

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONNECTICUT BAR ASSOCIATION,)	
NATIONAL ASSOCIATION OF CONSUMER)	
BANKRUPTCY ATTORNEYS, CHARLES A.)	Civil Action No. 3:06-cv-00729-CFD
MAGLIERI, EUGENE S. MELCHION,)	
WAYNE A. SILVER, IRA B. CHARMOY,)	
GERALD A. ROISMAN, BROWN & WELSH,)	
P.C., AND ANITA JOHNSON,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES OF AMERICA, ALBERTO)	
GONZALES (in his official capacity as Attorney)	
General for the United States of America), and)	
DIANA G. ADAMS (in her official capacity as)	
Acting United States Trustee))	
)	
Defendants.)	June 9, 2006

**AMICUS CURIAE BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA IN
SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

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The Commercial Law League of America (the “CLLA”), by and through its undersigned counsel, files this amicus curiae brief in support of Plaintiffs’ Motion for Preliminary Injunctive Relief.

INTEREST OF THE AMICUS

The CLLA, founded in 1895, is the nation’s oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and reorganization. Its membership, which includes attorneys from large and small firms and bankruptcy judges representing virtually every state, consists of representatives of divergent interests in bankruptcy cases. The CLLA has long been associated with the representation of creditor interests, while at the same time it seeks fair, equitable and efficient administration of bankruptcy cases for all parties in interest. The CLLA’s members have testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields and filed amicus briefs in judicial proceedings implicating the interests of the CLLA’s members.

The CLLA appears as amicus curiae to provide a practical, experienced perspective to complement and reinforce the scholarship and arguments of the Plaintiffs. The CLLA’s members recognize that the fair, equitable, uniform and efficient administration of bankruptcy cases and debtor-creditor relations requires that all parties, including consumer debtors, participate fully and fairly in the bankruptcy process. As recognized by the Plaintiffs, applying the provisions of the Bankruptcy Code relying on the term “debt relief agencies” to attorneys would severely restrict the availability of competent representation to consumer debtors. The provisions’ extremely broad scope also affects the interests of the membership of the CLLA by compromising the representation of non-debtors, including creditors. To the extent

an attorney may be a “debt relief agency,” the challenged provisions impair the constitutional rights of attorneys, including members of the CLLA, and their clients.

SUMMARY OF ARGUMENT

The CLLA submits this amicus curiae brief in support of the litigation brought by the Connecticut Bar Association, the National Association of Consumer Bankruptcy Attorneys (“NACBA”), individual attorneys and an “assisted person” (collectively, “Plaintiffs”) challenging certain provisions of the Bankruptcy Code enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Plaintiffs filed a Memorandum in Support of Their Motion For Preliminary Injunctive Relief (“Plaintiffs’ Brief”) seeking an order enjoining the application of BAPCPA to licensed attorneys. The CLLA supports the position of the Plaintiffs and submits this brief to focus on the interests of attorneys who represent creditors, an area particularly within the expertise of the CLLA.

Although the CLLA members represent all interests in the bankruptcy forum (*e.g.*, debtors, trustees, creditors, committees), the CLLA’s extensive experience with unsecured creditors provides it with a different perspective from that of NACBA and the Connecticut Bar Association. Sections 526, 527 and 528 of the Bankruptcy Code added by BAPCPA regulate the activities of “debt relief agencies,” as defined by section 101(12A), also added by BAPCPA to the Bankruptcy Code. Section 526, in part, prohibits advice relating to the incurrence of debt in contemplation of the filing of a bankruptcy petition and to pay attorneys’ fees. Section 527 mandates specific disclosures a debt relief agency must make to its clients. Finally, section 528 compels debt relief agencies to include misleading and often false representations in their advertising.

The United States of America and its representatives (the “Defendants”) have taken the position that attorneys provide bankruptcy assistance to assisted persons and therefore

are debt relief agencies and subject to the regulations set forth by BAPCPA applying to debt relief agencies. (*See, e.g.*, Br. for Att’y Gen. Gonzales and U.S. Trustee Kelly Beaudin Stapleton in Supp. of Mot. to Dismiss filed in *Geisenberger v. Gonzales*, No. 2:05-cv-5460 at 6 (E.D. Pa. Dec. 23, 2005), attached to Pls.’ Br. as App. A; *see also* Mem. of Law in Supp. of Mot. to Dismiss filed by the United States in *Milavetz, Gallop & Milavetz v. United States*, No. 05-cv-2626 at 1 (D. Minn. Jan 27, 2006) attached hereto as Exhibit A (“These provisions establish certain standards of professional conduct for attorneys and bankruptcy petition preparers who provide bankruptcy assistance to consumer debtors with limited assets.”)).

If “debt relief agency” includes attorneys, the broad definition of “bankruptcy assistance” includes the services rendered by attorneys representing creditors in connection with bankruptcies. Under the revised Bankruptcy Code, the definition of “bankruptcy assistance” includes:

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. § 101(4A). Indeed, this definition is sufficiently broad to include services provided by an attorney who does no more than fill out a proof of claim form on behalf of a consumer creditor client. Document preparation, without more, would be enough to constitute bankruptcy assistance. *See* 11 U.S.C. § 101(4A); *see also* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 Am. Bankr. L.J. 283, 295 (2005).

To comply with sections 526, 527 and 528, attorneys representing individual clients must determine whether an engagement renders them a “debt relief agency” and therefore

must determine whether a client is an “assisted person.” An attorney for a non-debtor with interests in a bankruptcy proceeding will be forced to gather from the client private information that is wholly unrelated to the representation. For a creditor’s attorney, conducting such an inquiry will necessarily impair her ability to practice law. A creditor’s attorney does not routinely investigate a client’s debts and assets, or the value of the creditor client’s nonexempt property. Because the creditor’s attorney provides services that fit within “bankruptcy assistance,” the attorney must now complete such an investigation within three days of the engagement¹ in order to assure compliance with BAPCPA’s debt relief agency provisions.

By requiring an attorney to seek irrelevant and invasive material from non-debtor clients, the inquiry will adversely impact the attorney-client relationship. Some clients may be unwilling to provide the information and choose not to retain the attorney. Other clients will be confused by the attorney’s request for personal information wholly unrelated to the purpose of the retention. As a practical matter, the investigation will also drive up the attorneys’ fees incurred in connection with such representations. In reaction to the potential additional fees, some clients may choose not to retain the attorney. Accordingly, compliance with sections 526, 527 and 528 will impair attorneys’ ability to practice law and thus render the provisions unconstitutional. *See Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

If this Court adopts the Defendants’ interpretation of “debt relief agency,” section 526 unconstitutionally restricts the scope of advice attorneys may provide to their clients. Section 526(a)(4) forbids a debt relief agency from advising an “assisted person,” as defined by section 101(3), to incur debt in contemplation of filing a case under title 11 or to pay fees for services rendered by an attorney in connection with the bankruptcy case. This section will

¹ Section 528(a)(1) requires that debt relief agencies provide notice to an assisted person within three days after the debt relief agency first offers to provide bankruptcy assistance. *See* 11 U.S.C. § 527(a)(2).

impact a creditor seeking to file an involuntary bankruptcy petition against a debtor, such as when a tort creditor institutes bankruptcy proceedings to stop a judgment debtor's dissipation of assets. To the extent that the creditor is an "assisted person," the creditor's attorney, under the Defendants' interpretation of "debt relief agency," is prohibited by section 526(a)(4) from advising the creditor to incur debt in contemplation of filing the involuntary petition. Even though doing so would be lawful and in the creditor client's best interests, the attorney cannot advise the creditor client to incur debt in order to pay the creditor's attorneys' fees or to pay other costs incurred in connection with filing the involuntary petition. If the Defendants' reading is adopted, the statute will interfere with the attorney-client relationship by banning attorneys from providing advice relating to an entire subject of the representation. Prohibiting attorneys from providing specific advice to their clients constitutes an unconstitutional content-based restriction on core protected speech. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). No government purpose can be posited in justification of this restriction.

If this Court adopts the Defendants' interpretation of "debt relief agency," sections 527 and 528 compel an attorney to make certain statements most of which are irrelevant, if not false or misleading, when applied to the representation of creditors and other non-debtor entities. If section 527 applies to attorneys, it compels attorneys, including those who represent only assisted persons who are creditors, to provide within three days of the initial consultation certain statements regarding the nature of their representation and a form statement purporting to describe their clients' rights and the bankruptcy process. If sections 528(a)(4) and (b)(2) apply to attorneys, including those who provide services solely to assisted persons who are creditors, those sections would require attorneys to identify themselves in advertisements directed to the general public as "debt relief agencies" and to state: "We help people file for bankruptcy relief

under the Bankruptcy Code” even when they do not. If applied to attorneys, the compelled speech required by sections 527 and 528 improperly abridges attorneys’ First Amendment rights. *See Velazquez*, 531 U.S. at 541; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

Further, if applicable to attorneys, sections 526, 527 and 528 violate the protections afforded to the States by the Tenth Amendment. To the extent the challenged provisions apply to “prospective assisted persons,” Congress purports to regulate attorney conduct outside the realm of bankruptcy. *See, e.g.*, 11 U.S.C. § 526 (applying to either “an assisted person or *prospective assisted person*”) (emphasis added). Even assuming that Congress may enact laws regulating the conduct of attorneys representing debtors in bankruptcy, Congress exceeds its Article I authority when it attempts to regulate when there is no bankruptcy. Furthermore, regulation of the legal profession is traditionally reserved to the States under the Tenth Amendment. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). If applicable to attorneys including those who represent only creditors, sections 526, 527 and 528 impose rules of professional conduct for lawyers in addition to the rules prescribed by the States. Congress failed to include in BAPCPA a clear statement of its intention to preempt the States in this field. Absent a clear and plain statement of congressional intent, federal statutes cannot displace state authority over professions such as law.

The interpretation of sections 526, 527 and 528 advocated by the Defendants implicates each of the examples discussed above. As Plaintiffs correctly argue, reading the sections regulating the operation of a “debt relief agency” to apply to attorneys is not the right result. (*See Pls.’ Br. at 3 et seq.*) This Court may adopt the approach taken by at least one other court and construe the sections not to apply to attorneys because their plain language omits

explicit reference to attorneys. *See In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 70 (Bankr. S.D. Ga. 2005). Alternatively, this Court may eliminate the Defendants' proffered interpretation because of the absurdity of its application to creditors' and debtors' attorneys alike. *See, e.g., Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (rejecting and affording no deference to a legal interpretation that "leads to absurd and wholly unacceptable results"). As argued by the Plaintiffs' Brief, the constitutional infirmities of sections 526, 527 and 528 may be remedied by excluding attorneys from the scope of the term debt relief agencies. (*See Pls.' Br. at 3 et seq*) *See also In re Attorneys at Law*, 332 B.R. at 70 (holding that because attorneys were conspicuously omitted from the definition of "debt relief agency" Congress did not intend the provisions relating to debt relief agencies to regulate attorneys).

ARGUMENT

I. IF BAPCPA PROVISIONS APPLY TO ATTORNEYS, THEY INCLUDE ATTORNEYS WHO REPRESENT CREDITORS

The Defendants have taken the position that attorneys who provide "*bankruptcy assistance to an assisted person*" are debt relief agencies subject to the regulations set forth by BAPCPA. (*See, e.g., Br. for Att'y Gen. Gonzales and U.S. Trustee Kelly Beaudin Stapleton in Supp. of Mot. to Dismiss filed in Geisenberger v. Gonzales*, No. 2:05-cv-5460 at 6 (E.D. Pa. Dec. 23, 2005), attached to Pls.' Br. as App. A; *see also* Mem. of Law in Supp. of Mot. to Dismiss filed by the United States in *Milavetz, Gallop & Milavetz v. United States*, No. 05-cv-2626 at 1 (D. Minn. Jan 27, 2006) attached hereto as Exhibit A ("These provisions establish certain standards of professional conduct for attorneys and bankruptcy petition preparers who provide bankruptcy assistance to consumer debtors with limited assets.")).

Although both "bankruptcy assistance" and "assisted person" are defined terms, neither helps to limit the Defendants' interpretation of the scope of the restrictions provided by

sections 526, 527 and 528 on the conduct of debt relief agencies. Section 101(12A)'s definition of "debt relief agency" does not expressly include attorneys. The section reads in full:

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, but does not include –

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

11 U.S.C. § 101(12A).

None of the five exceptions to the term "debt relief agency" applies to attorneys, let alone attorneys who only provide bankruptcy assistance to creditors. To the extent attorneys are within the language defining "debt relief agency," section 101(12A) does not indicate whether attorneys are included only to the extent they exclusively represent debtors or potential debtors, or whether it includes attorneys who represent creditors, potential creditors, or any other non-debtor party.²

² Another example of an entity that would be included within the scope of the term debt relief agency is a collection agent trying to collect debts on behalf of an "assisted person" from a debtor in bankruptcy. However, because

Section 101(4A) defines “bankruptcy assistance” to mean “any goods or services sold or otherwise 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. § 101(4A). Conspicuously absent from the “bankruptcy assistance” definition is any reference to a *debtor*. Rather, under the plain language of this definition, “bankruptcy assistance” includes services provided to non-debtor parties to a bankruptcy proceeding or potential proceeding.

The following examples illustrate the breadth of the definition of “bankruptcy assistance.” As previously discussed, an attorney who does no more than fill out a proof of claim form on behalf of a consumer creditor client performs services which would be included in “bankruptcy assistance.” Document preparation, without more, would be enough to constitute bankruptcy assistance. *See* 11 U.S.C. § 101(4A); *see also* Vance & Cooper, *supra* at 295.

Tort creditors present a more far-reaching example. If the pharmaceutical giant Merck were to go into bankruptcy, plaintiffs’ counsel in the individual and class action suits over Vioxx may fit within the definition of “debt relief agency.” *See id.* Similarly, counsel for the creditors committee, whose constituents would include individual and class action plaintiffs may be a “debt relief agency.” Again, the definition of “bankruptcy assistance” is broad enough to apply to advice given by counsel for the plaintiffs and for the creditors’ committee. The determination of whether an attorney is a “debt relief agency” will be determined by the nature of the claimants’ debts and the value of the claimants’ non-exempt assets. *See* 11 U.S.C. § 101(3) (relying on “consumer debts” and “nonexempt property” to define “assisted person”); *see*

section 101(12A)(A) excludes an agent, an attorney advising a collection agency apparently would not be a “debt relief agency.”

also Vance & Cooper, *supra* at 292. Similarly, counsel for a retirees' committee under section 1114 of the Bankruptcy Code represents clients with claims for retirement and healthcare benefits. Many, if not most of the retirees, would fit within the definition of an "assisted person" rendering the retirees' committee's counsel a "debt relief agency."

Section 101(3) defines "assisted person" to mean "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." As for "bankruptcy assistance," the plain language of the definition of "assisted person" is not limited to persons who have filed for bankruptcy relief or who are contemplating filing for bankruptcy. The term's scope is sufficiently broad to encompass not only persons who are presently debtors, but also any person who may potentially become a debtor, creditors of a debtor, and persons who are potential creditors of potential debtors. *See In re Attorneys at Law*, 332 B.R. at 67 ("Although attorneys are not expressly included in the definition, the language defining 'debt relief agencies' is broad enough on its face to include attorneys and the reference to 'providing legal representation' in § 101(4A) suggests that attorneys are covered."); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 Am. Bankr. L.J. 191, 206-07 (Spring 2005) ("More confusing, if not simply absurd, are the provisions setting out requirements for 'debt relief agencies.' These provisions, due to slipshod drafting, will apply to attorneys who rarely, or never, represent consumer bankruptcy debtors.").

Rather than limit the term "debt relief agency," the terms "assisted person" and "bankruptcy assistance" include within their plain language attorneys representing creditors. Congress omitted language limiting the application of "debt relief agency" from sections 101(3) and 101(4A). Therefore, if the Defendants' interpretation is adopted, the conduct of attorneys

representing creditors is subject to the regulations governing debt relief agencies. *See* 11 U.S.C. §§ 526, 527 and 528.

II. IF SECTION 527 APPLIES TO CREDITORS' ATTORNEYS, IT UNCONSTITUTIONALLY INTERFERES WITH CREDITORS' ATTORNEYS' SPEECH

Section 527 requires debt relief agencies to provide to clients (i) a notice containing a brief description including the general purpose, benefits, and costs of proceeding under chapters 7, 11, 12 and 13; and (ii) a form written disclosure statement. Section 527(a) requires debt relief agencies to provide:

- (1) the written notice required under section 342(b)(1); and
- (2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous notice advising assisted persons that –
 - (A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;
 - (B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;
 - (C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and
 - (D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including criminal sanction.

11 U.S.C. § 527.

In addition, pursuant to section 527(b), debt relief agencies must provide a form written statement set forth therein. The statement reads:

IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. **THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST.** Ask to see the contract before you hire anyone.

The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.

11 U.S.C. § 527(b).

At best, the disclosures are confusing. Worse, if applied to creditors' attorneys, the required disclosures will cause attorneys to issue false statements to their clients. The Plaintiffs' Brief provides a comprehensive discussion of the potential false disclosures required by section 527. (*See* Pls.' Br. at 20-22.) As applied to the representation of creditors, the section 527(b) disclosures cannot be justified because they require an attorney to provide information that is both false and irrelevant. For instance, the information concerning the petition and schedules is not relevant. If given to a creditor client who intends to file a proof of claim, the statement "You will have to pay a filing fee to the bankruptcy court" is not true. The section 527(b) written statement also states in part "If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities *from a bankruptcy petition preparer who is not an attorney.*" 11 U.S.C. § 527(b) (emphasis added). A creditor cannot seek help from a non-attorney bankruptcy petition preparer. If this Court adopts the Defendants' position and holds this section applicable to attorneys, an attorney who represents a creditor will be forced to utter false statements in order to comply with section 527(b).

A. The Government Cannot Demonstrate A Compelling Government Interest

Courts must "accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S.

618, 634 (1995). The Defendants' interpretation requires attorneys to issue false and misleading statements to their clients and therefore impairs the public's fundamental Fifth Amendment Due Process rights and First Amendment rights. *See Lane*, 541 U.S. at 523. Because section 527 impairs fundamental rights, it is subject to strict judicial scrutiny and the government bears the burden to demonstrate that the regulation (1) advances a compelling government interest; and (2) is narrowly tailored. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

The attorney-client relationship is entirely dependent upon the free flow of information between the client and attorney. *See, e.g., Judicial Watch, Inc. v. U.S. Dept. of Justice*, 306 F. Supp. 2d 58, 74 (D.D.C. 2004) (stating the "free flow of information" between attorney and client "is a necessary predicate for sound advice.") (citations omitted). The disclosures required by section 527 include false and misleading information that, if provided by attorneys to non-debtor clients, will irreparably damage the confidence necessary to the proper functioning of the attorney-client relationship. For example, providing the disclosures required by section 527(b) to a creditor would not only be nonsensical and entirely irrelevant to an attorney's representation, such representations would be patently inaccurate. Plaintiffs' Brief discusses at length why admonitions such as "If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or can get help in some localities from a bankruptcy petition preparer who is not an attorney" or "You will have to pay a filing fee to the bankruptcy court"³ are false statements of fact and/or law even when provided to a debtor. (*See Pls.' Br.* at 20-23.) When given to a non-debtor client, the admonitions are not only false statements of fact or law, they are wholly irrelevant to the representation. The government can have no interest, let alone a *compelling interest*, in the dissemination of false or misleading

³ The two quotes are excerpts from the form disclosure statement required to be provided to an assisted person pursuant to 11 U.S.C. § 527(b).

information. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 643 (1985) (“The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.”).

B. By Applying To Creditors’ Attorneys, Section 527 Is Not Narrowly Tailored

Even if an interest of the government can be posited, requiring attorneys who represent non-debtors to provide the section 527 disclosures to their clients renders the regulation hopelessly overbroad. Congress knows how to write a statute to exclude unintended parties from its application. For example, the Fair Debt Collection Practices Act (the “FDCPA”) regulates the conduct of debt collectors. Not surprisingly, “debt collector” is a defined term under the FDCPA. The section defining “debt collector” begins:

The term “debt collector” means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6).

Limiting “debt collector” to entities whose “principal purpose” is debt collection or to persons who “regularly collect” debts, the plain language Congress adopted, limits the statutory class regulated by the FDCPA. See, e.g., *Pollice v. Nat’l Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir. 2000) (recognizing that the FDCPA excludes from the definition of “debt collector” creditors who collect debts on their own behalf); *Schroyer v. Frankel*, 197 F.3d 1170, 1176 (6th Cir. 1999) (holding that an attorney may be considered a “debt collector” only if it is shown “that the attorney or law firm collects debts as a matter of course for its clients or for some clients, or collects debts as a substantial, but not principal, part of his or its general law practice”). Congress could have similarly limited “debt relief agency” to persons who regularly

represent consumer debtors or whose principal purpose is to assist consumers in filing bankruptcy cases. Congress, however, chose not to do so.

Because the definition of “debt relief agency” is not narrowly tailored, section 527 will increase the cost of filing for bankruptcy by requiring attorneys to spend a significant amount of time explaining the disclosures to creditor clients including why the disclosures are not applicable to the clients.⁴ Having to expend the attorney hours necessary to provide the required disclosures will necessarily – and needlessly – drive up the cost of representation. Applied to creditors, the section 527 disclosures will compound the increased cost of representing individuals because an attorney must complete an initial investigation to determine whether a creditor client is an “assisted person” based on the character of the client’s debts and the value and exempt status of her property. More troubling, upon receiving the misinformation required by section 527, the client may forgo representation altogether rather than answer the irrelevant and intrusive questions that have nothing to do with the services to be provided. A creditor seeking advice regarding the filing of an involuntary bankruptcy to collect debts from a debtor may very well come to doubt the competency of the attorney who provides documents that imply the creditor client is contemplating bankruptcy. By including creditors’ attorneys within the application of section 527, the regulation is not narrowly tailored.

III. IF APPLIED TO CREDITORS’ ATTORNEYS, SECTION 528 IMPOSES UNCONSTITUTIONAL LIMITATIONS ON PROTECTED SPEECH

If attorneys are within the definition of “debt relief agency,” sections 528(a)(3), (a)(4) and (b)(2) infringe upon attorneys’ First Amendment rights. The sections are

⁴ Attorneys are required by State rules of professional responsibility to fully explain all matters necessary to permit a client to make informed decisions regarding the attorney’s representation. *See* Model Rules of Professional Conduct (“MRPC”), Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”), adopted in Connecticut as Connecticut Rule of Professional Conduct (“CRPC”) 1.4(b).

unconstitutional whether they are evaluated under the test of strict scrutiny afforded to core speech or under the test of intermediate scrutiny afforded to commercial speech. Under both tests, the government cannot meet its burden. The sections are neither justified by a substantial government interest required by intermediate scrutiny – let alone a compelling interest required by strict scrutiny – nor are they narrowly tailored.

A. Sections 528(a)(3), (a)(4) and (b)(2) Regulate Core Protected Speech

Sections 528(a)(3), (a)(4) and (b)(2) require that all advertising of bankruptcy assistance services include specific statements.⁵ For example, section 528(a)(4) reads: “A debt relief agency shall 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.” 11 U.S.C. § 528(a)(4). As noted previously, the definition of “bankruptcy assistance” includes services provided to creditor parties to a bankruptcy proceeding or potential proceeding. To the extent an attorney or firm may have previously qualified as a “debt relief agency” because of a single representation, that attorney may forever retain the status of “debt relief agency.” Therefore, even if that attorney or firm never again represents an assisted person, section 528(b)’s disclosure obligations require that attorney to comply in perpetuity with the disclosure requirements set forth therein even if the advertised bankruptcy services are not intended for assisted persons, or even for bankruptcy proceedings.

As argued by the Plaintiffs’ Brief, the compelled statements do not constitute commercial speech because, if applied to attorneys, attorneys will be compelled to utter

⁵ Sections 528(a)(3)-(4) and 528(b)(2)(A)-(B) impose nearly identical obligations upon debt relief agencies. The sections require that any advertisement of bankruptcy assistance services “directed to the general public” must disclose: (i) “the services or benefits are with respect to bankruptcy relief,” 11 U.S.C. § 528(a)(3), or “the assistance may involve bankruptcy relief,” 11 U.S.C. § 528(b)(2)(A); and (ii) the statement “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).

statements with which they disagree. (*See* Pls.’ Br. at 51 *et seq.*) Therefore, section 528 is subject to the compelled-speech standards for determining constitutionality. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1309 (2006) (synthesizing cases finding compelled speech violations); *see also Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 20-21 (1986) (holding regulation requiring utility to carry a newsletter in its billing envelope to be unconstitutional). The fact that the compelled speech appears in attorney advertisements does not insulate the sections from judicial review under the standard of strict scrutiny. *See Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 796 (1988). Because inclusion of the government’s message mandated by these sections renders a creditors’ attorney’s advertisement false, the sections must be evaluated under the standard of strict scrutiny. *See Rumsfeld*, 126 S. Ct. at 1309 (stating that “[t]he compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate”). Under this standard of review, the government must demonstrate (i) a compelling government interest; and (ii) that the section is narrowly tailored to advance that interest. *See Pac. Gas & Elec.*, 475 U.S. at 19 (stating the regulation “could be valid if it were a narrowly tailored means of serving a compelling state interest”); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 535 (1980). Clearly, the Defendants cannot prove either element.

B. Even if Section 528 Does Not Regulate Core Speech, Section 528 Regulates Non-Deceptive Protected Commercial Speech

Even if the compelled statements are commercial speech, section 527 is unconstitutional. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 566 (striking down a ban on promotional advertising by electrical utilities because despite the government’s interest in conserving energy, less restrictive means were available to further that interest). The Supreme

Court has formulated a four-part test to evaluate the constitutionality of regulations affecting commercial speech. As a threshold matter, commercial speech is entitled to First Amendment protection if it is not deceptive. *See id.* at 563. Once the speech is established to warrant First Amendment protection, the government bears the burden to establish: (1) a substantial interest justifying the regulation; (2) that the regulation directly advances that interest; and (3) that there are no less restrictive means of furthering that interest. *See Zauderer*, 471 U.S. at 638 (“Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.”); *Cent. Hudson Gas & Elec.*, 447 U.S. at 564-66.

Provided the advertisements are not purposefully deceptive, attorney advertising is a form of commercial speech protected by the First Amendment. *See In re R.M.J.*, 455 U.S. 191, 203 (1982) (“Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). The government has failed to show that attorney advertising of bankruptcy services deceives the public. The government “must do more than simply posit the existence of the disease sought to be cured.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). The only evidence of deception Congress considered consisted of a few advertisements that touted an attorney’s ability to make “debts disappear.” *See Bankruptcy Reform Act of 1998 (Part III)*, Hearing on H.R. 3150 before H. Judiciary Comm., 105th Cong., 2d Sess. 90-92 (1998); (*See also* Pls.’ Br. at 53, 59.) The alleged deception arose from the undisclosed fact that use of the bankruptcy process provides the means by which debts are made to disappear.

However, the plain meaning of section 528 compels *all debt relief agencies* to include the disclosures in their advertising, not just debt relief agencies that run advertisements directed at debtors claiming the ability to cause the unexplained disappearance of debt.

C. The Government Cannot Demonstrate a Substantial Interest Justifying the Regulation

No rationale supports applying the provisions of section 528 to attorneys as required by the *Central Hudson* test. If “debt relief agency” includes attorneys who do not represent consumer debtors, section 528 compels many attorneys to issue false statements. The targeted advertising includes bankruptcy assistance with respect to typical creditor remedies such as mortgage foreclosures and eviction proceedings. *See* 11 U.S.C. § 528(b)(2) (applying to advertisements with respect to “credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt...”). If non-debtor attorneys are subject to section 528, attorneys who represent creditors or who represent landlords in eviction proceedings would be required to include *clearly and conspicuously in their advertising directed to the general public* that the assistance may involve bankruptcy relief and that the attorney helps people file for bankruptcy. As applied to a creditor’s attorney’s advertising, the disclosure would not be true. Even though a creditor’s attorney may never represent a debtor, such attorneys are required to include the false statement “We help people file for bankruptcy relief under the Bankruptcy Code.”⁶ Similarly, the same attorneys would have to clearly and conspicuously advertise that the services may involve bankruptcy relief even when the services would not.

⁶ The quoted language must be disclosed by debt relief agencies in “any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public” pursuant to section 528(a)(4) and 528(b)(2)(B).

If an attorney falls within the definition of “debt relief agency,” section 528 requires an attorney who limits her practice to the representation of creditors to include in all advertising the statement “We help people file for bankruptcy relief under the Bankruptcy Code.” In this case, section 528 would have the effect of requiring an attorney to issue a patently false statement for the alleged purpose of addressing the government’s interest in preventing the dissemination of false or deceptive claims. Compliance with this provision would subject attorneys to possible penalties under State rules of professional responsibility,⁷ whereas non-compliance will subject the attorneys to penalties under section 526(c).⁸ This outcome creates a Kafkaesque result. There can be no legitimate government interest in prohibiting attorneys from counseling their clients in regard to lawful matters. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (“A clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.”).

On the other hand, if creditors’ attorneys do comply with section 528, they will be compelled to issue false and misleading disclosures to their clients. The mandatory disclosures will confuse potential clients of creditors’ attorneys as to the nature of the attorneys’ practice and the public’s access to accurate and effective legal representation will be restricted. Under the standards articulated by the Supreme Court, the government can *never* show that it has an interest in deceiving, misleading or creating confusion in the minds of citizens. *See Zauderer*, 471 U.S. at 643 (“The State is not entitled to interfere with that access by denying its citizens

⁷ MRPC, Rule 7.1, adopted in Connecticut as CRPC, Rule 7.1, states in full: “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 misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

⁸ Section 526(c) provides for civil liability for violations of sections 526, 527 and 528. Section 526(c) authorizes penalties that include disgorgement of attorneys’ fees, payment of costs relating to an enforcement action and civil penalties that may be imposed *sua sponte*. *See* 11 U.S.C. § 526(c)(2), (c)(3)(C) and (c)(5)(B) respectively.

accurate information about their legal rights.”). The only purpose the disclaimer could serve is to influence the way people think about bankruptcy – such a purpose is improper when access to the courts is at issue: “That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.” *Id.*

D. Section 528 Is Not Narrowly Tailored to Directly Advance a Substantial Government Interest

Even if this Court finds that the government has a substantial interest, section 528’s mandatory disclosures are overly broad and cannot satisfy the requirements of the third and fourth prongs of *Central Hudson*. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 565 (a regulation “may extend only as far as the interest it serves”). “Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State’s substantial interest.” *In re R.M.J.*, 455 U.S. at 203 (addressing state regulation of the form and content of attorney advertising). If attorneys representing creditors are included within the scope of section 101(12A), section 528 is clearly not narrowly drawn. *See Zauderer*, 471 U.S. at 649 (“broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force”). Neither the term “bankruptcy assistance” nor the term “assisted person” is sufficient to limit the scope of “debt relief agency” so that such provisions directly advance the government’s possible interest in forestalling deception. *See, e.g., In re R.M.J.*, 455 U.S. at 203 (stating that restrictions on commercial speech may be no broader than “reasonably necessary to prevent the deception”).

E. Section 528 Is An Unconstitutional Violation of Attorneys’ Commercial Speech Rights

The compelled statements set forth by section 528 fail each of the four prongs of the *Central Hudson* test. All attorneys’ advertising of bankruptcy services is not deceptive and the sections do not advance a substantial government interest. By potentially applying to all

attorneys regardless of the nature of their practice, the section fails to advance directly an interest, even if such a government interest did exist. By forcing a creditors' attorney to include the mandatory disclosures, section 528 renders such an attorney's communications false. For these reasons, section 528 must be held to be an unconstitutional violation of attorneys' commercial speech rights.

IV. IF SECTION 526(a)(4) APPLIES TO ATTORNEYS, IT CONSTITUTES AN IMPERMISSIBLE ABRIDGEMENT OF THE STATES' RIGHT TO REGULATE THE PRACTICE OF LAW

The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Regulation of the legal profession is reserved to the States. The Supreme Court has recognized that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (explaining that although the Sherman Act applies to anticompetitive conduct by attorneys, the States retain the authority to regulate attorney conduct); *see also Arons v. N.J. State Bd. of Educ.*, 842 F.2d 58, 63 (3d Cir. 1988) (stating "explicit provisions" are necessary to demonstrate Congress' intent to preempt the States' traditional authority to regulate the practice of law). If attorneys are included within the scope of "debt relief agency," BAPCPA imposes rules of professional conduct for lawyers. To preempt State law, Congress must set forth its intention in clear and unambiguous language demonstrating Congress' intent to occupy the field. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). BAPCPA does not contain any such language.

State rules of professional responsibility prohibit attorneys from providing advice that encourages fraudulent or illegal activity.⁹ As discussed in Section VII below, section 526(a)(4) limits the scope of advice an attorney may provide to her client. Similarly, State laws also limit the scope of attorney advice by prohibiting attorneys from advising their clients to undertake illegal or fraudulent acts. The MRPC states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent” MRPC, Rule 1.2(d); *see also* CRPC, Rule 1.2(d). Accordingly, to the extent an attorney advises a client to undertake fraudulent or illegal conduct, such attorney would face sanctions under state laws of professional responsibility.

Despite the apparent conflict with state rules of professional responsibility, BAPCPA contains language that disclaims any Congressional regulation of the legal profession.

Section 526(d)(2)(A)-(B) states:

No provision of this section, section 527, or section 528 shall –

(2) be deemed to limit or curtail the authority or ability –

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

11 U.S.C. § 526(d)(2)(A).

Rather than including a clear statement that BAPCPA was meant to preempt state law, Congress has done the opposite. Section 526(d)(2)(A) indicates that the BAPCPA

⁹ MRPC, Rule 1.2(d), adopted in Connecticut as CRPC, Rule 1.2(d), states in full: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

provisions were not intended to preempt State law. However, as demonstrated, *supra*, these sections do conflict with State laws of professional responsibility. Therefore, BAPCPA constitutes a violation of the States' Tenth Amendment rights.

V. IF APPLIED TO CREDITORS' ATTORNEYS, SECTION 528 VIOLATES THEIR DUE PROCESS RIGHTS

If an attorney can constitute a "debt relief agency," section 528(a)(1) severely impairs the practice of law by imposing conditions on the provision of "bankruptcy assistance" to an "assisted person." The section reads:

(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.

11 U.S.C. § 528(a)(1).

As recognized by the Plaintiffs' Brief, section 528(a)(1) requires that all debt relief agencies execute a written contract within five days of commencing representation of an assisted person. If such a contract is not executed, the attorney risks having her retention agreement declared void and any fees incurred by the client uncollectable pursuant to section 526(c)(1). *See* 11 U.S.C. § 526(c)(1).¹⁰ For creditors' attorneys, complying with section 528(a)(1) imposes an onerous if not impossible burden on their practice of law.

¹⁰ Section 526(c)(1) reads: "Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person."

As the Plaintiffs correctly argue, the section imposes strict liability over conduct - the execution of a contract by the “assisted person” - that attorneys cannot control. (*See* Pls.’ Br. at 42.) Applied to creditors’ attorneys, the predicament created by 526(a)(1) is even more dire. As discussed in the preceding section, a creditor’s attorney does not routinely investigate a client’s debts and assets, or the value of the creditor client’s nonexempt property. As of the moment a creditor’s attorney first provides “bankruptcy assistance” to a client, that attorney will not have the information necessary to determine whether the client is an “assisted person.” Because they do provide services that fit within the express scope of “bankruptcy assistance,” a creditor’s attorney will be forced to complete within five days an investigation of all individual clients’ debts and assets, and the value of the creditor client’s nonexempt property to determine whether such clients are assisted persons. Access to this information is not within an attorney’s control. An attorney must rely on her client to provide the information necessary to determine whether the client is an “assisted person.” Therefore, to comply with section 528(a)(1), a creditor’s attorney must not only rely on her client’s timely execution of a contract, she must also rely on her client to provide the information necessary to determine whether compliance with the section is even necessary. Further, because the determination of whether the client is an “assisted person” will likely take longer than five days to complete, a creditor’s attorney as a practical matter will be forced to execute and deliver to every individual client a written contract. By imposing liability for conduct over which the creditors’ attorney has no control, section 528(a)(1) is an unconstitutional violation of Due Process rights. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

VI. SECTION 526(A)(4) VIOLATES RIGHTS PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

If it applies to attorneys, section 526(a)(4) prohibits attorneys from providing specific advice to their clients. Section 526(a)(4) reads:

A debt relief agency shall not – (4) 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.

11 U.S.C. § 526(a)(4). As discussed in Plaintiffs’ Brief, Defendants have construed this section as rendering it unlawful for an attorney to advise a client who is an assisted person to incur debt to pay fees to an attorney or petition preparer or to charge for services performed in connection with preparing or representing a debtor under this title. (*See* Pls.’ Br. at 12-13.) This interpretation is narrower than the plain language of the statute. *id.*

If it applies to attorneys, section 526(a)(4)’s prohibition would apply to creditors’ attorneys. Even as interpreted by Defendants, the content-based restriction is unconstitutional if it applies to creditors attorneys. An attorney advising a person preparing for a case under the Bankruptcy Code includes attorneys that represent creditors because the plain language of the statute would include, among others, creditors commencing involuntary bankruptcy cases under section 303 of the Bankruptcy Code.¹¹ For example, the plaintiff in a successful negligence suit might learn that the defendant is dissipating assets in an effort to evade paying on the judgment. A viable course of action for the plaintiff is to file an involuntary bankruptcy petition against the defendant. In this scenario, so long as the plaintiff is an “assisted person” and attorneys are

¹¹ The Defendants have argued that section 526(a)(4) prohibits an attorney from advising a client to incur debt because the client intends to file for bankruptcy. (*See* Pls.’ Br., App. A, at 6.) However, the express language is not so limited. The express language of section 526(a)(4) – “such person filing a case under this title...” – applies to a client who intends to file an involuntary petition against another.

within the definition of “debt relief agency,” the debt relief agency provisions would apply with full force to the representation of that plaintiff. The plaintiff’s attorney will be subject to the mandates applying to debt relief agencies and the penalties under section 526(c).

Section 526(a)(4) constitutes a content-based restriction on speech protected by the First Amendment and is thus subject to strict judicial scrutiny.¹² The statute identifies specific content by prohibiting attorneys from advising their clients “to incur more debt in contemplation of such person filing a case under this title...” 11 U.S.C. § 526(a)(4). Therefore, to pass muster, the government must demonstrate to the court that the regulation (1) advances a compelling government interest and (2) is narrowly tailored. *See Turner Broad. Sys., Inc.*, 512 U.S. at 653. The regulation neither furthers a compelling government interest nor is it narrowly tailored.

A. Section 526(a)(4) Does Not Advance a Compelling Government Interest

If section 526(a)(4) applies to attorneys as Defendants maintain, it prohibits an attorney from providing *any* legal advice that advocates her client undertake additional pre-petition debt in contemplation of filing for bankruptcy relief or to pay a fee to an attorney for services in connection with preparing for the filing of a bankruptcy case. There is no compelling interest advanced by censoring attorneys advising their clients under this provision. The Bankruptcy Code already provides for those situations where the debtor is “gaming the system” or otherwise engaging in behavior that is impermissible. (*See, e.g.*, Pls.’ Br. at 31-32.) With respect to creditors’ attorneys, however, section 526(a)(4) is even less defensible. The filing of

¹² As discussed in Plaintiffs’ Brief, section 526, like section 527, may also be an unconstitutional violation of substantive due process guaranteed by the Fifth Amendment because it deprives the public of its fundamental right of access to court. (*See* Pls.’ Br. at 37 *et seq.*) Regulations that impair fundamental rights are subject to strict judicial scrutiny. Pursuant to section 526(a)(4), persons with less than \$150,000 in nonexempt property will be deprived of the complete advice of competent counsel whereas a person with \$150,001 will have such access. Why should a difference in one dollar determine whether a person is allowed access to such advice? Not only is there no compelling government interest for denying this class this right, there is also no rational reason for drawing a line at \$150,000.

the involuntary petition may increase the creditor client's assets if the involuntary petition results in a larger dividend to creditors because it stops the debtor from dissipating the debtor's assets. Thus, there is no policy justification for prohibiting an attorney representing a creditor from providing the advice that section 526(a)(4) prohibits.

As the Supreme Court has made clear, restricting the scope of legal advice “distorts the legal system by altering the traditional role of attorneys” and is a “serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.” *Velazquez*, 531 U.S. at 544 (holding program denying funds to attorneys that seek to challenge constitutionality of federal welfare laws to be unconstitutional). By disabling the traditional role of an attorney, BAPCPA interferes with the proper functioning of the judiciary and therefore constitutes an impermissible abridgement of the judicial power vested by Article III of the Constitution in the Supreme Court. Unfettered attorney advice is necessary to the proper exercise of judicial power. By restricting the advice an attorney may provide to her client, Congress effectively restricts the strategies an attorney may pursue on behalf of her client which in turn restricts the relief a court may fashion. *See Velazquez*, 531 U.S. at 545. Just as Shakespeare's irony¹³ recognizes the role of lawyers in promoting functioning of the government, so did the Supreme Court in *Velazquez* when it addressed whether a similar scheme to restrict the scope of attorney advice could be justified by a governmental interest. “A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.” *Velazquez*, 531 U.S. at 546.

B. Section 526(a)(4) Is Not Narrowly Tailored

Section 526(a)(4) fails the second prong of strict judicial scrutiny because it is not narrowly tailored. Not all conduct implicated by advice banned by section 526(a)(4) is illegal

¹³ “The first thing we do, let's kill all the lawyers.” William Shakespeare, *Henry VI, Part II*, Act IV, Scene II.

nor does it run afoul of other provisions of the Bankruptcy Code. As Plaintiffs' Brief correctly observes, there is nothing inherently improper about incurring debt on the eve of bankruptcy. (See Pls.' Br. at 6 *et seq.*) "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." Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (2005). Similarly, an attorney representing a creditor may wish to counsel a client to borrow money to pay the filing fee in connection with an involuntary bankruptcy or to pay the attorney's fee. No laws, including any provision of the Bankruptcy Code, would render such conduct fraudulent or illegal. However, under section 526(a)(4), an attorney who advises her client in regard to such lawful activities will subject herself to possible penalty under section 526(c). There can be no legitimate government interest in prohibiting attorneys from counseling their clients in regard to lawful matters. *See Grayned*, 408 U.S. at 114 ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct.").

In *Velazquez*, the Supreme Court addressed a Congressional appropriation for legal services to persons with welfare benefit claims. Like section 526(a)(4), the conditional appropriation limited the scope of an attorney's representation of her client. Rather than the outright ban instituted by section 526(a)(4), Congress conditioned the receipt of funds by legal services providers to those who limited the scope of their representation to exclude efforts to amend or challenge existing welfare laws. The Supreme Court held that the condition was a viewpoint-based restriction of private speech and therefore unconstitutional: "[Congress] may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Velazquez*, 531 U.S. at 544. From this conclusion it

follows that if Congress cannot impose such restrictions through its spending powers, it may not do so through its direct legislative powers.

If it applies to attorneys, section 526(a)(4) does not advance the interests of creditors. First, it is likely to be in the creditor client's interest to incur debt to pay the filing fees or attorney's fees. Second, even if it applies only to debtors' attorneys, section 526(a)(4) does not advance the interests of creditors. Congress has demonstrated that it knows how to limit the application of Bankruptcy provisions addressing the potential underlying policy. Other sections of the Bankruptcy Code directly regulate conduct of debtors in this context and serve as examples of alternative provisions that are narrowly tailored. Section 523(a)(2)(C) directly regulates the conduct of debtors by disallowing the discharge of certain debts incurred immediately prior to the filing of a petition. *See* 11 U.S.C. § 523(a)(2)(C). Section 707(b)(1) contains provisions that permit a bankruptcy court to dismiss a petition "if it finds that the granting of relief would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b)(1). These sections directly advance creditors' interests by addressing conduct causing the dilution of the debtor's assets. If Congress wants to increase the protections afforded to creditors, its remedy lies in strengthening sections 523 and 707, not interfering with the attorney-client relationship. Indeed, the interests of creditors are furthered if debtors receive the benefit of unfettered representation by an attorney. Because the regulation does not directly regulate the allegedly offensive conduct, section 526(a)(4) is not narrowly tailored.

Because section 526(a)(4) censors a specific category of speech, it is not neutral and is thus subject to strict judicial scrutiny. The government can neither demonstrate a compelling interest justifying the censoring of attorney advice to clients nor demonstrate that the regulation is narrowly tailored. Accordingly, section 526(a)(4) is unconstitutional.

VII. SECTION 101(12A) SHOULD BE INTERPRETED TO EXCLUDE ATTORNEYS FROM ITS SCOPE

As argued by the Plaintiffs, the constitutional infirmities of sections 526, 527 and 528 may be remedied by excluding attorneys from the scope of the term “debt relief agency.” (See Pls.’ Br. at 61 *et seq.*) See also *In re Attorneys at Law*, 332 B.R. at 70 (holding that because attorneys were expressly omitted from the definition of “debt relief agency” Congress did not intend the provisions relating to debt relief agencies to regulate attorneys).

The constitutional infirmities of sections 526, 527 and 528 as they apply to creditors’ attorneys could also be remedied by excluding creditors’ attorneys from the scope of the term “debt relief agency” or the services performed by creditors’ attorneys from the scope of the term “bankruptcy assistance” or creditors from the term “assisted person.” However, as addressed in this Brief, such interpretations are narrower than the plain language of the statute.

Attorneys may be excluded from the definition of “debt relief agency” by relying on the plain language of sections 101(12A), 101(3) and 101(4A). Despite being a defined term under the Bankruptcy Code, section 101(12A) does not incorporate “attorney” in its language or in the language of any of its related definitions. See, e.g., 11 U.S.C. § 101(4) (defining the term “attorney”). The bankruptcy court in the Southern District of Georgia ruled *sua sponte* that the definition of debt relief agencies set forth by section 101(12A) does not include attorneys. See *In re Attorneys at Law*, 332 B.R. at 71 (ruling that “attorneys regularly admitted to the Bar of this Court or those admitted *pro hac vice* are not covered by the provisions of the Code regulating debt relief agencies”). The court recognized that section 101(12A) omits reference to attorneys despite the fact the term “attorney” is a separately defined term under section 101(4). The court concluded by negative inference that attorneys should therefore be excluded from the definition of “debt relief agency.”

Alternatively, if the plain language is not sufficient to limit the scope of “debt relief agency,” canons of statutory construction require that attorneys be excluded from the term. As previously discussed in this brief and in the Plaintiffs’ Brief, sections 526, 527 and 528 would superimpose federal rules of professional conduct upon attorneys. (*See* Pls.’ Br. at 62.) Attorneys will be forced to adopt practices to assure that they do not inadvertently violate section 526, 527 and 528. For example, until attorneys have the necessary information to make the determination of a client’s status, attorneys must treat every new individual client as an “assisted person” and limit the representation of that client in order to avoid inadvertently violating the requirements imposed upon debt relief agencies. In the absence of such practices, attorneys will risk inadvertently violating these sections. Because including attorneys within the scope of “debt relief agency” renders the sections relying on the term absurd, this Court may reject the Defendants’ interpretation. *See Kui Rong Ma*, 361 F.3d at 559 (rejecting and affording no deference to a legal interpretation that “leads to absurd and wholly unacceptable results”).

Finally, this court may hold that sections 526, 527 and 528 are void for vagueness to the extent they rely on the term “debt relief agency.” A law must be sufficiently specific to provide notice to potential actors that the regulated conduct is in fact illegal. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-49 (1991) (finding that Nevada rule of professional responsibility limiting attorneys from publicly commenting on details of pending matters failed to provide “fair notice to those to whom it is directed”). In order to ensure compliance with the provisions relying on the term “debt relief agency,” attorneys must guess at the scope of the term. For example, a creditors’ attorney unable to determine the status of an individual client may simply have to guess as to whether the client is an “assisted person” in order to determine whether an executed contract must be provided to that client within five days. In such cases,

where a statute's vagueness creates uncertainty as to its application, the statute will have an impermissible chilling effect on the free exercise of speech. *See Grayned*, 408 U.S. at 109 (“[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms”); *Smith v. California*, 361 U.S. 147, 151 (1959) (“[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.”).

[Remainder of page left intentionally blank.]

CONCLUSION

For the foregoing reasons, the Commercial Law League of America respectfully requests that this Court reject the Defendants' proffered interpretation of the term "debt relief agency" and grant the Plaintiffs' Motion For Preliminary Injunctive Relief.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2006, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone not registered to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

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