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

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

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CORPORATE DISCLOSURE STATEMENT

Appellants the Connecticut Bar Association, the National Association of Consumer Bankruptcy Attorneys, and Brown & Welch, P.C. state that the Corporate Disclosure Statement filed in their opening brief remains accurate, and they are nongovernmental corporate entities that have no parent corporations and do not issue stock.

The remaining Appellants are natural persons.

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Attorney for Plaintiffs-Appellants

Dated: May 27, 2009

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SUMMARY OF ARGUMENT

Plaintiffs' Principal Brief demonstrated that the District Court erred in sustaining any of the challenged portions 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. The Government's Principal Brief for the Appellees ("Govt. Br.") serves only to confirm the constitutional defects in the Act. The Supreme Court has recognized that the attorney-client relationship serves to support the goal of "sound legal advice [and] advocacy." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The challenged provisions of BAPCPA, if applied to attorneys, would profoundly disrupt that relationship.

Most strikingly, the Government does not even respond to, much less contradict, the factual record developed in the District Court demonstrating that the challenged provisions of BAPCPA are counterproductive in practical operation. Rather than ensuring that debtors receive accurate information about their rights and obligations in the federal bankruptcy system, and rather than preventing consumer deception, the challenged provisions of BAPCPA ***increase*** public confusion, ***mislead*** and ***harm*** consumers, and represent a substantial and wholly unnecessary burden on attorney-client communications. This case should be resolved by the simple proposition that – regardless of the appropriate level of constitutional scrutiny – a law regulating protected expression cannot stand where

the sole evidence regarding its practical operation shows that it has a completely counterproductive impact.

This is not a case, as the Government asserts, where Plaintiffs seek to mount a constitutional challenge based on "hypothetical applications [of the statute] not before the Court." Govt. Br. 41. Rather, Plaintiffs' claims are premised on the fully developed record evidence demonstrating how the challenged provisions actually operate in practice. In fact, it is the Government's defense of BAPCPA that relies on "hypothetical applications not before the Court." The Government seeks to defend BAPCPA not as it was actually written and enacted by Congress, but rather as the Government's litigators would prefer to construe and re-interpret it *post hoc*. And the Government seeks to defend BAPCPA not as it operates in the real world, but as it was ostensibly meant to operate in some imaginary universe hypothesized by the Government. The possibility that a statute might operate constitutionally under some hypothetical set of circumstances —even outside the bounds of the uncontroverted factual record — can hardly be enough to dispose of a systemic challenge to the statute.

The Government defends BAPCPA on the basis of scattered snippets from congressional hearings held as long as seven years prior to the enactment of the statute. The District Court did not even mention any of these materials in its decision. Even apart from the passage of time, which reduces greatly whatever

probative force these isolated snippets might have, the materials introduced by the Government actually ***undermine*** the purported justifications for the challenged provisions of BAPCPA.

The Government insists that the disclosures mandated by Section 527(b) of BAPCPA are accurate. But it fails to refute Plaintiffs' showing that in several important respects the disclosures are simply incorrect as statements of bankruptcy law. Moreover, the Government's principal response to the misleading and confusing impact of the BAPCPA disclosures is to insist that those statements are mandatory only "to the extent applicable" and may be "omit[ted]," modified, and "tailor[ed]" by the debt relief agency as it sees fit. Govt. Br. 33 (internal quotation marks omitted). This concession is fatal to the Government's constitutional defense. Every case cited by the Government in support of mandatory disclosures involves the delivery of factual, uncontroversial, and typically quite routine information to a consumer. In no prior case has the Government imposed such an ambiguous, confusing, and burdensome mandate on private speakers to formulate their own sets of disclosures according to vague guidelines – particularly when the Government's set of disclosures contain inaccuracies, and the onus lies on the private speakers to supply corrections.

Sections 528(a)(3), (a)(4), and (b)(2) would also be unconstitutional if 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). Again, the Government makes no attempt to confront the unrebutted factual record demonstrating that the mandated statement creates a new source of confusion. 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. This Court should hold that Sections 528(a)(3), (a)(4), and (b)(2) are unconstitutional as applied to ***all*** attorneys.

The executed-contract requirement of BAPCPA, codified at 11 U.S.C. § 528(a)(1) and (a)(2), also violates Plaintiffs' constitutional rights, if the Act is construed as applying to bankruptcy attorneys. The Government's claim that the provision "simply regulates the form of a particular economic transaction," Govt. Br. 35, is sophistry. The fact of the matter is that BAPCPA bans protected communications between lawyer and client in the absence of a contract executed within five days of the commencement of the representation, and the uncontested factual record demonstrates that the law has a substantial impact on protected speech.

The Government's cross-appeal has no merit. The Government asks this Court to reverse the District Court's judgment invalidating Sections 528(a)(3), (a)(4), and (b)(2), as applied to attorneys representing clients other than consumer debtors filing for bankruptcy. The Government also seeks to reverse the District Court's judgment holding unconstitutional Section 526(a)(4) as it applies to attorneys, on the ground that its prohibition on advising clients to incur debt in contemplation of filing for bankruptcy violates the First Amendment. But the District Court's reasoning on both issues was plainly correct, and the Government's argument should be rejected.

The Government's defense of Section 526(a)(4) is premised on a proposed rewriting of the Act that is contrary to its text. The Government cites the principle that a statute should be construed to avoid constitutional difficulties. But the Government fails to follow that principle to its logical conclusion. The simplest and most obvious saving construction in this case is that the Debt Relief Agency provisions should be construed as not applying to licensed attorneys. BAPCPA contains an express rule of construction mandating that very saving construction. 11 U.S.C. § 526(d)(2). All of the serious constitutional questions presented in this case show that the challenged provisions of BAPCPA should be construed as not applying to bankruptcy attorneys, under the doctrine of constitutional avoidance.

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

ARGUMENT

I. THE MANDATORY NOTICE PROVISIONS OF SECTION 527 ARE UNCONSTITUTIONAL IF APPLIED TO ATTORNEYS.

The Government concedes that Section 527 triggers at least ***some*** version of heightened First Amendment scrutiny, and it advocates the test of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). *See* Govt. Br. 24. According to the Government, Section 527 may be upheld so long as the Government meets its burden of demonstrating that it is "reasonably related to the legitimate government interest" and is "not duly burdensome." *Id*. The Government's argument fails, for four reasons: (1) even assuming that *Zauderer* prescribes the proper First Amendment test, the undisputed factual record demonstrates that Section 527 flunks that test; (2) the legislative materials adduced by the Government show that Section 527 cannot satisfy the *Zauderer* test; (3) even disregarding the factual record assembled in this case, the text of Section 527 demonstrates that it cannot meet the *Zauderer* standard; and (4) in truth the *Zauderer* standard is inapplicable, and Section 527 should be subject to more

rigorous First Amendment scrutiny, which the District Court failed to apply and which Section 527 cannot survive with respect to attorneys.

A. The Government Concedes The Factual Record Demonstrating The Constitutional Flaws In The Challenged Provisions.

This Court has consistently recognized the importance of a full factual record in analyzing constitutional questions. *E.g., Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 353 (2d Cir. 2005) (expressing criticism because "[w]e have been asked to address several weighty constitutional and statutory issues on what is an inadequate factual record."); *EMI Catalogue Partnership v. Hill, Holliday, Connors, Cosmopulos, Inc*., 228 F.3d 56, 68 (2d Cir. 2000) (premature to address First Amendment question where "[t]factual record is very limited" and "[t]here is no evidence in the record going to either the probability of confusion or the public interest in free expression").

The Supreme Court has also stressed the importance of a factual record. For example, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), cited by the Government (Govt. Br. 24), the Court invalidated a spousal notification rule based on the practical effect of the statute in operation. The Court explained that "[t]he District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute." *Id.* at 888. "Legislation is measured for consistency with the Constitution by its impact on

those whose conduct it affects." *Id.* at 894. *See also Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 668 (1994) (stressing the importance of a factual record in remanding a First Amendment challenge under intermediate scrutiny to "permit the parties to develop a more thorough factual record"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495-96 (1986) (rejecting government's argument that "a review of historical facts" was unnecessary in challenge to restriction on cable speech).

In this case, there is a full and ample record of the practical effect of Section 527 – but only the record provided by the Plaintiffs. Plaintiffs have developed a factual record documenting the real-world operation of Section 527 that is unrebutted. The uncontroverted evidence shows that the challenged disclosure provisions fail to advance any legitimate governmental interest and in fact are counterproductive. The Joint Appendix includes the Declarations of Charles A. Maglieri, Eugene S. Melchionne, Gerald A. Roisman, Thomas J. Welsh, Anita Johnson, Wayne Silver, and Henry Sommer in support of Plaintiffs' motion for preliminary injunction in the District Court. JA32-60.

As outlined in Plaintiffs' Principal Brief, the disclosure rules increase confusion, sow distrust between attorneys and clients, and exacerbate the plight of consumers in bankruptcy. JA36 ("Most of the information is irrelevant most of the time, much of it is incorrect, and it is confusing to [consumers]."); *id.* (clients are

"glassy-eyed"); JA41 ("Uniformly, potential clients that come to see me are confused by the required disclosures of BAPCPA."); JA42 ("[Section 527] 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."). Section 527, as applied to attorneys, requires them "to give inaccurate and misleading disclosures, causing confusion among clients which takes considerable time to clear up and generally disrupts and interferes with [attorneys'] relations with their clients." JA56. A client testified that the disclosures "confused us and left us indecisive as to which direction to turn." JA53.

The Government's failure to contest the record concerning the practical operation of Section 527 is fatal to its constitutional defense of the statute, under any version of First Amendment scrutiny. *Zauderer* is not a blank check for government regulation of speech. In *Zauderer* itself, for example, the Supreme 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 brushed aside the

government's justifications with the criticism that they "amount[ed] to little more than unsupported assertions" without "evidence or authority of any kind." *Zauderer,* 471 U.S. at 648-49. The Court noted the important constitutional protections accorded to attorney speech. *Id.* at 642. The Court rejected the notion that the government could impose sweeping restrictions on attorney advertising without any showing of deception and indicated that the government was obliged to "weed out accurate statements from those that are false or misleading," rather than restricting speech generally. *Id.* at 644. The Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment." *Id.* at 651.

Subsequent cases have reaffirmed that the "reasonably related" test of *Zauderer* has real teeth. The Supreme Court has cited *Zauderer* for the proposition that the Government is not free "to enact measures short of a total ban to prevent deception or confusion" simply by asserting that its regulations are necessary to address "potentially misleading" advertising. *Ibanez v. Fla. Dept. of Pro. & Bus. Regulation*, 512 U.S. 136, 146 (1994) (striking down, under *Zauderer,* a compelled disclaimer requirement). Therefore, even the test advocated by the Government requires a strong factual showing to justify a regulation of speech.

Yet remarkably, the Government's brief before this Court barely even alludes to the evidence documenting the practical impact of Section 527. Nor did

the Government seek to contradict the evidence in the District Court. The Government chose not to introduce controverting declarations of its own, with the minor exception of the Declaration of Elizabeth J. Austin. JA61-62.[1] The Government undertook no surveys or analysis of the operation of Section 527. The Government did not depose the authors of the Plaintiffs' declarations, cross-examine them in Court, or conduct an evidentiary hearing before the District Court.

The instant case comes to this Court with an unambiguous factual record that admits of only one conclusion: Section 527 is entirely counterproductive and disserves the asserted governmental interests it was ostensibly intended to promote. The compulsory disclosure requirement is therefore unconstitutional. "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).

[1] Plaintiffs address the irrelevance of Ms. Austin's declaration in footnote 6, *infra*.

B. The Legislative Materials Adduced By The Government Confirm That Section 527 Fails The *Zauderer* Test.

The Government attempts to justify Section 527 by citing various excerpts from congressional hearings that long preceded the enactment of BAPCPA in 2005. In particular, the Government culls anecdotal statements from three hearings in 1998, two hearings in 1999, and one hearing in 2003. Govt. Br. 21-24, 38-40. The excerpts are hardly an authoritative measure of Congress' purpose. *Cf. Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted).

Moreover, the District Court did not even mention any of the snippets – much less rely on them – in its decision. In any event, the snippets fall far short of satisfying the Government's burden under any version of First Amendment scrutiny.

1. The Snippets From The Congressional Hearings Are Not Conclusive.

First, the legislative materials cannot obviate the need for the Court to inquire for itself, in light of the record assembled in this case, whether Section 527 in fact materially achieves any legitimate governmental interest. Even formal legislative findings by Congress – let alone seven-year-old anecdotes culled from witness statements in congressional hearings – are not conclusive on this Court as a constitutional matter. In the words of then-judge Clarence Thomas, writing for the District of Columbia Circuit: "We know of no support ... for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce. At least since *Marbury v. Madison* that has not been the law." *Lamprecht v. FCC,* 958 F.2d 382, 392 n.2 (D.C.Cir.1992) (citation omitted).

In the First Amendment context, the Supreme Court has long made clear that a court has an independent duty to examine the record for itself. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field

of free expression.") (internal quotation marks omitted). The Supreme Court has repeatedly held that "[d]eference to a legislative finding" "cannot limit judicial inquiry when First Amendment rights are at stake," because "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978). *See also Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (opinion of Breyer, J.) ("We consequently must examine the record independently and carefully to determine whether Act 64's contribution limits are 'closely drawn' to match the State's interests."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("Both the District Court and the Court of Appeals found that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars. In the District Court's words, 'none of the witnesses, none of the depositions that I have read, no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote ... strength wars.'"); *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (striking down Florida ban on CPA solicitation where Board "presents no studies that suggest personal solicitation ... creates the dangers ... the Board claims to fear").

Where the evidence shows that actual operation of a statute is inconsistent with its ostensible purpose, a court may not credit the latter. *See Edenfield*, 507

U.S. at 768 (citing *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 730 (1982) ("although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification")).

The legislative history materials cited by the Government therefore cannot override the uncontroverted factual record demonstrating the invalidity of Section 527.

2. The Excerpts Cited By The Government Prove The Opposite of What It Contends.

In any event, the portions of the legislative history cited by the Government ***undermine***, rather than support, the constitutionality of the Section 527 disclosure requirements. For example, the Government cites the 1998 testimony of a professor at Iowa State University, Tahira K. Hira, who described a survey she had conducted regarding debtors' experiences in the bankruptcy system. Govt. Br. 22. The witness found a desire for more information *ex ante* about the "consequences" of filing for bankruptcy and the "details about the process." Govt. Br. 23. But the witness said nothing about a written disclosure rule, much less the advisability of Section 527 in particular. In any event, Congress addressed such concerns in other provisions in BAPCPA, such as Section 342(b)(1)(A), which requires "written notice containing . . . a brief description of . . . chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters. . ."

Such notice must be provided by debt relief agencies to assisted persons under § 527(a)(1). Hence, it is Section 342(b)(1)(A) (which Plaintiffs do not challenge), rather than Section 527, that requires provision of a description of the various types of bankruptcy proceedings and the costs and benefits of proceeding under each chapter. Plaintiffs do not contest the constitutionality of requiring attorneys to provide such notices if they are "debt relief agencies" within the meaning of the statute. Indeed, if they are not debt relief agencies, attorneys would be required to provide the notice by Section 521(b)(1)(B)(iii)(I).

Moreover, the Government ignores the ways in which Professor Hira's testimony undermines Section 527. The mandated disclosures run contrary to the witness' recommendations that "[l]awyers should be made to explain details of the process and consequences instead of taking money and moving you through the system like cattle." The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to Consumer Bankruptcy Crisis, Hearings on S. 1301 before Senate Judiciary Comm., 105th Cong., 2d Sess. 29 (1998) (statement of Tahira K. Hira). The mandate of written disclosure treats consumers ***precisely*** like "cattle," by requiring a one-size-fits-all written disclosure statement that is not individualized in any way to a client's particular situation or needs. The unrebutted factual record shows that the impact of Section 527 has been to

discourage attorney-client communications and worsen the very problems described by Professor Hira.

To the same effect is the statement of Judge Edith Hollan Jones of the Fifth Circuit cited by the Government: "Many bankruptcy lawyers never talk to their clients." Govt. Br. 22 (quoting Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 Before House Judiciary Comm., 105th Cong., 2d Sess. 14 (1998). Section 527 does not promote oral communications between attorneys and clients; in fact, the only available evidence is that it discourages and interferes with them.

Next, the Government cites the testimony of Hon. Carol J. Kenner, a bankruptcy judge from the District of Massachusetts. Govt. Br. 22. Judge Kenner testified about creditor abuse of the reaffirmation process, not about the need for a written disclosure rule like Section 527. Bankruptcy Reform, Joint Hearing Before House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. at 35-36 (1999). She urged a wide range of restrictions on ***creditor*** behavior. *Id*. at 36. In fact, Congress addressed the reaffirmation issues raised by Judge Kenner through extensive amendments to Section 524 of the Code.

Judge Kenner did testify that debtors sometimes have no warning that creditors may seek to cause them to reaffirm debts and may do so in intimidating ways. But the compelled statements of Section 527 do not properly address this problem. In fact, they worsen it. Section 527 would require the attorney to inform

a client: "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." This statement nowhere mentions that the debtor's attorney is the logical person to provide such "help." The only party mentioned by Section 527 is the creditor, creating the misleading impression that the creditor might usefully be able to help the debtor determine whether to reaffirm a debt, so long as the creditor does not "coerce" the debtor. Judge Kenner stressed the need to strengthen the attorney-client relationship and to avoid "driv[ing] a wedge between the attorney and client." *Bankruptcy Reform*, at 36. Section 527 runs counter to that purpose.

Other evidence cited by the Government involves complaints about a lack of debtor knowledge concerning the availability of credit counseling. Govt. Br. 21-22. For example, the Government cites the anecdotal experience of an individual debtor who testified: "When I filed for bankruptcy, I needed immediate relief from all of my debts . . . Chapter 7 was the right place for me . . . When I saw an attorney about filing for bankruptcy, all he talked about was how easy it would be to wipe out all of his debts in Chapter 7. He never mentioned Chapter 13, and he certainly never mentioned anything about credit counseling. I believe it is imperative that the laws require attorneys or the bankruptcy court to tell debtors about their options, both within and outside of bankruptcy, such as consumer credit

counseling." Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 Before House Judiciary Comm., 105th Cong., 2d Sess. 94 (1998) (paragraph breaks omitted).

This testimony offers no support for Section 527. None of the compelled statements at issue in this case involve credit counseling. New section 109(h) requires credit counseling before bankruptcy and mandates a separate notice that describes credit counseling services. *See* 11 U.S.C. §§109(h), 342(b). Plaintiffs do not challenge these sections, and the fact that Congress remedied the problem directly through credit counseling provisions underscores that Section 527 is not reasonably related to whatever problems with respect to credit counseling may have existed seven years before BAPCPA was enacted.

C. The Text of Section 527 Shows That It Is Unconstitutional As Applied To Attorneys.

Section 527 would be unconstitutional even without regard to the factual record assembled by Plaintiffs or the legislative materials adduced by the Government.

1. The Mandated Disclosures Contain Inaccuracies.

As detailed in Plaintiff's Principal brief (Opening Br. 27-28), the statements required by Section 527 include information that is factually inaccurate and misleading. The Government blithely states that "plaintiffs identify no genuine

errors of fact or law in section 527(b)," Govt. Br. 30, but that assertion is untrue. For example, the Government itself does not contest that Section 527's description of the filing fee requirement is not accurate, as even the District Court's opinion suggested. JA88 n.14 ("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))).

Section 527(b) contains other inaccuracies as well. It requires an attorney to state that debtors in Chapter 13 cases 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. In addition, the Code does not always take into account a Debtor's actual expenditures in calculating repayment ability. Rather, in some cases, it uses unrelated guidelines promulgated by the Government. 11 U.S.C. § 1325(b)(3) (incorporating § 707(b)(2) expense methodology based in large part on Internal Revenue Service expense allowances).

In addition, Section 527(a)(2)(C) requires an attorney to state that "current monthly income, the amounts specified in section 707(b)(2) [11 U.S.C. § 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). The Government's argument that Plaintiffs are mistaken on this score (Govt. Br. 31 n.9) is incorrect,[2] and the Official Bankruptcy Forms make clear that Plaintiffs' interpretation is the proper one.[3]

The Government does not deny that Section 527's discussion of debt reaffirmation is woefully incomplete and potentially misleading because it suggests that creditors may offer assistance in this process, so long as they do not "coerce" the debtor. As noted in Part I-B, *supra*, the Government's own legislative

[2] Section 707(b)(2) is the chapter 7 means test. While all assisted persons must state their current monthly income, only those whose current monthly income is above the applicable state median income (about 10% of chapter 7 debtors and 20% of chapter 13 debtors) must state any of the other amounts specified in Section 707(b)(2). Since the provision mentions current monthly income separately, the language of Section 527(a)(2)(C) presumably refers to the amounts in Section 707(b)(2) other than current monthly income, which need not be stated by most chapter 7 debtors. (Disabled veterans and certain military and reserve members are also excluded from means testing by Section 707(b)(2)(D)). Similarly, only chapter 13 debtors whose current monthly income is above median income are required, by 11 U.S.C. 1325(b)(3), to state or use the Section 707(b)(2) amounts in calculating disposable income. In fact, under Section 1325(b)(2), all other chapter 13 debtors must use actual expenses, as opposed to the IRS allowances required by Section 707(b)(2), to determine disposable income, and their using the Section 707(b)(2) amounts would be improper.

[3] Official Bankruptcy Forms 22A and 22C can be found at http://www.uscourts.gov/bkforms/bankruptcy_forms.html#official. On Form 22A, Line 15 carries out the statute's dictate that only chapter 7 debtors over median income need compute the Section 707(b)(2) amounts. (11 U.S.C. 707(b)(7)). On Form 22C, line 23 instructs debtors below median income to skip the portions that carry out the Section 707(b)(2) computations.

materials indicate that debt reaffirmation is a serious issue for many debtors. Far from solving the problem, Section 527 aggravates it.

The Government does not contest that Section 527(b) requires an attorney to inform clients that they "may want help preparing [their] chapter 13 plan and with the confirmation hearing on [their] plan," but it fails to state that attorneys are the only ones authorized by law to provide such help. Similarly, the Government does not deny that Section 527(b) requires an attorney to disclose that, "[i]f 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. The silence in these disclosures is not merely a technical inaccuracy; in fact, the omissions misleadingly suggest that nonattorneys, such as petition preparers, are equally able to provide such help.[4]

2. The Government's Proposed "Cures" Compound The Constitutional Violation.

The Government attempts to sweep aside the defects in Section 527 by asserting that "nothing in the statute prevents plaintiffs from providing additional

[4] 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. The Government insists that the disclosure means only that the trustee has "official duties," Govt. Br. 32, but if that were the intent, Section 527(b) could have said so directly.

information to their clients as they see fit." Govt. Br. 32. There are numerous problems with the Government's attempt to save the statute in this manner.

First, the Government fails to respond to the argument in Plaintiffs' Principal Brief that such reasoning effectively turns the First Amendment upside down. Open. Br. 29. By relying on private attorneys to fix the problems in a government-mandated disclosure rule, the Government effectively admits that the rule, by itself, is constitutionally flawed. The Government cannot cite any case involving a mandatory disclosure in which a court held that similar problems could be cured by supplementary private speech. It would be as though the Government were permitted to compel a newspaper to include an inaccurate statement on its front page, on the theory that the newspaper could always correct the misinformation through its own speech. *Cf. Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (holding right of reply statute for newspapers unconstitutional).

Second, the Government also ignores the showing in Plaintiffs' Principal Brief that it is impractical and burdensome to rely on private attorneys to correct the misstatements in Section 527. Open. Br. 30-32. The uncontroverted evidence in the record shows that clients are confused and misled by the mandated disclosures, JA52-53; that explaining and correcting them takes an enormous amount of attorney time and imposes substantial expense, JA35-36; and that the

process of correction and explanation does not work. JA35-36, 41-42. The Government simply does not come to terms with the practical operation of the statute.

Third, the Government's contention that the disclosures are mandatory only "to the extent applicable" and may be "omit[ted]," modified, and "tailor[ed]" by the debt relief agency as it sees fit, Govt. Br. 33 (internal quotation marks omitted), creates an entirely new constitutional vice in Section 527. The Government does not deny the factual showing in Plaintiffs' Principal Brief that 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. JA57. For example, an attorney can determine whether a specific client triggers the Section 707(b)(2) expense standards only after computing current monthly income and comparing it to the state median, which itself is adjusted twice a year. Computing current monthly income requires gathering precise information on all forms of income for the preceding six months and, in some cases, legal analysis of what constitutes income.

More fundamentally, there simply is no constitutional precedent for the vague and ambiguous "disclosure" rule created by the Government's new-found construction of Section 527. Prior cases involving mandatory disclosures have involved factual, noncontroversial statements in a form prescribed by the

Government. By contrast, the Government appears to adopt the construction of Section 527 advanced by the Fifth Circuit in *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008), petition for cert. pending, No. 08-1174, under which private attorneys have the authority "to expand upon, clarify, *or even express disagreement with* any of the provisions of the required statement." *Id.* at 767 (emphasis added); *see also id.* (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.* (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.*

Such rewriting of Section 527 undermines any conceivable justification for the statute. The Government suggests that an attorney could comply with the statute by handing a client a written disclosure sheet while simultaneously telling the client that the attorney did not agree with the statements or that the sheet was not "necessary." An effectively optional written notice rule, or a rule that permits private speakers openly to dispute the contents of the disclosure, is unlike any other disclosure requirement upheld by this Court or the Supreme Court. Such an unprecedented approach can hardly be said to be reasonably related to an important

interest in preventing deception. Thus, the Government's own arguments doom Section 527, if applied to attorneys.

Moreover, the Government's new-found interpretation of Section 527 creates a new vice of vagueness. The Government provides few clues as to how attorneys are expected to exercise their discretion under Section 527. The Government denies that such flexibility could be constitutionally problematic. Govt. Br. 33. Yet the Government fails to address the predicament of private attorneys provided with little if any guidance as to the circumstances in which they are permitted to omit the statements contained in Section 527. The Government offers no safe harbor – only a standardless "mandate" and the prospect of selective and discretionary enforcement. *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) (a law that is "vague and standardless" "may authorize and even encourage arbitrary and discriminatory enforcement") (internal quotation marks and citation omitted); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (standardless discretion invalid where it carries the "potential for arbitrarily suppressing First Amendment liberties").

D. The District Court Erred By Failing To Apply More Rigorous Constitutional Scrutiny.

The District Court applied the same *Zauderer* standard as the Government urges before this Court. JA 87. The application of such a standard was legal error. Instead, the District Court should have applied full First Amendment scrutiny.

Zauderer governs routine disclosure requirements involving purely factual, uncontroversial information. In *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009), for example, this Court upheld a municipal rule requiring chain restaurants with fifteen or more establishments nationally to make certain statements disclosing calorie content of food on menus and menu boards, according to the manner prescribed by the regulation. The Court treated the rule as a "purely factual and uncontroversial disclosure requirement[]." *Id.* at 132 (brackets, internal quotation marks, and citation omitted); *see also id.* at 134 ("NYSRA does not contend that disclosure of calorie information is not 'factual'"); *see also National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 n.4 (2d Cir. 2001) (noting that there was no claim that the mandatory disclosure was inaccurate); *id*. at 114 n.5 ("Our decision reaches only required disclosure of factual commercial information.").

Section 527 is not a law mandating factually accurate, uncontroversial disclosures. Nor is it a rule about commercial speech, because the statements involved do not propose a commercial transaction. Rather, they relate to the

operation of the bankruptcy system, and therefore the speech at issue here is entitled to full First Amendment protection. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544, 546 (2001) (opining that "advice or legal assistance" is entitled to full First Amendment protection and that "information respecting . . . statutory rights" is "vital"); *Riley v. National Federation of the Blind,* 487 U.S. 781, 795-96 (1988) (applying strict scrutiny to invalidate North Carolina compelled disclosure law that required professional fundraisers to disclose to solicited potential donors the percentage of charitable contributions that the fundraiser collected during the past year that were actually given to the charities represented).[5]

The Government has nowhere suggested that Section 527 could survive such scrutiny. Accordingly, the mandatory disclosure rule should be struck down.

[5] Even if the communication were deemed to be commercial speech, First Amendment protections still apply in the context of compelled commercial speech. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Thus, if this case were viewed as a commercial speech case, it would be governed by *IDFA*, where this Court held that a State's desire to assure that citizens had accurate, factual information about an advertised product (as opposed to a need to prevent deception) was an insufficiently substantial interest to permit compelled disclosure of that information in the commercial context, even when it was clear that that disclosure would lead many consumers, who wanted to know the information, not to purchase the advertised product. *See Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 74 (2d Cir. 1996).

II. THE ADVERTISING REQUIREMENTS OF SECTIONS 528(A)(3), (A)(4), AND (B)(2) ARE UNCONSTITUTIONAL.

Plaintiffs' Principal Brief demonstrated that, if attorneys were included within the definition of "debt relief agency," then Sections 528(a)(3), (a)(4), and (b)(2) would be unconstitutional, under any version of constitutional scrutiny, 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.

For the reasons set forth in Part I, supra, this Court should apply full First Amendment scrutiny to invalidate all challenged provision of Section 528. But even under the *Zauderer* standard urged by the Government, the provisions would be unconstitutional.

A. The Government Fails To Adduce Any Plausible Evidence of Deceptive Attorney Advertising.

The Government asserts that there was evidence before Congress indicating that some bankruptcy lawyers touted their ability to make debts "disappear," without mentioning the bankruptcy process. Govt. Br. 38-39.

But the attorney advertisements displayed in the very hearing cited by the Government disprove that assertion. The first of the attorney advertisements states, "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 says the attorney "will discuss bankruptcy and non-bankruptcy options." Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Session 93-94 (1998). Thus, the attorney advertising actually before Congress ***did include reference to the bankruptcy process.***

The Government also cites a "Consumer Alert" put out by the Office of Consumer and Business Education of the Bureau of Consumer Protection of the Federal Trade Commission. But the alert does not recite any evidence of deception and does not mention attorney advertising or attorneys at all. It describes "advertisements that offer a quick fix," and an accompanying press release asserts it concerns 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, though it also said that in some circumstances "bankruptcy may be the likely alternative."

Next, the Government cites testimony by a creditor who was the owner of a home furnishing store. Govt. Br. 38. The retailer's testimony was hearsay purportedly based upon his having "talk[ed] to my customers about why they have filed for bankruptcy," and he ***made no mention of advertising at all***. Bankruptcy Reform Act of 1999 (Part II), Hearing on H.R. 833 Before House Judiciary Comm., 106th Cong. 123 (1999).

The final piece of legislative history the Government cites, Govt. Br. 38, did not contain a complaint about advertising at all, but instead raised a concern that lawyers were not advising their clients properly about the negative consequences of filing for bankruptcy. 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.").

The Government has not demonstrated, and cannot demonstrate, that there is a genuine problem warranting the prescribed statement. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (*Edenfield* standard cannot be met by "various tidbits" including "anecdotal evidence" and "educated guesses"). There is, in fact, no showing of any need for Section 528 – or of any real problem of anyone ever being deceived or misled. "[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 Int'l Dairy Foods Ass'n v. Amestoy,* 92 F.3d 67, 74 (2d Cir. 1996) (First Amendment requires Government to "demonstrate[] . . . cognizable harms").

B. Section 528 Is Not Reasonably Related To Any Governmental Interest.

Section 528 also fails any version of constitutional scrutiny because it is not appropriately tailored to serve the interest put forward the Government. If construed as applying to attorneys, it could not survive even rational basis scrutiny, let alone any kind of heightened scrutiny.

Section 528 already requires – in a provision that Plaintiffs do not challenge -- that all advertising subject to the statute must state that it relates to "bankruptcy relief under this title." 11 U.S.C. §528(a)(3), (b)(2)(A). This provision fully addresses the Government's asserted interest in ensuring that consumers have "knowledge or appreciation" that they are in fact filing for bankruptcy. Govt. Br. 39. The Government has put forth no reason that a two-sentence statement describing an attorney as a "debt relief agency" would serve any additional purpose at all. Even the District Court noted that "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." JA 94 n.17. Under whatever standard, then, the Government has clearly failed to show that the restriction on attorneys' commercial speech is justified.

The challenged portions of Section 528(a) require statements that are affirmatively misleading, and sometimes simply false, to address a hypothetical or completely fictional problem. The Government responds that the label of "debt relief agency" is a truthful description of governing law. Govt. Br. 45. But that is not the relevant test under *Zauderer*. There, the Supreme Court explained that the pertinent 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. 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," particularly when the same label applies to non-attorney bankruptcy petition preparers. Section 528 fails to recognize the important distinction between attorneys and petition preparers and in fact creates the misleading impression that there is none.

The Government contends that "nothing in section 528 precludes plaintiffs from identifying themselves as attorneys in their advertisements or from listing the particular services they provide." Govt. Br. 45. That contention ignores the constitutional principles already discussed in Part I-C-2, *supra*: it is the Government's obligation to demonstrate that the regulation of speech is properly tailored to an appropriate interest – it is not Plaintiffs' duty to fix the constitutional defects in the statute.

Nor does the Government explain how an attorney could cure the mystifying label of "debt relief agency" by identifying herself as an attorney. The mystification will remain. Thus, the District Court opined that clarification "would be difficult and confusing in the limited context of an advertisement." JA94 n.17. Further, the undisputed record in this case establishes that the advertising provision will aggravate any deception rather than reducing it. JA41 ("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"); JA60 ("If 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.").[6]

C. The Government's Cross-Appeal Should Be Rejected.

The Government appeals the District Court's holding that the advertising requirements of Sections 528(a)(3), (a)(4), and (b)(2) cannot constitutionally be applied to attorneys representing clients other than consumer debtors filing for bankruptcy. JA93-94. The District Court explained that, where an attorney represents creditors, for example, the statement that "We help people file for

[6] The Government points to the Declaration of Elizabeth Austin (Govt. Br. 45 n.18), but that statement does not refute any of the assertions contained in Plaintiffs' declarations. Ms. Austin simply notes that Mr. Melchionne's legal advertising and website states that his law office is "designated as a Federal Debt Relief Agency by an Act of Congress and the President of the United States," JA67 – an attempt by Mr. Melchionne to make the best of the mandate of Section 528. Indeed, to the extent that Ms. Austin suggests that there is something wrong with Mr. Melchionne's reference to a "Federal Debt Relief Agency" in his advertising and website, such a suggestion would simply underscore the constitutional defect in the challenged provisions of BAPCPA.

bankruptcy relief" in Section 528(a)(4) would be "actually false." JA94 n.17. The Government's criticisms of the District Court are misplaced.

1. Plaintiffs Are Entitled To Bring An "As Applied" Challenge.

The Government suggests that the District Court was "mistaken" in describing its decision as an "as applied" determination. Govt. Br. 40-41. There is no merit to the Government's suggestion. There are nine Plaintiffs in this lawsuit: (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. JA13-18. All Plaintiffs allege that there are potentially subject to, and therefore at risk at prosecution under, the challenged provisions, and in fact that they already suffer irreparable First Amendment harm as a result. JA24-29. They are therefore entitled to bring an as-applied challenge. *Am. Booksellers Found. v. Dean,* 342 F.3d 96, 101 (2d Cir.2003); *Vt. Right to Life Comm. v. Sorrell,* 221 F.3d 376, 382 (2d Cir.2000). In any event, the Government fails to explain the relevance of its argument. Because the advertising provisions are invalid as applied to all attorneys

– not simply those who represent non-consumer debtors – the statute is facially invalid and the Government's argument is irrelevant. *See New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 839 (2d Cir. 1994) (citing *Edenfield* and other examples of commercial speech regulations held facially invalid).[7]

2. If Applied To Attorneys, Section 528 Is Not Limited To Those Representing Debtors.

The Government contends that Sections 528(a)(3), (a)(4), and (b)(2) apply only to attorneys who represent debtors to bankruptcy proceedings and do not apply to "attorneys who represent only creditors and other non-debtor parties." Govt. Br. 46. That argument relies on the Government's attempt to rewrite Sections 101 and 528 to add words of limitation to BAPCPA. The statute applies to "debt relief agencies." A "debt relief agency" includes, with certain exceptions, "any person who provides any bankruptcy assistance to an assisted person" in exchange for a fee. 11 U.S.C. § 101(12A). "Bankruptcy assistance," is turn, includes "providing information, advice, counsel, document preparation, or filing, or attendance at a creditor's 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." § 101(4A).

[7] The overbreadth doctrine cited by the Government is not implicated here, because Plaintiffs attack the advertising requirement based on the factual record before the Court, not on the basis of "hypothetical applications not before the Court." Govt. Br. 41.

Conspicuously absent from the definition of "bankruptcy assistance" is any reference to a debtor, let alone a specific type of representation. Thus, the express language of Sections 101(4A) and 101(12A) would apply to any attorney engaged by a debtor, creditor or any other non-debtor party.

The Government's contrary argument assumes that the category of "assisted persons" is limited to debtors filing for bankruptcy. But it is not. Nothing in the definition of "assisted persons" limits that term to persons who have filed for bankruptcy: "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." § 101(3). The term's scope is sufficiently broad to encompass not only persons who are currently debtors, but also any person who may potentially become a debtor, creditors of a debtor, and persons who are potential creditors of potential debtors. Even the Government uses the phrase "debtors ***and prospective debtors*****"** to describe the set of "assisted persons." Govt. Br. 47 (emphasis added). The definitions of "assisted person" and "debt relief agency" incorporate no less than six terms defined by section 101 or section 110 ("person," "debt," "consumer debt," "bankruptcy petition preparer," "creditor," "affiliate"). If Congress had wanted to limit their reach to debtors, surely it would somewhere have included the term "debtor," which is also defined in section 101.

As the District Court explained, "[n]othing in the text of the statute limits its application to attorneys representing debtors contemplating filing for bankruptcy." JA78. The Court found that the statute could apply to attorneys representing a wide range of nondebtor parties, including "customers of a failed business, non-debtor spouses, or anyone else who may need representation related to a bankruptcy proceeding." JA79.

If applied to attorneys, Section 528 would therefore by its plain language extend to many real estate and commercial lawyers. Counsel for a creditors' committee, whose constituents would include individual and class action plaintiffs, may be a "debt relief agency." The definition of "bankruptcy assistance" is broad enough to apply to advice given by counsel for the plaintiffs and for the creditors' committee. Similarly, counsel for a retirees' committee under section 1114 of the Bankruptcy Code represents clients with claims for retirement and healthcare benefits. *See* 11 U.S.C. § 1114. Many, if not most of the retirees, would fit within the definition of an "assisted person" rendering the retirees' committee's counsel a "debt relief agency."

The Government's contrary argument ignores the plain meaning of the statutory text and relies on "legislative history" (Govt. Br. 48) and the supposed purpose of BAPCPA. This Court has instructed that "[s]tatutory analysis begins

with the text and its plain meaning, if it has one." *Gottlieb v. Carnival Corp.,* 436 F.3d 335, 337 (2d Cir. 2006). That principle is dispositive here.

3. The "Fix" Proposed By the Government Cannot Save Section 528.

The Government contends that the constitutional defect in Section 528 can be remedied by allowing attorneys representing non-debtor parties to "tailor their advertisement disclosure statements." Govt. Br. 49. Even if this were possible, and it is not, the Government fails to provide any First Amendment justification for imposing a disclosure requirement on non-debtor attorneys in the first place. When the "First Amendment is implicated, the tie goes to the speaker." *Federal Election Comm'n v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 127 S. Ct. 2652, 2669 (2007). The Government cannot regulate speech first and ask questions later.

Next, the District Court correctly held that the Government's proposed remedy is foreclosed by the text of Sections 528(a)(4) and 528(b)(2)(B), which require a statement that is "substantially similar" to: "We help people file for bankruptcy relief under the Bankruptcy Code." Any such disclosure by attorneys representing creditors and non-debtors would require a "substantially dis-similar" statement. JA94 n.18.

The Government proposes the following statement: "We represent people in bankruptcy cases under the Bankruptcy Code." Govt. Br. 49 n.19. But this

statement would be affirmatively misleading in the case of attorneys who represent creditors and non-debtor parties, because the common meaning of the phrase "people in bankruptcy cases" is "debtors." The uncontested evidence also shows that such language would severely damage the ability of law firms "to keep and retain new creditor clients," JA50, because the natural inference of such a disclosure would be that the law firm assists in filing bankruptcy petitions. More generally, the Government's approach of forcing attorneys to draft disclosures on their own, without sufficient guidance of what is permissible, introduces the constitutional problems of vagueness and discretion previously discussed.

III. THE CONTRACT PROVISIONS OF SECTIONS 528(A)(1) AND (A)(2) WOULD BE UNCONSTITUTIONAL IF APPLIED TO ATTORNEYS.

The five-day executed-contract requirement of Sections 528(a)(1) and (a)(2) would also be unconstitutional if applied to attorneys. The District Court committed error by declining to apply any First Amendment scrutiny at all. Accordingly, at minimum the District Court's judgment must be reversed for the application of First Amendment review. Because there is no doubt that the executed-contract requirement cannot survive any form of First Amendment scrutiny, this Court should direct the entry of judgment in favor of Plaintiffs.

A. The Requirement Violates The First Amendment.

Remarkably, the Government ignores the compelling real-world evidence in the record showing that, in practical terms, the executed-contract requirement has restricted a substantial amount of attorney-client communication. Open. Br. 48-50. It prevents "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." JA59. The requirement is particularly burdensome for attorneys "who serve clients in rural areas and who serve clients in underserved populations, such as the homebound, non-English-speakers, or the poor." JA60. The statute leads to the loss of important rights even in emergency situations. The Government's suggestion otherwise (Govt. Br. 36 n.10) ignores the evidence that attorneys will be chilled from providing legal advice in emergencies for fear of being unable to secure an executed written contract within five days. JA45, 50.

The Government defends Sections 528(a)(1) and (a)(2) by arguing that the rules of professional conduct in many states already require attorneys to provide their clients with written contracts specifying their services and fees. Govt. Br. 34. But Plaintiffs' complaint is not that they are required to provide their clients with written contracts; their complaint is that Sections 528(a)(1) and (a)(2) disrupt the attorney-client relationship, hinder attorney-client communications, and indeed

prohibit such communications where a client has failed to execute a written contract within five days. If anything, the existence of written-contract requirements in state ethics rules obviates any need for Sections 528(a)(1) and (a)(2).

The Government maintains that the executed-contract requirement "simply regulates the form of a particular economic transaction." Govt. Br. 35. That argument was expressly rejected in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 789 n.5 (1988) (financial regulation of professional fundraisers could not be defended as a "merely economic" regulation having "only an indirect effect on protected speech"). The argument has also been implicitly rejected in such First Amendment cases as *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983) (tax on ink), *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (placement of newsracks), and the other cases cited in Plaintiffs' Principal Brief, Open. Br. 46-47, all of which could equally be said to involve mere "economic" regulations.

The Government insists that any impact on speech can be avoided by requiring a client to sign a contract at the time services are provided. Govt. Br. 36. However, the Government ignores that the practical effect of such a requirement is to preclude a substantial amount of attorney-client communication. One Plaintiff reported, in uncontested testimony, that twenty percent of clients refuse to sign.

JA35. Another reported that requiring an initial agreement for consultation, as the Government suggests, is utterly impractical: "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." JA42.

The Government does not deny these deleterious impacts but instead states, "[T]his is precisely the point: compliance is entirely within the attorney's control." Govt. Br. 36. But the evidence shows that compliance is ***not*** within the attorney's control. An attorney cannot force the client to return an executed copy of the contract, even when the client wishes the representation to continue. The attorney has no choice but to curtail protected speech, and terminate the representation, even when the client otherwise indicates that he or she wishes to proceed. The First Amendment flaw of such an onerous affirmative consent requirement is exactly the vice condemned in such cases as *Martin v. Struthers*, 319 U.S. 141 (1943), *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

B. The Requirement Violates Due Process.

The Government admits that an attorney who fails to secure an executed contract within five days faces liability under Section 526(c)(2) for fees or charges in connection with the bankruptcy assistance provided, for actual damages, and for reasonable attorneys' fees and costs, on a showing that the attorney intentionally or negligently failed to comply with the statute. Govt. Br. 36-37. In addition, the attorney might face disciplinary actions, including disbarment, for violations of BAPCPA.

The Government claims that the negligence standard provides an adequate safe harbor for attorneys. Govt. Br. 37. But the available evidence proves otherwise. The uncontested record demonstrates that, if attorneys are deemed to be subject to the executed-contract requirement, they will refrain from providing legal advice rather than risk after-the-fact assessments of whether they took all appropriate measures in trying to obtain executed contracts from clients who fail to return them in timely fashion. The attorneys face the loss of their fees if the contracts are held to be nonenforceable. The Government's blithe assurances that there will be no harmful effects simply ignore the factual record assembled in this case.

C. The Requirement Violates The Right of Access To Courts.

The executed-contract requirement, if applied to attorneys, would also violate the right of access to court, which is protected by the Due Process Clause, *Tennessee v. Lane*, 541 U.S. 509, 523 (2004), and the First Amendment. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *NAACP v. Button*, 371 U.S. 415 (1963).

The Government incorrectly argues that the access-to-court claim was not raised below. Govt. Br. 37. Plaintiffs' Complaint alleged that Section 528, if applied to attorneys, would violate the First and Fifth Amendments. JA30. Plaintiff's Motion for Preliminary Injunction argued that, "[b]ecause [Sections 528(a)(1) and (a)(2)] implicate the client's right of access to court, these provisions must be subjected to strict scrutiny." Memorandum in Support of Motion for Preliminary Injunction 45 n.18.

The Government contends that there can be no right of access to court because there is no right to counsel in civil cases and there is no constitutional right to waiver of the bankruptcy filing fee. Govt. Br. 38. But there is a world of difference between a ***positive*** right (such as the right to appointment of counsel) and a ***negative*** right (freedom from governmental interference in an ongoing attorney-client relationship through the executed-contract requirement). The

Government's argument is foreclosed by such decisions as *Tennessee v. Lane*, *Velazquez*, and *Button*.

IV. IF CONSTRUED AS APPLYING TO ATTORNEYS, SECTION 526(a)(4) WOULD BE UNCONSTITUTIONAL.

This Court should affirm the District Court's judgment that Section 526(a)(4) is unconstitutional and should reject the Government's cross-appeal. *See also Milavetz, Gallop & Milavetz, P.A. v. United States,* 541 F.3d 785 (8th Cir. 2008) (holding § 526(a)(4) substantially overbroad and unconstitutional as applied to attorneys providing bankruptcy assistance), petitions for cert. pending, No. 08-1119, 1225. The Government's defense of Section 526(a)(4) hinges on a radical rewriting of the statutory language, which is not textually supportable and which introduces the new vice of statutory vagueness.

A. The Government's Reading Is Not Textually Supportable.

The Government insists that the phrase "to incur more debt in contemplation of" bankruptcy in Section 526(a)(4) should be construed to refer "only [to] advice to incur new debt on the eve of bankruptcy for the purpose of abusing the bankruptcy system or defrauding creditors." Govt. Br. 51-52. The District Court correctly rejected this construction: "there is no indication in the statute that this prohibition is limited to advice to take on such fraudulent debt," and "giving a

client advice to take on illegal debt is already unethical." JA83. The District Court's reasoning on this issue was correct, for several reasons.

First, the text of the statute says nothing about "abuse" of the bankruptcy system. Instead, the statute refers simply to incurring debt "in contemplation of" bankruptcy. The Supreme Court has interpreted this language broadly: "the controlling question is with respect to the state of mind of the debtor and whether the thought of bankruptcy was the impelling cause of the transaction." *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 477 (1933). The Court in *Conrad, Rubin & Lesser* did not suggest that the "in contemplation of" bankruptcy test is limited to fraudulent transactions. To the contrary: the Court held that attorney's fees paid for a completely legitimate purpose – to enable a lawyer to negotiate with creditors for a time extension for the repayment of debt and, if necessary, for operation of the debtor's business under the creditors' supervision – nonetheless fell within the "in contemplation of" bankruptcy test. *Id.* at 478. The Court explained that "negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. A man is usually very much in contemplation of a result which he employs counsel to avoid." *Id*. at 479 (citation and internal quotation marks omitted). Accordingly, the Supreme Court has indicated that any debt incurred with a view to bankruptcy, or incurred because

a bankruptcy filing is planned, falls within the category of debts incurred "in contemplation of" bankruptcy.

Yet advising a client to incur additional debt in such circumstances can hardly be automatically equated with "abuse." In fact, in many instances, it is entirely proper for a debtor to incur additional debt on the eve of bankruptcy – indeed, to incur debt ***precisely because*** he intends to file for bankruptcy. JA33-34, 39. For example, it may well be advisable for a debtor with unreliable transportation to incur secured debt in advance of bankruptcy to purchase a car that will allow him to continue working so that he will have income with which to pay creditors. JA39. The negative effect of bankruptcy on the debtor's credit scores may make it impossible, or at the very least much more expensive, to obtain a car loan after filing a petition for relief. In the typical Chapter 13 consumer bankruptcy, such fully secured debt must normally be paid in full, and the debtors' other creditors will benefit from the debtor's reliable transportation at a reasonable cost. However, the plain language of Section 526(a)(4) would bar such advice. The District Courts striking down Section 526(a)(4) have cited other examples of incurring debt with the prospect of bankruptcy in mind that a competent lawyer might include as part of the legal advice he or she is ethically required to give a client. *Zelotes v. Martini*, 352 B.R. 17, 24 (D. Conn. 2006), appeal pending, No.

07-1853 (2d Cir.); *Olsen v. Gonzales*, 350 B.R. 906, 916-17 (D. Or. 2006), appeal pending, Nos. 07-35616, 35762 (9th Cir.).

The next problem with the Government's attempt to rewrite Section 526(a)(4) is that it would render that provision entirely superfluous. Debt incurred for fraudulent purposes is already nondischargeable, and, indeed, incurring it may give rise to criminal liability. 11 U.S.C. § 523(a)(2); 18 U.S.C. §§ 152-157. The Government admits that, prior to BAPCPA, it was already "settled law that a debtor's good faith should be questioned if the debtor makes purchases in contemplation of a bankruptcy case." Govt. Br. 55 (citing *In re Charles*, 334 B.R. 207, 222 (Bankr. S.D. Tex. 2005)). Advising a client to engage in any unlawful conduct was also already prohibited, prior to BAPCPA. *See* 18 U.S.C. § 2 (imposing criminal liability for counseling an offense). Every state's rules of professional conduct prohibit an attorney from advising a client to engage in unlawful or fraudulent conduct. *See, e.g.*, ABA Model Rules of Professional Conduct R. 1.2(d). In fact, the Government itself notes that rules of professional conduct for attorneys commonly prohibit advice to engage in fraudulent or improper conduct, Govt. Br. 53, and it cites an example where ethics rules have already been applied to police abuse of the bankruptcy system. Govt. Br. 53 (citing *Attorney Grievance Comm'n of Maryland v. Culver*, 381 Md. 241, 275-76 (2004)).

Entirely apart from state ethics rules, the Government admits (Govt. Br. 52-53) that Section 707 of the Act requires an attorney who represents a consumer debtor in filing a bankruptcy petition to make her own reasonable investigation into the circumstances giving rise to the debtor's petition, including a specific inquiry into the veracity of the debtor's debt and asset schedules. 11 U.S.C. § 707(b)(4)(C)-(D). By signing the petition, the attorney personally certifies that she has determined that the petition is well-grounded in fact, that she has no knowledge that the debtor's schedules are incorrect, and that she has determined that the petition does not constitute an "abuse" under Section 707(b)(1). *See id.*; *see also* Fed. R. Bankr. P. 9011(b) (by signing petition, attorney certifies that "it is not being presented for any improper purpose" and "factual contentions have evidentiary support"). In short, the Government's interpretation of Section 526(a)(4) would read it as adding nothing to existing prohibitions.

The only change is that the Government's construction would introduce the new vice of vagueness into the statute. According to the Government, "Section 526(a)(4) forbids only advice to incur new debt on the eve of bankruptcy for the purpose of abusing the bankruptcy system or defrauding creditors." Govt. Br. 51-52. It is unclear whether the Government thinks its standard encompasses abusive conduct generally, whether it is limited to "loading up" on debt prior to filing a petition, Govt. Br. 52, 55, or whether it is focused on attempts to manipulate the

"means test" adopted by Congress to restrict the availability of Chapter 7 discharges.

The Government has plucked the term "abuse" from thin air. It is not defined by the Act, and it does not (unlike existing ethical rules and statutory provisions) enjoy an operating history and background understanding. As a result, the Government's statutory revision creates a palpable danger that "abuse" will be defined in different and unpredictable ways. Indeed, the term "abuse" in new section 707(b)(3) has given rise to an enormous amount of litigation, sometimes about the legal meaning of the term and often fact-sensitive, and there is no suggestion that section 526(a)(4) would be limited to only that type of abuse. The very legislative history cited by the Government confirms that, "as recognized by Congress, 'abuse' may be found to exist based on a review of the totality of circumstances surrounding the filing. No formula, however well considered or crafted, can be flexible enough to encompass the endless combinations of circumstances which debtors bring to the bankruptcy court. While intended to provide a very objective standard, such formulas have proven historically to be the source of much litigation focused on interpreting and defining all of the parameters of the standards." Bankruptcy Reform, Joint Hearing Before House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. 94 (1999) (statement of Judith Greenstone Miller, Commercial Law League of America) (citation omitted).

Such uncertainty is intolerable in the context of the regulation of speech. Statutory ambiguities and variations in the definition of "abuse" render the Government's test too manipulable and uncertain to provide constitutionally adequate guidance to bankruptcy attorneys. A statute is impermissibly vague when the conduct it forbids is not ascertainable. *See Chicago v. Morales,* 527 U.S. 41, 56 (1999). "[People] of common intelligence cannot be required to guess at the meaning of the enactment." *Winters v. New York,* 333 U.S. 507, 515 (1948). The void-for-vagueness rule is particularly important in the speech context, because of the possibility of a chilling effect. Under the Government's reinterpretation of Section 526(a)(4), the statute is at least as imprecise as many prohibitions on speech the Supreme Court has declared void for vagueness. For example, in *Plummer v. City of Columbus*, 414 U.S. 2 (1973) (*per curiam*), the Court held that a statute providing that "[n]o person shall *abuse* another by using menacing, insulting, slanderous, or profane language" was facially invalid. *Id.* at 2 (emphasis added). In *Coates v. Cincinnati,* 402 U.S. 611 (1971), the Court struck down a municipal ordinance prohibiting three or more persons to "conduct themselves in a manner annoying to persons passing by." *Id.* at 614. In *Houston v. Hill,* 482 U.S. 451 (1987), the Court invalidated an ordinance making it "'unlawful for any person to ... in any manner oppose ... or interrupt any policeman in the execution of his duty.'" *Id.* at 455. The Government's proposed rewriting of Section 526(a)(4) to

incorporate a new standard of "abuse" suffers from the same impermissible vagueness.

B. The Structure of Section 526 Does Not Support The Government's Argument.

The Government contends that the structure of Section 526 "indicates that Congress intended only to target abusive practices." Govt. Br. 56. The Government's argument is incorrect.

First, the Government points to the remedy afforded by Section 526(c), which provides that in the event of a violation of Section 526(a)(4), the debtor may bring suit against the debt relief agency to recover "actual damages," as well as restitution of any fees paid by the debtor. Govt. Br. 56. But Section 526(c) says nothing about "abuse," and in any event the Government's argument confuses the ***substantive scope*** of Section 526(a)(4) with the question of ***remedy***. The two issues are distinct. In addition, the presence of an "actual damages" remedy will often be irrelevant. The attorney will lose her own fees, and will pay the debtor's attorney's fees, regardless of whether there are actual damages.

The Government also cites subsections 526(a)(2), which prohibits debt relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief, and 526(a)(3), which prohibits debt relief agencies from misrepresenting to debtors the costs or benefits of bankruptcy. Govt. Br. 57. But

the Government's interpretation would construe Section 526(a)(4) as largely superfluous in light of these prohibitions.

In short, the structure of Section 526 refutes rather than sustains the Government's statutory construction.

C. The Government Ignores the Second Half of Section 526.

The Government fails to analyze the second clause of Section 526(a)(4), which prohibits an attorney from advising a client to "pay an attorney . . . fee or charge for services performed as part of preparing for or representing a debtor in a case under this title." Thus, the second half of the section forbids advice on how to pay an attorney, regardless of whether the payment scheme entailed incurring more debt.

The second half of Section 526(a)(4), even as interpreted by the Government, is a separate First Amendment violation. One of the most difficult issues faced by financially distressed debtors is how to pay for legal representation. Chapter 7 debtors can expect to pay $1200 to $2500 for legal representation and Chapter 13 debtors can pay $1500 to $4000 and up depending on the complexity of the case. There are many instances in which it is lawful and appropriate to advise a debtor to borrow money to pay a bankruptcy attorney's fee. A debtor may access a fully secured home equity line of credit to pay the fee, essentially using some of

the equity in his or her home to produce cash. It may also be advisable for a debtor to borrow from a 401(k) plan to finance representation. JA35.

Indeed, in Chapter 13 cases, which can save a home from foreclosure but which give rise to higher attorney fees because of their complexity, clients ordinarily pay their attorneys by incurring additional debt. Usually, a portion of the attorney's fees are paid up front with the remainder being paid through the plan. That portion of the fee that is paid through the plan constitutes a debt to the attorney which is approved by the court and paid out as part of the plan.[8]

Section 526, if applicable to lawyers, would forbid them from advising their clients to use this standard arrangement which ordinarily harms no one, is subject to court approval, and is usually the only realistic way a debtor can afford legal representation and access to chapter 13. Although the Government argues that there are "few instances" in which debtors should be advised to incur additional debt before bankruptcy (Govt. Br. 59), such advice is given in almost every chapter 13 case, and chapter 13 cases have constituted 30% to 40% of all bankruptcies since the 2005 Act.. To prohibit an attorney from advising a client regarding the payment of fees is a direct attack on the provision of advice to clients and, indeed, on the legal profession.

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[8] A "debt" is defined as a "liability for a claim;" 11 U.S.C. § 101(12); a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id*. § 101(5).

Hence, the second half of Section 526(a)(4) creates additional First Amendment infirmities. Courts must "accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went For It*, 515 U.S. 618, 634 (1995). By preventing an attorney from advising a client regarding payment, the statute "single[s] out a particular idea for suppression because it [is] . . . disfavored." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). As the Court explained in *NAACP v. Button*, 371 U.S. 415 (1963), a law prohibiting an individual from "advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance" violates the First Amendment. *Id.* at 434; *see also U.M.W. v. Illinois Bar*, 389 U.S. 217, 223 (1967) (holding *Button* broadly applicable).

Therefore, Section 526(a)(4) would be unconstitutional if it were construed as applying to attorneys.

D. The Government's Remaining Arguments Lack Merit.

The Government insists that the District Court erred in holding Section 526(a)(4) invalid on its face, supposedly without considering whether the statute's unconstitutional applications are "substantial." Govt. Br. 59 (citing *Farrell v. Burke*, 449 F.3d 470, 499 (2d Cir. 2006), and *United States v. Williams*, 128 S.Ct. 1830, 1838 (2008)). Incredibly, the Government levels this accusation without

once referring to the factual record before this Court, which conclusively demonstrates the substantial and indeed widespread constitutional violations triggered by Section 526(a)(4). *See* JA33-35, 39-41, 60.

V. THE CHALLENGED PROVISIONS SHOULD BE CONSTRUED AS NOT APPLYING TO ATTORNEYS.

The Government repeatedly cites "fundamental principles of constitutional avoidance," which require a court "to avoid, rather than invite, constitutional difficulties." Govt. Br. 48; *see also id.* at 14, 58. On this basis, the Government seeks to rewrite Sections 526(a)(4), 527, 528 beyond what the statutory text would allow. But there is an easier cure for the constitutional infirmities in BAPCPA: construing the definition of "debt relief agencies" to exclude attorneys. Such a saving construction would be a simpler and more straightforward solution than the re-interpretations of BAPCPA urged by the Government.

The Government contends that the plain meaning of "debt relief agencies" includes attorneys. Govt. Br. 16. However, it does not deny that the statutory definition of "debt relief agency" fails to mention the word "attorney" or "lawyer." 11 U.S.C. § 101(12A). Indeed, the Government admits that the definition of "debt relief agency" explicitly includes the defined term "bankruptcy petition preparer." Govt. Br. 19. "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 would have been very easy to do so. After all, Congress provided definitions for more than 63 terms, including "accountant," "affiliate," "entity," "security," and "stockbroker." *See* §§ 101(1), (2), (15), (49), (53A).

Moreover, it is more plausible to infer that the reference to "legal representation" in the definition of "bankruptcy assistance" (11 U.S.C. § 101(4A)) 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. Thus, subsections (b) and (e) of section 110 were amended to strengthen the protections against unauthorized legal representation in a number of ways, including new required disclosures by bankruptcy petition preparers.

The Government cites legislative history from the House Report indicating that "[t]he bill's consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." H.R. Rep. No. 109-31, pt. 1, at 17 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 103 (cited at Govt. Br. 17, 48). But this passing reference to "attorneys" – "and others" – cannot bear the weight the Government attributes to it. It fails to prove that the challenged provisions of BAPCPA apply to

attorneys. First, the Government omits the very next sentence of the House Report, which contains no reference to attorneys: "S. 256 mandates that certain services and specified notices be given to consumers by professionals and others who provide bankruptcy assistance." H.R. Rep. No. 109-31, at 17. The fact that the second sentence, which is specifically concerned with disclosures, does ***not*** mention attorneys is evidence that Congress did not mean to apply the BAPCPA disclosure and notice provisions to attorneys.

In addition, the passing reference to "attorneys" in the House Report cannot sustain the Government's argument because there were ***other*** provisions of the 2005 bill, such as new 11 U.S.C. § 707(b)(4), to which the first sentence in the House Report could validly apply with respect to attorneys. These other provisions do not impose unconstitutional disclosure requirements and are not the subject of Plaintiffs' suit. The Government cannot show that the reference to "attorneys" pertains to the challenged portions of BAPCPA. Even the second sentence in the House Report (concerning disclosures) could just as easily have been referring to Section 521(a)(1)(B)(iii)(I) (which Plaintiffs do not challenge and which concerns the notice mandated by Section 342(b),[9] or the new disclosures required of petition

[9] Section 342(b) requires written notice to the debtor regarding chapters 7, 11, 12, and 13 "and the general purpose, benefits, and costs of proceeding under each of those chapters," as well as "the types of services available from credit counseling agencies."

preparers by amended Section 110(b), as any of the challenged provisions of BAPCPA.

The most logical conclusion is that "debt relief agencies" should be defined as including bankruptcy petition preparers and excluding attorneys. Such an interpretation would avoid the serious constitutional questions presented by the challenged provisions of BAPCPA.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i) and 32(a)(7)(B) because this brief contains 13,814 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.

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ANTI-VIRUS CERTIFICATION FORM

In accordance with Local Rule 32(a)(1)(E), I certify that the PDF version of this 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.

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Dated: May 27, 2009

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellants' Response and Reply Brief were served by Federal Express, and an additional copy was served by e-mail, on May 27, 2009, on the following counsel:

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