No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The questions presented are as follows:

1. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.

2. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

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 Richardson (captioned as Mary Doe). The district court denied the Doe respondents leave to proceed pseudonymously.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 541 F.3d 785. The opinion of the district court denying the government's motion to dismiss (App., *infra*, 29a-44a) is reported at 355 B.R. 758.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 5, 2008 (App., *infra*, 47a). On February 20, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

April 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 48a-53a.

STATEMENT

This case involves a facial First Amendment challenge to 11 U.S.C. 526(a)(4), a provision of the Bankruptcy Code that regulates paid bankruptcy advice. Congress has established certain minimum standards of professional conduct for bankruptcy attorneys, bankruptcy petition preparers, and other "debt relief agencies" that charge consumer debtors for bankruptcy assistance. Section 526(a)(4) provides, *inter alia*, that debt relief agencies may not advise clients to incur additional debt "in contemplation of" filing a bankruptcy petition. The district court declared Section 526(a)(4) facially invalid under the First Amendment. A divided panel of the court of appeals affirmed. Shortly thereafter, the Fifth Circuit upheld Section 526(a)(4) against a substantially similar challenge and endorsed the reasoning of the dissenting opinion in this case. *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743 (2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009).

1. Congress enacted Section 526(a)(4) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring per-

sonal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*House Report*). Described by the House Report as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," *id.* at 3, the BAPCPA both modified the substantive standards for bankruptcy relief and adopted new measures intended to curb a variety of abusive practices that Congress concluded had come to pervade the bankruptcy system.

After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions and, in some circumstances, jeopardized debtors' ability to obtain a discharge of their debts. For example, Congress heard evidence that a civil enforcement initiative undertaken by the United States Trustee Program had "consistently identified * * * misconduct by attorneys and other professionals" as among the sources of abuse in the bankruptcy system. *House Report* 5 (citation omitted). Congress responded by "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The BAPCPA added or strengthened several regulations on bankruptcy professionals' conduct. Those regulations are intended to protect the clients and prospective clients of bankruptcy professionals, the creditors of clients who do enter bankruptcy, and the bankruptcy system. The regulations require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system.

See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D). Many of the regulations apply equally to bankruptcy attorneys, to bankruptcy petition preparers who are not attorneys, and to all other professionals who provide bankruptcy assistance to consumer debtors for a fee; those professionals are collectively termed "debt relief agenc[ies]." 11 U.S.C. 101(12A).[1]

Section 526 sets out four basic rules of professional conduct for debt relief agencies. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising an assisted person to make statements that are untrue or misleading in seeking bankruptcy relief. Section 526(a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the benefits and risks attendant to filing for bankruptcy. And Section 526(a)(4), the provision held unconstitutional below, states:

> A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

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[1] The term "bankruptcy assistance" is defined to include providing an "assisted person" with advice, counsel (including "legal representation"), or document preparation or filing assistance "with respect to a case or proceeding under" the Bankruptcy Code. 11 U.S.C. 101(4A). An "assisted person" is "any person whose debts consist primarily of consumer debts" and whose nonexempt property is worth less than a specified, inflation-adjusted amount, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

The principal remedy for violations of Section 526 is a civil action by the debtor to recover the debtor's "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). The statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). The bankruptcy court may also impose an injunction or an "appropriate civil monetary penalty" for intentional or recurring violations, either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Respondents are a law firm, two of the firm's attorneys, and two prospective clients. App., *infra*, 1a-2a.[2] They filed this action against the United States, seeking a declaratory judgment that the attorney respondents are not obligated to comply with several of the BAPCPA's provisions regulating debt relief agencies' professional conduct, including the advice limitation in Section 526(a)(4). Respondents contended that licensed attorneys are not "debt relief agencies" within the meaning of the statute even if they provide bankruptcy-related advice to debtors. They also claimed that, to the extent the statute encompasses licensed attorneys, Section 526(a)(4) and other provisions of the BAPCPA violate the First Amendment. *Id.* at 2a.

The district court denied the government's motion to dismiss, App., *infra*, 29a-44a, and then granted summary judgment for respondents, *id.* at 45a. The court held that Section 526(a)(4) and the other challenged provisions violate the First Amendment. *Id.* at 33a-41a.

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[2] The district court denied the prospective clients leave to proceed pseudonymously, App., *infra*, 31a-33a, and they disclosed their identities in an amended complaint, see 05-CV-2626 Docket entry No. 34, at 3 (D. Minn. Dec. 15, 2006).

The court further held that attorneys do not fall within the statutory definition of "debt relief agency." *Id.* at 41a-43a.

3. The government appealed, contending in relevant part that attorneys unambiguously fall within the definition of "debt relief agency" and that the district court's constitutional holding was premised on a misreading of Section 526(a)(4). Gov't C.A. Br. 18-41, 49-54. The government explained that the phrase "in contemplation of" bankruptcy is a term of art with a specialized meaning. Based on that established understanding, the government argued, Section 526(a)(4) should be construed to forbid only advice that a client take on new debt on the eve of bankruptcy with the intent of abusing the bankruptcy system. The government further contended that, to the extent the term "in contemplation of" is ambiguous, the doctrine of constitutional avoidance supports the government's narrow reading of the term, which avoids the overbreadth that the district court perceived.

4. The court of appeals affirmed in part and reversed in part. The court unanimously agreed that attorneys may fall within the definition of "debt relief agency," but held by a divided vote that Section 526(a)(4) violates the First Amendment. App., *infra*, 1a-28a.[3]

a. The court of appeals rejected the government's proposed narrowing construction of Section 526(a)(4). App., *infra*, 12a. The court concluded that, under the only permissible interpretation of the statute's "plain language," Section 526(a)(4) prohibits debt relief agencies from advising consumer clients "to incur *any* additional debt when the assisted person is contemplating

[3] The court unanimously rejected respondents' challenges to certain disclosure requirements imposed by 11 U.S.C. 528. App., *infra*, 15a-21a.

bankruptcy," *ibid.*, and that "this prohibition would include advice constituting prudent prebankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws," *id.* at 13a.

Based on that broad construction, the court of appeals held that Section 526(a)(4) is unconstitutionally overbroad.[4] App., *infra*, 12a-14a. The court explained that advice to take on new debt just before bankruptcy will sometimes be legitimate. As examples, the court observed that "it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments," or to purchase a car to ensure "dependable transportation * * * to and from work." *Id.* at 13a-14a. And the court stated that "[f]actual scenarios other than these few hypothetical situations no doubt exist." *Id.* at 14a. The court concluded that the First Amendment precludes regulation of such legitimate advice, and it noted its agreement with three district courts that had reached the same conclusion. See *id.* at 13a & n.8 (citing, *inter alia*, *Hersh* v. *United States*, 347 B.R. 19, 25 (N.D. Tex. 2006)).

The court of appeals did not identify the precise constitutional standard under which respondents' challenge should be evaluated. Respondents had argued that

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[4] The court of appeals did not limit its holding to the plaintiffs before it, but stated more generally that the statute was "unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies." App., *infra*, 12a; see *id.* at 10a n.7, 15a, 21a; see also *id.* at 23a n.13 (Colloton, J., concurring in part and dissenting in part). Nothing in the court of appeals' statutory and First Amendment analysis, moreover, suggests that the court would reach a different conclusion regarding the statute's application to non-attorney professionals who provide bankruptcy advice.

strict scrutiny should apply, while the government had contended that Section 526(a)(4) is a reasonable regulation of attorneys' professional conduct that is to be reviewed more deferentially under the standard announced in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). The court acknowledged that the government had a "legitimate interest" in prohibiting advice that would assist debtors in abusing the bankruptcy system by accumulating more debt in contemplation of bankruptcy. App., *infra*, 12a. But the court held that, on its reading of Section 526(a)(4), the statute was insufficiently connected to that legitimate interest and therefore was unconstitutional under either strict scrutiny or the *Gentile* standard. *Id.* at 12a-13a.

b. Judge Colloton dissented in relevant part. He explained that, in his view, "[t]he text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction," under which "the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system." App., *infra*, 25a. He would have held that the statute, so construed, is constitutional. See *id.* at 22a, 25a, 28a.

First, Judge Colloton observed that the phrase "in contemplation of bankruptcy" is a term of art that "has been construed * * * to mean actions taken with the intent to abuse the protections of the bankruptcy system." App., *infra*, 25a; see *id.* at 25a-26a (collecting authorities). Second, Judge Colloton pointed out that the remedies for a violation of Section 526(a)(4) "emphasize actual damages," and he reasoned that a debtor who follows his attorney's bankruptcy advice is unlikely to be harmed as a result unless he is induced to file "an abusive bankruptcy petition, where the debtor may suffer

damages if the petition is dismissed as abusive." *Id.* at 27a (citing 11 U.S.C. 707(b)(1)). Third, Judge Colloton pointed to legislative history that showed Congress's desire to address "abusive" practices by bankruptcy professionals and by debtors who "knowingly load up" on debt before filing for bankruptcy. *Id.* at 27a-28a (quoting *House Report* 5, 15). The dissent concluded: "Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that [respondents] say[] is absurd, that the [government] says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." *Id.* at 28a.

5. The court of appeals denied rehearing en banc by a vote of 6-5. See App., *infra*, 47a.

6. Thirteen days later, the Fifth Circuit upheld Section 526(a)(4) against a substantially similar First Amendment challenge, reversing one of the district court opinions on which the court of appeals in this case relied. *Hersh*, 553 F.3d at 752-764; see App., *infra*, 13a n.8. The court endorsed the reasoning and the authorities in Judge Colloton's dissenting opinion. See 553 F.3d at 750 n.6, 759 n.17.

7. Respondents have filed their own petition for a writ of certiorari, which seeks review of the court of appeals' holding that attorneys may be "debt relief agencies" for purposes of Section 526, as well as its holding (see note 3, *supra*) that Section 528's disclosure requirements are valid. See Pet. at ii, *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, No. 08-1119 (filed Mar. 5, 2009). The government will address that petition in a separate response.

REASONS FOR GRANTING THE PETITION

A divided panel of the court of appeals has invalidated an Act of Congress, even though the statute can constitutionally be applied to a significant range of conduct. The court failed to give due regard to a narrowing construction that eliminates the perceived constitutional difficulty, and its ruling squarely conflicts with a Fifth Circuit decision that adopted the constitutionally unproblematic construction that the court rejected in this case. The Eighth Circuit's decision also threatens to undermine the important reforms that Congress crafted, after years of study, to reduce the abuse of the bankruptcy system, including abuse encouraged by lawyers. This Court's review is warranted to prevent those harms, to resolve the circuit conflict, and to effectuate Congress's efforts to craft a federal remedy for the provision of abusive bankruptcy advice.

I. THE CIRCUITS ARE IN CONFLICT OVER THE CONSTITUTIONALITY OF AN ACT OF CONGRESS

The court of appeals' decision in this case squarely conflicts with the Fifth Circuit's resolution of the same statutory and constitutional issues as are presented here. As the Fifth Circuit has recognized, Section 526(a)(4) imposes a modest requirement to refrain from urging a debtor to accumulate eve-of-filing debt that would abuse the bankruptcy system. The court of appeals here imposed its own, much more expansive construction and then struck down the statute, so interpreted, as overbroad. As a result, attorneys in the Eighth Circuit who qualify as "debt relief agencies" are free to urge even the most abusive practices without being subject to the federal sanctions and client-protection measures set out in Section 526(a)(4) and (c).

A. In *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008), petition for cert. pending, No. 08-1174 (filed Mar. 18, 2009), a bankruptcy attorney challenged Section 526(a)(4) on grounds substantially similar to those respondents raised here. Hersh contended that Section 526(a)(4) unambiguously prohibits attorneys from advising clients who are considering bankruptcy to incur *any* additional debt, and that Section 526(a)(4) so construed is unconstitutionally overbroad. *Id.* at 747 & n.3, 754, 762. A unanimous Fifth Circuit panel rejected both of these arguments. *Id.* at 752-764. The Fifth Circuit acknowledged the court of appeals' contrary holding in this case but stated that it "agree[d] with Judge Colloton's dissenting opinion." *Id.* at 750 n.6.[5]

1. The Fifth Circuit in *Hersh* agreed with the government that Section 526(a)(4) can be construed in a way that focuses directly on Congress's acknowledged purpose in enacting it: preventing attorneys from encouraging their clients to "load up" on debt to abuse the bankruptcy system. 553 F.3d at 758-761. The court noted that the term "in contemplation of bankruptcy" is often used as a term of art that connotes an intent to abuse the bankruptcy system. *Id.* at 758 (citing *Black's Law Dictionary* 336 (8th ed. 2004) (*Black's Law Dictionary*)). Indeed, a few years before Congress enacted the BAPCPA, the Fifth Circuit itself had described the abusive practice of "incurring card debt in contemplation of bankruptcy" with the term "loading up." *Id.* at

[5] Like the respondents in this case, Hersh also argued that attorneys cannot be "debt relief agencies" subject to the restrictions imposed by Section 526(a)(4). See 553 F.3d at 751-752. The Fifth Circuit rejected that argument, *id.* at 752, as the court of appeals unanimously did here, see App., *infra*, 3a-10a.

758-759 (quoting *AT&T Universal Card Servs.* v. *Mercer (In re Mercer)*, 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc)). The Fifth Circuit in *Hersh* noted that Judge Colloton had adopted the same reasoning in this case, and it cited Judge Colloton's dissenting opinion for additional supporting sources. *Id.* at 759 & n.17.

The court in *Hersh* also explained that the structure of Section 526 supported the specialized interpretation described above. See 553 F.3d at 759-760, 761. Like Judge Colloton, see App., *infra*, 26a-27a, the Fifth Circuit pointed out that violations of Section 526 may be remedied by awarding the debtor actual damages, which strongly suggests that the practices banned are practices that would actually harm the debtor. See 553 F.3d at 760. And the court noted that Section 526(a)(4) was enacted alongside, and placed together with, "three other rules of professional conduct designed to protect debtors." *Id.* at 761 (citing 11 U.S.C. 526(a)(1)-(3)).

The court in *Hersh* agreed with Judge Colloton that the legislative history and purpose of the BAPCPA supported its construction of Section 526(a)(4). It explained that numerous elements of the BAPCPA were demonstrably "intended to curb abuse," which the court took as further evidence that "as part of this plan, section 526(a)(4) is only meant to curb abusive practices." 553 F.3d at 761; accord App., *infra*, 26a-27a (Colloton, J., concurring in part and dissenting in part).

2. The Fifth Circuit further explained that, even if its reading of Section 526(a)(4) were not the most natural interpretation of the statute, that reading would be compelled by the doctrine of constitutional avoidance. The court identified numerous cases in which this Court had adopted an arguably countertextual construction in the interest of constitutional avoidance, including *Boos*

v. *Barry*, 485 U.S. 312 (1988), on which Judge Colloton had relied significantly, see App., *infra*, 23a-24a. See 553 F.3d at 756-758. As the Fifth Circuit noted, the avoidance doctrine may even require giving "[a] restrictive meaning [to] what appear to be plain words." *Id.* at 757 (quoting *United States* v. *Witkovich*, 353 U.S. 194, 199 (1957)) (first brackets in original).

The Fifth Circuit acknowledged Hersh's argument, identical to that advanced by respondents and endorsed by the court below, that the text of Section 526(a)(4) is so unambiguous that no narrowing construction is possible. See 553 F.3d at 754. The court concluded, however, that "the language of [the statute] 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." *Id.* at 761; see *id.* at 756. The court explained that, on that reading, "[S]ection 526(a)(4) has no application to good faith advice to engage in conduct that is consistent with a debtor's interest and does not abuse or improperly manipulate the bankruptcy system." *Id.* at 761.

3. The Fifth Circuit concluded that, if Section 526(a)(4) is construed in this manner, it is not facially unconstitutional. The court explained that a statute is not unconstitutionally overbroad unless the "overbreadth is substantial in relation to the statute's legitimate reach." 553 F.3d at 762 (citing *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008)). Hersh did not dispute that Congress could validly regulate the sort of advice to engage in abusive conduct that all parties agreed was covered by Section 526(a)(4). See *id.* at 754-

756.[6] And under the court's narrowing construction, Section 526(a)(4) did not apply to *any* of Hersh's examples of speech that could not constitutionally be prohibited. *Id.* at 763. Accordingly, the Fifth Circuit found it "clear that the potential for the statute to prohibit protected speech is not by any means *substantial* in relation to the statute's legitimate reach." *Id.* at 764.

B. The Fifth Circuit's decision cannot be reconciled with the decision below. The Fifth Circuit adopted the government's proposed construction of Section 526(a)(4), whereas the court below found that construction to be foreclosed by the statutory text. As a result of those divergent statutory interpretations, the Fifth Circuit upheld the statute against a First Amendment challenge, while the court below invalidated Section 526(a)(4) as an unconstitutional infringement on the right of attorneys to provide non-abusive bankruptcy-related advice. And the Eighth Circuit, by a closely divided vote, has declined to reconsider its position en banc. App., *infra*, 47a.

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[6] The Fifth Circuit in *Hersh* noted various contexts in which the First Amendment permits Congress and the States to regulate that sort of unethical attorney advice. For instance, the First Amendment does not protect speech proposing an illegal transaction, and abusive accumulation of debt may amount to fraud or theft. See 553 F.3d at 755 (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982)). Further, the government has a sufficiently important interest in the judicial process, including the bankruptcy system, to justify regulation of attorneys' unethical conduct affecting that process. See *id.* at 755-756 (citing *Gentile* v. *State Bar*, 501 U.S. 1030 (1991), and Model Rules of Professional Conduct Rule 1.2(d)). The court in *Hersh* explained that the abusive accumulation of debt in contemplation of bankruptcy "is akin to committing a fraudulent act," and therefore "Congress can constitutionally prevent attorneys or other debt relief agencies from advising their clients to [commit such an act]." *Id.* at 756.

The question presented here is a recurring one, as substantially similar challenges to Section 526(a)(4) are also pending in the Second and Ninth Circuits.[7] Review by this Court is warranted to resolve the division in the courts of appeals over the constitutionality of this important federal statute.

II. THE COURT OF APPEALS ERRED IN HOLDING SECTION 526(a)(4) UNCONSTITUTIONALLY OVERBROAD

The court of appeals' decision in this case is erroneous. The court below acknowledged that Congress had a "legitimate interest" in restricting bankruptcy professionals from peddling abusive strategies to individuals who are facing bankruptcy. App., *infra*, 12a. The government construes the statute to further that interest directly, by prohibiting only advice that would lead to intentional abuse of the bankruptcy system.

The court of appeals did not dispute that Congress could enact such a prohibition without violating the First Amendment. Rather, the court held that Section 526(a)(4) *unambiguously* sweeps in other attorney advice, unrelated to abuse of the bankruptcy system, and that the statute is therefore fatally overbroad. Both the statutory premise and the constitutional conclusion are flawed. As the text, structure, and purposes of Section 526(a)(4) make clear, Congress forbade only advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors. That prohibition is consistent with the First Amendment.

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[7] See *Zelotes* v. *Adams*, No. 07-1853 (2d Cir. argued Oct. 10, 2008); *Connecticut Bar Ass'n* v. *United States*, No. 08-5901 (2d Cir.) (argument not yet scheduled); *Olsen* v. *Holder*, No. 07-35616 (9th Cir.) (argument not yet scheduled).

A. The court of appeals rejected the government's interpretation of Section 526(a)(4) in a single sentence, asserting that the statute's "plain language" precludes any construction other than the unconstitutionally overbroad one. App., *infra*, 12a. The court did not identify any statutory term that unambiguously compelled such a reading. Rather, without quoting the statutory text, the court stated that "[Section] 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Ibid.* But the statute does not use the temporal phrase "*when* the assisted person is contemplating bankruptcy." Rather, the statute forbids advising the client "to incur more debt *in contemplation of* [bankruptcy]." 11 U.S.C. 526(a)(4) (emphasis added). The difference is significant, as Judge Colloton explained.

The statute's reference to debt incurred "in contemplation of [bankruptcy]" is reasonably read to mean debt incurred with the expectation of using the bankruptcy discharge to avoid full repayment. As Judge Colloton observed, "the phrase 'in contemplation of' has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system." App., *infra*, 25a; see, *e.g.*, *Black's Law Dictionary* 336 (defining "contemplation of bankruptcy" as "[t]he thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding*") (emphasis added). Indeed, more than a century of "American and English authorities construing the bankruptcy laws also support the proposition that the words 'in con-

templation of' may be understood to require an intent to abuse the bankruptcy laws." App., *infra*, 25a (Colloton, J., concurring in part and dissenting in part); see *id.* at 25a-26a (citing cases); accord *Hersh*, 553 F.3d at 758-760. Congress's use of an established term of art may reasonably be understood to incorporate the same meaning that those authorities have given it. See, *e.g.*, *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2605 (2007).

The Eighth Circuit did not rebut the dissent's understanding of prior judicial decisions construing the phrase "in contemplation of" in the bankruptcy context. Nor did the court identify any reason to believe that Congress, in enacting Section 526(a)(4), intended to depart from that prior understanding. Indeed, the court did not respond to the dissent's analysis at all; it simply asserted without explanation that "the plain language of the statute does not permit this narrow interpretation." App., *infra*, 12a.

The statutory context and structure support the reading of the term "in contemplation of" that was endorsed by the dissent below and adopted by the Fifth Circuit in *Hersh*. See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). The other three subdivisions of Section 526(a) unambiguously establish rules of professional conduct designed to protect debtors from abusive practices by the attorneys and other debt relief agencies who advise them. See 11 U.S.C. 526(a)(1) (prohibiting debt relief agencies from failing to perform promised services); 11 U.S.C. 526(a)(2) (prohibiting debt

relief agencies from advising debtors to make false or misleading statements to obtain bankruptcy relief); 11 U.S.C. 526(a)(3) (prohibiting debt relief agencies from misrepresenting to debtors the risks or benefits of bankruptcy). Section 526(a)(4)'s placement alongside these other restrictions indicates that it is likewise properly read to target unethical communications by bankruptcy professionals—not, as the court below held, all manner of lawful and ethical attorney advice. See *Hersh*, 553 F.3d at 761.

Furthermore, the principal remedy for violation of each of Section 526's rules of professional conduct is a suit against the attorney (or other debt relief agency) to recover the debtor's "actual damages," as well as restitution of any fees paid by the debtor. 11 U.S.C. 526(c)(2). Congress's emphasis on the debtor's "actual damages" presupposes that the debtor has been injured by the attorney's conduct. As Judge Colloton noted, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." App., *infra*, 27a; accord *Hersh*, 553 F.3d at 759-760.

"In enacting the BAPCPA, Congress was attempting to address common abuses of the bankruptcy system. Congress concluded that there was a pervasive abuse * * * by debtors who incur debt before bankruptcy with the intention of having their debt discharged." *Hersh*, 553 F.3d at 760 (citing *House Report* 15). Construing Section 526(a)(4) in a way that focuses precisely on that goal is perfectly consistent with the statutory text, structure, and purpose.

B. Even if the court of appeals' broad reading of the statute were the most natural one, the court erred in adopting an interpretation that resulted in invalidating

the statute when a plausible alternative reading is constitutionally unproblematic. Particularly in the context of a First Amendment overbreadth challenge, where the plaintiff's demand is to declare a statute invalid even though it may be legitimately applied in some or many circumstances, the federal courts have not only "the power to adopt narrowing constructions," but "the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos*, 485 U.S. at 330-331; see also, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). Indeed, respondents themselves urged the court of appeals to construe another provision, the term "debt relief agency," to avoid the same constitutional overbreadth objection. *E.g.*, Resp. C.A. Br. 17 ("A statute should be interpreted so as to avoid constitutional issues."). The term "debt relief agency," however, has a statutory definition that forecloses respondents' proposed construction. See 11 U.S.C. 101(12A) (defining "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for * * * payment"); App., *infra*, 6a-10a. By contrast, the phrase "in contemplation of [bankruptcy]" is not defined and can reasonably be read to avoid constitutional problems, particularly in light of its status as a term of art in the bankruptcy context.

This Court has repeatedly applied saving constructions to avoid constitutional difficulties, even without the firm grounding in statutory text and context that the Fifth Circuit's reading of Section 526(a)(4) has. For instance, in *Boos*, this Court considered a First Amendment overbreadth challenge to a federal statute that made it unlawful "to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police." 485

U.S. at 329. The Court acknowledged that "[s]tanding alone, this text is problematic * * * because it applies to *any* congregation within 500 feet of an embassy for *any* reason." *Id.* at 330. Nevertheless, in accordance with the "duty to avoid constitutional difficulties" when a narrowing "construction is fairly possible," the Court construed the statute to apply "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'"—a limitation that was unstated in the statute but ensured the validity of the Act. *Id.* at 330-331 (citation omitted). See also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-578 (1988).

Federal courts construe federal statutes to avoid, not invite, constitutional difficulties. *E.g.*, *Boos*, 485 U.S. at 331. The court of appeals disregarded that important principle when it invalidated Section 526(a)(4) without adverting to the doctrine of constitutional avoidance or explaining why its interpretation of the disputed provision was the only plausible reading.

C. Even if the court of appeals' construction were so clearly required by the text of the statute as to overcome the avoidance doctrine, the court's overbreadth analysis would still be deficient. Because "invalidating a law that in some of its applications is perfectly constitutional * * * has obvious harmful effects," this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. The court of appeals failed to adhere to that principle when it struck down Section 526(a)(4) without giving proper weight to the statute's many legitimate applications.

Advice to engage in conduct that amounts to an abuse of the bankruptcy system is plainly subject to congressional regulation. Congress, the state legislatures and state bars, and the federal and state courts routinely require attorneys to abide by professional standards like Section 526(a)(4). Indeed, the conduct that Section 526(a)(4) targets falls squarely within the scope of Rule 1.2(d) of the Model Rules of Professional Conduct, which prohibits attorneys from advising their clients to engage in fraud. See, *e.g.*, *Attorney Grievance Comm'n* v. *Culver*, 849 A.2d 423, 443-444 (Md. 2004) (disciplining an attorney for advising and assisting a client to load up on debt before declaring bankruptcy). Those requirements serve valid and important governmental interests, both in protecting clients from unethical advice and in protecting the judicial process and other litigants from the harm that ensues when clients follow that unethical advice. As the Fifth Circuit noted, the constitutionality of Rule 1.2(d) has never been in doubt. *Hersh*, 553 F.3d at 756. Section 526(a)(4) regulates the very same conduct.

Section 526(a)(4) therefore may validly be applied to a significant category of unethical attorney advice. Against that legitimate sweep, the court below hypothesized two instances of legitimate, ethical advice to accumulate new debt on the eve of bankruptcy: buying a car and refinancing a mortgage.[8] App., *infra*, 13a-14a. The court added that "[f]actual scenarios other than these

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[8] The court assumed that merely refinancing an existing mortgage—that is, exchanging one loan for another with the same principal balance but a different interest rate, repayment period, or other terms—would constitute incurring "more debt" within the meaning of the statute. See App., *infra*, 13a. It is not at all clear that this understanding is correct.

few hypothetical situations no doubt exist." *Id.* at 14a. On that slim and concededly "hypothetical" basis, the majority held the statute unconstitutional as applied to all attorney conduct, including the abusive practices at which Section 526(a)(4) was directly aimed.

As Judge Colloton correctly pointed out, "a facial challenge resting on a 'few hypothetical situations' * * * is unlikely to justify invalidating a statute in *all* of its applications, because 'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" App., *infra*, 24a (quoting *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). The court of appeals here did no more than posit "some impermissible applications" of Section 526(a)(4). *Taxpayers for Vincent*, 466 U.S. at 800. The court did note this Court's admonition that First Amendment challenges of this sort require *substantial* overbreadth compared to the statute's valid coverage. App., *infra*, 15a n.10. But the court merely asserted that "[Section] 526(a)(4) is substantially overbroad," *id.* at 15a, without ever explaining how its "few hypothetical situations" supported that conclusion.

III. THE QUESTION PRESENTED IS IMPORTANT

As this Court has repeatedly observed, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The federal statute at issue here serves an important function in the administration of the Nation's bankruptcy laws, and the circuit conflict over the validity of that statute warrants this Court's review.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama* v. *Citizens Bank*, 549 U.S. 365, 367 (2007) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991)). Section 526(a)(4) is an important part of Congress's effort to preserve that focus on the "honest but unfortunate debtor" by curbing abuse of the bankruptcy system, including abuse that comes at the suggestion of a bankruptcy professional. By invalidating Section 526(a)(4), the court of appeals has frustrated that effort, and the conflict between the decision below and the Fifth Circuit's decision in *Hersh* also undermines Congress's decision "[t]o establish * * * *uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, Cl. 4 (emphasis added); cf., *e.g.*, *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 465-466, 471-472 (1982) (discussing the importance the Framers placed on uniform bankruptcy rules).

A. Congress has long been aware that the relief afforded by the bankruptcy laws creates a perverse incentive for debtors to amass additional debt in contemplation of obtaining a discharge. Congress has recognized that such conduct poses a fundamental threat to the Code's twin goals of affording debtors a fresh start while providing an orderly and equitable system of resolving creditors' claims. For example, when Congress enacted 11 U.S.C. 523(a)(2)(C), which creates a presumption that certain eve-of-bankruptcy debts are not dischargeable, the accompanying Senate Report emphasized that "[e]xcessive debts incurred within a short period prior to the filing of the petition present a special problem: that of 'loading up' in contemplation of bankruptcy." S. Rep. No. 65, 98th Cong., 1st Sess. 9 (1983). The report

explained that "[a] debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property," noting that "[i]n many instances, the debtor will go on a credit buying spree in contemplation of bankruptcy at a time when the debtor is, in fact, insolvent." *Ibid.* As the report concluded, "[n]ot only does this result in direct losses for the creditors that are the victims of the spree, but it also creates a higher absolute level of debt so that all creditors receive less in liquidation. During this period of insolvency preceding the filing of the petition, creditors would not extend credit if they knew the true facts." *Ibid.* As early as 1973, Congress was informed that "the most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge." *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. I, at 11 (1973).

Congress has accordingly enacted a number of protections against eve-of-bankruptcy attempts to abuse the system's protections. For instance, it authorized bankruptcy courts to dismiss a petition for "substantial abuse," 11 U.S.C. 707(b) (2000), which could include the debtor's purposeful accumulation of debt in contemplation of bankruptcy. *E.g.*, *Price* v. *United States Tr. (In re Price)*, 353 F.3d 1135, 1139-1140 (9th Cir. 2004). It precluded debtors from obtaining a discharge for debts obtained fraudulently. 11 U.S.C. 523(a)(2)(A). And it provided that certain categories of debts are presumed to be fraudulent and nondischargeable if they are in-

curred on the eve of bankruptcy. 11 U.S.C. 523(a)(2)(C) (2000).

B. When Congress enacted the BAPCPA in 2005, the House Report expressed concern that those earlier measures had not adequately restricted the ability of debtors to "knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." *House Report* 15. Accordingly, Congress strengthened each of the aforementioned protections against bankruptcy abuse. See, *e.g.*, BAPCPA § 310, 119 Stat. 84 (11 U.S.C. 523(a)(2)(C)). Most fundamentally, Congress greatly expanded the bankruptcy courts' authority to dismiss petitions for "abuse" of the bankruptcy system, including in cases in which debtors purposefully incur additional debt in contemplation of filing a petition. See BAPCPA § 102, 119 Stat. 27; *House Report* 48-49. Congress permitted dismissal of a petition based on a less stringent showing of abuse; authorized "any party in interest" to file a motion to dismiss for abuse (except in some cases involving lower-income debtors); repealed the pre-existing presumption in favor of granting the relief sought by the debtor; and specified that bankruptcy courts must consider, in determining whether a petition should be dismissed for abuse when no presumption applies, "whether the debtor filed the petition in bad faith" and whether "the totality of the circumstances * * * of the debtor's financial situation demonstrates abuse." 11 U.S.C. 707(b)(1), (3) and (6); see *House Report* 49.

Congress also made another significant change, which heightened the importance of the professional-conduct regulations at issue in this case. The "principal consumer bankruptcy reform" in the 2005 legislation was the adoption of a "means testing" mechanism in-

tended to ensure that debtors who have the ability to repay at least some of their debts will do so, through a structured repayment plan entered under Chapter 13 of the Bankruptcy Code, instead of obtaining a complete discharge under Chapter 7. *House Report* 48; see *id.* at 2 (describing means testing as the "heart" of the 2005 Act's reform provisions). See generally 11 U.S.C. 109(b) and (e) (eligibility for Chapter 7 and Chapter 13).

Under the means test, a debtor's petition for complete relief under Chapter 7 is presumed to be abusive if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See 11 U.S.C. 707(b)(2)(A)(i) and (iii). If the court finds a petition to be abusive under this standard, it can dismiss the debtor's case or, with the debtor's consent, convert it to Chapter 13, which involves a repayment plan. 11 U.S.C. 707(b)(1). The means test, however, exacerbates the incentive for debtors to manipulate the system by "loading up" on certain debt in contemplation of filing, because payments on secured debts that qualify under Section 707(b)(2)(A)(iii) reduce the amount of the debtor's monthly income counted in the means test, and may therefore allow the debtor to remain eligible for a complete and immediate discharge of unsecured debt under Chapter 7.

C. Congress was accordingly concerned that the introduction of the means test would give attorneys an incentive to counsel their clients to take on additional debt before filing for bankruptcy. As one bankruptcy judge testified, "[t]he more debt that is incurred prior to filing, the more likely the debtor will qualify for chapter 7." *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin-*

istrative Law of the House Comm. on the Judiciary, 105th Cong., 2d Sess. Pt. I, at 25 (1998) (statement of Judge Randall J. Newsome). Thus, the bankruptcy judge testified that, "[p]erverse as it may seem, I can envision debtor's counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford (at least until the bankruptcy is filed) as a way of increasing their deductions under [the means test]." *Ibid.*; see also *B9ankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. Pt. II, at 30 (1999) (statement of Judge William Brown). And as discussed above, see p. 3, *supra*, Congress credited evidence compiled by the United States Trustee Program that "consistently identified," among the sources of bankruptcy abuse, "misconduct by attorneys and other professionals [and] problems associated with bankruptcy petition preparers." *House Report* 5 (quoting Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: The Civil Enforcement Initiative,* Am. Bankr. Inst. J., Sept. 2002, at 12).

Section 526(a)(4) is an important component of Congress's effort to prevent such efforts to circumvent of the means test. If a debtor is made financially worse off by following his attorney's unethical advice to incur more debt in an attempt to take advantage of the bankruptcy system, Section 526 provides him a remedy against the attorney, including both a refund of attorney's fees and actual damages. Section 526 also ensures that attorneys will be subject to a concrete sanction for giving such unethical advice; while state bars have a significant role to play in disciplining attorneys for un-

ethical conduct, the additional remedy provided by Section 526 is both more uniform and more certain. Section 526 also facilitates the client's cooperation through its fee-shifting provision, 11 U.S.C. 526(c)(2), whereas a state bar must rely on public-spirited complainants.

Section 526(a)(4) thus serves both a compensatory and a deterrent function within Congress's carefully designed framework for reducing well-documented ways of abusing the bankruptcy system. The court of appeals' decision invalidating that important tool raises an important question that is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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