UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT BAR ASSOCIATION, et al. **Plaintiffs,** **v.** **UNITED STATES OF AMERICA, et al.** **Defendants.**	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** **Civil Action No. 3:06CV729**

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INTRODUCTION

In enacting the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress found that there was "abuse by attorneys and other professionals." H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 5 (2005), reprinted at 2005 U.S.C.C.A.N. 88, 92. To correct this abuse, Congress included in BAPCPA "provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." Id. at 103. These standards are known as the "debt relief agency" provisions. See 11 U.S.C. §§ 526-528.

In this action, plaintiffs – the Connecticut Bar Association, the National Association of Consumer Bankruptcy Attorneys, six private attorneys, a law firm and an individual who is contemplating filing for bankruptcy — contend that these standards do not apply to attorneys and, if they are applied to attorneys, four of those standards are unconstitutional. Complaint, ¶¶ 70-71. First, plaintiffs contend that the prohibition against advising a consumer debtor with limited assets to "incur more debt in contemplation of such [debtor] filing" for bankruptcy, 11 U.S.C. § 526(a)(4),

violates the attorney plaintiffs' First Amendment right, the client plaintiff's First and Fifth Amendment rights, and the separation of powers principle. Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction ("Pl. Mem.") at 28-41. Second, they contend that the requirement that a debt relief agency provide certain written disclosures to such consumer debtors, 11 U.S.C. § 527, violates the First Amendment. Pl. Mem. at 45-51. Third, plaintiffs contend that the requirement that a debt relief agency insert a written disclosure in advertisements for bankruptcy assistance, 11 U.S.C. § 528(a)(3)-(4), violates the First Amendment. Pl. Mem. at 51-61. Fourth, they challenge the requirement that a debt relief agency execute a written contract describing the services to be provided and the fees for such services, 11 U.S.C. § 528(a)(1)-(2). Pl. Mem. at 41-45. Finally, plaintiffs claim that the professional standards imposed on debt relief agencies violate their due process rights. Id. at 63-65. Based on these claims, they seek a preliminary injunction enjoining the defendants from enforcing Sections 526, 527 and 528 against the plaintiffs, the members of their organizations, and others similarly situated.[1]

A preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the plaintiffs make a clear showing that they meet the criteria for such relief. Where, as here, plaintiffs seek to enjoin government action taken in the public interest pursuant to a statute, the burden is especially heavy. Able v. United States, 44 F.3d 128, 131-32 (2d Cir. 1995). Plaintiffs must establish that they will suffer irreparable injury and that they are likely to succeed on the merits

[1] While plaintiffs seek an injunction barring the defendants from enforcing any of the debt relief provisions against them, they do not raise any specific challenge to some of the provisions. For example, plaintiffs do not contend that the prohibitions set forth in Section 526(a)(1)-(3) violate their First Amendment rights. Similarly, while they criticize the standardized disclosure set forth in Section 527(b), they do not raise any specific objections to the disclosures required by Sections 527(a) and (c).

of their claim. Id. Plaintiffs cannot make either showing here.

In this case, plaintiffs cannot demonstrate a likelihood of success on the merits because their claims have no legal merit. Their complaint should, therefore, be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Plaintiffs' claims are based in a large part on a misinterpretation of the terms "debt relief agency" and "bankruptcy assistance." On one hand, plaintiffs assert that the term "debt relief agency" does not include attorneys. In the alternative, they argue that if it includes attorneys, the term "bankruptcy assistance" is so broad that it sweeps in attorneys for creditors or any one who provides advice to an assisted person on any matter. They then try to use this stretched definition of a debt relief agency to bolster their constitutional claims by making the professional standards seem irrational and overbroad. Both of plaintiffs' interpretations are incorrect.

Plaintiffs' statutory claim that the term "debt relief agency" does not include attorneys who provide legal assistance to consumer debtors cannot be squared with the plain language of the statute. The BAPCPA defines "debt relief agency" as "any person" that, for a fee, "provides any bankruptcy assistance to an assisted person." 11 U.S.C. § 101(12A).[2] "Bankruptcy assistance" includes "providing information, advice, counsel . . . or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A). Therefore, attorneys who provide bankruptcy assistance to assisted persons fall squarely within the plain language of the BAPCPA. The legislative history of the BAPCPA further confirms that attorneys are included within the definition of debt relief agency.

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[2] An "assisted person" is defined as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." 11 U.S.C. § 101(3).

Plaintiffs' interpretation of the definition of "bankruptcy assistance" to include attorneys who represent creditors and mortgage companies is also incorrect.[3] Even if it were possible to read the definition of the term "bankruptcy assistance" in isolation as including such attorneys, it is well-established that a section of a statute should not be read in isolation from the context of the whole statute or its purpose. The other parts of the statute dealing with debt relief agencies and the legislative history make it clear that the that the term "bankruptcy assistance" refers to information, advice and legal representation to certain consumer debtors ("assisted persons") who are contemplating or seeking bankruptcy relief.

Plaintiffs' constitutional challenges to the debt relief provisions also have no merit. Plaintiffs' claim that Section 526(a)(4) violates the First Amendment rights of attorneys is based in large part on a misinterpretation of this restriction. It does not prohibit an attorney from advising an assisted person about what the bankruptcy law states. Nor is it a general prohibition against advising an assisted person to incur any debt prior to filing for bankruptcy. Instead, it prohibits an attorney only from advising an assisted person "to incur more debt in contemplation" of filing for bankruptcy. 11 U.S.C. § 526(a)(4) (emphasis added). In other words, it prohibits advice to incur more debt because the debtor intends to file bankruptcy. This restriction is an ethical standard that protects debtors from receiving advice that could result in the denial of bankruptcy relief and prevents abuse of the bankruptcy system. Thus, it satifies the balancing test set forth in Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991).

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[3] The Commercial Law League of America has filed an amicus curiae brief on behalf of attorneys representing creditors. The arguments made by the Commercial League for the most part simply duplicated the arguments already made by defendants. In any case, its brief is predicated on the erroneous assumption that the term "bankruptcy assistance" includes advice to creditors.

Plaintiffs' claim that Section 526(a)(4) violates the First and Fifth Amendment rights of their clients also lacks any merit. Whatever First Amendment right a client may have to receive advice, the right cannot be greater than the right of the attorney to provide the advice. Moreover, nothing in this provision limits the clients' ability to file for bankruptcy or assert various claims or defenses in that proceeding. Accordingly, plaintiffs' claim that this provision violates their clients' right of access to the court simply has no legal basis. Similarly, plaintiffs' claim that this provision somehow discriminates against small consumer debtors turns the provision on its head. This provision, together with the other requirements imposed on debt relief agencies, protects small consumer debtors from the abuses which Congress found to exist.

Plaintiffs' claim that Section 526(a)(4) violates the separation of powers principle is frivolous. Unlike the statute at issue in Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), the restriction does not preclude an attorney from asserting any claims or defenses in a bankruptcy proceeding. Instead, it is an ethical prohibition which seeks to protect the integrity of the bankruptcy system.

The Supreme Court has consistently found that disclosure requirements, like those contained in 11 U.S.C. §§ 527 and 528(a)(4) and (b)(2), are not subject to a strict scrutiny test. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). Instead, such requirements should be upheld as long as they are reasonably related to a legitimate state interest. Id. The disclosure requirements at issue here meet this test. Congress enacted these disclosure requirements after hearing evidence about (1) the failure of some attorneys to provide consumer debtors with basic information about bankruptcy proceedings, and (2) consumer deception by way of advertisements promising debt relief without

mentioning that such relief may actually involve filing for bankruptcy. The required written disclosures ameliorate these problems by ensuring that consumer debtors receive basic information regarding the proceedings and that advertisements alert potential clients that bankruptcy is an option that attorneys may recommend to them.

Plaintiffs' challenge to the requirement imposed by Section 528(a) that a debt relief agency execute a written contract explaining the services that it will provide and the fees for such services also lacks merit. Since this requirement does not infringe on any fundamental rights, it must be upheld as long as there is a rational basis. This requirement is clearly reasonable. As the American Bar Association and various states have recognized, a written statement outlining the attorney's services and fees prevents misunderstandings regarding fees.[4] Indeed, Connecticut requires such a written agreement based on this factor. Conn. Rules of Prof'l Conduct, Rule 1.5(b). The fears that plaintiffs raise that they may be subject to sanctions because their clients may not execute a contract within five business days are purely illusory. A client can bring an action for violation of this provision only if the attorney intentionally or negligently fails to comply with the provision. 11 U.S.C. § 526(c)(2). An attorney who presents a client with a contract has not negligently or intentionally violated this provision because the client fails to timely sign it. Furthermore, plaintiffs can limit their risk by requiring prospective clients to sign an agreement before they provide any advice or representation.

Plaintiffs' claim that the requirements imposed on debt relief agencies violate the attorneys' Fifth Amendment rights by unconstitutionally restricting their right to practice law also has no legal

[4] See ABA's Model Rules of Prof'l Conduct, Rule 1.5(b) and Exhibit A (excerpts from various state rules regarding written contracts for attorneys).

basis. As courts have recognized, a person's "right" to practice law is not a fundamental right, and restrictions placed on them are subject to only minimal scrutiny under the rational basis test. The requirements imposed on debt relief agencies meet this test.

Finally, four of the plaintiffs – Brown & Welsh, Wayne A. Silver, Jeffrey M. Sklarz and Gerald A. Roisman – should be dismissed, pursuant to Fed. R. Civ. P. 12(b), for lack of standing. Brown & Welsh cannot demonstrate any injury from the challenged provisions because it alleges that it only represents creditors and is thus not a debt relief agency. The other three plaintiffs have failed to allege sufficient facts to show that they are debt relief agencies. They, therefore, cannot establish the prerequisite injury for standing.

Not only can plaintiffs not demonstrate a likelihood of success on the merits, plaintiffs also are unable to demonstrate the other requirement for a preliminary injunction -- irreparable injury. Plaintiffs' claim of irreparable injury rests primarily on the contention that loss of their First Amendment rights constitutes irreparable injury. This contention is flawed in at least three aspects. First, while courts have recognized that in certain instances, claims under the First Amendment may constitute irreparable injury, some of plaintiffs' challenges are not even based on violations of the First Amendment. Second, their First Amendment claims with Sections 527 and 528 deal with disclosure requirements, not restrictions on speech. As the Supreme Court recognized in Zauderer v. Office of Disciplinary Counsel, 471 U.S. at 650, there are material differences between disclosure requirements and outright prohibitions on speech. Plaintiffs' interest in not providing any particular factual information is minimal, if any such interest exists. Id. Third, even when there is a presumption of irreparable injury, courts have found that a delay in filing suit or moving for a preliminary injunction "undercuts the sense of urgency that ordinarily accompanies a motion for

preliminary relief and suggests that there is, in fact, no irreparable injury." Citibank, N.A. v. Citytrust, 756 F.2d 273, 277 (2d Cir. 1985). In this case, the BAPCPA was enacted in April 2005 and the provisions at issue have been effective since October 17, 2005. Therefore, plaintiffs' delay in seeking such relief belies any need for a preliminary injunction.

Accordingly, plaintiffs' motion for a preliminary injunction should be denied, and defendants' motion to dismiss should be granted.

STATUTORY BACKGROUND

A. Legislative History of BAPCPA

After conducting a series of hearings, Congress found that over the past decade "the number of bankruptcy filings has *nearly doubled to more than 1.6 million cases filed in fiscal year 2004.*" H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 4, reprinted in 2005 U.S.C.C.A.N. at 90 (emphasis in original).[5] It concluded that this "increase in consumer bankruptcy filings has adverse financial consequences for our nation's economy." Id. at 91. For example, "it was estimated that in 1997 alone more than $44 billion of debt was discharged by debtors who filed for bankruptcy relief, a figure when amortized on a yearly basis amounts to a loss of at least $110 million every day." Id. (footnotes omitted). According to one estimate, these losses "translate into a $400 annual 'tax' on every household in our nation." Id.

Looking for the source of this meteoric increase in bankruptcy filings, Congress determined that the bankruptcy system "ha[d] loopholes and incentives that allow[ed] and – sometimes – even encourage[d] opportunistic personal filings and abuse," 2005 U.S.C.C.A.N. at 92, and that attorneys

[5] The BAPCPA is the product of nearly eight years of proposals and hearings on reform of bankruptcy law and practices. See 2005 U.S.C.C.A.N. at 92-96.

sometimes played a role in exploiting these "opportunities." A civil enforcement initiative undertaken by the United States Trustee Program, and considered by Congress, found that "[a]buse of the system is more widespread than many would have estimated." Id. (quoting J. Christopher Marshall, Civil Enforcement: An Early Report, Journal of the Nat'l Ass'n of Bankr. Trustees 39 (Fall 2002)). The study "'consistently identified'" such problems as "'misconduct by attorneys and other professionals'" along with "'debtor misconduct and abuse . . . , problems associated with bankruptcy petition preparers, and instances where a debtor's discharge should be challenged.'" 2005 U.S.C.C.A.N. at 92 (quoting Antonia G. Darling and Mark A. Redmiles, Protecting the Integrity of the System: the Civil Enforcement Initiative, Am. Bankr. Institute J. 12 (Sept. 2002)).

Congress heard evidence regarding several specific problems with the bankruptcy bar. One was the use of deceptive advertisements by some bankruptcy practitioners. Dean Sheaffer, Chairman of the Pennsylvania Retailers' Association, testified that some lawyers run advertisements "promising to make individuals' debts disappear" without even mentioning bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, Hearing on H.R. 975 before House Judiciary Comm., 108th Cong., 1st Sess. 55 (2003)(Exhibit B). And the House Judiciary Committee took note of a consumer alert issued by the Federal Trade Commission, which warned that some advertisers promising debt relief may actually use bankruptcy as the method for such relief. Bankruptcy Reform Act of 1998: Part III, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Session 90-92 (1998)(Exhibit C). See also Bankruptcy Reform Act of 1999 (Part II), Hearing on H.R. 833 before House Judiciary Committee, 106th Cong., 1st Sess. 122-23 (1999) (creditor describing examples of customers misled by such advertisement into thinking that they had consolidated their loans and "didn't even realize that they filed" for bankruptcy) (Exhibit D). As Senator Sessions

explained, "[i]n many instances, the deceptive and fraudulent advertising practices of bankruptcy mills lure consumers into bankruptcy unnecessarily." 151 Cong. Rec. S2472 (March 10, 2005)(Exhibit E).

The evidence before Congress also suggested that some bankruptcy attorneys were failing to provide clients with sufficient information regarding their options and the consequences of bankruptcy. The Honorable Edith Hollan Jones, United States Court of Appeals Judge for the Fifth Circuit and member of the National Bankruptcy Review Commission, testified as follows:

> Most debtors never see a judge. Many bankruptcy lawyers never talk to their clients. The first time they see their clients often is when they are in a herd of people in bankruptcy courts and the lawyer raises a hand, and says, "Anyone's who's my client needs to step forward right now."

Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Sess. 15 (1998)(Exhibit F). Congressman James Moran testified that "there are some within the bankruptcy profession operating like a mill, steering many consumers into bankruptcy without adequately informing them of their choices . . . ." Id. at 13. In this same vein, a study conducted by Tahira K. Hira, a Professor at Iowa State University, revealed that the two most common complaints of people who had their debts discharged in a bankruptcy proceeding were a lack of information and concern about the practices of their lawyers. The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to Consumer Bankruptcy Crisis, Hearing on S. 1301 before Senate Judiciary Comm., 105th Cong., 2d Sess. 29 (1998)(Exhibit G).

The Honorable Carol J. Kenner, United States Bankruptcy Judge for the District of Massachusetts, testified that some debtors receive no warning from their attorneys about creditors approaching them asking to reaffirm their debts:

> Debtors often make the decision to reaffirm (1) without understanding the legal effect of what they are doing, (2) without understanding its financial cost, and (3) without understanding alternatives. . . . Often they have no advance warning that they will have to face this issue. And often their attorney is not with them when the creditors approaches, if they have an attorney at all.

Bankruptcy Reform, Joint Hearing before House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. 35-36 (1999) (Exhibit H).

B. The Debt Relief Agency Provisions in BAPCPA

The BAPCPA is "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." 2005 U.S.C.C.A.N. 88, 89. As part of this package, Congress amended the Bankruptcy Code ("Code") to establish certain standards of professional conduct for "debt relief agencies," see 11 U.S.C. §§ 526-528, a category of persons that includes attorneys or their law firms. See 11 U.S.C. §§ 101(12A), 101(4A).

Section 526 lays down a number of rules of professional conduct for lawyers when dealing with consumer debtors. Section 526(a)(1) provides that a debt relief agency shall not fail to perform any service that it informed the consumer debtor that it would provide in connection with a bankruptcy proceeding. 11 U.S.C. § 526(a)(1). In addition, Sections 526(a)(2) and (3) prohibit a debt relief agency from advising a consumer debtor to make an untrue statement in a document filed in a bankruptcy case or misrepresent the services that it will provide or the benefits and risks that may result if such person files for bankruptcy. 11 U.S.C. §§ 526(a)(2)-(3). Section 526(a)(4), for example, provides that:

> 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 representing a debtor in a case under this title.

11 U.S.C. § 526(a)(4). This portion of the statute thus prohibits an attorney from "advis[ing]" a consumer debtor (1) "to incur more debt in contemplation of" filing for bankruptcy; or (2) "to incur more debt . . . to pay" an attorney or bankruptcy petition preparer. 11 U.S.C. § 526(a)(4).

It is important to note in relation to Section 526(a)(4) that, in addition to the more general evidence about attorney misbehavior, Congress heard testimony to the effect that its addition of a means test that depends on debt levels, see 11 U.S.C. § 707(b)(2)(A),[6] would increase the likelihood that a bankruptcy attorney would counsel his or her client to take on debt before filing for bankruptcy. In discussing the means test, the Honorable Randall Newsome, United States Bankruptcy Judge for the Northern District of California, issued the following warning:

> The more debt that is incurred prior to filing, the more likely the debtor will qualify for chapter 7. Perverse 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 § 109(h).

Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Sess. 25 (1998)(Exhibit F). The Honorable William Brown, United States Bankruptcy Judge for the Western District of Tennessee, also warned that "the fact that allowed expenses can be increased by incurring secured debts provides a strategy for avoiding the means test." Bankruptcy Reform Act of 1999 (Part II), Hearing before House Judiciary Comm., 106th Cong., 1st Sess. 30 (1999) (Exhibit D). Attorneys opposing the means test also recognized this danger. For example,

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[6] The means test is used to determine whether the presumption that a Chapter 7 filing is abusive should apply. See infra at 26 n.13. If a filing is abusive, it is dismissed or converted to a Chapter 11 or 13 filing. 11 U.S.C. § 707(b)(1).

Judith Greenstone Miller, an attorney testifying on behalf of amicus Commercial Law League of America, stated that means test is "likely to be the subject of creative avoidance efforts by counsel for debtors." Bankruptcy Reform, Joint Hearing before House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. 157 (1999) (Exhibit H). As she explained,

> Because individuals with secured debt are allowed deductions for such obligations prior to calculating available disposable net income, a debtor with too much income could trade in an old car for a new one, or take a second loan on a house, deduct the payments from the means formula and thereby become eligible for chapter 7 relief.

Id. See id. at 96 (statement by Ms. Miller that means test "invites manipulation" by increasing debts to fit within the standard).

Section 527 requires that debt relief agencies provide certain disclosures and notices to an assisted person, including (1) a description of the various types of bankruptcy proceedings and the costs and benefits of proceeding under each chapter, (2) an explanation of the information that the debtor is to provide during the bankruptcy proceeding (e.g., an accurate accounting of assets and liabilities), and (3) a warning that the assisted person's failure to provide such information may result in the dismissal of the case or other sanction, including a criminal sanction. 11 U.S.C. § 527(a). A debt relief agency must also provide an assisted person with a separate specified notice explaining, inter alia, that the assisted person may proceed pro se or hire an attorney or a bankruptcy petition preparer, and that the attorney or preparer must furnish the person with "a written contract specifying what the attorney or bankruptcy petition preparer will do for you and how much it will cost." 11 U.S.C. § 527(b). In addition, a debt relief agency must provide an assisted person with reasonably sufficient information regarding valuation of assets and determining liabilities, income, and other information required to be provided in the proceeding (except to the extent that the debt relief agency

itself completes the relevant forms on behalf of the debtor). 11 U.S.C. § 527(c). Section 528 provides that a debt relief agency shall execute a written contract with the assisted person explaining the agency's services and fees. 11 U.S.C. § 528(a)(1). It also requires a debt relief agency to insert in any advertisements of "bankruptcy assistance services" the following statement or a substantially similar one: "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). An advertisement of bankruptcy assistance includes a "description of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement" and statements such as "'federally supervised repayment plan' or 'Federal debt restructuring help' or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title." 11 U.S.C. § 528(b)(1). In addition, in any advertisements directed to the general public for "assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt," a debt relief agency must disclose in such advertisement that the assistance may involve bankruptcy relief and include the following statement or a substantially similar one – "We are a debt relief agency. We help people file for bankruptcy under the Bankruptcy Code." 11 U.S.C. § 528(b)(2).

The BAPCPA establishes various remedies for violations of these debt relief provisions. First, a debt relief agency shall be liable to an assisted person for (a) "any fees or charges" paid to him or her by the debtor-client, (b) "actual damages," and (c) "reasonable attorneys' fees," if the debt relief agency is found, after notice and a hearing, to have "intentionally" or "negligently" violated any requirement imposed on it by §§ 526-528. 11 U.S.C. § 526(c)(2)(A). Second, in addition to

such other remedies as are provided by State law, the BAPCPA authorizes state attorneys general to bring actions to enjoin violations of Section 526 and recover damages for debtors. 11 U.S.C. § 526(c)(3). Finally, "nothwithstanding any other provisions of Federal law and in addition to any other remedy provided by Federal or State law, the court, on its own motion or on the motion of the United States trustee or debtor" may enjoin violations or impose an appropriate civil penalty, if the court "finds that a person intentionally violated [Section 526] or engaged in a clear and consistent pattern or practice of violating this section." 11 U.S.C. § 526(c)(5).

STANDARD OF REVIEW

I. STANDARDS FOR A PRELIMINARY INJUNCTION

A preliminary injunction is "'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" Moore v. Consolidated Edison Co. of New York, Inc., 409 F.3d 506, 510 (2d Cir. 2005) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). The general Second Circuit standard for a party moving for a preliminary injunction requires the movant to establish (1) establishing irreparable harm, and (2) either (a) a likelihood of success on the merits of its claim, or (b) existence of a serious question going to the merits of its claim and a balance of hardships tipping decidedly in favor of the moving party. Beal v. Stern, 184 F.3d 117, 122 (2d Cir. 1999). While a moving party will normally be permitted to use either prong of the second test—establishing either a likelihood of success or the existence of a serious question going to the merits of its claim and a decisive tipping of the hardships in its favor, option (b) is unavailable when, as here, the injunction at issue stays "government action taken in the public interest pursuant to a statutory . . . scheme." Able v. United States, 44 F.3d 128, 131-32 (2d Cir.1995). As the Second Circuit explained, when a statutory scheme is involved, 'it is

inappropriate for this Court to substitute its own determination of the public interest for that arrived at by the political branches whether or not there may be doubt regarding its wisdom." Id. at 132. Accordingly, since plaintiffs seek to enjoin defendants from enforcing provisions of a federal statute, plaintiffs must satisfy the more rigorous "'likelihood of success' prong." Id. See also NAACP, Inc. v. Town of East Haven, 70 F.3d 219, 223 (2d Cir.1995); Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir.1989); Union Carbide Agricultural Products Co., Inc. v. Costle, 632 F.2d 1014, 1018 (2d Cir.1980); Medical Society of State of New York v. Toia, 560 F.2d 535, 538 (2d Cir.1977).

II. STANDARDS FOR A MOTION TO DISMISS

A court should dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Harris v. City of New York, 186 F.3d 243, 247 (2d Cir.1999). While courts must accept all precisely worded factual allegations as true, legal conclusions or unsupported inferences or assumptions in a complaint need not be accepted in the context of deciding a Rule 12 motion. See Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002) ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss"); Oxford Asset Management, Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal").

When considering a motion to dismiss under Rule 12(b)(1), the court must take all facts alleged in the complaint as true and draw all reasonable inferences in the favor of the plaintiff. Raila v. United States, 355 F.3d 118, 119 (2d Cir. 2004). However, "[i]t is the affirmative burden of the

party invoking [federal subject matter] jurisdiction . . . to proffer the necessary factual predicate – not just an allegation in a complaint – to support jurisdiction." Juvenile Matters Trial Lawyers Ass'n v. Judicial Department, 363 F. Supp.2d 239, 243 (D. Conn. 2005) (quoting London v. Polishook, 189 F.3d 196, 199 (2d Cir. 1999).

ARGUMENT

I. THE BAPCPA'S REQUIREMENTS AND RESTRICTIONS ON "DEBT RELIEF AGENCIES" APPLY TO ATTORNEYS TO PROTECT CONSUMER DEBTORS OF MODEST MEANS WHEN THEY RECEIVE "BANKRUPTCY ASSISTANCE."

In their memorandum, plaintiffs assert two different interpretations of the term "debt relief agency." On the one hand, plaintiffs assert that the term "debt relief agency" does not, as a matter of statutory construction, include attorneys. See Complaint, ¶ 71; Pl. Mem. at 62. On the other hand, they argue that the term "debt relief agency" is so broad that it includes attorneys who represent creditors and includes any person providing "any advice" to an "'assisted person' for any purpose." Pl. Mem. at 3. Both interpretations are incorrect and are based on misinterpretations of the terms "debt relief agency" and "bankruptcy assistance."

A. The Term "Debt Relief Agency" Applies to Attorneys Who Provide Bankruptcy Assistance To Debtors.

The BAPCPA defines the term "debt relief agency," with certain exceptions not applicable here, as "any person" that, for a fee, "provides any bankruptcy assistance to an assisted person." 11 U.S.C. § 101(12A). "Bankruptcy assistance" includes "providing information, advice, counsel . . . [and] legal representation with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A). Thus, while the definition of "debt relief agency" does not specifically mention attorneys, its plain language, when coupled with the definition of the term "bankruptcy assistance," clearly covers

attorneys who provide "advice," "counsel," or "legal representation" to a debtor contemplating or seeking to file bankruptcy.

Aside from the statutory language used to define "debt relief agency" and "bankruptcy assistance," other provisions of the BAPCPA also indicate that Congress intended to include attorneys within the definition of "debt relief agency." For example, § 527(b) specifically requires the debt relief agency to provide to assisted persons written notice containing the following statements:

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

11 U.S.C. § 527(b) (emphasis in the form of underlining added). If attorneys were not debt relief agencies, the disclosure would not say "information . . . from an attorney." Id. (emphasis added). Similarly, the reference to the law requiring an attorney to provide a written contract to the debtor would make no sense unless an attorney were a debt relief agency.

Plaintiffs cite 11 U.S.C. Section 526(d)(2) as support for their contention that the term debt relief agency does not include attorneys. Pl. Mem. at 62. But Section 526(d)(2) demonstrates the opposite: that the debt relief agency provisions do cover attorneys. That provision states that no language in Sections 526, 527, or 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 the 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). If the debt relief provisions did not apply to attorneys, this provision would be rendered meaningless. As the Supreme Court has recognized, courts are reluctant to treat statutory provisions as "surplusage." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001); Duncan v. Walker, 533 U.S. 167, 174 (2001); Connecticut ex rel Blumenthal v. United States Dept. of Interior, 228 F.3d 82, 88 (2d Cir. 2000).

Plaintiffs' argument, moreover, ignores the difference recognized by the BAPCPA between restrictions on conduct and qualifications to practice law. Compare 11 U.S.C. §§ 526(d)(1) and (d)(2). The restrictions at issue here do not relate to bar admission or other "qualifications for the practice of law" imposed by State or Federal courts. Instead, the challenged provisions are standards of conduct setting forth the notices and other requirements that attorneys must follow in representing clients in bankruptcy proceedings.[7] Thus, while Section 526(d)(2) specifically provides that nothing in the debt relief agency provisions limit or curtail the power of the State or Federal court to determine the "qualifications" for practicing law, the BAPCPA treats state law governing conduct differently. State laws governing conduct are preempted "to the extent that such law is inconsistent with [Sections 526, 527 and 528], and then only to the extent of the inconsistency." 11 U.S.C. §

[7] State laws establishing qualifications for practice of law are distinct from those that establish professional rules of conduct. See, e.g., Wash. Rev. Code Ann. § 2.48.060 (West 2006) (Board of Governors have power to establish "the qualifications, requirements and procedure for admission to the practice of law" and "to establish . . . and enforce rules of professional conduct for all members of the state bar"); S.C. Code Ann. § 40-5-20(2005) (State Supreme Court has power to establish regulation "determining the qualifications and requirements for admission to the practice of law" and "prescribing a code of ethics governing professional conduct of attorneys at law"); Conn. Gen. Stat. Ann. § 51-80 (judges of the Superior Court "may establish rules relative to the admission, qualifications, practice and removal of attorneys).

526(d)(1).[8]

Thus, contrary to plaintiffs' allegation, under the plain language of the BAPCPA, the term "debt relief agency" clearly encompasses an attorney who provides bankruptcy assistance to an assisted person.[9] Where, as here, the plain language of a statute is broad enough to encompass attorneys, the courts have refused to imply an exception. For example, in Heintz v. Jenkins, 514 U.S. 291, 296-97 (1995), the Supreme Court held that lawyers who regularly engaged in litigation to collect consumer debts fell within the definition of "debt collector" under the Fair Debt Collection Practices Act even though the definition did not mention "lawyers" or the "practice of law." Accord Goldman v. Cohen, 445 F.3d 152, 155 (2d Cir. 2006); Wilson v. Draper & Goldberg, P.L.L.C., 443

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[8] In view of this specific preemption provision, plaintiffs' claim that the statute lacks the clarity to displace the states as the "the traditional regulators of the bar"(Pl. Mem. at 65) has no merit. Moreover, while courts have acknowledged the interests of the states in regulating the practice of law in their boundaries, the courts have not held that such state regulation precludes the federal government from adopting legislation governing attorney conduct or displacing state regulation when an attorney practices federal law in a federal forum. See Sperry v. State of Florida ex rel. Florida Bar, 373 U.S. 379 (1963) (Florida may not enjoin a non-lawyer registered to practice before the United States Patent Office from preparing and prosecuting patent applications in Florida). Nor do plaintiffs contend that the federal government lacks such authority. Indeed, they cannot. The Bankruptcy Clause authorizes Congress "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4. The provisions at issue clearly come within that power. Furthermore, as the Supreme Court held in Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975), advice, legal representation and other services provided by an attorney for money are "'commerce' in the most common usage of the word," and as such may be regulated by Congress under the Commerce Clause.

[9] Even if the plain language of the statute left any room for doubt, the legislative history of the provision likewise demonstrates that Congress intended the term "debt relief agency" to encompass attorneys. In the Conference Report, Congress specifically found that there was "misconduct by attorneys and other professionals" in the bankruptcy system. 2005 U.S.C.C.A.N. at 92. See also supra at 8-11 (testimony in hearings regarding problems with practices by attorneys in bankruptcy proceedings). Moreover, Congress specifically described the debt relief provisions as "provisions strengthening professional standards for attorneys and others who assist debtors with their bankruptcy cases." 2005 U.S.C.C.A.N. at 103.

F.3d 373, 378 (4th Cir. 2006). Similarly, in Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 (1975), the Supreme Court refused to imply an exemption for attorneys in the Sherman Act, which prohibits those engaged in a "trade or commerce" from price fixing. As the Supreme Court emphasized, "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." Id. at 787. That presumption applies with particular force here because the BAPCPA expressly excepted from the definition of "debt relief agencies" certain other types of persons or organizations (i.e. nonprofit organizations). See 11 U.S.C. § 101(12A). That Congress provided for such exceptions and did not exempt attorneys further shows that attorneys who provide bankruptcy assistance to assisted persons are not exempt from the notice requirements and restrictions on "debt relief agencies." Detweiler v. Pena, 38 F.3d 591, 594 (D.C. Cir. 1994) ("Where a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions.").

Thus, contrary to plaintiffs' assertion, the term "debt relief agency" should not be interpreted to exclude attorneys.

B. The Term "Bankruptcy Assistance" Refers to Information, Counsel, Advice or Representation to Debtors Regarding Filing Bankruptcy.

Faced with the statutory language demonstrating that the term "debt relief agency" includes attorneys, plaintiffs try to make the statute seem nonsensical by expanding the term "debt relief agency" to include attorneys for "creditors, customers of a failed business, nondebtor spouses, former spouses, or anyone else who may need representation relating to a bankruptcy proceeding so long as they meet the definition of 'assisted person.'" Pl. Mem. at 4. Indeed, in their reach to challenge the BAPCPA, they even argue that "bankruptcy assistance" is not limited to information, advice, counsel or legal representation regarding a bankruptcy proceeding, but includes "any advice" on any matter

to an assisted person. Id. at 3.

Plaintiffs' sweeping interpretation of the term "bankruptcy assistance" to include any advice given to an assisted person is completely unsupportable. Interpreting the term to include all advice given by an attorney would in effect read the word "bankruptcy" out of the term "bankruptcy assistance."

Plaintiffs' alternative interpretation of the term to include assistance to creditors and other non-debtors who may participate in a bankruptcy proceeding is also flawed. Even if it were possible to read the definition of "bankruptcy assistance" in a vacuum, as plaintiffs do – to include attorneys for creditors and other non-debtors – plaintiffs' interpretation is not reasonable when the definition is read together with other related provisions of the statute and its legislative history. As the Supreme Court has stressed, "statutory construction is a 'holistic endeavor.'" Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004) (quoting United Sav. Assn. of Texas v. Timbers of Inwood Forrest Associates, LTD, 484 U.S. 365, 371 (1988)). Therefore, "a section of a statute should not be read in isolation from the context of the whole Act." Richards v. United States, 369 U.S. 1, 11 (1962). Instead, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,'" and "fit, if possible, all parts into an harmonious whole.'" FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citations omitted). Accord United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 24 (2d Cir. 1989) (a court must "interpret [a] specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part").

The other parts of the statute dealing with debt relief agencies and the legislative history make it clear that the term "bankruptcy assistance" refers to information, advice, counsel or legal

representation to certain consumer debtors seeking bankruptcy relief. For example, Section 528(b)(1) requires debt relief agencies to insert into any advertisement for "bankruptcy assistance services" the following 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). This provision clearly demonstrates that the term "bankruptcy assistance" refers to assistance to debtors seeking to file for bankruptcy, not attorneys for creditors. Indeed, as plaintiffs themselves argue, this disclosure would make no sense if it would applied to an advertisement by an attorney for creditors. Pl. Mem. at 60.

The written disclosures required by Section 527 also underscore that the debt relief provisions are directed at attorneys who provide assistance to debtors, not attorneys for creditors. For example, Section 527(a)(2)(A) requires a debt relief agency to provide a disclosure which explains "all information that the assisted person is required to provide with a petition." (emphasis added). Similarly, the written disclosure required by Section 527(b) states that "[b]efore filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code." (emphasis added). These disclosures are clearly directed at a debtor considering filing for bankruptcy, not a creditor. See also id. ("[i]f you decide to seek bankruptcy relief," "[b]e sure you understand the relief you can obtain and its limitations").

The legislative history also undercuts plaintiffs' broad reading of the term "debt relief agency." In the Conference Report, Congress described the debt relief standards as applying to "attorneys and others who assist consumer debtors with their bankruptcy cases." 2005 U.S.C.C.A.N. at 103. Similarly, in discussing the need for the provisions, Congress refers to misconduct by attorneys in the filing of cases. Id. at 92. The statute should be interpreted in light of this purpose. Chapman v, Houston Welfare Rights Org., 441 U.S. 600, 607-608 (1979).

Accordingly, while plaintiffs' interpretations of the term "debt relief agency" to exclude attorneys is too narrow, plaintiffs' interpretation of the term "bankruptcy assistance" to include attorneys for creditors or any attorney who provides advice to any assisted person on any matter is too broad.[10] In view of the plain language of the statute and its legislative history, an attorney falls within the definition of a "debt relief agency" to the extent he/she provides advice, assistance and/or legal representation to small consumer debtors contemplating or seeking to file bankruptcy. Therefore, plaintiffs' request for a declaratory judgment that an attorney is not a debt relief agency should be denied.[11]

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[10] In view of the definition of "bankruptcy assistance," four plaintiffs have not alleged sufficient facts to show that they are debt relief agencies. They, therefore, lack standing to challenge the debt relief agency provisions. See infra at 68-71.

[11] In their memorandum, plaintiffs cite to an order issued by Judge Lamar W. Davis, the Chief Judge for the Bankruptcy Court in the Southern District of Georgia, which ruled that attorneys were not covered by the term "debt relief agency. Pl. Mem. at 6, citing In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005), appeal docketed, Nos. 4:05-cv-00206 (S.D. Ga. Nov. 3, 2005). That order concedes that "the definition of debt relief agency is facially broad enough to cover bankruptcy petition preparers and attorneys" and "[t]he inclusion of 'legal representation' in the scope of what a debt relief agency does certainly suggests a contrary result" to that which the court reached. Order at 5. The order, however, tries to avoid this clear reading of the statute by suggesting that "the inclusion of the term 'legal representation' in the definition of 'bankruptcy assistance' was Congress's effort to empower the Bankruptcy Courts presiding over a case with the authority to protect consumers" from "non-lawyers" who "often attempt to provide 'legal representation,' often to poorer, less educated, and more vulnerable citizens." Order at 5-6. This holding is misguided in at least two ways. First, since the interpretation is not consistent with the plain language of this provision, there is no need to resort to legislative history. Exxon Mobil Corp. v. Allapattah Serv., Inc., 125 S.Ct. 2611, 2626 (2005). Second, as explained supra at 9-11, the legislative history demonstrates that Congress intended to include attorneys. In any event, the validity of the order is in serious question, inasmuch as it was issued by the bankruptcy judge sua sponte, in the absence of any pending case or controversy. The order has been appealed to the U.S. District Court of the Southern District of Georgia, Case No. 04:05cv00206 (S.D. Ga.).

II. SECTION 526(a)(4) IS CONSTITUTIONAL.

In their complaint, plaintiffs raise various constitutional challenges to Section 526(a)(4), which prohibits attorneys from advising assisted persons to incur additional debt in contemplation of filing for bankruptcy or to incur debt to pay for bankruptcy assistance services. Specifically, plaintiffs argue that this provision (1) violates the First Amendment rights of attorneys to provide advice, (2) infringes on the First Amendment rights of clients to receive such advice and to petition the government for redress of grievances and their Fifth Amendment due process rights, (3) discriminates against clients based on their amount of non-exempt assets, and (4) violates the separation of powers. Complaint, ¶¶ 44, 46-49. As explained below, none of these claims has merit.

A. Section 526(a)(4) Does Not Violate the First Amendment Right of Attorneys.

Plaintiffs allege that Section 526(a)(4) violates the plaintiff attorneys' First Amendment rights to provide legal advice to their clients to incur additional debt. Complaint, ¶ 44. This challenge is based on misconceptions regarding both the scope of the restrictions and the proper standard of review for such restrictions. As explained below, this restriction on advice is narrowly tailored and only prohibits an attorney from advising a debtor to take on additional debt because he or she intends to file for bankruptcy. Moreover, because this provision is an ethical rule, there is no basis for subjecting it to "strict scrutiny review" as plaintiffs suggest. Pl. Mem. at 28. Instead, it is subject to the more lenient balancing test set forth in Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073 (1991), and should be upheld under that standard.

1. The Scope of the Advice Prohibited by Section 526(a)(4) Is Limited.

Contrary to plaintiffs' contention, this provision does not establish a general prohibition

against advising an assisted person to incur more debt.[12] Nor does it prohibit an attorney from advising an assisted person about what the law states. Instead, it prohibits an attorney only from advising an assisted person "to incur more debt in contemplation" of filing a petition for bankruptcy. 11 U.S.C. § 526(a)(4)(emphasis added).

The phrase "in contemplation of . . . filing a case under this title" is the key to understanding this provision, and as always, Congress's intention is the touchstone for interpretation, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Congress enacted the BAPCPA "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors;" it wanted to limit abuses of the bankruptcy system to mitigate the financial toll that bankruptcy filings were taking on creditors and the economy as a whole. See 2005 U.S.C.C.A.N. 88, 89, 91. In light of Congress' intention, the best interpretation of the "in contemplation" language is that it prevents an attorney from advising a debtor to take on debt because he or she intends to file for bankruptcy, as such advice is aimed at allowing the debtor to take unfair advantage of discharge (by running up debt primarily because it will not need to be repaid) or "game" the means test (by piling on enough debt to avoid a presumption of abuse, 11 U.S.C. § 707(b)(2)).[13] See United States v.

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[12] See Declaration of Wayne Silver, ¶ 9 ("I would be prohibited from advising 'an assisted person' to incur any new debt for 'any purpose'").

[13] Under the means test, an abuse of the bankruptcy system is presumed where the amount of the debtor's income, after deduction of certain expenses and other specified amounts, exceeds specified thresholds. See 11 U.S.C. § 707(b)(2)(A). Because the amount of secured and priority debt is one of the amounts deducted from income, increasing the amount of debt could reduce the amount of income under the means test, and thus allow an individual who would otherwise fall within the presumption of abuse to evade the presumption. Similarly, since the trigger for the presumption is based on the ratio of "available income" to the amount of "unsecured debt," increasing the amount of unsecured debt could also help an assisted person evade the

Wells, 283 U.S. 102, 118 (1931) (phrase "in contemplation of death" in a tax statute governing gifts interpreted to mean "thought of death is the impelling cause of the transfer"). These opportunistic uses of bankruptcy are antithetical to the notions of "personal responsibility" and "integrity" that motivated Congress to pass the BAPCPA. Competent and ethical attorneys do not encourage such conduct. The BAPCPA protects small consumer debtors from attorneys who do.

Section 526(a)(4) thus prohibits an attorney only from advising a debtor to take on debt solely because he or she intends to file for bankruptcy; it does not forbid an attorney from counseling a debtor to take on debt when the attorney would give the same advice for reasons other than evading the means test or gaming the bankruptcy system. Hence, contrary to plaintiffs' assertion, it would not prohibit an attorney from providing advice to "debtors with unreliable transportation to incur secured debt to purchase a car that will allow them to consistently get to work so that they will have income with which to pay creditors." Pl. Mem. at 7. Nor would it prohibit advice to obtain a loan "to go to school," "to make necessary home improvement repairs that are needed for the health, welfare and safety of the consumer and his or her family," "to pay for needed medical procedures not covered by insurance," or "to buy needed prosthetic devices for debtor or debtor's dependents." See Declaration of Charles A. Maglieri ("Maglieri Decl."), ¶¶ 7. Advice to incur such debts is not given to evade the means test or game the bankruptcy system, but because such items are essential to fulfilling everyday needs.

Similarly, Section 526(a)(4) does not prohibit advice to obtain a loan "to satisfy court ordered restitution payments which may cause a violation of probation" or to satisfy a domestic support

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presumption of abuse. See Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Sess. 25 (1998) (testimony of The Honorable Randall Newsome, United States Bankruptcy Judge for Northern District of California.) (Exhibit F).

obligation to avoid contempt proceedings in Family Court." Maglieri Decl. ¶ 7. Such advice is not given because the debtor plans to file for bankruptcy but to avoid contempt.

Likewise, contrary to plaintiffs' claim (Pl. Mem. at 11), Section 526(a)(4) does not restrict advice that attorneys may provide to clients in attempting to avoid bankruptcy altogether. Advice regarding debt restructuring to avoid bankruptcy is not "debt incurred in contemplation" of filing for bankruptcy and is thus not prohibited.

Plaintiffs also misread the restriction in Section 526(a)(4) regarding the payment of attorneys. Plaintiffs allege that this provision prohibits attorneys from advising their clients to pay for legal assistance in filing for bankruptcy and even advising them "to hire a lawyer." Pl. Mem. at 35.[14] While plaintiffs concede that the defendants have interpreted this provision to prohibit only advice to incur additional debt to pay for attorney fees, plaintiffs claim that their broader reading of this provision is the "most natural reading." Pl. Mem. at 13 n.8. Plaintiffs arrive at their reading by examining this sentence in isolation from the rest of the statute and then dissecting it under rules of grammar. Id. This analytical approach to statutory interpretation is seriously flawed. As courts have recognized "[g]rammar needn't trump sense; the purpose of statutory interpretation is to make sense out of statutes not written by grammarians." Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, 214 F.3d 872, 875 (7th Cir. 2000). Cf. United States National Bank of Oregon v. Independent Ins. Agents,

[14] In their memorandum, plaintiffs also suggest that if the provision were interpreted to prohibit an attorney from advising a client to incur additional debt to pay for his attorney, the provision would prohibit an attorney from receiving payments under a Chapter 13 plan because the "portion of the fee that is paid through the plan [in a Chapter 13 proceeding] constitute a debt to the attorney," and thus would be prohibited under Section 526(a)(4). Pl. Mem. at 13-14. This is simply incorrect. Under the Bankruptcy Code, fees paid to an attorney in a Chapter 13 proceeding are considered "administrative expenses," not debts, and are afforded first-priority status. See 11 U.S.C. §§ 330(a)(4)(B); 507(a)(2). Accordingly, nothing in Section 526(a)(4) prohibits such payments or advice regarding such payments.

508 U.S. 439, 455 (1993) ("No more than isolated words or sentences is punctuation alone a reliable guide for the discovery of a statute's meaning"). Instead, the court "must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy." Id.; accord FDA v. Brown & Williamson Tobacco Corp., 529 U.S. at 133 (it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). See also supra at 22. Hence, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme, because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United Savings Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

Interpreting this provision, as plaintiffs do, to prohibit advice to pay for legal assistance would make it inconsistent with 11 U.S.C. § 528(a)(1), which requires that a debt relief agency provide an assisted person with a written contract which sets forth "the services such agency will provide" and "the fees or charges for such services."[15] Plaintiffs' broad interpretation also conflicts with the legislative history of the BAPCA. As the House Report explains, the second clause of § 526(a)(4) "prohibits [a debt relief] agency from . . . advising an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case." H.R. Rep. No. 109-31(I), at 66 (2005) (emphasis added). See Thornburg v. Gingles, 478 U.S. 30, 44

[15] Contrary to plaintiffs' contention, defendant's narrower reading does not render the provision regarding payment of attorney fees superfluous. While debt incurred to pay attorneys may arguably be covered by the first clause, the second clause clarifies that the provision also covers debt incurred to pay for attorneys fees.

n.7 (1986).

In short, plaintiffs' challenge to Section 526(a)(4) is based on a misreading of that provision. Contrary to plaintiffs' claim, this provision does not prohibit all advice to incur debt prior to filing for bankruptcy. Nor does it prohibit advice to pay an attorney for legal assistance with regard to bankruptcy. It only prohibits advice to incur additional debt in contemplation of bankruptcy and advice to incur debt to pay for an attorney in bankruptcy proceedings.

2. The Supreme Court Has Held That Ethical Restrictions on Attorney Speech Are Subject to the Balancing Test.

The Supreme Court has recognized that the government may properly regulate attorney speech, particularly when that speech breaches professional duties of competency or loyalty to a client, or otherwise abuses the special trust that attorneys hold as agents of the justice system. See Gentile v. State Bar of Nevada, 501 U.S. at 1073; Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-62 (1978). See also In re Sawyer, 360 U.S. 622, 646-47 (1959) (concurring opinion of Justice Stewart) ("obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.").

In Ohralik, a state bar association had brought a disciplinary action against an attorney for soliciting accident victims in person for the purposes of representing them on a contingent fee basis. Applying a balancing test, the Supreme Court found that the disciplinary action did not violate the attorney's First Amendment rights because the government has a "special responsibility for maintaining standards among members of the licensed professions." Ohralik, 436 U.S. at 460. The Court held that this interest "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

court.'" Id. (quoting Goldfarb v. Virginia State Bar, 421 U.S. at 792). As the Court stressed, lawyers are not only "self-employed businessmen," but also are "trusted agents of their clients" and "assistants to the court in search of a just solution to dispute." Id. (quoting Cohen v. Hurley, 366 U.S. 117, 124 (1961)).

The Supreme Court applied this same more lenient balancing test in evaluating the constitutionality of a gag order issued by a state court in a criminal case. Gentile v. State Bar of Nevada, 501 U.S. at 1073. In that case, the Court found that lawyers are "subject to ethical restrictions on speech to which an ordinary citizen would not be." Id. at 1071. Thus, while the Court found that the order was void for vagueness, it did not apply strict scrutiny. Instead, it held that the speech of attorneys "may be regulated under a less demanding standard than that established for regulation of the press." Id. Under this more lenient test, courts balance the First Amendment rights of attorneys "against the government's 'legitimate interest in regulating the activity in question.'" Id. at 1075. The Court found that "a constitutionally permissible balance" is achieved when the ethical restrictions prohibit speech that would create a substantial likelihood of material prejudice to judicial proceedings and impose "only narrow and necessary limitations on lawyers' speech." Id.[16] Accord United States v. Scarfo, 263 F.3d 80, 92-93 (3d Cir. 2001); United States v. Brown, 218 F.3d 415, 426 (5th Cir. 2000).

In Canatella v. Stovitz, 365 F. Supp.2d 1064, 1076 (N.D. Cal. 2005), a court recently applied this balancing test to an ethical restriction on advice given by attorneys. The court upheld Section

[16] In its decision, the Court found that "[e]ven if a fair trial can be ultimately ensured through *voir dire*, change of venue, or some other device, these measures impose serious costs to the system," and "[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants." Id. at 1075.

6068(c) of the California Business and Professions Code which provides that "it is the duty of an attorney . . . to counsel . . . those actions, proceedings, or defenses only as appear to him or her legal or just." Cal. Bus. & Prof. Code § 6068(c). The court held that the "task of the court" in reviewing such ethical standards was to "'weigh[] the State's interest in the regulation . . . against [the] lawyer's First Amendment interest in the kind of speech that was at issue." Id. (quoting Gentile, 501 U.S. at 1073). The court upheld the restriction because it found that the state "had a strong interest in ensuring that its attorneys adhere to the highest standard of conduct" and that "[c]ounseling illegal or unjust actions or pleadings has a direct, adverse effect on the administration of the courts." 365 F. Supp.2d 1076.

Therefore, in reviewing First Amendment challenges to ethical rules, courts balance the interests of the government in protecting judicial proceedings against the First Amendment rights of the attorneys. Applying this test, courts should uphold ethical rules restricting speech by an attorney when the regulated speech would create a substantial likelihood of material prejudice to a judicial proceeding and the rule is narrowly tailored to accomplish its purpose. Gentile, 501 U.S. at 1075-76.

3. Restricting Advice to Incur Further Debt in Contemplation of Bankruptcy Is An Ethical Rule Which Satisfies the Gentile Standard.

Section 526(a)(4) can be upheld under the Gentile test because it is an ethical restriction. Just as the ethical restrictions at issue in Gentile, Ohralik, and Canatella sought to protect the integrity of the legal system, Section 526(a)(4) also protects the integrity and fairness of the bankruptcy system. More specifically, Section 526(a)(4) seeks to protect two basic principles of the bankruptcy system, namely ratable distribution to creditors according to the priorities set forth in the Code, and a discharge to provide a fresh start for honest debtors. United States v. Fox, 95 U.S. 670, 672 (1877).

First, Section 526(a)(4) protects debtors from attorneys who would lead them to undertake abusive practices which would result in the debtor being injured because the bankruptcy court would order a particular debt non-dischargeable under 11 U.S.C. § 523 or deny the discharge entirely under 11 U.S.C. § 727. Certain consumer debts incurred on the eve of bankruptcy are presumed fraudulent and, therefore, nondischargeable under Section 523(a)(2)(c). In addition, one of the factors used to determine whether a debt fraudulent is "[w]hether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made." In re Mercer, 246 F.3d 391, 408 (5th Cir. 2001); In re Samani, 192 B.R. 877, 880 (Bankr. S.D. Tex. 1986); In re Spring, 2005 WL 588776 * 4 (Bankr. D. Conn. March 7, 2005).

Additionally, even prior to the recent amendments, incurring additional debts prior to filing a bankruptcy petition could constitute impermissible abuse of the bankruptcy system, i.e., "substantial abuse," and result in the dismissal of a petition. See, e.g., In re Charles, 334 B.R. 207, 222 (Bankr. S.D. Tex 2005) ("It is settled law that a debtor's good faith should be questioned if the debtor makes purchases in contemplation of bankruptcy."); In re Rathbun, 309 B.R. 901, 904 (Bankr. N.D. Tex 2004) (determination of "substantial abuse" would include a consideration of, among other things, whether the debtor has obtained "cash advancements and consumer goods on credit exceeding his or her ability to repay them" or "has engaged in eve-of-bankruptcy purchases"); In re Aiello, 284 B.R. 756, 761 (Bankr. E.D.N.Y. 2002). As amended, the Code lowers the threshold that must be met for a bankruptcy court to dismiss a debtor's petition from "substantial abuse" to "abuse" of Chapter 7. See 11 U.S.C. § 707(b)(1).

Moreover, accruing greater debt in contemplation of bankruptcy might be used to circumvent the means test.[17] Under the means test, abuse of the bankruptcy system is presumed where the amount of the debtor's income, after deduction of certain expenses and other specified amounts, exceeds specified thresholds. See 11 U.S.C. § 707(b)(2)(A); see also 36 n.13, supra. Because the amount of secured and priority debt is one of the amounts deducted from income, increasing the amount of debt could reduce the amount of the debtor's disposable income under the means test, and thus allow an individual who would otherwise fall within the presumption of abuse to evade the presumption. Similarly, since the trigger for the presumption is in some cases based on the ratio of "available income" to the amount of "unsecured debt," increasing the amount of unsecured debt could also help an assisted person evade the presumption of abuse.

Under the revised Code, then, accruing greater debt in contemplation of bankruptcy, either to take advantage of discharge or "game" the means test, is more likely to lead to a dismissal of a client's petition. See 11 U.S.C. § 707(b)(3)(B).[18] Thus, it is more important than ever to deter attorneys from

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[17] See Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Sess. 25 (1998) (testimony of The Honorable Randall Newsome, United States Bankruptcy Judge for Northern District of California.)(Exhibit F); Bankruptcy Reform Act of 1999 (Part II), Hearing before House Judiciary Comm., 106th Cong., 1st Sess. 30 (testimony of The Honorable William Brown, United States Bankruptcy Judge for the Western District of Tenn.) (Exhibit D); Bankruptcy Reform, Joint Hearing before the House Judiciary Comm. and Senate Judiciary Comm., 106th Cong., 1st Sess. 96, 157 (1999) (testimony of Judith Greenstone Miller on behalf of the Commercial Law League of America) (Exhibit H).

[18] Courts have dismissed petitions under Section 707 when the debtor voluntarily decreases his income in order to qualify for Chapter 7. In re Helmick, 117 B.R. 187, 190 (Bankr. W.D. Pa. 1990); In re Manske, 315 B.R. 838 (Bankr. E.D. Pa. 2004). By the same token, increasing one's debt to meet the means test can constitute abuse.

advising their clients to "incur debt in contemplation" of bankruptcy.[19]

Second, Section 526(a)(4) also protects creditors. Improperly enlarging the pool of pre-existing debt subverts the principle of ratable distribution, because it dilutes the dividend that would otherwise be payable to prior creditors. Section 526(a)(4) protects creditors from such a reduction by deterring advice that would encourage debtors to accumulate debt simply to take advantage of the discharge or to "game" the new debt-triggered means test. Section 526(a)(4) also protects creditors by reducing the likelihood that a court will unwittingly discharge debts that Congress has determined, through the Code, see 11 U.S.C. §§ 707(a),(b), ought not be discharged.

Incurring additional debt in contemplation of filing a petition under Chapter 13 also impacts prior creditors because it can dilute the recovery available to them from the debtor's current earnings. Moreover, even the creditor who provided the new "eve-of-bankruptcy" loan may be injured. If the debt is unsecured, the creditor may receive very little recovery on the claim in the bankruptcy proceeding. Encouraging a client to take advantage of an unsuspecting creditor by incurring such debt clearly presents legitimate legal and ethical concerns. See 11 U.S.C. § 523(a)(2).

Accordingly, advice to incur debt in contemplation of filing for bankruptcy is likely to cause substantial prejudice to the outcome of the proceedings. Incurring such abusive debts would decrease the amount of money that each creditor would receive, or, in some cases, result in no recovery at all

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[19] Advice to incur more debt in contemplation of filing a Chapter 13 petition can also be detrimental to the debtor. In addition to the prohibition against fraudulent debt, 11 U.S.C. § 523(a)(2), in order for a Chapter 13 plan to be confirmed, the debtor must show that the petition was filed in "good faith." 11 U.S.C. § 1325(a)(7). In addition, Chapter 13 petitions can be dismissed or converted to Chapter 7 for various reasons, including "material default by the debtor with respect to a material term of the confirmed plan." 11 U.S.C. § 1307. Incurring additional debt may jeopardize the ability of the debtor to devise a realistic payment plan or increase the risk that the plan will be dismissed for failure to make timely payments.

for creditors. To prevent such abuse in a particular case, creditors, the United States Trustee, and the court would have to expend substantial resources to dismiss the abusive filing. 11 U.S.C. § 707(a),(b). As the Supreme Court recognized in Gentile, 501 U.S. at 1075, the government has "a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system." Such a dismissal may in turn prejudice an honest debtor who had relied on the bad advice of his attorney. Thus, whether viewed from the perspective of the debtor, the creditors or the judicial system itself, a lawyer's advice to incur debt in contemplation of filing for bankruptcy would be substantially likely to prejudice the outcome of the bankruptcy proceeding and/or impose substantial costs on the judicial system to prevent such prejudice.

An attorney's advice to an assisted person to incur more debt to pay for his/her services with respect to the filing of a bankruptcy petition also presents a substantial likelihood of prejudice with respect to the outcome of the bankruptcy proceeding. The data submitted by the United States Trustee in Lamie v. United States Trustee, 540 U.S. 526 (2004), which held that the Code generally does not allow the attorney for Chapter 7 debtors to be compensated from the estate, reveal that 96% of Chapter 7 cases closed during 2002 had no assets in the estate to pay anything to creditors.[20] Brief of the Solicitor General, 2003 WL 21839367, at 38-39. This helps explain why Congress adopted the restriction on debtors' attorneys not to advise their clients to incur more debt to pay them. In 96% of Chapter 7 cases, debtors' attorneys will have counseled their clients and will know (or should know) that their clients' bankruptcy cases will be "no asset" cases, which means that a creditor who provided the money for the filing will recover nothing. In short, it protects the integrity and fairness

[20] The Bankruptcy Code permits a debtor attorney to be paid from the estate if he is employed by the trustee with approval of the bankruptcy court. 11 U.S.C. § 327.

of the bankruptcy system by discouraging attorneys from using their position as "trusted agents of their clients," Ohralik, 436 U.S. at 460 (quotations omitted), to secure preferential treatment for themselves by counseling clients to pay them so that they (the lawyers) can avoid the sting of discharge at the expense of other unsuspecting creditors. Prohibiting attorneys from advising clients to incur debts to pay them reduces the likelihood that a debtor will shift the cost of attorneys' fees to an unsuspecting creditor.

Section 526(a)(4) is designed to prevent these harms to the bankruptcy system. While prior to BAPCPA, a court could deny the debtor discharge of a particular debt, 11 U.S.C. § 523, or deny a discharge of all debts, 11 U.S.C. § 727, or dismiss his petition or convert it to a different chapter, 11 U.S.C. §§ 707 or 1307, those remedies penalize a client who relied upon his attorney's advice and incurred such debt. Section 526(a)(4) seeks to avoid these injuries by allowing debtors to seek compensation from their attorneys when they are injured by such advice. 11 U.S.C. § 526(c)(2). It thus addresses the attorney's conduct directly and provides an incentive not to disregard the law. Moreover, by addressing the attorney's conduct directly, it seeks to avoid the time and expense of dismissing such abusive filings to the U.S. Trustee, the creditors and the court itself by preventing such advice in the first place.

Furthermore, Section 526(a)(4) is narrowly tailored because it does not limit more speech than is necessary to accomplish this purpose. It does not prohibit an attorney from advising a client on what the law is or discussing the standards for determining when debt is abusive. Nor does it prevent an attorney from advising a debtor to incur further debt in all cases. Instead, it simply prohibits an attorney from advising a client to incur debt where the motivation for incurring such debt is that the debtor will be filing for bankruptcy.

In their memorandum, plaintiffs argue that Section 526(a)(4) is not "narrowly tailored" to achieve its objectives because it is both underinclusive, in that it does not prevent debtors from incurring such debts, and overinclusive, in that it prohibits advice to incur debts beyond the scope of Congress' concerns.[21] This argument is, however, predicated upon plaintiffs' erroneous interpretation of the prohibition to include all debt prior to filing for bankruptcy. Under the government's interpretation of "to incur more debt in contemplation" of filing for bankruptcy, Section 526(a)(4) only prohibits advice to incur debt because the assisted person intends to file for bankruptcy. It thus is limited to advice aimed at allowing the debtor to take unfair advantage of the discharge or to "game" the bankruptcy system. As previously explained, even prior to the BACPA incurring such debt was itself disfavored and restricted. See supra at 33.[22] Accordingly, it is not overinclusive or underinclusive, but consistent with the existing standards against abuse and fraud. Therefore, plaintiffs' contention that Section 526(a)(4) is not narrowly tailored in a manner to meet the Gentile test has no merit.

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[21] In their memorandum, plaintiffs also assert that this provision places an "unconstitutional burden" on speech by requiring attorneys to determine whether a client is an "assisted person" (i.e., a consumer debtor with less than $150,000 in non-exempt assets). Pl. Mem. at 22-23. Plaintiffs allege that this requirement is "difficult – and prohibitively burdensome" and that "some clients would find such scrutiny invasive and embarrassing." Id. This allegation is apparently based on plaintiffs' erroneous assumption that "bankruptcy assistance" include all advice on any matter. See supra at 21-23. Plaintiffs cannot seriously contend that inquiry into the assets of an individual contemplating filing for bankruptcy is irrelevant or burdensome. For example, a debtor must list his/her assets when he files for bankruptcy.

[22] Plaintiffs' reliance on Rubin v. Coors Brewing, 514 U.S. 476, 485 (1995), is misplaced. In that case, the Court found that prohibiting the disclosure of alcohol content in beer labels was irrational because there was no prohibition against such disclosures in beer advertisements or on the labels of wine and spirits. In this case, the restriction on advice by attorneys is consistent with the existing prohibitions on fraud and abuse.

4. None Of The Cases Cited By Plaintiffs Supports Their Contention That A Strict Scrutiny Test Should Be Employed.

Realizing that Section 526(a)(4) meets the Gentile balancing test, plaintiffs seek to avoid the Gentile test by asserting that "advice or legal assistance" is subject to full First Amendment protection under the strict scrutiny test. Pl. Mem. at 29, citing Legal Services Corp. v. Velazquez, 531 U.S. at 544. Their assertion that the Gentile test does not extend to restrictions on advice given to clients is incorrect. The Supreme Court has noted that leniency traditionally has permeated its review of ethical restrictions on lawyers "[e]ven in an area far from the courtroom and the pendency of a case." Gentile, 501 U.S. at 1073. Indeed, Gentile has been described as providing the standard for reviewing restrictions on attorneys' speech "in general." United States v. Scarfo, 263 F.3d at 92-93. In fact, in Canatella v. Stovitz, 365 F. Supp. 2d at 1071-1072, 1076, the court specifically applied the Gentile standard to an ethical restriction on advice.

None of the cases cited by plaintiffs offers support for their contention that a stricter test should be applied to ethical restrictions on advice. Velazquez is inapposite. The law at issue in that case, unlike here, was not an ethical restriction seeking to protect the integrity of the judicial system. Indeed, it was held to be a restriction seeking to insulate the welfare law from judicial scrutiny. Id. The law prevented an attorney funded by the Legal Service Corporation ("LSC") from "arguing to a court that a state [welfare] statute conflict[ed] with a federal statute or that either a state or federal [welfare] statute by its terms or in its application []violat[ed] [] the United States Constitution." Id. at 537. The Court in Velazquez concluded that the statute impaired the judicial function because it limited LSC attorneys' abilities to "advise the courts of serious questions of statutory validity," thereby infringing on the courts' primary function to interpret the law. Id. at 545. The restriction here, on the

other hand, does not preclude an attorney from raising any claims or arguments on behalf of an assisted person in court. Therefore, Section 526(a)(4) does not interfere with the court's core function of interpreting the law and the Constitution and so does not threaten the independence of the judiciary. Indeed, as explained, § 526(a)(4) seeks to protect clients and the integrity of the judicial system from abusive filings.

Plaintiffs' reliance on NAACP v. Button, 371 U.S. 415 (1963), is also misplaced. The law at issue in that case prohibited an attorney from telling a prospective client that his/her civil rights are being infringed and advising him/her to seek assistance of particular counsel. Id. at 426. As previously explained, nothing in Section 526(a)(4) prohibits an attorney from advising a client of his/her legal rights. Nor does the provision restricts an attorney's ability to recommend that an individual seek the assistance of a particular counsel or hire an attorney.

Plaintiffs likewise distort a statement in Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995), regarding the appropriate test for speech by attorneys. They cite the case as holding "that courts must 'accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer.'" Pl. Mem. at 29. When read in full, the Court actually stated: "Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protections our Constitution has to offer." 515 U.S. at 634. In any case, the statement was dicta since the Court found that the speech at issue in that case was commercial. Therefore, plaintiffs' claim that this Court should employ strict scrutiny has no merit, and the Section 526(a)(4) should be upheld under the Gentile standard.

B. Section 526(a)(4) Does Not Violate The Rights Of Plaintiffs' Clients Under The First and Fifth Amendments.

Plaintiff Anita Johnson (an "assisted person" who has sought legal advice from an attorney with respect to filing a petition for bankruptcy) contends that Section 526(a)(4) violates her constitutional rights in three ways: (1) it violates her rights under the First Amendment to receive legal advice, (2) it impairs her right of access to court under the Due Process Clause and the Petition Clause of the First Amendment, and (3) it deprives her right to equal protection under the Fifth Amendment. Complaint, ¶ 46; Pl. Mem. at 37-41.[23]

1. Plaintiff Johnson's claim that Section 526(a)(4) infringes her First Amendment right to receive legal information and advice has no merit. As previously explained, Section 526(a)(4) does not prohibit an attorney from providing information about bankruptcy law. Instead, it simply prohibits an attorney from advising an assisted person to incur additional debt in contemplation of bankruptcy (advice to accumulate debt to take advantage of the discharge or to "game" the system). See supra at 26-27. Although "free speech carries with it some freedom to listen," Richmond

[23] The attorney plaintiffs also allege that this section violates the rights of their clients. They lack standing, however, to assert the constitutional rights of their clients. As courts have stressed, the usual rule is that a plaintiff must "'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). Courts have recognized exceptions to this rule only where the plaintiff can show (1) he/she has a "close" relationship with the person who possesses the right, and (2) there is a "hinderance" to that person's ability to protect his own interest. Id. Accord Singleton v. Wulff, 428 U.S. 106, 116 (1976); Corey v. Dallas, 492 F.2d 496, 497 (5th Cir. 1974). Applying these standards, courts have rejected attempts by attorneys to adjudicate the rights of a client where there is no obstacle to the client's ability to protect his own rights. Kowalski v. Tesmer, 543 U.S. at, 131-34 (attorney lacked standing to assert the rights of indigent defendants denied appellate counsel); Conn v. Gabbett, 526 U.S. 286, 292-93 (1999) (rejecting an attorney's attempt to adjudicate the rights of a client); Juvenile Matters Trial Lawyers v. Judicial Department, 363 F. Supp. 2d 239, 249 (D. Conn. 2005) (plaintiffs lacked standing to assert that low rates paid to attorneys representing indigent children violated their right to effective representation).

Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980), the freedom to listen cannot be greater in scope than the freedom of the speaker to speak. Therefore, since this prohibition on attorneys does not violate First Amendment rights of attorneys to provide such advice, plaintiff Johnson cannot claim that it violates her right to receive such advice.

2. Plaintiff Johnson's claim that Section 526(a)(4) impairs her right of access to court likewise has no merit. As previously explained, unlike the restriction at issue in Valazquez, the restriction at issue here does not prohibit an attorney from asserting or raising any claim in court. See supra at 39. Nor does it prohibit her from filing a petition for bankruptcy. Instead, Section 526(a)(4) only prohibits an attorney from advising her to incur more debt in contemplation of bankruptcy.

To the extent that this claim is based on the prohibition in Section 526(a)(4) against advice to incur more debt to pay for an attorney, plaintiff Johnson is also unable to state a claim. First, nowhere in her complaint (or even in her declaration) does she allege that she is unable to pay for an attorney without incurring additional debt. Second, even if she alleged that she is unable to pay for an attorney without incurring more debt, the issue would not be her right of access to court, but her purported right to be represented by an attorney in a bankruptcy proceeding. But there is no constitutional right to retain counsel in a civil proceeding, See Stroe v. INS, 256 F.3d 498, 500 (7th Cir. 2001) ("The general rule . . . is that civil litigants have no constitutional right to the assistance of counsel."); Glick v. Henderson, 855 F.2d 536, 541 (8th Cir. 1988) ("there is no constitutional or statutory right to effective assistance of counsel in a civil case"); Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985) ("generally, a plaintiff in a civil case has no right to effective assistance of counsel"); Mekdeci v. Merrell Nat'l Lab., 711 F.2d 1510, 1522 (11th Cir.1983) (similarly); Kusher v. Winterhur Swiss Ins. Co., 620 F.2d 404, 408 (3d Cir. 1980) (civil litigant "does not have a

constitutional right to the effective assistance of counsel").[24]

Boddie v.Connecticut, 401 U.S. 371 (1971) (requirement to pay filing fees for a divorce proceeding), and M.L.B. v. S.L.J., 519 U.S. 102 (1996) (requirement to pay fee for preparation of the record for an appeal by a mother of a decision to terminate her parental rights), are not analogous. First, neither of those cases dealt with a claim that an individual lacked legal representation. Instead, they involved claims that individuals did not have access to court because they could not pay a filing or other court fee. Second, the Supreme Court has specifically held that the holding in Boddie does not extend to filing fees for bankruptcy petitions. United States v. Kras, 409 U.S. 434 (1973). In that case, the Court found that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." Id. at 446. As the Court explained, "[t]he denial of access to the judicial forum in Boddie touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship . . . [but an] alleged interest in the elimination of [a] debt burden . . . does not rise to the same constitutional level." Id. at 445-46. In addition, the Court recognized that "[i]n contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors" because "'[w]ithout a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts.'" Id. at 444-45 (quoting Boddie, 401 U.S. at 376). "[A] debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors." Id. Thus, plaintiff Johnson's claim that Section 526(a)(4) impairs her right of' access to the bankruptcy system has no merit.

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[24] Griffith v. Illinois, 351 U.S. 12, 16 (1956), another case cited by plaintiffs, dealt with the right of an individual to an attorney in a criminal proceeding.

3. Plaintiff Johnson's claim that Section 526(a)(4) violates her right to equal protection is also flawed. Rather than injuring assisted persons, this provision, along with the other restrictions and requirements imposed upon debt relief agencies, protects assisted persons (consumer debtors with a limited amount of assets). As previously explained, Section 526(a)(4) protects assisted persons from advice which would prejudice his/her petition for bankruptcy and could result in judgments against the debtor under 523 or 727 or dismissal of the petition under Section 707. See supra at 32-34. Similarly, the disclosure requirements in Sections 527 and 528 provide an assisted person basic information regarding bankruptcy and prevent deception in advertising. Moreover, Section 526(c)(2) provides an assisted person with a right to seek damages from a debt relief agency that intentionally or negligently failed to comply with any provision in Sections 526 - 528.

Congress' decision to require these special consumer protections for assisted persons is reviewed under the rational basis test because the distinction involves no suspect classification.[25] The rational basis test is highly deferential, and a classification will be upheld if there is "any conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communication, Inc., 508 U.S. 307, 313 (1993). In this case, Congress could reasonably have found that consumer debtors with limited assets should be afforded special protection because they are likely to be less knowledgeable about bankruptcy proceedings and thus more vulnerable. Thus, while consumer debtors with greater than $150,000 in non-exempt assets may also have their bankruptcy petitions dismissed as a result of an attorney's advice to incur more debt in contemplation of bankruptcy, the classification drawn by Congress "does not offend the Constitution simply because

[25] To the extent that plaintiffs' equal protection claim is premised upon an asserted burden on their First Amendment right, the argument fails for the same reason plaintiffs' First Amendment argument fails. See supra at 41.

the classification is not made with mathematical nicety or because in practice it results in some inequality." Dandridge v. Williams, 397 U.S. 471, 485 (1970) (internal quotations omitted). As the Supreme Court has stressed, "the legislature must be allowed leeway to approach a perceived problem incrementally." FCC v. Beach Communictions, Inc., 508 U.S at 316. Thus, Congress "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" and "may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955). Accord Dandridge v. Williams, 397 U.S. at 487 (Congress need not "choose between attacking every aspect of a problem or not attacking the problem at all.").

Accordingly, plaintiff Johnson's claim that Section 526(a)(4) violates her constitutional rights should be dismissed.

C. Section 526(a)(4) Does Not Violate Separation of Powers Principle.

Plaintiffs also claim that Section 526(a)(4) violates the separation of powers principle"because it interferes with clients obtaining full information about their legal rights" and "prevents the presentation to the courts" of certain claims. Pl. Mem. at 30 n. 14, 36. To support this claim, they rely on the statement in Velazquez that the prohibition on LSC attorneys on bringing certain claims in court was "inconsistent with accepted separation-of-powers principles" because it threatened the impairment of the judicial function. Pl. Mem. at 14 n. 30, citing Velazquez, 531 U.S. at 546. As previously explained, however, the restriction at issue in that case is not analogous to the restriction at issue here. See supra at 38-39. The restriction at issue in that case precluded LSC attorneys from raising claims alleging that state or federal welfare regulations violated the United States Constitution or were inconsistent with federal statutes.

In this case, Section 526(a)(4) does not preclude attorneys from raising any claim in court on behalf of their clients. Nor does it, as plaintiffs allege, interfere with their clients' access to courts or their ability to receive full information about their rights. Moreover, nothing in the BAPCPA prevents attorneys from providing their clients with information about bankruptcy law. Nor does it prevent attorneys from explaining the means test and advising their clients that incurring additional debts prior to bankruptcy can in certain cases be found to be fraudulent or abusive and thus lead to dismissal of their petition. Instead, Section 526(a)(4) only prohibits attorneys from advising their clients to incur such debts.

Thus, contrary to plaintiffs' claim, the restriction does not even remotely threaten to impair the judicial function. Accordingly, plaintiffs' separation of powers claim should be dismissed.

III. THE DISCLOSURE REQUIREMENTS IN SECTION 527 DO NOT VIOLATE THE FIRST AMENDMENT.

Section 527 requires debt relief agencies to provide certain written disclosures containing factual information about bankruptcy proceedings at the time that the assisted person is retaining the services of an attorney. 11 U.S.C. § 527. First, a debt relief agency must explain the different types of bankruptcy proceedings and the information that a debtor is required to provide and warn a debtor that his/her failure to provide accurate information may result in dismissal or other sanction. 11 U.S.C. § 527(a). Second, a debt relief agency must provide the standardized disclosure statement set forth in Section 527(b), or one substantially similar, providing basic information on the procedures and a debtors' rights and obligations. 11 U.S.C. § 527(b). Third, the debt relief agency must provide sufficient information to allow an assisted person to complete the required forms accurately (except to the extent that a debt relief agency completes the relevant forms on behalf of the debtor). 11

U.S.C. § 527(c).

While plaintiffs' complaint does not distinguish among the three different disclosure provisions in Section 527, plaintiffs' memorandum focuses exclusively on the standardized written disclosure required by Section 527(b). Plaintiffs contend that this written disclosure is unconstitutional under the strict scrutiny test because it compels plaintiffs to make statements that they believe to be false or misleading, or with which they disagree. Pl. Mem. at 20. This claim has no legal basis. It is based on a mischaracterization of the nature of the information contained in the disclosure and a misunderstanding of the proper test for such disclosures. Under the First Amendment, statutes compelling professionals to provide factually correct disclosures are upheld if they are reasonably related to a government objective and are not unduly burdensome. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. at 884. The standardized written disclosure required by Section 527(b) meets this test because it provides accurate factual information regarding the bankruptcy process.

A. Statutes Compelling Professionals To Provide Factual Information Are Upheld If They Are Reasonably Related To A Legitimate Government Interest.

Contrary to plaintiffs' claim, statutes compelling professionals to provide factual disclosures are not subject to strict scrutiny. Instead, such statutes are upheld if they are reasonably related to a state interest. See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. at 884. In Casey, physicians challenged a state law requiring them to provide factual information about the risks of abortions and the options available to a patient if she chose not to have an abortion. As here, plaintiffs argued that the disclosures violated their First Amendment rights and infringed on their right to provide advice to their patients. The Court upheld the disclosure requirements, concluding that

there was no "constitutional infirmity in the requirement that the physician provide the information mandated by the State." 505 U.S. at 884 The Court held that the physicians' First Amendments rights were implicated "only as part of the practice of medicine" which is subject to "reasonable licensing and regulation by the State." Id.

Similarly, in Zauderer v. Office of Disciplinary Counsel, 471 U.S. at 651, the Court upheld a requirement on attorneys to disclose certain information regarding legal fees in their advertisements. See infra at 56-57. In that case, the Court held that the disclosure requirements satisfy the First Amendment because they were reasonably related to the State's interest in preventing the deception of consumers and are not "unjustified or unduly burdensome." 471 U.S. at 651. The same is true here.[26]

The cases cited by plaintiffs to support their position that this Court should employ strict scrutiny are not analogous because they did not involve factual disclosures. Instead, the compelled speech at issue in those cases represented certain religious or political viewpoints or discriminated against certain viewpoints. For example, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), plaintiffs challenged a state requirement compelling students to recite the Pledge of Allegiance on the grounds that it violated their First Amendment rights. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), plaintiffs sought to enjoin enforcement of a New Hampshire statute making it a crime to obscure the words "Live Free or Die" on their license plates on the grounds the

[26] While Zauderer addresses the disclosure issue in a commercial context, the reasoning used by the Court should not be limited to the commercial context, in as much as Casey applied the same reasonable basis test. Moreover, even if Zauderer were limited to the commercial context, the disclosures here are issued in a commercial context since they must be made at the time or within three days of the initial consultation when the debtor is considering the scope of the legal services he will retain. 11 U.S.C. § 527(b) (incorporating the 3 business day requirement set forth in Section 527(a)).

slogan was repugnant to their moral and religious beliefs. See also Board of Regents v. Southworth, 529 U.S. 217 (2000) (challenge to required student activity fee on the grounds that it subsidized political groups in which the students disagreed). In Riley v. National Federation of the Blind of N.C., 487 U.S. 781 (1988), the law required a fundraiser to disclose to potential donors the average percentage of gross receipts actually received by the charity from the fundraiser. The Court applied strict scrutiny because the solicitations were inextricably tied to political advocacy and the disclosure requirement "necessarily discriminates against small and unpopular charities." Id. at 799.

Therefore, contrary to plaintiffs' claim, statutes requiring factual disclosures are not subject to strict scrutiny. Instead, they are upheld if they are reasonably related to a state interest.

B. The Disclosure Requirements in § 527 Should Be Upheld Under The Reasonable Basis Test Set Forth In Casey.

The limited disclosure requirements required by § 527 satisfy the standard announced in Casey. Contrary to plaintiffs' assertion, the written disclosures do not convey a particular viewpoint or ideological message. Nor do they offer advice to assisted persons to take certain courses of actions in their cases. Instead, they are similar to the informational disclosures at issue in Casey. They provide assisted persons with certain basic factual information regarding bankruptcy and their legal options. See supra at 13. In the various hearings on bankruptcy reform, several witnesses testified regarding the failure of some bankruptcy attorneys to provide their clients with sufficient information regarding bankruptcy proceedings and their options and the consequences of bankruptcy. See supra at 10-11. For example, one debtor, who had his debts discharged under Chapter 7, testified that "[it] was imperative that laws require attorneys or the bankruptcy court to tell debtors about their options, both within bankruptcy and outside of bankruptcy." Banrkruptcy Reform Act of 1998: Part I, Hearing

on H.R. 3150 before the House Judiciary Committee, 105th Cong., 2d Sess. 93 (1998) (Exhibit F) (testimony of Nicholl J. Russell). As he explained,

> [w]hen [he] saw an attorney about filing for bankruptcy, all he talked about was how easy it would be to wipe out all of his debts in Chapter 7. He never mentioned Chapter 13, and he certainly never mentioned anything about credit counseling.

Id. These concerns were echoed by other debtors in a survey conducted by Professor Tahira Hira of Iowa State University. She testified that many debtors complained that they had not received sufficient information about the bankruptcy process from their attorneys. The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solution to Bankruptcy Crisis, Hearing on S. 1301 before the Senate Judiciary Comm., 105th Cong., 2d Sess. 29 (Exhibit G). The comments and suggestions that she received from debtors included statements that

> "There should be strict guidelines for lawyers as to inform clients fairly and not for their own wallets." "The lawyers should be made to explain details instead of taking your money and moving you through the system like cattle." "Lawyers who don't give written explanations of procedures and give inadequate advice and mess things up should not be allowed to collect their fees and should pay for court costs."

Id. at 32. In addition, the Honorable Carol J. Kenner, United States Bankruptcy Judge, District of Massachusetts, testified that debtors often had "no advance warning" from attorneys that creditors may approach them about reaffirmation of their debts. Bankruptcy Reform, Joint Hearing before House Judiciary Comm. and Senate Judiciary Comm. 106th Cong., 1st Sess. 36 (1999) (Exhibit H).

The disclosure requirements in Section 527(b) are "reasonably related" to resolving these problems by insuring that certain basic information will be made available to consumer debtors. They explain the procedures for filing for bankruptcy and alert debtors that they may be approached by creditors seeking reaffirmation of a debt. As Senator Grassley explained, the disclosure provisions

"prevent bankruptcy mills from preying upon those who are uninformed of their rights." 151 Cong. Rec. S2469 (March 10, 2005)(Exhibit E). It curbs such practices by requiring debt relief agencies to "disclose the nature of the services they offer, explain the alternatives to filing bankruptcy, disclose the rights and obligations of debtors who file for bankruptcy, and explain the consequences of filing for bankruptcy." Id. at S2472 (Senator Sessions). See also id. at S2459 (Senator Hatch states that the Act "prevent[s] bad actors from preying upon the uninformed.").

Plaintiffs seek to distinguish the constitutionality of the disclosures under Casey by asserting that the standardized disclosure required by Section 527(b) here requires attorneys to provide information which is false or misleading. Pl. Mem. at 20-22. Their central complaint appears to be the allegation that this written disclosure requires them to advise their clients "that an attorney may not be required in their case" and that they "blur[] the distinction between an attorney and a bankruptcy petition preparer." Pl. Mem. at 48.[27] In fact, five of the alleged "inaccuracies" relate to this point. But contrary to plaintiffs' claim, nothing in the disclosure states that it may not be advisable for a client to be represented by an attorney in a bankruptcy case. Instead, the disclosure simply states that "[i]f 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." This is an accurate factual statement. Nothing in the Bankruptcy Code legally requires a debtor to have an attorney. Indeed, it would be misleading for an attorney to advise a client that a lawyer was legally required. Furthermore, while the disclosure notes that "many cases are routine," nothing in that statement or other parts of the disclosure suggests that a client's particular

[27] See also Declaration of Wayne Silver, ¶ 9 ("debt relief provisions would require me to advise clients that they do not need a bankruptcy attorney to file for bankruptcy").

case is routine or that an attorney would not be recommended even in a routine case. Nor does anything in BAPCPA prevent an attorney from orally recommending that legal representation may be advantageous in a client's case. Instead, like the disclosure in Casey, the written disclosure here simply explains the options available.

Plaintiffs' claim that this disclosure blurs the distinctions between attorneys and bankruptcy petition preparers is also incorrect. The disclosure expressly states that a bankruptcy petition preparer is not an attorney. Thus, it explains that an individual "can get help in some localities from a bankruptcy petition preparer who is not an attorney." 11 U.S.C. § 527(b)(emphasis added). It also clearly states that "only attorneys, not bankruptcy petition preparers, can give you legal advice." 11 U.S.C. § 527(b). The disclosure further reinforces the fact that bankruptcy petition preparers cannot provide advice in the discussion of the availability of different forms of debt relief. It explains that "[b]efore 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." Id. Thus, there is no basis for finding that the disclosure is misleading on this ground. Moreover, nothing in the BAPCPA prohibits an attorney from further explaining the differences between bankruptcy petition preparers and attorneys.

Plaintiffs' argument regarding other statements in the disclosure appears to be based on the assertion that the disclosures may not be applicable in certain cases or may not provide a "complete" picture in specific cases. See Pl. Mem. at 20-22. But Section 527(b) only requires an attorney to provide the information "to the extent applicable" and allows modification of the required statement so long as it is "substantially similar" to that offered by the statute. 11 U.S.C. § 527(b). Moreover, to the extent that plaintiffs believe that additional or clarifying information or advice is needed,

nothing in Section 527 prevents them from providing it.

Accordingly, the examples cited by plaintiffs of allegedly "inaccurate" information are frivolous. For example, plaintiffs contend that the statement that debtors "will have to pay a filing fee to the bankruptcy court" (Pl. Mem. at 21) is incorrect because the fee may be waived in certain cases. If a waiver might be appropriate in a particular client's case, nothing prevents the attorney from explaining that, or filing an application for a waiver. Similarly, while the information provided regarding Chapter 13 repayment plans is a brief description and does not fully set forth all permutations that may occur under the Code in any given Chapter 13 case, the summary is not misleading. If additional information is needed to address a debtor's specific case, his/her attorney is free to provide it.

In short, the disclosures are simply intended to insure that the debtor has certain basic information regarding bankruptcy. They are not intended to be an exhaustive list of advice that a competent attorney should provide to a debtor-client about his or her particular case.

Accordingly, plaintiffs' challenge to Section 527's disclosure provisions should be rejected.

V. SECTION 528's DISCLOSURE REQUIREMENTS ARE CONSTITUTIONAL UNDER ZAUDERER.

Plaintiffs also contend that Sections 528(a)(3), (a)(4) and (b) violate the First Amendment because they allegedly "would restrict plaintiffs' ability to continue to advertise their services as they desire." Pl. Mem. at 51. This claim has no merit. Section 528 does not impose an outright ban on any particular advertising by debt relief agencies. Instead, the challenged provision merely obligates debt relief agencies to place the following or similar statement in advertisements that are actually, if not explicitly, touting bankruptcy assistance services: "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).

Like their challenges to other provisions, plaintiffs' claim is predicated on an incorrect standard of review. In their memorandum, plaintiffs assert that these provisions are subject to strict scrutiny because "the compelled statements articulate a noncommercial idea with which plaintiffs disagree." Pl. Mem. at 51. In the alternative, they argue that if the statements are commercial speech, they are subject to the three prong test set forth in Central Hudson Gas & Electric Corp. v. Public Service Com., 447 U.S. 557 (1980).

Neither test is appropriate. The Supreme Court has held that factual disclosures requirements, like those at issue here, are reviewed under a relaxed standard under which disclosure requirements need only be "reasonably related to the state's interest in preventing of deception of consumers" and "not [be] unduly burdensome." Zauderer, 471 U.S. at 651. The disclosure requirements imposed by Sections 528(a)(4) and (b)(2) satisfy this standard.

A. The Disclosure Requirements in Section 528 Are Not Subject To Strict Scrutiny.

Plaintiffs do not dispute that the advertisements in which the required statements must be placed are commercial speech. Indeed, they cannot. It is "well established that lawyer advertising is commercial speech." Fla. Bar v. Went For It, Inc., 515 U.S. at 623. Nevertheless, plaintiffs contend that the requirement that they insert a two-line disclosure identifying themselves as debt relief agencies and explaining that they help persons file for bankruptcy is subject to strict scrutiny. Plaintiff argue that the statement is not commercial speech because it allegedly "articulates a noncommercial idea with which plaintiffs disagree." Pl. Mem. at 51.

This argument is misguided in several ways. First, the required statement does not represent

a particular political or religious viewpoint.[28] While plaintiffs may disagree with Congress' decision to define attorneys who assist consumer debtors as "debt relief agencies," that is how they are classified under the federal law. See supra at 17-24. Moreover, since the required statements must be included only in advertising which directly or indirectly offer bankruptcy assistance (see supra at 14), plaintiffs cannot seriously contend that they do not help people file for bankruptcy relief under the Bankruptcy Code. In short, the statement does not reflect any ideological viewpoint. It is simply an accurate factual statement explaining who they are and what they do.

Second, the test cited by plaintiffs for defining commercial speech — does the speech propose a commercial transaction – has been used by courts in determining whether the speech prohibited by a certain restriction is commercial in nature. Courts have not suggested that a mandatory disclosure statement is subject to strict scrutiny simply because the statement itself does not propose a commercial transaction or could otherwise be considered "commercial speech." See, e.g., National Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001) (label informing consumers that product contains mercury and should be recycled or disposed of as a hazardous waste was held to be commercial speech). Instead, the focus is on whether it is a factually accurate statement.

In any case, while commercial speech has sometimes been characterized as "speech that does no more than propose a commercial transaction," United States v. United Foods, Inc., 533 U.S. 405, 409 (2001), a broader standard has been applied in determining whether statements should be

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[28] The cases cited by plaintiffs are not even remotely analogous. West Virginia Bd. of Ed., 319 U.S. at 632 (law requiring students to recite the Pledge of Alliegance violated plaintiff's freedom of religion); Wooley v Maynard, 430 U.S. 705 (1977) (requiring plaintiffs to exhibit the slogan "Live Free or Die" on their license plates violated the First Amendment); Prune Yard Shopping Center v. Robins, 447 U.S. 79 (1980) (distribution of pamphlets in a shopping center condemning a United Nations resolution); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (challenge to the distribution of religious tracts). See Zauderer, 471 U.S. at 651.

consider commercial in nature. For example, a statement included with an advertisement that concerns public policy associated with contraception use was held to be commercial speech, even though the statement did not itself propose a commercial transaction. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66-67 (1983). Similarly, a statement disclosing the alcohol content on a beer bottle has been held to be commercial speech, Rubin v. Coors Brewing Co., 514 U.S. at 481-82, as has a lawyer's printing of professional certifications on stationery or in the phone book. Ibanez v. Fla. Dep't of Business & Prof'l Regulation, 512 U.S. 136, 142 (1994) (lawyer's use of "CPA" (Certified Public Accountant) or "CFP" (Certified Financial Planner) designations in advertising or other communications with the public qualifies as "commercial speech"). In short, courts have not looked at statements in isolation but have looked at the context in which they appear. In this case, the required statement is placed in what is admittedly a commercial advertisement.

Thus, plaintiffs' contention that this Court should employ strict scrutiny is incorrect.

B. Statutes Compelling Factual Disclosures Are Subject To The Reasonable Basis Test Set Forth In Zauderer.

Plaintiffs' alternative argument that the Court must evaluate the disclosure statement under the three prong test set forth in Central Hudson Electric Corp. v. Public Service Com., 447 U.S. 557 (1980), is also incorrect. Pl. Mem. at 53-54.[29] In that case, the Court found that a regulation banning a public utility from promoting the use of electricity was unconstitutional. Courts have found that disclosure requirements, unlike restrictions on commercial speech, are not subject to the Central Hudson test. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. at 651. Instead, such

[29] Under the Central Hudson test, courts examine three factors in evaluating the constitutionality of restrictions on non-deceptive commercial speech: (1) whether the asserted government concern is substantial, (2) whether the regulation directly advances the government asserted interest, and (3) whether it is not more extensive than necessary. 447 U.S. at 566.

disclosures should be upheld as long as they are reasonably related to a state interest and are not unduly burdensome. Id.

In Zauderer, an attorney challenged three different ethical restrictions: (1) prohibitions on advertising legal business through advertisements containing advice and information regarding specific legal problems, (2) restrictions of the use of illustrations in advertising by lawyers, and (3) disclosure requirements relating to the terms of contingent fees. Id. at 638. While the Supreme Court employed the Central Hudson test with respect to the restrictions on advertisements, the Court employed a different and more lenient reasonable basis test to the disclosure requirement. Id. at 650.[30] The Supreme Court recognized that there were "material differences between disclosure requirements and outright prohibitions on speech." Id. It explained that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." Id. at 651 (emphasis in the original) (internal citation omitted). The Court held that factual disclosure requirements will be upheld if they are "reasonably related to the State's interest in preventing deception of consumers" and are not "unjustified or unduly burdensome." Id. Applying this test, the Court concluded that the state's disclosure requirement "easily passe[d] muster" under this reasonableness standard given the "self-evident" possibility of deception. Id. at 652.

The Second Circuit emphasized this distinction between restrictions on advertisements and disclosure requirements in National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114 (2d Cir. 2001).

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[30] Plaintiffs attempt to obscure this distinction by selectively citing to the portion of the Zauderer decision which discusses the use of the Central Hudson test for restrictions. Pl. Mem. at 53.

There, the Second Circuit held that "[r]egulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech." In that case, the court upheld a requirement that manufacturers of some mercury-containing products label their products to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste. The court found that even though the restriction was not intended to prevent deception but rather "to better inform consumers about the products they purchase," that difference was irrelevant. Instead the court held that a disclosure requirement should be upheld because it was reasonably related to a legitimate government interest. Id. at 115.[31]

Thus, plaintiffs' contention that "both restrictions on and compelled statements relating to advertising may be subject to the Central Hudson standard" (Pl. Mem. at 54) is simply invalid.

C. The Disclosure Requirements In Section 528 Satisfy The Zauderer Test.

Section 528's disclosure requirements satisfy Zauderer's standard because they are reasonably related to the government's interest in preventing deception and are not unduly burdensome. Evidence before Congress established that the Federal Trade Commission had found some bankruptcy lawyers did not mention in their advertisements that their ability to make "debts disappear" derived from the use of the bankruptcy process, and the FTC deemed it necessary to issue a Consumer Alert warning consumers of these misleading advertisements. Bankruptcy Reform Act of 1998 (Part III), Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Session 90-92 (1998) (Exhibit

[31] In that case, the Second Circuit limited its prior holding in Int'l Dairy Foods Assoc. v. Amestoy, 92 F.3d 67, 72-74 (2d Cir. 1996), which is cited by plaintiffs. The court explained that its application of the Central Hudson test in that case "was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" 272 F.2d at 115 n. 6.

C). The FTC Consumer Alert cautioned consumers

> to read between the lines when faced with ads in newspapers, magazines, or even telephone directories that say:
> "Consolidate your bills into one monthly payment without borrowing."
> "STOP credit harassment, foreclosures, repossessions, tax levies and garnishment," "Keep Your Property."
> "'Wipe out your debts! Consolidate your bills! How? By using the protection and assistance provided by federal law. For once, let the law work for you."

Id. at 92. Since such advertisements easily could have misled laypeople into thinking that debts could be erased without payment or bankruptcy, the FTC warned consumers "that such phases often involve bankruptcy proceedings, which can hurt your credit and cost you in attorneys' fees." Id. Specific examples of such advertisements were also presented at the hearings. Id. at 93-94. Plaintiffs assert that any such initial deception would be harmless because it would be corrected before any petition is filed when the client meets with the attorney. But the evidence before Congress was to the contrary. Congress heard testimony from a creditor describing examples of where customers misled by such advertisements "did not even understand that they had filed for bankruptcy." Bankruptcy Reform Act of 1999 (Part II), Hearing on H.R. 833 before House Judiciary Comm., 106th Cong., 1st Sess. 122-23 (1999) (testimony of Michael Moore, Babcock Home Furnishing Centers) (Exhibit D) (emphasis added). See also, Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, Hearing on H.R. 975 before House Judiciary Comm., 108th Cong., 1st Sess. 55 (2003); (Exhibit B).[32] As the Supreme Court has recognized, protecting the public from deception in the context of legal

[32] Plaintiffs seek to dismiss this legislative history by asserting that it is not the legislative history of this act, "but of earlier unenacted statutes." Pl. Mem. at 57. This contention ignores the fact that Congress considered its work in the prior sessions to be part of a single process of enacting the BAPCPA. See 2005 U.S.C.C.A.N. at 91-93 (Conference Report discussing earlier efforts to pass reform and citing to the prior hearings).

advertisement by attorneys is especially important "because the public lacks sophistication concerning legal services, [so] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). Thus, contrary to plaintiffs' assertion (Pl. Mem. at 59), the government's concern for deception was not simply speculative or illegitimate.[33]

The disclosure requirement of Section 528 is reasonably related to the government's interest in forestalling deception by alerting people that a lawyer may use bankruptcy as a means to help them, even though his or her advertisement does not say so. Plaintiffs try to refute the rationality of the disclosure requirement by noting that not all advertisements without the required disclosures are necessarily deceptive. Pl. Mem. at 56. The decision by Congress to adopt a prophylactic remedy of limited disclosure, rather than an outright prohibition which would be applied on a case-by-case basis, is reasonable. As the Supreme Court noted in Zauderer, 471 U.S. at 651 n. 14, it is not appropriate to strike down a disclosure requirement "merely because other possible means by which the state might achieve its purpose can be hypothesized." Moreover, the requirement is not unduly burdensome: it consists simply of inserting a two-line admonition into certain advertisements.

Plaintiffs' claim that the two-line statement is confusing or misleading also has no merit. While the term "debt relief agency" is a new legal term, the two line statement on its face explains

[33] In any case, the cases cited by plaintiffs for the holding that the government bears the burden of proving that the harms are real are not on point. They involved restrictions on speech, which are evaluated under the intermediate scrutiny, not to factual disclosures evaluated under the reasonable basis test. See Florida Bar, 515 U.S. at 626 (intermediate scrutiny under Central Hudson cannot be satisfied by "mere speculation and conjecture").

what a debt relief agency is — it is any entity that helps people file for bankruptcy.[34] To the extent that plaintiffs fear that the term "debt relief agency" may cause confusion between them and bankruptcy preparers who also provide assistance, nothing in Section 528 prohibits attorneys from identifying themselves as attorneys and stating that they, unlike bankruptcy petition preparers, can provide legal advice or describing the reasons why legal advice might be advantageous.

Plaintiffs' contention that the two-line statement is misleading is based on the erroneous assumption that attorneys who do not help people file for bankruptcy will be required to insert the statement into their advertisements. Contrary to plaintiffs' assertion, Section 528 does not require attorneys for creditors or landlords or mortgage companies to include the two-line statement in their ads. This disclosure statement only applies to debt relief agencies who implicitly or explicitly tout "bankruptcy assistance services" or assistance with respect to relief from "credit defaults, eviction proceedings, excessive debt, debt collection pressures, or inability to pay any consumer debt." 11 U.S.C. § 528(a)(4), (b)(2)(B). Thus, this requirement does not apply to attorneys for creditors, landlords or mortgage companies because they are not debt relief agencies. Moreover, even if an attorney provides bankruptcy assistance to debtors, he/she is only required to insert the statement in his or her advertisements touting such bankruptcy assistance.

Therefore, plaintiffs' challenge to the constitutionality of the disclosure provisions of Section

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[34] One of the plaintiffs complains that some of his clients "have expressed concern that the designation denotes that [he] is an agent for the federal government." Declaration of Eugene Melchionne, ¶ 20. Any such confusion, however, is attributable to his potentially misleading "modification" to the standardized language. See Declaration of Elizabeth J. Austin in Opposition to Plaintiffs' Motion for a Preliminary Injunction, ¶¶ 4-5. His website states that "The Law Offices of Eugene S. Melichionne, designated as a Federal Debt Relief Agency by an Act of Congress and the President of the United States." Exhibit 2 to Austin Decl. An advertisement in the 2005 SNET Yellow Pages states that his firm is a "Federally Designated Debt Relief Agency."

528 should be dismissed.

VI. THE REQUIREMENT IN SECTIONS 528(a)(1) AND (2) THAT A DEBT RELIEF AGENCY EXECUTE A WRITTEN CONTRACT WITH AN ASSISTED PERSON IS CONSTITUTIONAL.

Plaintiffs also challenge the constitutionality of Section 528(a) dealing with the requirement for written contracts. Pl. Mem. at 41-45. That provision provides that

> a debt relief agency shall–
>
> > (1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously –
> >
> > > (A) the services such agency will provide to such assisted person; and
> > >
> > > (B) the fees or charges for such services, and the terms of payment;
> >
> > (2) provide the assisted person with a copy of the fully executed and completed contract.

11 U.S.C. § 528(a)(1),(2). This requirement does not impose any restrictions on an attorney's freedom of speech. Instead, it is purely economic in nature. Accordingly, plaintiffs' challenge must evaluated under the rational basis test. FCC v. Beach Communications, Inc., 508 U.S. at 313-14; see also infra at 66.

The importance and value of attorneys having written contracts specifying fees and services has been recognized by the American Bar Association ("ABA") and various states in their rules of professional conduct. The Model Rules of Professional Conduct adopted by the ABA require that

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Model Rules of Prof'l Conduct R. 1.5(b) (2002). Thirteen other states have adopted the Model Rule on this point.[35]

Four states – Connecticut, California, Arizona and New York — are stricter than the ABA's Model Rules.[36] They require all lawyers to provide their clients with a written document outlining the scope of representation and the basis or rate of the fee. For example, Connecticut requires that

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. This subsection shall not apply to public defenders or in situations where the lawyer will be paid by the court or a state agency.

Connecticut Rules of Professional Conduct, Rule 1.5. As Connecticut explains in its comments on this rule, "[a] written statement concerning the fee reduces the possibility of misunderstanding." Id., Comment.[37] Connecticut further provides that "[a]bsent extraordinary circumstances the lawyer

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[35] Arkansas Rules of Prof'l Conduct, Rule 1.5(b); Delaware Lawyer's Rules of Prof'l Conduct, Rule 1.5(b); Idaho Rules of Prof'l Conduct, Rule 1.5; West's Ann. Indiana Code, Rules of Prof'l Conduct, Rule 1.5(b); ICA, Rule 32:1.5(b) (Iowa); Louisiana Rules of Prof'l Conduct, Rule 1.5(b); MD Rules, Rule 16-812, MRPC 1.5 (Maryland); 52 M.S.A., Rules of Prof'l Conduct, Rule 1.5(b) (Minnesota); NE Rules of Prof'l Conduct, Rule 1.5; Rule 407 (Nebrasksa), SCACR, Rules of Prof'l Conduc, Rule 1.5(b) (South Carolina); Utah Rules of Prof'l Conduct, Rule 1.5(b); 2006 Wyoming Court Order 002 (dated April 11, 2006; effective July 1, 2006). For the convenience of the Court, defendants have attached excerpts from the relevant state rules. See Exhibit A.

[36] 17A A.R.S. Sup. Ct. Rules, Rule 42, Rules of Prof'l Conduct, ER 1.5; West's Cal. Bus & Prof. Code, § 6148; 22 NYCRR 1215.1, Conn. Rules of Prof'l Conduct, Rule 1.5(b).

[37] The ABA Model Rules echo this same concern:

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In

should send the written fee statement to the client before any substantial services are rendered, but in any event not later than ten days after commencing the representation." Id.

The rationale for requiring a debt relief agency to enter into written contracts with assisted persons for bankruptcy services is based on the same concerns recognized by the ABA and the states in adopting their rules. Requiring a debt relief agency to have a written contract specifying its fees and services will reduce misunderstandings. Since assisted persons (consumer debtors with limited assets) may not have had experience in dealing with attorneys and are especially vulnerable due to their financial problems, it is especially important that they understand what services the attorney will provide and the charges for the services. As one witness explained during the hearing, this provision "requires consumers to be informed about what to expect in bankruptcy and protect[s] against the unscrupulous practices of those who 'low ball' the price for a bankruptcy and then extract high fees after the case is filed to defend bankruptcy litigation." Bankruptcy Reform Act of 1999 (Part II), Hearings on H.R. 833 before House Judiciary Comm., 109th Cong., 1st Sess. 11 (March 17, 1999)(testimony by George Wallace, Eckert, Seamans, Cherin and Mellott) (Exhibit D).

Plaintiffs do not directly quarrel with the value of having a written contract specifying their fees and the services that they will provide. Instead, they focus their challenge on the requirement

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> a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

that the contract be executed "not later than 5 business days after the first date on which [the attorney] provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed." 11 U.S.C. § 528(a). Plaintiffs contend that this provision violates due process because it "imposes strict liability for an act over which the attorney has no control: If an attorney provides advice to an "assisted person," but that person does not execute a contract within five days, the attorney has violated the provisions." Pl. Mem. at 42.

This argument is flawed in several ways. First, a client can bring an action for violation of this provision only if the attorney intentionally or negligently failed to comply with the provision. See 11 U.S.C. § 526(c)(2). An attorney who provides a contract to the client did not act negligently simply because the client did not return it within five business days.

Second, plaintiffs' claim that they have "no control" of this process is simply wrong. Attorneys are in total control of the process. They can require a client to sign a contract at the time that they provide the services. Indeed, plaintiffs allege that many attorneys are now requiring clients to sign a contract before they provide them any advice. Maglieri Decl., ¶ 14. Plaintiffs, however, complain that requiring a client to sign a retainer at the initial meeting is problematic because a client may be wary of signing a retainer "before they even begin discussing their case, fearful that they are getting into something they may not be able to get out of." Pl. Mem. at 44. This problem is illusory because it predicated on the notion that the initial agreement must be an agreement for the attorney to file a petition for bankruptcy and represent the client in the proceedings. An attorney can resolve this problem by having an initial fee agreement for consultation and another agreement if the client agrees to have the attorney represent him/her in a bankruptcy proceeding.

Accordingly, plaintiffs' challenge to the requirement in Section 528(a) regarding the need for

a written contract has no legal basis.

VII. THE DEBT RELIEF AGENCY PROVISIONS ARE REASONABLE AND DO NOT VIOLATE THE DUE PROCESS CLAUSE.

Plaintiffs claim that application of the debt relief provisions to attorneys violates the Due Process Clause by restricting their right to practice their profession. Complaint, ¶ 73; Pl. Mem. at 64-65. This claim has no merit. " A person's 'right' or 'privilege' in the practice of law . . . has never been among those held to be 'fundamental.'" Verner v. State of Colorado, 533 F. Supp. 1109, 1116 (D. Colo. 1982) (upholding a mandatory continuing legal education requirement). Accord Edelstein v Wilenetz, 812 F.2d 128, 132 (3d Cir. 1987).[38] Restrictions on attorneys are, therefore, subject to "only minimal scrutiny under the rational basis test." Verner, 533 F. Supp. at 1116. Accord Conn v. Gabbert, 526 U.S. 286, 292 (1999) (attorneys are "subject to reasonable government regulation"); Martin v. Walton, 368 U.S. 25 (1961); Bedrosian v. Mintz, 518 F.2d 396, 400 (2d Cir. 1975) (government "may establish reasonable rules and qualifications for the practice of law").[39]

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[38] Plaintiffs cite Supreme Court of N.H. v. Piper, 470 U.S. 274, 281-282 (1985), for the proposition that the "right to practice law" was a "fundamental right" for purposes of the Privilege and Immunities Clause of Article IV." Pl. Mem. at 64. The Privileges and Immunity Clause prohibits a state from engaging in certain types of discrimination against residents of other states. Plaintiffs' attempt to equate "fundamental privileges and immunities" under Article IV with a "fundamental right" under the Due Process Clause is misguided. As courts have recognized, "the Privilege and Immunities Clause protects more [rights] than those rights considered fundamental rights protected" by the Due Process Clause. Friedman v Supreme Court of Virginia, 822 F.2d 423, 426 (4th Cir. 1987), cert. denied, 487 U.S. 59 (1988). Accord Tolchin v. Supreme Court of N.J., 111 F.3d 1099, 1114 (3d Cir. 1997).

[39]The cases cited by plaintiffs are not analogous to this case because they deal with "a complete prohibition of the right to engage in a calling." Conn v. Gabbert, 526 U.S. at 292. See Tomanio v. Bd. of Regents, 603 F.2d 255(2d Cir. 1979) (chiropractor lost his ability to practice); Meyer v. Nebraska, 262 U.S. 390 (1923) (foreign language teacher barred from teaching foreign languages); Bradley v. Fisher, 80 U.S. 335 (1872) (attorney prohibited from practicing in the District of Columbia). Bd. of Regents v. Roth, 408 U.S. 564 (1972) (professor with one-year contract did not have a property interest);

In this case, the restrictions placed on attorneys who fall within the definition of the term "debt relief agency" are reasonable. Plaintiffs' allegation that the debt relief provisions "prohibit[s] them from providing the comprehensive and competent legal advice that is the essence of [their] occupation" (Pl. Mem. at 64) is based in large part on a misinterpretation of the debt relief provisions. See supra at 25-28. As explained, the debt relief provisions apply only to attorneys to the extent that they provide bankruptcy assistance to an assisted person seeking to relief under the Bankruptcy Code. See supra at 21-24. They thus have no application to attorneys providing advice on other matters. Second, Section 526(a)(4) does not bar attorneys from advising an assisted person about what the law states. Nor is it a general prohibition against advising an assisted person to incur more debt. Instead, it only prohibits an attorney from advising a person "to incur more debt in contemplation of . . . filing" for bankruptcy. 11 U.S.C. § 526(a)(4). In other words, it only restricts an attorney from giving advice aimed at allowing the debtor to take unfair advantage of the discharge by running up debt because it will not be repaid or otherwise abusing the bankruptcy system (e.g. piling on debt to avoid the means test). See supra at 25-28. Restricting such advice is a reasonable ethical rule and thus does not violate any due process right. See supra at 32-38.

The other provisions dealing with written disclosures and the need for written contracts are also reasonable restrictions and do not deprive plaintiffs of their right to practice law. See supra at 46-61. They simply require a debt relief agency to have a written contract with the assisted persons seeking bankruptcy assistance, to provide them certain written disclosures and to include a two line statement in any advertisements touting directly or indirectly bankruptcy services.

While plaintiffs make general allegations about the burdensome nature of these provisions, none of the allegations made by the plaintiffs in their declarations show that the debt provisions

impose unreasonable burdens. For example, one plaintiff complains that he now needs to "set aside ninety minutes for each prospective client" rather than an hour, and that, as a result, he "can see only six or seven" clients a day rather than "twelve clients." Magleieri Decl. ¶ 15. He further complains that he now "must provide them with a checklist of what they need to bring in." Id. The fact that he must now spend more time with an assisted person seeking bankruptcy assistance, however, does not make the provisions unreasonable. Indeed, just the opposite: the fact that an attorney gives more extensive information to clients is beneficial. As the testimony in Congressional hearings established, debtors complained that they felt their attorneys had not spent sufficient time with them explaining the bankruptcy process. See supra at 10. Similarly the fact that this attorney is now providing his clients with a checklist of the information needed for the petition and the attached schedules of assets and debts helps to insure that the information contained in the bankruptcy petition and the attached schedules is accurate and complete. Moreover, to the extent that the debt relief agency provisions require plaintiffs to spend additional time or effort on bankruptcy cases for assisted persons, they can adjust their fees accordingly. In fact, the declarations submitted by plaintiffs indicate that they have increased their fees to reflect the additional "burdens" associated with the new provisions.

Accordingly, plaintiffs' claim that the debt relief provisions violate an attorney's substantive due process rights should be dismissed.

VIII. FOUR PLAINTIFFS SHOULD BE DISMISSED FOR LACK OF STANDING.

Article III of the Constitution limits the federal courts to the resolution of live "cases and controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992); Diamond v. Charles, 476 U.S. 54, 61-62 (1986); Allen v. Wright, 468 U.S. 737, 750 (1984). "The concept of standing is part of this limitation." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37

(1976). As the Supreme Court has stressed, "the presence of a disagreement, however, sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." Diamond v. Charles, 476 U.S. at 62. Instead, Article III's standing doctrine requires a plaintiff

> to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision. . . ."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

In this case, at least four plaintiffs – Brown & Welsh, P.C., Jeffrey Skylarz, Gerald Roisman, and Wayne Silver – cannot show that they have suffered any injury in fact as a result of the challenged provisions because they are not debt relief agencies.[40] Brown & Welsh represents only creditors. Complaint, ¶ 15. See also Declaration of Thomas J. Welsh, ¶¶ 4-6. The firm, therefore, does not meet the definition of a debt relief agency since it does not provide advice or represent consumer debtors seeking bankruptcy relief. See supra at 21-24.

The allegations made in the complaint are also insufficient to show that Jeffrey M. Sklarz is a debt relief agency. While he states that the practice of his firm includes bankruptcy, he (unlike Mr. Mr. Maglieri, Mr. Melchionne and Mr. Charmony) does not affirmatively allege that he represents or otherwise advises consumer debtors seeking bankruptcy. Compare Complaint, ¶¶ 10-12 with ¶ 13. Moreover, the description of his firm suggests that he does not represent such debtors. He states that

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[40] While the complaint alleges that each of these plaintiffs "may be considered a 'debt relief agency'" under BAPCPA because they provide "bankruptcy assistance," that allegation is based on plaintiffs' misinterpretation of the word "bankruptcy assistance." While factual allegations are accepted as true for purposes of a motion to dismiss, such legal conclusions "masquerading as factual conclusions" are not. Smith v. Local 819 I.B.T., Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002).

his practice "is focused on the representation of individuals and businesses in complex commercial litigation, bankruptcy, tax litigation, pension and employee benefits litigation, employment litigation and construction litigation." Id. at 13. The fact that some of his clients may fall within the definition of an "assisted person" because they have less than $150,000 in non-exempt assets is insufficient. The fact that he may represent such persons in litigation involving a commercial transaction or as a creditor in a bankruptcy proceeding is also not sufficient. To meet the definition of debt relief agency, he must assist, counsel or represent them in filing for bankruptcy. To show that the challenged statutory provisions have an effect on his practice, he must allege sufficient facts to show that he is a debt relief agency. Mr. Sklarz, therefore, failed to meet his "affirmative burden . . . to proffer the necessary factual predicate "to establish standing to challenge the debt relief provisions. Juvenile Matters Trial Lawyers v. Judicial Department, 363 F. Supp.2d at 243 (quoting London v. Polishook, 189 F.3d 196, 199 (2d Cir. 1999).

Similarly it does not appear from the facts alleged in the complaint or his declaration that Gerald A. Roisman is a debt relief agency. The complaint alleges that his practice "focuses primarily on family law matters." Complaint, ¶ 16. The complaint further alleges that "[a]lthough he does not represent debtors or creditors in bankruptcy cases, he is sometimes called upon to discuss the impact that a bankruptcy filed by either his own client or an opposing party may have on his clients' legal rights and obligations." Id. To the extent that he provides advice regarding a bankruptcy petition filed by another person, he would not be a debt relief agency because he would not be providing "bankruptcy assistance" as that term is properly interpreted. To the extent he provides advice regarding a bankruptcy petition filed by another attorney on behalf of his own client, his advice appears limited to the impact of the bankruptcy petition on the clients' rights in the family law matter.

Accordingly, it does not appear from the facts alleged that he provides "bankruptcy assistance" as that term is used.

Finally, while Mr. Silver states that he represents both debtors and creditors in bankruptcy proceedings, the complaint affirmatively alleges that he "has stopped providing bankruptcy advice and counsel for a fee to any person he knows to be an 'assisted person' or 'prospective assisted person.'" Complaint, ¶ 14. Since he has voluntarily stopped representing such clients, he cannot show that he is "injured" by the debt relief provisions.

Accordingly, since these four plaintiffs have not alleged facts sufficient to show that they are a "debt relief agency," this Court should dismiss these plaintiffs for lack of standing to challenge the debt relief provisions.

VIII. PLAINTIFFS HAVE NOT ESTABLISHED ANY IRREPARABLE HARM SUFFICIENT TO SUPPORT THEIR REQUEST FOR A PRELIMINARY INJUNCTION.

For all of the reasons previously stated, plaintiffs have demonstrated no likelihood of success on the merits of their claims. They are, therefore, not entitled to preliminary relief. See Able v. United States, 44 F.3d at 131-32. In any event, plaintiffs have not borne their burden of demonstrating that they will suffer irreparable injury if a preliminary injunction is not granted. See supra at 15-16 (discussing the standards for a preliminary injunction). Here plaintiffs' claims of irreparable injury rest primarily on the assertion that violations of the First Amendment constitute irreparable injury. Pl. Mem. at 27.

This claim is flawed in three ways. First, not all of plaintiffs' claims are tied to the First Amendment. For example, plaintiffs' claim that attorneys are not included in the term "debt relief agency" is a statutory claim. Likewise, plaintiffs' challenge to the requirement for a written contract

and their claim that the restrictions interfere with their ability to practice their professions are essentially due process challenges, which are reviewed under a rational basis test. Plaintiffs cite no cases to support that such substantive due process claims by their nature constitute irreparable injury Indeed, they cannot. As this Court has noted, plaintiffs "must establish the existence of irreparable harm on their non-First Amendment claims." Piscottano v. Murphy, 317 F. Supp.2d 97, 103 (D. Conn. 2004). While plaintiffs complain that the restrictions may impose some burdens, the circumstances are not analogous to the cases that they cite involving plaintiffs who were completely deprived of their livelihoods. See Roso-Lino Beverage Distribs., Inc. V. Coca-Cola Bottling Co., 749 F.2d 124, 125-26 (2d Cir. 1984) (termination of a distributorship); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (loss of a franchise).

Second, even with respect to claims of First Amendment violations, courts have found that the assertion of First Amendment rights does not automatically require a finding of irreparable injury. Bronx Household of Faith v. Bd. of Education, 331 F.3d 342, 349 (2d Cir. 2003). "Unless a governmental directive limits protected speech directly . . . , the Second Circuit has required that the First Amendment plaintiffs seeking an injunction demonstrate tht the challenged governmental action has had or likely will have an actual chilling effect on speech." Pincottano v. Murphy, 317 F. Supp.2d at 103. Plaintiffs' First Amendment challenges to Sections 527 and 528 involve disclosures, not direct restrictions on speech. As the Supreme Court found in Zauderer, 471 U.S. at 651, an individual's "constitutionally protected interest in not providing any particular factual information . . . is minimal."

Third, in any case, plaintiffs' allegation of irreparable harm is undercut by their delay in requesting such relief. In this case, the BAPCPA was enacted in April 2005 and became effective on October 17, 2005. Nevertheless, plaintiffs did not file this suit until May 11, 2006, over a year

after it was enacted and seven months after the challenged provisions became effective. A delayed filing of suit or movement for preliminary injunction weakens any claim of irreparable injury. The Second Circuit has recognized this very point in the context of infringements of trademarks. Tough Traveler, Ltd. V. Outbound Products, 60 F.3d 964, 968 (2d Cir. 1995); Majorica, S.A. v. R.H. Macy & Co., 762 F.2d 7,8 (2d Cir. 1982); Citibank, N.A. v. Citytrust, 756 F.2d 273, 277 (2d Cir. 1985). In cases alleging infringement of trademarks, like the cases alleging violation of the First Amendment, courts have presumed irreparable injury in the context of preliminary injunctions. Where there is delay in seeking such relief, courts have held that such delay rebuts any presumption of irreparable injury because the delay "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."' Citibank, N.A. v. Citytrust, 756 F.2d at 277. A delay in seeking an injunction of as little as seven months has defeated a motion for preliminary injunction. Worldwide Sport Nutritional Supplements, Inc. v. Five Star Brands, Inc., 80 F. Supp.2d 25, 34-35 (N.D.N.Y.1999).

Accordingly, plaintiffs have failed to show any support for their claim of irreparable injury.

CONCLUSION

For the above stated reasons, plaintiffs' motion for a preliminary injunction should be denied, and defendants' motion to dismiss should be granted

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT BAR ASSOCIATION , NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, CHARLES A. 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 United States Attorney General), and DIANA G. ADAMS (in her official capacity as United States Acting Trustee, Region 2) Defendants.	)	Civil Action No. 3-06-CV-729-CFD

CERTIFICATE OF SERVICE

IT IS CERTIFIED that I have caused the foregoing **Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction and Appendix** to be electronically filed, which will result in automated electronic service, on June 30, 2006, for the same by the Court's ECF system and, in addition, to the extent any of the following are not indicated as served on the ECF confirmation notices, I will immediately cause them to be served by First Class Mail, postage prepaid, as follows:

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