No. 08-1225

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

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

REPLY BRIEF FOR THE UNITED STATES

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The court of appeals has invalidated an important federal statute based on a mistaken reading of its text and a consequently mistaken conclusion that it is fatally overbroad. Congress enacted 11 U.S.C. 526(a)(4) to address the documented problem of attorneys' advising clients to take on more debt on the eve of bankruptcy with the intent to abuse the bankruptcy system. Correctly read, Section 526(a)(4) prohibits only that abusive advice, and as so construed it is clearly constitutional. The Fifth Circuit has reached that conclusion and, in so doing, has disagreed with the decision below. This Court should resolve the circuit conflict and remove the obstacle to nationwide enforcement of Section 526(a)(4) created by the decision below.

A. The Circuit Split On The Statutory And Constitutional Questions Presented Warrants This Court's Review

The court of appeals in this case struck down Section 526(a)(4) as "unconstitutional as applied to attorneys," Pet. App. 15a, which respondents characterize as holding the statute "unconstitutional on its face," Br. in Opp. 4. By contrast, the Fifth Circuit has upheld Section 526(a)(4) against a substantially identical First Amendment challenge. *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 764 (5th Cir. 2008) ("[W]e hold that the district court erred in holding section 526(a)(4) unconstitutional on its face and we reverse the judgment of the district court on this issue."), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009). Respondents contend (Br. in Opp. 4-5) that those holdings are nonetheless consistent because the Fifth Circuit "found that [Section 526(a)(4)] as written was unconstitutional." That argument lacks merit.

1. To resolve the constitutional question before it, the Fifth Circuit in *Hersh* initially construed Section 526(a)(4). 553 F.3d at 755-761, 763. That approach is consistent with this Court's recognition that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). The Fifth Circuit concluded that Section 526(a)(4) "can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system." *Hersh*, 553 F.3d at 761. The court then held that the statute, so construed, is constitutional. *Id.* at 762-764.

To be sure, the court in *Hersh* used all relevant tools of statutory interpretation, including the canon of constitu-

tional avoidance, in construing Section 526(a)(4). See, *e.g.*, 553 F.3d at 758-759 (accepted meaning of "'in contemplation of' bankruptcy"); *id.* at 759-761 (statutory structure); *id.* at 760 (legislative history). But, as this Court often has noted, construing a statute to avoid a substantial constitutional question is not the same thing as actually answering that question. Rather, "the canon of constitutional avoidance 'is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.'" *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (quoting *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005)).

The Fifth Circuit in *Hersh* construed Section 526(a)(4) in a way that removes any significant doubt as to its constitutionality. The court then confirmed that, so construed, the statute is constitutional. The court did not hold that Section 526(a)(4) is unconstitutional and then impose a "remedy" (Br. in Opp. 4-5) such as the severance of an invalid portion of the statute; it upheld the statute in full. Respondents' contrary argument "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation." *Clark*, 543 U.S. at 381.

2. Even if respondents' characterization of the Fifth Circuit's *reasoning* were correct, the actual *holding* of *Hersh* is irreconcilable with the holding in this case. The court in this case struck down Section 526(a)(4) on grounds of overbreadth "as applied to attorneys." Pet. App. 15a. The consequence of that holding is that, in the Eighth Circuit, Section 526(a)(4) cannot be applied even to attorney conduct that concededly can be regulated consistent with the First Amendment, such as advice to abuse the bankruptcy system. In the Fifth Circuit, by contrast, attorneys

who engage in that sort of abusive conduct are subject to the remedies set out in Section 526(c)(2)(A), (3) and (5).

Thus, attorneys are regulated in materially different ways in the Fifth and Eighth Circuits as a result of the court of appeals' erroneous statutory construction, see Pet. 16-20, and its erroneous constitutional analysis, see Pet. 20-22. That conflict alone provides a sufficient reason for this Court's review.

B. The Court Of Appeals' Invalidation Of An Important Act Of Congress Warrants This Court's Review

Respondents further contend that, even when the courts of appeals are in conflict, this Court often denies review of questions "regarding a bankruptcy interpretation." Br. in Opp. 14. But this is no run-of-the-mine bankruptcy case, because here the court of appeals invalidated an Act of Congress on First Amendment grounds. A declaration that a federal statute is unconstitutional, as applied to a substantial category of regulated persons, presents "an important question of federal law" that should be settled by this Court. Sup. Ct. R. 10(c); see, *e.g.*, *Williams*, *supra*; *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari."); *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) (same); Pet. 22.

Furthermore, Section 526(a)(4) is an important part of the federal framework that protects the nationwide bankruptcy system against abuse. Respondents acknowledge the extensive reforms that Congress adopted in 2005 to reduce and remedy those abuses. See Br. in Opp. 6, 13; see also Pet. 3-4, 23-27. Section 526(a)(4) plays a key role in those reforms. Several provisions of the Bankruptcy Code penalize debtors who engage in abusive filings, and Section 526(a)(4) allows those debtors to seek compensation from

their attorneys when the abusive conduct is attributable to the attorneys' unethical advice. See 11 U.S.C. 526(c)(2)(A).

Respondents suggest that Section 526(a)(4)'s invalidation will not be of great consequence because state rules of professional conduct provide overlapping protection in this area.[1] Although the substance of Section 526(a)(4) indeed overlaps with longstanding state-law restrictions on unethical attorney advice, that fact simply underscores that Section 526(a)(4), properly construed, does not violate the First Amendment. See p. 8, *infra*. Moreover, as compared with state law, the Bankruptcy Code provides both a uniform nationwide rule and a set of additional remedies.

First, the Code creates a private right of action by a client against an unethical attorney who has violated Section 526(a)(4), and it encourages such actions in the public interest by providing for fee-shifting. 11 U.S.C. 526(c)(2). Second, the Code permits prospective injunctive relief, 11 U.S.C. 526(c)(3)(A) and (5)(A), whereas an unethical practitioner who has been sanctioned under the law of one jurisdiction may continue to provide unethical advice in another. Each of these elements is particularly significant in light of the multijurisdictional, even nationwide nature of much

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[1] Respondents also suggest (Br. in Opp. 7), for the first time in this litigation, that Section 526(a)(4) is an infringement of States' authority to regulate attorneys. That contention is without merit. The federal government has long regulated the conduct of attorneys as it bears on federal interests. See, *e.g.*, *Sperry* v. *Florida*, 373 U.S. 379, 387-400 (1963); 15 U.S.C. 7245 (providing for the Securities and Exchange Commission to issue "minimum standards of professional conduct for attorneys appearing and practicing before the Commission"); 31 C.F.R. 10.20 *et seq.* (rules for practice before the Internal Revenue Service); 37 C.F.R. 10.20 *et seq.* (Patent and Trademark Office Code of Professional Responsibility). Bankruptcy is a subject of particular federal concern. See U.S. Const. Art. I, § 8, Cl. 4.

modern bankruptcy practice.[2] Indeed, a practitioner in a particular bankruptcy court may not even be licensed by the bar of the State in which the court is located. See, *e.g.*, *Rittenhouse* v. *Delta Home Improvement, Inc. (In re Desilets)*, 291 F.3d 925, 930-931 (6th Cir. 2002).

C. The Court Of Appeals' Decision Is Erroneous

Respondents' defense of the Eighth Circuit's holding on the merits of the constitutional issue depends entirely on accepting that court's interpretation of the statute. See, *e.g.*, Br. in Opp. 5-6 (asserting that Section 526(a)(4) "effectively prohibit[s] attorneys from advising clients to incur *any* debt"); accord *id.* at 7-8, 9-11, 12. The first question presented seeks review of that statutory interpretation, with which the Fifth Circuit squarely disagreed. Respondents offer no persuasive defense of the court of appeals' statutory holding.

1. As explained in the petition (at 16), the court of appeals erred in concluding that the "plain language" of Section 526(a)(4) requires an interpretation that would render the statute unconstitutionally overbroad. The court of appeals did not identify any aspect of the statutory text supporting that assertion. See Pet. App. 12a. Respondents invoke the court of appeals' reference to the "plain language" of Section 526(a)(4), Br. in Opp. 7, 8; see *id.* at 5, 9, but they similarly do not explain how the unambiguous

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[2] See, *e.g.*, Daniel Pouladian & Leslie Reed, Comment, *"You Are Now Free to Move About the Country": Why Bankruptcy Lawyers Should Be Free to Engage in Multijurisdictional Practice*, 52 UCLA L. Rev. 937, 966 (2005) (discussing "[t]he hybrid nature of bankruptcy practice and the unique way in which the location of debtors, creditors and the property at issue can be in so many locations").

meaning of any term in the statute compels their reading.[3] Nor do they dispute the analysis of the statutory structure, context, and legislative history set forth in the government's certiorari petition and in the dissenting opinion below. See p. 3, *supra*; Pet. 17-18; Pet. App. 25a, 26a-28a (Colloton, J., concurring in part and dissenting in part).

Indeed, petitioners concede that the crucial term "in contemplation of [bankruptcy]" is ambiguous. See Br. in Opp. 7 n.1 ("The term 'contemplating' [*sic*] as used in BAPCPA is itself vague."). Because that ambiguity plainly *permits* the adoption of the government's proposed narrowing construction, the court of appeals erred by interpreting the statute in a way that raised rather than avoided constitutional concerns. That is particularly so in light of the ample history and precedent supporting the government's construction of the term as requiring an abusive purpose. See Pet. 16-17; Pet. App. 25a-26a (Colloton, J., concurring in part and dissenting in part); *Hersh*, 553 F.3d at 758-760.[4]

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[3] Respondents appear to contend (Br. in Opp. 8) that the use of the term "any" is sufficiently unambiguous to preclude reliance on the doctrine of constitutional avoidance. But the word "any" does not appear in Section 526(a)(4), and respondents' argument would lack merit even if the statute did contain that word. See *Boos* v. *Barry*, 485 U.S. 312, 329 (1988).

[4] Respondents' reliance (Br. in Opp. 11) on *Tripp* v. *Mitschrich*, 211 F. 424 (8th Cir. 1914), is misplaced. The court in *Tripp* held that, under Section 60d of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 562, a transaction is undertaken "in contemplation of [bankruptcy]" only if the transaction is "induced at least to some extent by" the prospect of a bankruptcy proceeding. 211 F. at 427. But the court had no occasion to identify the precise connection that the statute required, because it did not find "anything [in the record] which shows that [the] contract [at issue] * * * was prompted by impending bankruptcy." *Id.* at 429. In addition, *Tripp* involved a federal statute different from the one at issue here, and the case did not implicate the doctrine of constitutional avoidance.

2. Properly construed, Section 526(a)(4) is not unconstitutionally overbroad. The court of appeals' finding of *substantial* overbreadth was unsupported even under the court's construction, see Pet. 20-22; that finding plainly cannot stand if the statute covers only advice to incur debt to abuse the bankruptcy system. Indeed, the Eighth Circuit did not suggest that Section 526(a)(4) would be subject to any plausible constitutional objection if the government's narrowing construction were adopted.

Respondents likewise do not dispute that the government's interpretation would save the statute from any claim of overbreadth. Indeed, they appear to recognize that Rule 1.2(d) of the Model Rules of Professional Conduct is constitutional. Br. in Opp. 13. And, as the Fifth Circuit explained, Rule 1.2(d) overlaps with Section 526(a)(4) and furthers complementary ends. *Hersh*, 553 F.3d at 756; see Pet. 21. Thus, if this Court agrees with the Fifth Circuit's construction of Section 526(a)(4), its ruling on the interpretive question effectively will resolve the existing circuit conflict with respect to the statute's constitutionality.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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