply with this section." Melchionne Decl. . ¶ 23 (JA 42). "Nor would forcing people to sign an agreement before the initial consultation agreement help me in my attempts to

comply. Many potential clients are wary of signing even an acknowledgment of receipt of the disclosures required by Section 527, let alone a retainer or agreement, and worry that they are being tricked into agreeing to pay for legal services when they have not yet decided on their course of action or that there will be some public paper trail of their discussion with an attorney that will not allow the consultation to be completely confidential." *Id.*

As described by NACBA President Henry Sommer, many attorneys are now simply unwilling to give any advice before they have the executed contract in hand: "If the [Debt Relief Agency] provisions are applicable to attorneys, they deter attorneys from giving advice to potential clients over the telephone, even in emergency situations and without compensation, because of the risk they will be found to have provided bankruptcy assistance to a person who has not executed a written contract." Sommer Decl. ¶ 6 (JA 59-60). "This provision is particularly burdensome for our member attorneys who serve clients in rural areas and who serve clients in underserved populations, such as the homebound, non-English-speakers, or the poor." *Id.*

This restriction of communication could lead to the loss of important rights. Thomas Welsh, a principal of Plaintiff creditors' law firm Brown & Welsh, P.C., has testified that "to comply we would have to forego giving any type of advice to ['assisted persons'] without a written contract even in emergency situations."

Welsh Decl. ¶ 14 (JA 50). S*ee also* Roisman Decl. ¶ 10 (JA 45). ("Providing any type of advice or emergency assistance over the telephone . . . would be risky as there would be no way to assure that we would be able to get an executed contract back."). The executed-contract requirement applies even to bar association lawyer referral services that typically are modestly compensated for their referrals.[3]

The requirement therefore violates the right of access to court, one of "the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002); *see also Tennessee v. Lane*, 541 U.S. 509, 523 (2004) ("[T]he right of access to the courts" is "protected by the Due Process Clause"); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (representation of indigent clients protected by First Amendment). The burden on access to justice is at least as severe as in many cases in which the Supreme Court has found a constitutional violation. *Boddie v. Connecticut,* 401 U.S. 371 (1971) (striking down divorce filing fee on basis of access to court); *M.L.B. v. S.L. J.,* 519 U.S. 102 (1996) (invalidating record fee in parental rights termination action); *Smith v. Bennett,* 365 U.S. 708 (1961) (striking down filing fee for habeas petitions).

[3] For example, the New Haven County Bar Association charges a $35 referral fee for all types of cases except personal injury and social security matters. *See* http://www.newhavenbar.org/lrs.php. The Hartford County Bar Association charges a $25 referral fee for a ½ hour consultation. *See* http://www.hartfordbar.org.

Sections 528(a)(1) and (a)(2) therefore infringe on speech and the right of access to court.

**B. Sections 528(a)(1) and (a)(2) Violate Due Process.**

In addition, Sections 528(a)(1) and (a)(2), if applied to attorneys, would violate due process because they impose strict liability for an act over which the attorney lacks control. The provisions do not merely require the attorney to offer the client a contract or to let the client know of his or her rates. Rather, *they mandate an executed contract.* Thus, the provisions impose strict liability for an act over which the attorney has no control: If an attorney provides advice to an "assisted person," but that person does not execute a contract within five days, the attorney has violated the provision and is subject to punishment.

The District Court insisted that a client may bring an action against an attorney "only if the attorney intentionally or negligently failed to comply with the provision." (Order at 21) (JA 90). But the District Court overlooked the possibility of enforcement by governmental authorities, and there is no scienter requirement in such actions to enforce Sections 528(a)(1) and (a)(2). *See, e.g.,* 11 U.S.C. § 526(c)(3) (enforcement action by state authorities). Violation does *not* require intent or deliberateness. The statute creates a strict liability offense. If attorneys were deemed to be "debt relief agencies" -- as the Government contends -- violation of Sections 528(a)(1) and (a)(2) would subject them to civil penalties,

return of any fees or charges paid by the assisted person, "actual damages," and attorney fees and costs. The statute empowers not only the assisted person to bring such claims, but also empowers the States to bring actions on behalf of their residents, seeking all these same remedies and penalties. If BAPCPA were construed to apply to lawyers, violations could also lead to disbarment or other disciplinary action.[4]

Due process forbids punishing a person for an action over which he has no control. *See, e.g.*, (invalidating penalty under Due Process Clause for conduct that involved "no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct"); *Peisch v. Ware*, 8 U.S. (4 Cranch.) 347, 363 (1807) (Marshall, CJ.) (even civil forfeiture of an owner's goods may not be imposed "without any fault on his part" based solely upon the actions of "strangers, over whom [he] could have no control").

## IV. The Statute Should Be Construed As Not Applying To Attorneys.

This Court should hold that the Debt Relief Agency provisions do not apply to licensed attorneys and should, on that basis, affirm the judgment of the Court below with respect to Section 526(a)(4) and reverse it with respect to the remaining challenged provisions.

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[4] *See, e.g.*, Connecticut Rules of Professional Conduct, Preamble [4]("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.").

Two bankruptcy courts have held that the Debt Relief Agency provisions do not apply to attorneys. *See In re Reyes*, 361 B.R. 276, 279-280 (Bankr. S.D. Fla. 2007); *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005). Such an interpretation reflects the best reading of the text, is the construction required by clear statement rules, and avoids the serious constitutional questions presented by this case.

### A. Under the Plain Language of the Statute, These Provisions Do Not Apply to Attorneys.

The provisions in question apply to an entity known as a "debt relief agency." As one court has observed, "[t]he term 'debt relief agency' appeared nowhere in the legal lexicon prior to the adoption of BAPCA and is a creation of the drafters of BAPCA. Prior to this legislation there was no such term of art. So, while the experts who drafted BAPCA are entitled to a failing grade in Legislative Drafting 101, the Court is left to determine what Congress intended." *In re Reyes*, 361 B.R. at 279.

The statutory definition of "debt relief agency" does not include the word "attorney" or "lawyer." 11 U.S.C. § 101(12A). It does include the term "bankruptcy petition preparer," but that term is separately defined in § 110 and expressly *excludes* attorneys and their staffs. "Attorney" is separately defined in § 101(4), which makes no reference to debt relief agencies or to subsection (12A). Plainly, had Congress meant to include "attorneys" within the category of "debt

relief agencies," it could have done so expressly in §§ 101(12A) or 101(4). Indeed, Congress provided definitions for more than 63 terms, including "accountant," "affiliate," "entity," "security," and "stockbroker." *See* §§ 101(1), (2), (15), (49), (53A). When Congress wished to include a defined term within another definition – by providing, for example, that a "person" includes a "corporation" and a "governmental unit" – it said so expressly. *See* § 101(4A).

Judge Lamar Davis has therefore concluded that the "plain language" of the statute excludes attorneys: "'attorney' and 'debt relief agency' are not synonymous nor do they in common understanding include each other. . . . Because the definition of 'debt relief agency' omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise." *In re Attorneys at Law*, 332 B.R. at 69.

To be sure, a debt relief agency is defined as an entity that provides "bankruptcy assistance," which may include "providing legal representation." 11 U.S.C. § 101(4A). However, as Judge Davis opined, the reference to "legal representation" was designed not to sweep all attorneys within the scope of the statute, but rather to fortify the consumer protection provisions of BAPCPA by authorizing bankruptcy courts to regulate non-attorney bankruptcy professionals who engaged in the unauthorized practice of law:

> [I]t is well-known that non-lawyers often attempt to provide "legal representation," often to poorer, less educated, and more vulnerable

> citizens. . . . I conclude that the inclusion of the term "legal representation" in the definition of 'bankruptcy assistance' was Congress's effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who are before the Court, who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law, and whose existing remedies for any damage is more theoretical than real.

*In re Attorneys at Law*, 332 B.R. at 69.

This inference is strengthened by the disclosure provisions of BAPCPA. Section 527(b) requires debt relief agencies to inform assisted persons that they have the right to hire an attorney or to represent themselves, that only an attorney can render legal advice, and how to perform services pro se that would be universally provided if the person hired an attorney. If attorneys were considered to be "debt relief agencies," this disclosure provision would be nonsensical: it would require an *attorney* to inform a client that he or she had the right to hire an *attorney*:

> It is hard to imagine that the language which, again, conspicuously omits the word "attorney" really requires an attorney to tell an assisted person that he/she has the right to hire an attorney or how to prepare the documents pro se that the attorney is poised to prepare on that person's behalf. It is far more likely that the provision is a consumer protection provision intended to regulate that universe of entities who assist persons but are not attorneys.

*Id.* at 70.

Properly construed, the Debt Relief Agency provisions do not apply to attorneys. Rather, they regulate bankruptcy petition preparers and other entities that may exploit consumers seeking bankruptcy assistance.

**B. The Rule of Construction Shows That The Provisions Do Not Apply To Attorneys.**

If the plain language left any ambiguity, the question would be resolved by a rule of construction contained in the Act itself, which requires this Court to conclude that the Debt Relief Agency provisions do not apply to attorneys. Section 526(d)(2) provides specifically that the provisions at issue shall not "be deemed to limit or curtail the authority or ability of a State or subdivision or instrumentality thereof to determine and enforce qualifications for the practice of law under the laws of that State; or of a Federal court to determine and enforce the qualifications for the practice of law before that court." 11 U.S.C. § 526(d)(2).

If the Debt Relief Agency provisions were construed as applying to lawyers, they would violate the rule of construction contained in the Act. They would limit the power of state and federal courts to regulate the legal profession – Section 526, for example, by determining what advice may ethically be given by lawyers, Section 527, by mandating what disclosures they ethically must provide, and Section 528, by prescribing what their advertisements may ethically say.

Values of federalism complement the rule of construction. "The interest of the States 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.'" *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975). The Supreme Court has recognized that federal statutes ordinarily will not be interpreted as displacing state authority over professions such as law or medicine, absent a clear and plain statement of congressional intent. *See Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

In view of the rule of construction supplied by BAPCPA itself, as well as the principles of federalism reflected by the traditional state regulation of the legal profession, Judge Davis concluded that it would be unreasonable to construe BAPCPA as effecting, *sub silentio*, a vast expansion of federal power:

> It would be a breathtakingly expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of this Act, which in no clear fashion lay claim to the right to do any such thing. It could possibly violate the Tenth Amendment to the Constitution as well. I cannot conceive that as long as this bill has been pending any such intent could have gone unnoticed and undebated by the states. Nor can I conceive that Congress would ever take such an astounding step toward the federal regulation of professionals without forthrightly and expressly stating its intent.

*In re Attorneys at Law*, 332 B.R. at 70. In this case, the absence of statutory history reflecting such a momentous decision by Congress is equivalent to the "dog that did not bark." *Chisom v. Roemer,* 501 U.S. 380, 396 n.23 (1991) (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)).

Accordingly, the rule of construction embodied in BAPCPA requires that the Debt Relief Agency provisions be interpreted as not applying to attorneys.

### C. If The Statute Were Deemed Ambiguous, It Should Be Construed Not To Apply To Attorneys In Order To Avoid The Substantial Constitutional Questions That Would Otherwise Be Presented.

If there were any statutory ambiguity, the Debt Relief Agency provisions would have to be interpreted as not applying to attorneys, under the principle that a statute should be construed to avoid grave constitutional questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Debt Relief Agency provisions would present grave constitutional questions if they were construed to apply to attorneys; indeed, they would be unconstitutional. The proper course, therefore, is for this Court authoritatively to construe the statutory term "debt relief agency" in § 101(4A) so that it does not include licensed attorneys.

Although two circuit courts have held that attorneys qualify as "debt relief agencies" within the meaning of BAPCPA, those courts have either held portions of BAPCPA unconstitutional, *Milavetz*, 541 F.3d at 792-94 (holding Section 526(a)(4) unconstitutional), or have relied heavily on the doctrine of constitutional avoidance. *See Hersh*, 2008 WL 5255905, *7-8. Appellants submit that the most logical solution is to apply the doctrine of constitutional avoidance to conclude that attorneys are outside the Debt Relief Agency provisions altogether.

## CONCLUSION

The District Court's judgment should be reversed insofar as it denied any portion of the preliminary judgment sought by Plaintiffs and granted any portion of the Government's motion to dismiss. This Court should direct that Plaintiffs' motion for preliminary injunction be granted in full.

Respectfully submitted,

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Dated: February 25, 2009

## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,931 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 the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

/s/ Jonathan S. Massey
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Dated: February 25, 2009

## ANTI-VIRUS CERTIFICATION FORM

In accordance with Local Rule 32(a)(1)(E), I certify that the PDF version of this opening brief – submitted in this case as an e-mail attachment to briefs@ca2.uscourts.gov – was scanned for viruses using Symantec Antivirus Corporate Edition, Version 10.0.2.2002, and that no viruses were detected.

/s/ Jonathan S. Massey
Attorney for Plaintiffs-Appellants

Dated: February 25, 2009

## CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellants were served by Federal Express, and an additional copy was served by e-mail, on February 25, 2009, on the following counsel:

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# STATUTORY ADDENDUM

## 11 U.S.C. § 101

## § 101. Definitions

In this title the following definitions shall apply:

**(3)** The term “assisted person” means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250.

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

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

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

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

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

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

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

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

**11 U.S.C. § 110**

**§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions**

**(a)** In this section--

**(1)** "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing; and

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

**11 U.S.C. § 526**

**§ 526. Restrictions on debt relief agencies**

**(a)** A debt relief agency shall not--

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

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

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

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

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

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

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

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

**(2)** Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person

that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--

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

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

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

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

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

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

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

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

**(5)** Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--

**(A)** enjoin the violation of such section; or

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

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

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

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

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

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

**11 U.S.C. § 527**

**§ 527. Disclosures**

**(a)** A debt relief agency providing bankruptcy assistance to an assisted person shall provide—

**(1)** the written notice required under section 342(b)(1); and

**(2)** to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that--

**(A)** all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

**(B)** all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

**(C)** current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

**(D)** information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

**(b)** A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."

**(c)** Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--

**(1)** how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

**(2)** how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

**(3)** how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

**(d)** A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

**11 U.S.C. § 528**

**§ 528. Requirements for debt relief agencies**

**(a)** A debt relief agency shall--

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

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

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

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

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

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

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

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

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

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

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

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