No. _____

In the Supreme Court of the United States

MILAVETZ, GALLOP & MILAVETZ, P.A., ROBERT J. MILAVETZ, BARBARA NILVA NEVIN, JOHN DOE, MARY ROE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioners brought this civil action based upon Respondent's overbreadth and vagueness of subjectivity in whether attorneys are debt relief agencies, and if so the provisions of Section 526(a)(4) and Section 528(a)(2), (b)(4) are unconstitutional. The district court concluded that attorneys are not debt relief agencies and that the challenged sections were unconstitutional as applied to attorneys. P.A. 74a-88a. The Petitioners petitioned this Court for review because the Eighth Circuit's ruling confirming that Section 526(a)(4) is unconstitutional and reversing that attorneys are debt relief agencies. Section 526(a)(2), (b)(4) is constitutional is inconsistent with decisions of other courts. A decisions by this Honorable Court is necessary to protect the freedom of speech and due process rights of the attorney petitioners and other attorneys throughout the United States. Further, and most important a decision will protect Petitioners' John Doe, Mary Roe and the rights of other members of the public to receive constitutionally protected speech from attorneys regarding their rights and responsibilities. Three questions are presented:

1. Whether the appellate court's interpretation of attorneys as "debt relief agencies" is contrary to the plain meaning of 11 U.S.C. § 101(12A).

2. Whether 11 U.S.C. § 528, which as applied to attorneys, restrains commercial speech by requiring mandatory deceptive disclosures in their advertisements, violates the First Amendment free speech guarantee of the United States Constitution.

3. Whether 11 U.S.C. § 528 requiring deceptive disclosures in advertisements for consumers and attorneys, violates Fifth Amendment Due Process.

PARTIES TO THE PROCEEDING

Petitioner is the law firm of Milavetz, Gallop & Milavetz, P.A., attorney and President of Milavetz, Gallop & Milavetz, P.A. Robert J. Milavetz, attorney Barbara Nilva Nevin, John Doe and Mary Doe are members of the public who desire to seek bankruptcy law advice and information from attorneys. John Doe and Mary Roe appear on behalf of themselves and all other persons similarly situated. Their names have been disclosed to the lower court. Respondent is the United States of America.

CORPORATE DISCLOSURE STATEMENT

Milavetz, Gallop & Milavetz, P.A. pursuant to Sup. Ct. Rule 29.6 makes the following disclosures:

Milavetz, Gallop & Milavetz, P.A. has no parent corporation and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit entered on September 4, 2008. Request by Respondent for rehearing and en banc rehearing was denied on December 5, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). (App. A89)

STATUTORY PROVISIONS INVOLVED

Section 101, 526 and 528 of the Bankruptcy Abuse Prevention and Consumer Protection Act(BAPCPA), 11 U.S.C. 101, 526 and 528 (A47-88).

11 USC § 101. Definitions
In this title the following definitions shall apply--
....
(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.
(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors'

meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.
....
(12) The term "debt" means liability on a claim.
(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110...

11 USC § 528. Requirements for debt relief agencies

(a) A debt relief agency shall--
(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--
(A) the services such agency will provide to such assisted person; and
(B) the fees or charges for such services, and the terms of payment;
(2) provide the assisted person with a copy of the fully executed and completed contract;
(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and
(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially

similar statement.
(b)
(1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes--
(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and
(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.
(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall--
(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and
(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

STATEMENT OF THE CASE

The Petitioners brought this civil action based upon the overbreadth of Respondent's subjective determination that attorneys are "debt relief agencies", hereinafter "DRAs", and if so whether

provisions of Section 526(a)(4) and Section 528(a)(2), (b)(4) are unconstitutional limit freedom of speech. The Minnesota District Court concluded that attorneys are not DRAs and that the challenged sections were unconstitutional as applied to attorneys. App. 1-15. The Petitioners petition this Court for review because the Eighth Circuit's ruling is inconsistent with decisions of other courts, wrongly decides an important issue, and, if left uncorrected, will impede, rather than advance, the freedom of speech and due process rights of Petitioners.

Petitioners brought this action in Minnesota District Court, seeking a declaratory judgment that two provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") (a) do not apply to attorneys and law firms and (b) are unconstitutional. The first provision at issue provides that a DRA (defined by 11 U.S.C. § 101(12A)) shall not advise a person who is being assisted in bankruptcy to incur more debt in contemplation of filing for bankruptcy. 11 U.S.C. § 526(a)(4). The second provides that a DRA shall clearly and conspicuously state in its advertising, "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4), (b)(2)(B).

Petitioners argues the definition of a "DRA" in 11 U.S.C. § 101(12A) excludes attorneys. Petitioners also argue, in the alternative, that 11 U.S.C. § 526(a)(4) and 11 U.S.C. § 528(a)(4), (b)(2)(B), to the extent applied to attorneys, violate freedom of speech as guaranteed by the 1st Amendment and Due Process Clause of the 5th Amendment of the United States Constitution. The District Court on December 7, 2006 denied the United States' request to dismiss

the action. App. A1-15. The District Court on April 19, 2007 then granted Petitioners' motion for summary judgment for the Petitioners, and issued a declaratory judgment that (a) attorneys do not fall within the definition of "DRA" and (b) the challenged provisions, as applied to attorneys, violate the First Amendment. App. A16-17.

The United States on August 21, 2007 appealed the District Court's order to the 8th Circuit Court of Appeals. The Petitioners submitted their brief in opposition on September 24, 2007. The 8th Circuit Court of Appeals heard oral arguments on March 11, 2008 and issued their opinion on September 4, 2008. App. A18-46. The Court of Appeals then issued a corrected order on September 23, 2008. On the merits, the 8th Circuit majority ruled that giving the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 a plain reading, attorneys who provide bankruptcy assistance to assisted persons are unambiguously included in the definition of DRAs. App, A25-26.

The Court further held the government's interest in prohibiting certain kinds of speech under the Act was not legitimate or compelling. Section 526(a)(4), preventing DRAs from advising debtors to incur debt, was unconstitutionally overbroad as applied to attorneys because it is not narrowly tailored and necessarily limited to restrict only that speech the government has an interest in restricting. This prohibition includes advice constituting prudent bankruptcy planning that is not an attempt to circumvent, abuse or undermine bankruptcy laws and, as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial financial advice not otherwise prohibited.

App. A31-32.

The Court also ruled that the advertising requirements mandated by Sections 528(a)(4) and (b)(2)(B) of the Act which require DRAs to disclose that they are DRAs which help people file for bankruptcy relief under the Code are not unconstitutional. The Court only requires attorneys to disclose factually correct statements in their advertising under the similar language provision of Section 528 an indicated in FN.12 of the Eighth Circuit's opinion. Although less intrusive means may be conceivable to prevent deceptive advertising, the sections' disclosure requirements are not reasonably related to the government's interest in protecting consumer debtors from deceptive advertising. App. A34-35.

Judge Colloton, concurred in part and dissented as to whether Section 526(a)(4) is unconstitutionally overbroad. App. A36. The Government motioned for a rehearing en banc on the issue of Section 526(a)(4). The request was made to reconsider whether Judge Colloton was correct in his dissent.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit majority ruled that giving the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 a plain reading, attorneys who provide bankruptcy assistance to assisted persons are unambiguously included in the definition of DRAs. P.A., C., 00013. There are compelling reasons for this Court to review that decision.

First, the decision is in conflict with other court

decisions regarding whether attorneys are "DRAs"" See, Geisenberger v. Gonzales; Hersch v. U.S.; Zelotes v. Martini; Olsen v. Gonzales; In re Attorneys at Law and Debt Relief Agencies; In re Reyes; Connecticut Bar Association v. United States. The decision is of national importance given the number of challenges to whether attorneys are DRAs throughout the United States. The Court's review would clarify the issue of attorneys as "DRAs" under 11 U.S.C. Section 101(12A). The Court's review would eliminate the need for other courts to review the issue and enhance judicial economy.

Second, the divided panel has incorrectly decided an issue of surpassing importance. Congress enacted provisions of 11 U.S.C. Section 528(a)(2)-(b)(4) that limit consumers rights to receive information and attorneys to advertise truthfully under the ethical rules of practice. The Court of Appeals attempted to bypass the constitutional implications by interpreting the "or similar statement" provision to eliminate the proposed language of 11 U.S.C. Section 528(b)(4) and allow attorneys to craft statements on a case-by-case basis. Such a decision creates a chilling effect on attorneys to advertise similar statements for fear of prosecution. The attorney is forced into a subjective dilemma without any objective standard as to whether an advertisement is similar or not. App., A37-38, fn. 12. The Court's reinterpretation is void for vagueness under the Fifth Amendment Due Process Clause as it is unclear what will constitute a "similiar statement."

This advertising leads to consumer deception and confusion given the various definitions of the term

"agency."[1] To some members of the public, the definition connotes governmental or charitable control or power delegated for a particular service.

The various dictionary definitions add to the ambiguity of the term DRA. An agency is "an organization providing a particular service. 2 a government office or department providing a specific service. 3 action or intervention to produce a particular result." Oxford Dictionary. Petitioner, Milavetz, Gallop & Milavetz is not formed for the particular result of only providing bankruptcy relief.

It is both illogical and deceptive to claim to the public that Petitioners and other law firms are agencies. Milavetz, Gallop & Milavetz and other firms' stock and trade is advice and counseling. Petitioner Milavetz, Gallop & Milavetz and other law firms do not solely prepare and assist in filing bankruptcy petitions but also engage in legal counseling. This counseling is presumptively protected under the first amendment.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

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[1] Merriam-Webster 2008 defines agency as:
2: the capacity, condition, or state of acting or of exerting power : operation
3: a person or thing through which power is exerted or an end is achieved : instrumentality <communicated through the agency of the ambassador>
....
5: an administrative division (as of a government) <the agency for consumer protection>

A. SUPREME COURT DECISIONS ARE IN CONTRADICTION TO COURT OF APPEALS' DECISION.

The Supreme Court has decided on numerous occasions that the "liberty" protected by the due process clause includes not only the freedoms explicitly mentioned in the Bill of Rights but also a freedom of choice in certain matters, which include implicit constitutional liberty to refrain from action. *McGuire v. Reilly*, 544 U.S. 974, 125 S.Ct. 1827, 161 L.Ed.2d 724, 73 USLW 3415, 73 USLW 3615, 73 USLW 3619 (U.S., Apr 18, 2005) (NO. 04-939); *Webster v. Reproductive Health Services*, 490 U.S. 1018, 109 S.Ct. 1739, 104 L.Ed.2d 177 (U.S. Apr 17, 1989) (NO. 88-605); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 510 U.S. 1309, 114 S.Ct. 909; *Webster v. Reproductive Health Services*, 490 U.S. 1018, 109 S.Ct. 1739, 104 L.Ed.2d 177490 U.S. 1018, 109 S.Ct. 1739 (U.S.,1989); *Leigh v. Olson*, 497 F.Supp. 1340 (D.N.D., 1980); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 78448 U.S. 297, 100 S.Ct. 2671 (U.S.N.Y.,1980).

B. COURTS ACROSS THE UNITED STATES ARE DIVIDED ON THE INTERPRETATION OF THE BAPCPA.

Connecticut Bar Association v. United States, 2008 WL 4149990 (D. Conn. 2008). The District Court granted the attorneys a preliminary injunction preventing §§526(a)(4) and 528 from being enforced against them, denied an injunction with respect to §527. and held that attorneys are DRAs under § 101(12A).

Hersh v. United States, 347 B.R. 19 (N.D. Tex.

2006) The District Court held bankruptcy attorneys are included in the definition of "DRA" and that the requirements of 11 U.S.C.§527(b) are constitutional, but §526(a)(4) unconstitutionally restricts speech.

In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005) The Court held that attorneys regularly admitted to the bar are not governed by the provisions of the BAPCPA that regulate DRAs. The United States Trustee appealed to the United States District Court for the Southern District of Georgia. In 353 B.R. 318 (S.D. Ga. 2006), the Court determined that the Trustee lacked standing and dismissed the appeal.

In re Irons, 379 B.R. 680 (Bkrtcy. S.D. Tex. 2007)
The Bankruptcy Court determined that the debtor's attorney was a DRA, such that he could be sanctioned for misconduct under § 526.

In re McCartney, 336 B.R. 588 (Bkrtcy. M.D. Ga. 2006) An attorney for a Chapter 7 debtor moved for a determination that bankruptcy attorneys are not DRAs under the definition in § 101(12A). The Bankruptcy Court determined that the attorney lacked standing and dismissed the motion. There was no real case or controversy and the Court would be rendering an advisory opinion in deciding the issue.

In re Mendoza, 347 B.R. 34 (Bkrtcy. W.D. Tex. 2006) In a footnote, the Court assumed that the debtor's attorney was a DRA, and therefore needed to comply with §526(a)(2), which prohibits DRAs from making or advising people to make untrue and misleading statements in bankruptcy filings.

In re Norman, 2006 WL 3053309 (Bkrtcy. E.D. 2006) The Court determined that the debtor's attorney needed to comply with the provisions of the BAPCPA applicable to DRAs.

In re Reyes, 361 B.R. 276 (Bkrtcy. S.D. Fla. 2007) The Bankruptcy Court determined that pro bono attorneys are not included under the definition of a "DRA" in § 101(12A).

In re Robinson, 368 B.R. 492 (Bkrtcy. E.D. Va. 2007) The Bankruptcy Court determined that the attorney was a "DRA" and therefore needed to follow the requirements of §528(a)(1), which require DRAs to provide written contracts that clearly and conspicuously explain the fees and charges associated with bankruptcy assistance. The Court determined that the debtor's attorney was a "DRA" under the definition in § 101(12A).

Olsen v. Gonzales, 350 B.R. 906 (D. Or. 2006) The Court granted the Attorney General's motion to dismiss in part and denied it in part, finding that attorneys do qualify as DRAs, upholding §§ 527 and 528, and invalidating §526(a)(4).

Zelotes v. Martini, 352 B.R. 17 (D. Conn. 2006) The District Court found that §526(a)(4) is unconstitutional even under the more lenient *Gentile* standard. §526(a)(4) goes beyond Congress' purpose of preventing abuse to the bankruptcy system to also prevent bankruptcy attorneys from advising their clients to take on lawful debt when it is in clients' best interests. The provision chills attorney speech and prevents attorneys from giving prudent financial planning advice. The District Court held that

§526(a)(4) is a restriction of free speech.

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT AN ATTORNEY IS NOT A "DRA" UNDER 11 U.S.C. §101(12A).

A statute should be interpreted so as to avoid constitutional issues. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905).

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932). "The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties . . . ." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Constr. Trades Council*, 485 U.S. 568, 575 (1988).

This Court has stated that "It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), citing *Gomez* v. *United States,* 490 U. S. 858, 864 (1989); *Ashwander* v. *TVA,* 297 U. S. 288, 346-348 (1936) (Brandeis, J., concurring).

Because, as discussed below, the application of the term "DRA" to attorneys raises constitutional issues, it is first necessary to determine whether the definition of "DRA" can be interpreted to exclude attorneys.

A. A PLAIN MEANING OF THE TERM "DRA" EXCLUDES ATTORNEYS.

The words "attorney" or "lawyer" do not appear in BAPCPA's definition of "DRA." BAPCPA defines a DRA as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110." 11 U.S.C. § 101(12A).

The definition of a DRA suffers from over breadth if attorneys are included. Clarity of a statute is particularly important when it purports to restrict free speech because of the "chilling effect" that an indistinct statute may have on otherwise entirely truthful and honest viewpoints. *Smith v. California*, 361 U.S. 147, 151 (1959) ("[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."); *Winters v. New York*, 333 U.S. 507, 509-10 (1948) (failure of a statute that limits freedom of expression to give fair notice of what is prohibited acts as a prior restraint that violates an individual's right to procedural due process as well as freedom of speech).

Since the statute does not explicitly use the terms "attorney" or "lawyer," the plain language of the

statute supports the conclusion that the definition does not include attorneys or law firms. In fact, "attorney" is separately defined earlier within the same part of the statute. *See* 11 U.S.C. § 101(4).[2] If Congress had intended to include attorneys, it could easily have done so, using the term which Congress took care to define elsewhere in section 101. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711, n. 9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (citation omitted)); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.").

Certainly under a plain language approach to interpreting § 101(12A), the terms "attorney" and "DRA" are far from synonymous. The word "agency" is not used in any other context to describe attorneys or law firms engaged in the private practice of law, and so to apply it to attorneys in this context is

[2] That section provides that "[t]he term 'attorney' means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4).

contrary to the ordinary meaning of the word. Generally, the plain meaning of words themselves is the starting point when interpreting a statute, and it is assumed that Congress intended statutory language to be applied and interpreted according to its ordinary meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Richards v. United States*, 369 U.S. 1, 9 (1962); *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999).

B. A LOGICAL INTERPRETATION OF THE TERM "DRA" EXCLUDES ATTORNEYS.

Even if this Court should conclude that the definition of "DRA" is ambiguous, the term should be interpreted logically, and a logical interpretation of BAPCPA's definition compels the conclusion that attorneys are excluded. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co.*, 456 U.S. at 71. To further legislative intent, an ambiguous provision of a statute shall be clarified by examination of the entirety of the statute because it is presumed that the legislature intended a statute to be interpreted consistently throughout and for each provision to add meaning to the statutory scheme. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . .").

Several provisions of BAPCPA imply that attorneys are not included under the definition of a DRA. For example, BAPCPA requires DRAs to

notify debtors that they have the right to hire an attorney or to represent themselves during bankruptcy. *See* 11 U.S.C. § 527(b). If an attorney were categorized as a DRA, this provision of the statute would be entirely illogical as it would require bankruptcy attorneys to notify clients that they have a right to hire an attorney, when the client already has an attorney.

"The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977), *citing, NAACP v. Button*, 371 U.S. 415, 433 (1963).

In addition, the term "DRA" applies only to those who provide bankruptcy assistance "in return for the payment of money or other valuable consideration." 11 U.S.C. § 101(12A). However, attorneys are strongly encouraged to provide pro bono legal services under rules of professional responsibility, and many attorneys fulfill this responsibility by assisting people in filing for bankruptcy. *See* Model Rules of Prof'l Conduct R. 6.1 (2007) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."); *accord* Minn. Rules of Prof'l Conduct R. 6.1 (2007). Therefore, if attorneys fall under the definition of a DRA, BAPCPA's provisions would apply to attorneys who are being paid for their bankruptcy services, and not to attorneys who are providing pro bono legal

services. This illogical result can be avoided if it is determined that attorneys are not included under § 101(12A). It is far more likely that the definition of a DRA was meant to signify the many types of entities which assist debtors during bankruptcy but who are not attorneys.

Moreover, inclusion of attorneys under the definition of a DRA would also create a conflict between state and federal law, in violation of the 10th Amendment and §526(d)(2)(A). The government argues that "bankruptcy assistance" is defined in § 101(4A) to include "counsel" and "legal representation." As the district court points out, however, BAPCPA expressly provides that nothing in sections 526, 527 or 528—the sections which impose obligations and restrictions on "DRAs"—shall

> be deemed to limit or curtail the authority or ability . . . of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State.

11 U.S.C. § 526 (d)(2)(A). This provision is a clear recognition by Congress that, in creating the new regulated entity of "DRA," they did not intend to infringe on the States' traditional role of regulating attorneys.

The government argues that this provision means nothing more than that Congress did not intend these provisions of BAPCPA to limit state bar admission requirements. The language itself is not so narrow, however, and a provision so limited makes no sense—it is difficult to imagine how any of the enumerated provisions could otherwise be

construed to limit bar admissions. It is more logical to infer that Congress' intent was to exclude from sections 526, 527 and 528 any regulation of attorneys, and that attorneys are therefore excluded from the class of persons providing "bankruptcy assistance" under § 101(4A) and from the definition of "DRA" found in § 101 (12A).

The regulation of attorneys has historically been a matter left to the states:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flynt, 439 U.S. 438, 442 (1979). The Tenth Amendment to the United States Constitution reserves rights and powers to the states, including the regulation of the practice of professions within a state's boundaries. *See* U.S. Const. Amend. X; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

The government argues that the advice that attorneys can give to their clients and in the content of attorney advertising is regulated by BAPCPA. If the conduct of attorneys is interpreted as being governed by this federal law, the statute conflicts with the role of the states and the ethical obligations of that state's Bar.

Following the government's interpretation puts the attorney in a clear conflict. Clearly, in order to remain licensed and comply with the rules of ethical behavior set forth the Rules of Professional Conduct RPC 1.1 the attorney must be competent. The attorney, having a fiduciary duty to the client must advise the client of all lawful actions available to the client. The government's interpretation is clearly at odds wit those ethical duties. For example, the attorney might advise getting downsizing from a large luxury car to a smaller and more inexpensive one. This might necessitate a refinance. An attorney may advise refinancing the mortgage to cure the arrearage and get a lower rate. Advice to both of these is virtually required of a competent attorney under the Rules of Professional Conduct.

C. LEGISLATIVE HISTORY DOES NOT SUPPORT INCLUSION OF ATTORNEYS IN DEFINING "DRA" UNDER § 101(12A).

The government argues that the legislative history supports their interpretation of the statute. It is axiomatic, however, that the legislative history has a role in statutory construction only to the extent the statutory language is ambiguous. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2626 (2005). Here, the plain language of § 101(12A) cannot be construed to include attorneys, and so it is inappropriate to look to legislative history, which "is itself often murky, ambiguous and contradictory . . . rather like looking over a crowd and picking out your friends." *Id.*, *quoting* Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (Jan. 1983).

If this Court should nonetheless conclude that the statute is ambiguous and a review of legislative history is appropriate, that history in fact supports the conclusion that Congress did not intend to include attorneys within the definition of "DRA." Congress was in fact silent, with the exception of the Feingold Amendment, on the issue of whether attorneys fall under the definition of "DRA." That proposed amendment would have modified § 101(12A) to read that a "DRA" means "any person, other than an attorney or an employee of an attorney, who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration..." 151 Cong. Rec. S2180 (daily ed. Mar. 7, 2005). This amendment was not voted on by Congress, as Senator Feingold withdrew the amendment, shortly after its introduction, as unnecessary. 151 Cong. Rec. S2463 (daily ed. Mar. 10, 2005) (statement of Sen. Feingold). The withdrawal of the Feingold Amendment creates an inference that Congress believed the amendment was unnecessary, as attorneys were never intended to be included in the definition of "DRA" in the first place.

Further, the government has not specifically cited where in the legislative history of BAPCPA Congress signaled that attorneys are to be included within the definition of "DRA." The government's citation to the House Report accompanying BAPCPA merely cites a study that the Justice Department "has consistently identified such problems as . . . misconduct by attorneys and other professionals." Defendant-Appellant at 50, *citing* H.R. Rep. No. 109-31, pt. 1, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88,92. However, the study does not specifically discuss the meaning of the term "DRA" or the scope of its

definition. Darling & Redmiles, Protecting the Integrity of the System: the Civil Enforcement Initiative, 21 Am. Bankr. Inst. J. 12 (Sept. 2002). Review of the legislative history, even if appropriate, does not shed any light on Congress' intent with respect to the term at issue.

D. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE REQUIRES THAT THE PHRASE "DRA" EXCLUDES ATTORNEYS.

A statute should be interpreted so as to avoid constitutional issues. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905).

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932). "The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties . . . ." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Constr. Trades Council*, 485 U.S. 568, 575 (1988).

This Court has stated that "It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Legal Servs. Corp.*

v. Velazquez, 531 U.S. 533, 545 (2001), citing *Gomez* v. *United States,* 490 U. S. 858, 864 (1989); *Ashwander* v. *TVA,* 297 U. S. 288, 346-348 (1936) (Brandeis, J., concurring).

Because the application of the term "DRA" to attorneys raises constitutional issues, it is first necessary to determine whether the definition of "DRA" can be interpreted to exclude attorneys.

The bankruptcy act can be construed that congress intended to include attorneys, such as plaintiff, within the DRAs definition or that congress did not intend to include attorneys within the definition of DRAs. To construe the law as set forth under the inclusion definition raises serious constitutional problems. Construing the law in accordance with exclusion of attorneys would eliminate the constitutional problems. Under this analysis it is clear that congress did not intend attorneys as DRAs.

III. IF ATTORNEYS ARE DRAs, THE DISTRICT COURT WAS CORRECT IN HOLDING § 528(a)(4), (b)(2)(B) BURDENS ATTORNEY COMMERCIAL SPEECH GUARANTEED BY THE FIRST AMENDMENT.

BAPCPA requires that a DRA clearly and conspicuously disclose in its advertising "We are a DRA. We help people file for bankruptcy relief under the Bankruptcy Code," or a substantially similar statement. 11 U.S.C. § 528(a)(4), (b)(2)(B).

This language is compelled speech which, like a restriction on speech, receives constitutional protection under the First Amendment. *Wooley v.*

Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."). The BAPCPA provision impermissibly compels attorney commercial speech, and the judgment of the district court should be affirmed.

A. REGULATIONS OF COMMERCIAL SPEECH ARE SUBJECT TO INTERMEDIATE SCRUTINY.

Sections 528(a)(4) and 528(b)(2)(B) regulate commercial speech by mandating DRAs to include certain information in their advertisements. Statutes regulating commercial speech receive intermediate scrutiny when the speech involved is not false, misleading, or related to unlawful activity. *Central Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) ("It is clear . . . that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.").

A regulation of commercial speech, when the speech is not false, misleading, or related to unlawful activity, must be supported by a substantial

governmental interest. *Central Hudson Gas and Elec. Corp.*, 447 U.S. at 564. The restriction involved must be narrowly drawn to directly advance that interest and be no more restrictive than necessary. *Id.* at 564-65. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* at 564.

The government has the burden of showing that its regulation of commercial speech passes this standard. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999); *Edenfield*, 507 U.S. at 770-71 ("This burden is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

The Supreme Court has determined that the *Central Hudson* test for evaluating restrictions on commercial speech applies to attorney advertising as well. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637-38 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). In *Zauderer*, the Supreme Court applied the *Central Hudson* test to an Ohio rule of professional responsibility that prohibited advertisements soliciting legal employment from featuring drawings or illustrations. *Zauderer*, 471 U.S. at 632. The Office of Disciplinary Counsel filed a complaint against an attorney who had run an advertisement to attract women who had been injured by the Dalkon Shield device; the advertisement included a sketch of this device. *Id.* at 630. In attempting to uphold the disciplinary rule, the Office argued that,

although this particular attorney's advertisement may itself have been harmless, the rule was necessary as a prophylactic to ensure that attorneys would not use false or misleading advertising in an effort to secure business and increase litigation. *Id.* at 643-44. The Court rejected this argument, stating:

> The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes.

Id. at 644.

B. § 528(a)(4), (b)(2)(B) DOES NOT PASS INTERMEDIATE SCRUTINY BECAUSE IT IS NOT SUPPORTED BY A SUBSTANTIAL GOVERNMENT INTEREST AND IS NOT NARROWLY DRAWN.

Because § 528(a)(4), (b)(2)(B) applies to all attorney advertising, including advertisements that could not be classified as false or misleading, the *Central Hudson* test applies. The commercial speech compelled by this provision of BAPCPA is not justified by a substantial governmental interest, nor is it narrowly drawn to directly advance any governmental interest. The government does not have a substantial interest in regulating truthful, non-fraudulent attorney advertising.

The government argues that requiring bankruptcy attorneys to include language stating "We are a debt relief agency" We help people file for bankruptcy relief under the Bankruptcy Code." in their advertising was intended to clarify specific advertisements that offered to "make consumers' debts disappear." The government argues that this promise deceived potential clients into believing that the attorney would be able to erase their debts without having to file for bankruptcy and pay the costs associated with a bankruptcy proceeding.

Other provisions of BAPCPA ensure that consumers and bankruptcy clients are not misled as to how debts are discharged, or as to the fees associated with bankruptcy. Under BAPCPA, DRAs must furnish assisted persons with a description of the services they will provide, the fees and charges for such services. §528(a)(1)-(2). DRAs may not misrepresent services they are providing or benefits and risks associated with a bankruptcy. § 526(a)(3).

Moreover, attorneys are governed by rules of professional responsibility which further prevent clients from being misled into unknowingly filing for bankruptcy. An attorney is required to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter." Model Rules of Prof'l Conduct R. 1.4(a)(2)-(3) (2007). Attorneys are also required to present retainer agreements to clients upon establishing an attorney-client relationship which explains the costs and fees for services without deception. *See e.g., id.* at R. 1.5(b) ("The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible

shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."); *Id.* at R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."). If an attorney does not follow these requirements, the professional responsibility bar of the state involved will investigate and discipline an offending attorney upon receiving a complaint from the lawyer's clients, the creditor counsel or even the bankruptcy trustee for such inappropriate actions.

The government does not have a substantial interest in infringing upon the traditional roles of the judiciary and the States to regulate attorneys. Like the rule invalidated in *Zauderer*, the BAPCPA provision is a prophylactic rule meant to deter potentially misleading advertising, and is unconstitutional in that it unjustifiably burdens entirely harmless attorney advertisements.

The plain language of the statute would require every attorney who might practice bankruptcy or give bankruptcy advice—even on an occasional basis—to make the obligatory disclaimer on all advertisements. Attorney advertisements that are entirely straightforward and not misleading to clients are required to include this language as well. The provision also imposes increased advertising costs on attorneys who are not trying to defraud clients. Section 528(a)(4), (b)(2)(B) is not narrowly drawn to prevent misleading clients into believing that their debts can be automatically erased. The disclaimer compels more speech than is necessary to prevent this deception. The bankruptcy court could simply submit complaints against particular

attorneys to the state bar of the offending attorney, which would resolve the alleged concerns.

The BAPCPA requirement suffers from further over breadth in that, if an attorney who does not regularly practice bankruptcy for a living happens to discuss a potential filing of bankruptcy with even a single client, that attorney is categorized as a "DRA," and that attorney's advertisement is required to include the disclaimer "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." For example, the requirement would apply to a family law attorney who discusses the basic advantages and disadvantages of filing for bankruptcy with a client or addresses a client's concerns that an ex-spouse's bankruptcy proceeding will affect the client. Because of BAPCPA's all-encompassing definition of "bankruptcy assistance,"[3] this attorney would be required to include the disclaimer as well.[4]

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[3] The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title. 11 U.S.C. Section 101(4A).

[4] *See* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law,* 79 Am. Bankr. L.J. 283, 294 (Spring 2005).

Imagine a woman goes to an attorney and says, "My ex-husband has just filed for bankruptcy. How will this affect me?" Like most folks, this woman's own debts are primarily consumer obligations, and her nonexempt assets are worth less than $150,000. Now, suppose the attorney: "Looks over the property and debt allocation in the divorce decree and tells the woman

An attorney who happens to discuss bankruptcy with a client would be providing bankruptcy information and advice under this definition, and would be subject to punishment under § 526(c) if the attorney's advertising did not include the BAPCPA disclaimer.

Moreover, the required disclaimer "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code," is itself misleading to potential bankruptcy clients who may see this language in an attorney's advertisement. This conflicts with the ethical rules regulating attorney advertising. *See* Model Rules of Prof'l Conduct R. 7.1 (2007) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misstatement of fact or law, or omits a fact necessary to make the statement considered as a whole not materially

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which items might be exempted(sic)from the ex-husband's discharge. Attends the ex-husband's 341 meeting of creditors. Files a complaint to determine the dischargeability of any of the divorce debts."

Under the plain language of the definitions, the woman is an "assisted person" and the attorney has rendered "bankruptcy assistance." This attorney is a "DRA" and must comply with all the mandates of Code 526(B)(2).

Suppose all the attorney says to the woman is, "Let me look over the papers and I'll get back to you." That might be enough to become a DRA; the definition of "bankruptcy assistance" includes "services sold or otherwise provided . . . with the express or implied purpose of providing information, advice [or] counsel . . . ."

misleading"); *accord* Minn.R.P.C., R. 7.1 (2007). Because the term "DRA" is a legislative contrivance, the public is confused by an advertisement containing this language. The disclaimer does nothing to differentiate between attorney and non-attorney bankruptcy preparers. The same disclaimer is required of every attorney who practices bankruptcy law, so a client could easily be misled into believing that an attorney who practices bankruptcy on only isolated occasions is actually a more experienced bankruptcy attorney who practices in this area of law daily. Additionally, § 528(a)(4), (b)(2)(B) makes no distinction between creditor and debtor bankruptcy attorneys, so a debtor client could be deceived into contacting a bankruptcy firm only to find out that they assist creditors instead of working to diminish debt. Instead of alleviating misleading advertising, the required language, in fact, creates more deception.

IV. CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted.

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