No. 08-1225

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 526(a)(4) is amenable to an interpretation that would not act as a prior restraint to Petitioners' rights to receive information and to give truthful legal advice to bankruptcy clients.

2. Whether Section 526(a)(4) can be subjected to an objective interpretation if the doctrine of constitutional avoidance if applied to avoid First Amendment violations of freedom of speech.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents, who were appellees in the court of appeals, are Milavetz, Gallop & Milavetz, P.A.; Robert J. Milavetz; Barbara N. Nevin; Ronald Richardson (captioned as John Doe); and Lynette Richarson (caption as Mary Doe).

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STATEMENT OF THE CASE

I. Declaratory Judgment Complaint

The Petitioners brought this civil action based upon respondent's overbreadth of subjectivity in whether attorneys are "debt relief agencies," (hereinafter DRAs) and if so if the provisions of Section 526(a)(4) and Section 528(a)(2), (b)(4) are unconstitutional as limiting freedom of speech. The district court concluded that attorneys are not DRAs and that the challenged sections were unconstitutional as applied to attorneys. Pet. App. 74a-88a. The Petitioners petition this Court for review because the court of appeals' 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 in this extraordinarily important case.

1. Petitioners brought this action in the United States District Court for Minnesota, 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 argue that 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 they apply to attorneys, violate freedom of speech as guaranteed by the First Amendment and Due Process by the Fifth Amendment of the United States Constitution.

II. Proceedings Below

The District Court on December 7, 2006 denied the government's request to dismiss the action. P.A. 29A. 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 "debt relief agency" and (b) the challenged provisions, as applied to attorneys, violate the First Amendment.

The United States on August 21, 2007 appealed the District Court's order to the Eighth Circuit Court of Appeals. P.A. . The Petitioners submitted their brief in opposition on September 24, 2007. The Eighth Circuit Court of Appeals heard oral arguments on March 11, 2008 and issued their opinion on September 4, 2008. The Court of Appeals then issued a corrected order on September 23, 2008. On the merits, the Eighth Circuit majority ruled that giving the provisions of the BAPCPA a plain reading, attorneys who provide bankruptcy assistance to assisted persons are unambiguously included in the definition of DRAs.

The Court further held regardless of whether the government's interest in prohibiting certain kinds of speech under the Act was 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, nor narrowly and necessarily limited to restrict only that speech that the government has an interest in restricting; this prohibition would included 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 advice not otherwise prohibited by the Bankruptcy Code or other applicable law.

The Court also ruled that advertising disclosure 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 as they only require attorneys to disclose factually correct statements in their advertising; although less intrusive means may be conceivable to prevent deceptive advertising, the sections' disclosure requirements are reasonably related to the government's interest in protecting consumer debtors from deceptive advertising.

SUMMARY OF THE ARGUMENT

Issuance of a writ of *certiorari* as to Questions One and Two of Petitioner's should be denied. The Eighth Circuit gave due regard to a narrowing construction and found none available. No conflict exists that Section 526(a)(4) is written in a manner that needs revision or is unconstitutional. Congress's efforts to craft a federal remedy for the provision of abusive bankruptcy advice would still exist without Section 526(a)(4).

REASONS FOR DENYING THE PETITION

I. THE CIRCUITS ARE NOT IN CONFLICT OVER THE REVISION OF SECTION 526(a)(4).

The government relies heavily on a conflict between the decision by the Eighth Circuit and the decision in *Hersch v. United States ex rel. Mukasey*, 552 F.3d 743 (2008), petition for cert. Pending, No. 08-1174 (filed Mach 18, 2009). The conflict is unfounded. Both courts found that the provision as written was unconstitutional. The remedy the courts used to correct the unconstitutional provision were different in that the Eighth Circuit declared Section 526(a)(4) unconstitutional on its face as overbroad and no constitutional interpretation could exist as it would only create a subjective dilemma. The *Hersch* court held that constitutional avoidance could be used to read the statute as only applying to abusive debts.

The question of whether facially the Section 526(a)(4) as written is unconstitutional, is not in dispute and the circuits are not in conflict that Section 526(a)(4)

is unconstitutional on its face. The dissent of Judge Colloton in the Eighth Circuit indicates that the statute suffers from overbreadth, but indicates constitutional avoidance can remedy the overbreadth in Section 526(a)(4).

II. THE COURT OF APPEALS DID NOT ERROR IN HOLDING SECTION 526(a)(4) UNCONSTITUTIONAL.

Section 526(a)(4) cannot survive strict scrutiny. The government argues that the statute should be narrowly interpreted as merely prohibiting an attorney from advising a client to take on more debt in contemplation of bankruptcy when the intent is to manipulate the bankruptcy system and take unfair advantage of bankruptcy debt discharge. The statutory language, however, does not support this narrow interpretation. The statute will have a chilling effect on attorneys, effectively prohibiting attorneys from advising clients to incur *any* debt—even under circumstances not prohibited by the bankruptcy laws—for any purpose in contemplation of bankruptcy.

There are several types of debt obligations, such as home mortgages, home equity loans, or auto loans, as to which it is entirely legitimate and prudent for an attorney to advise a client to incur "more debt" as part of routine pre-bankruptcy planning. These debts are not taken on to manipulate the bankruptcy system and will usually survive bankruptcy through the reaffirmation process. Instead the debts are incurred in contemplation of bankruptcy because of the adverse financial consequences that the bankruptcy will have on

the debtor. The government does not have a compelling interest in preventing a debtor from incurring these types of debts prior to filing for bankruptcy, particularly since nothing in the bankruptcy laws prevent the consumer from incurring such debt in contemplation of bankruptcy.

Section 526(a)(4) is not narrowly tailored because Congress has numerous less drastic alternatives to prevent abuses and manipulation of the federal bankruptcy system. Under BAPCPA, debt relief agencies are prohibited from advising the people they are assisting to make untrue or misleading statements in bankruptcy filings. Attorneys who assist in bankruptcies are required, by Fed. R. Bankr. P. 9011, which applies the Rule 11 standard to bankruptcy proceedings, to sign bankruptcy documents as a certification that they have performed a reasonable investigation into the circumstances and that the documents do not constitute an abuse of the bankruptcy system. Section 707(b) of the new bankruptcy code is written to prohibit violations of abusive debts, regardless of whether Section 526(a)(4) exists. Attorneys are also governed by state rules of professional responsibility, which prohibit attorneys from advising clients to undermine the law, at the risk of discipline, including license revocation. Moreover, bankruptcy courts and creditors are gatekeepers of bankruptcy filings and have a number of existing procedures available to determine whether a debtor has acted in bad faith or with intent to abuse the bankruptcy system.

Finally, Congress could have addressed this perceived abuse by a less restrictive alternative:

amending the bankruptcy code to tighten the restrictions on debt incurred in contemplation of bankruptcy by, for example, making such debt more difficult to discharge. Congress did not choose this route, however, but instead chose to prohibit attorneys from informing clients as to routine bankruptcy planning options that are perfectly legal and ethical. In doing so, Congress infringed on the free speech rights of attorneys and on the traditional role of the States in regulating the legal profession.

The government argues that § 526(a)(4) should be interpreted as merely preventing an attorney from giving advice that a client take on more debt in contemplation of bankruptcy when the intent is to manipulate the bankruptcy system, engage in abusive conduct, and take unfair advantage of bankruptcy debt discharge. However, the plain language of the statute does not permit this narrow interpretation—it prohibits advising a client to incur *any* debt for *any* purpose when the client will be filing or is contemplating[1] filing for

[1] The term "contemplating" as used in BAPCPA is itself vague. The statute does not specify a time frame for when a debt relief agency is prohibited from advising a person who is contemplating bankruptcy to take on more debt. For example, a particular debtor may be considering filing for bankruptcy weeks, months, or even years, in the future and may be attempting to organize his financial situation so as to avoid having to file for bankruptcy. Section 526(a)(4) prevents a debt relief agency from advising this debtor to take on more debt during this entire span of time, and even if the additional debt would prevent the debtor from even having to file for bankruptcy. This vagueness of the term "contemplating" creates an even larger prior restraint on free speech.

bankruptcy, even if that debt would not be discharged during a bankruptcy proceeding. The statute thus permits an attorney to be sanctioned for fulfilling his duty to his client to give legal and appropriate advice not otherwise prohibited by the Bankruptcy Code. In fact, it has long been recognized that lawyers are required to give clients competent legal advice, even at the expense of the government. *See* Model Rules of Prof'l Conduct R. 1.1 (2007); Minn. Rules of Prof'l Conduct R. 1.1 (2007). Courts in other jurisdictions have construed the provision in this way. *See Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006); *Zelotes v. Martini*, 352 B.R. 17 (D. Conn. 2006). This Court has traditionally interpreted the use of the word "any," which prefaces the business or transaction clause, undercuts the ability to apply constitutional avoidance. *See United States v. James*, 478 U.S. 597, 604-605, and n.5, 106 S.Ct. 3116, 3120-3121, and n.5, 92 L.Ed.2d 483 (1986); *Trainmen v. Baltimore & Ohio R. Co.*, 331, U.S. 519, 529, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646 (1947)

In general laws must follow the plain and unambiguous meaning of the statutory language. "[O]nly the most extraordinary showing of contrary intentions; in the legislative history will justify departure from that language." *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed. 536 (1985). (citations omitted) (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482-483, 83 L.Ed.2d 472 (1984); *see also Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 519-520, 116 L.Ed.2d 496 (1991) (courts may deviate from the plain language of a statue on in "rare and exceptional circumstances").

While statutes should be construed to avoid constitutional conflict, the principle of constitutional avoidance is not a license for the judiciary to rewrite language enacted by the legislature. *See Heckler v. Matthews*, 465 U.S. 728, 741-742, 104 S. Ct. 1387, 1396-1397, 79 L.Ed.2d 646 (1984). The government is requesting this Court to press a statutory construction to the point of disingenuous evasion even to avoid a constitutional question. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

In *NAACP v. Button*, 371 U.S. 415 (1963), the United States Supreme Court held:

> The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, * * * that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.

Id. at 438-439, citations omitted.

Many debt obligations assumed prior to filing for bankruptcy are wholly appropriate from a financial and legal prospective. These obligations are not necessarily taken on for fraudulent reasons. BAPCPA restricts

attorneys from advising clients on various strategies of routine and prudent pre-bankruptcy planning that may be in their clients' best interests , that may enable a bankruptcy petitioner to avoid bankruptcy, and that are not an attempt to circumvent or undermine federal bankruptcy laws. For example, BAPCPA prevents attorneys from recommending that their clients obtain or refinance a home mortgage, apply for a home equity line of credit, or take on an auto loan for a vehicle that is needed to get to work, prior to filing for bankruptcy. These steps are often prudent because the debtor's credit rating, the interest rate on the loan, or the down payment or monthly payments will be adversely affected by bankruptcy. Such debts are generally not fraudulent because they are of a secured nature and will usually survive the bankruptcy.[2] Section 526(a)(4) also prevents

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[2] *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (Summer 2005).

> This [§ 526(a)(4)] prohibition is particularly troubling when it might be completely legal and even desirable for the client to incur such debt. For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case. For example, the client may intend to keep all payments fully current and to reaffirm such debt once the case is filed.
>
> Moreover, most of an attorney's fee for handling a Chapter 13 case is paid over time through the Chapter 13 plan. But that means that at the time the case is filed, the client has incurred
>
> (Cont'd)

attorneys from advising their clients that they may co-sign on a child's student loan or pay for credit counseling prior to filing for bankruptcy (which is required as part of beginning a bankruptcy proceeding). Prohibiting such advice thus runs counter to the overall purpose of bankruptcy laws (1) to assist the debtor, as well as the creditor, by not having debts go through bankruptcy, and (2) to have debtors learn sound financial planning.

These types of debts are incurred "in contemplation of bankruptcy" under the language of § 526(a)(4) in that the debt obligation is strategically taken on prior to bankruptcy because of the adverse financial consequences that the bankruptcy will have on the debtor. *See Tripp v. Mitschrich*, 211 F. 424, 427 (8th Cir. 1914) (stating that the phrase "in contemplation of bankruptcy" means that, "in making the transfer the debtor is influenced by the possibility or imminence of such proceeding. There must be some relation of cause and effect between knowledge of his condition and the transfer.").

(Cont'd)

additional debt in contemplation of filing a bankruptcy case. Indeed, such debt was specifically incurred for the purpose of paying the fees of the attorney filing the case.

But 526(a)(4) appears to prohibit any attorney from advising a client to incur any such debt, regardless of how appropriate or advisable. The clause directly regulates the content of speech of lawyers to their clients, even when it is accurate, legal, and desirable. In addition to First Amendment considerations on this issue, there are strong public policy considerations implicated when the government restricts the type of advice attorneys can give their clients.

Appropriate pre-bankruptcy planning is an important aspect of an attorney's professional responsibility when knowledgeably, skillfully, and thoroughly representing a client who is contemplating filing for bankruptcy. *See* Model Rules of Prof'l Conduct R. 1.1 (2007) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *accord* Minn. Rules of Prof'l Conduct R. 1.1 (2007). The § 526(a)(4) restriction on attorney free speech prohibits attorneys from fulfilling a critical aspect of their ethical obligation to provide competent pre-bankruptcy planning. The government can provide no compelling interest in preventing such planning when it is not intended to be fraudulent.

Congress also has numerous less drastic alternatives to prevent abuses of the bankruptcy system. Debt relief agencies are prohibited from advising the people they are assisting to make untrue or misleading statements in bankruptcy filings. 11 U.S.C. § 526(a)(2). Attorneys who prepare bankruptcy petitions, pleadings, and motions are required to sign such documents as a certification that they have performed a reasonable investigation into the circumstances giving rise to the documents and that the documents are well grounded in fact and do not constitute an abuse of the bankruptcy system. 11 U.S.C. § 707(b)(4)(C). *See also* Fed. R. Civ. P. 11(b) (stating that, in presenting a pleading to a court, an attorney is certifying that the document is not being presented for any improper purpose); *accord* Fed. R. Bankr. P. 9011(b) (application of Rule 11 standards to bankruptcy filings).

Attorneys are also regulated by state rules of professional responsibility, which prohibit them from advising clients to undermine the law. *See e.g.*, Model Rules of Prof'l Conduct R. 1.2(d) (2007) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."); *accord* Minn. Rules of Prof'l Conduct R. 1.2(d) (2007).

Moreover, bankruptcy courts are able to closely examine bankruptcy filings to determine whether a debtor has acted with bad faith or with intent to abuse the bankruptcy system. *See* 11 U.S.C. § 707(b)(1), (b)(3); *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105, 1110-11 (2007); *In re Walton*, 866 F.2d 981 (8th Cir. 1989). BAPCPA amended the previous bankruptcy laws to make it easier for a court to dismiss a bankruptcy petition by reducing the threshold finding from "substantial abuse" to mere "abuse," and even created a presumption of abuse if certain qualifications are met. *See* 11 U.S.C. § 707(b); H.R. Rep. No. 109-31, pt. 1, at 48-49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 119-20. Bankruptcy courts also have the authority to punish violations of federal bankruptcy laws. *See* 11 U.S.C. § 526(c)(5).

III. THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW.

"Writs of certiorari are matters of grace" (*Wade v. Mayo*, 1948, p. 680). Supreme Court Rule 10 sets out factors that, while "neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers." These are that

(1) the decision below conflicts with decisions of one or more federal courts of appeals or state courts of last resort on an important issue of federal law; (2) the court below decided an important federal question in a way that conflicts with rulings of the Supreme Court; (3) the court below decided a question of federal law that is so important that the Supreme Court should pass upon it even absent a conflict; or (4) (a category into which very few grants fall) the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

The government has, at best, presented that a conflict exists between two circuit courts of appeal, which respondent disagrees. The government has not shown however that uniformity is necessary and that the conflict is going to be difficult to live with. *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990); The issue of conflicting circuit opinions regarding a bankruptcy interpretation is not uncommon and the conflict is acceptable and not sufficient to warrant review. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747 (C.A. 1999); *In re Sunterra Corp.*, 361 F.3d 257 (C.A.4 2004); *In re James Caple Partners, L. P.*, 27 F.3d 534 (C.A. 11 1994) (*per curiam*); *In re West Electronics, Inc.*, 852 F.2d 79 (C.A. 3 1988); *N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc., et al.*, 2008 WL 4522334 (U.S.), 77 USLW 3242 (U.S. 2008).

CONCLUSION

The government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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