IN THE SUPREME COURT OF THE UNITED STATES

MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL., Petitioners v. UNITED STATES; No. 08-1119

and

UNITED STATES, Petitioner v. MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL. No. 08-1225

Washington, D.C.

Tuesday, December 1, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

G. ERIC BRUNSTAD, JR., ESQ., Hartford, Conn.; on behalf of Milavetz, Gallop & Milavetz, P.A., et al.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-1119, Milavetz, Gallop & Milavetz v. United States and United States v. Milavetz.

Mr. Brunstad.

ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

ON BEHALF OF MILAVETZ, GALLOP & MILAVETZ, P.A., ET AL.

MR. BRUNSTAD: Mr. Chief Justice, and may it please the Court:

Section 526(a)(4) is unconstitutional because it proscribes truthful information about entirely lawful activity, it whipsaws the attorneys who are trying to apply it, it creates an impossible situation for them, and it harms the client.

JUSTICE KENNEDY: If it were confined to unlawful activity and narrowly drawn, do you concede that such a statute would be constitutional?

MR. BRUNSTAD: Perhaps, Justice Kennedy, but the real challenge is to actually do that narrowing.

JUSTICE KENNEDY: You say "perhaps." Yes or no? Can Congress by an appropriately, an appropriately drawn narrow statute, prohibit attorneys from advising,

A, criminal conduct in reference to a bankruptcy; or, B, civil conduct -- conduct that is improper under the civil code because it's a fraud on creditors?

MR. BRUNSTAD: Yes, Justice Kennedy, if it were narrowly drawn to apply to criminal activity or fraudulent activity, yes. Those terms have well-established meanings. We know how to apply them. This statute, of course, does not do that.

Now, the government does not defend the statute as written. The government seeks to rewrite it, but the manner in which the government seeks to rewrite the statute really doesn't work under the statutory terms. We do not have that guidance.

The government in its brief proposes three different formulations of how it might be narrowed. None of those work, even if we -- we were to accept any of those formulations. We don't know what "abusive conduct" means. The government simply would trade a First Amendment problem for a vagueness problem. We do not have --

JUSTICE GINSBURG: But there's already in the statute an -- a required attestation from the lawyer who signs a bankruptcy petition that the petition does not constitute an abuse. This is 707(b).

MR. BRUNSTAD: Yes, Justice Ginsburg.

JUSTICE GINSBURG: And the words are something like "does not constitute an abuse." So apparently it has meaning there. Why doesn't -- why don't we say, well, whatever it means in 707(b), it also means in 5, whatever it is.

MR. BRUNSTAD: Two reasons, Justice Ginsburg. First, the 707(b) abuse standard is a completely different context. It involves gatekeeping to the access to bankruptcy relief.

The second reason is that Congress -- there is no indication whatsoever, in the legislative history or elsewhere, that Congress intended to import the abuse standard under Section 707 into the 526(a)(4) context.

JUSTICE KENNEDY: Well, again in the hypothetical context, could Congress enforce by a statute what it requires in the attestation clause?

MR. BRUNSTAD: No, Justice Kennedy, because the abuse standard is too nebulous to satisfy, I think, scrutiny under the First Amendment.

JUSTICE KENNEDY: You think the attestation clause cannot be the basis for sanctioning an attorney.

MR. BRUNSTAD: It can be the basis for sanctioning an attorney --

JUSTICE KENNEDY: I mean, how can that be if it's too vague.

MR. BRUNSTAD: Well, I think, Your Honor, that the gateway to the bankruptcy procedures or basically provisions, like section 707 or in the Chapter 11 context, basically are equitable inquiry that looks into the totality of the circumstances, whether what the lawyer has done or what the debtor has done -- and really it looks to what the debtor has done -- would be such that it would deny access to bankruptcy relief. Has the debtor engaged in inequitable conduct, engaged in inequitable conduct in some way that would basically shut the door to bankruptcy relief?

JUSTICE KENNEDY: The attestation clause is designed to ensure that the attorney has performed in an ethical and proper way, I take it.

MR. BRUNSTAD: In a sense.

JUSTICE KENNEDY: Isn't that one of its purposes?

MR. BRUNSTAD: I think it goes more towards the attorney checking the information that the debtor has basically provided in the petition and elsewhere to make sure that the information that's provided is accurate and that the bankruptcy petition is not being proposed in essence for an abusive purpose.

JUSTICE KENNEDY: I won't take up too much more of your argument, but it just seems to me odd that

you can enforce an attestation clause, but not a statute that does the same thing. I don't understand the principle for that. You say it's a gateway and it's designed to facilitate the bankruptcy process. Well, the government could say the same thing about its statute.

MR. BRUNSTAD: Except, I think, Your Honor, that whereas for the purposes of getting into bankruptcy or staying in bankruptcy is one standard that courts apply basically on an equitable basis, that analysis -- what Congress did there, it didn't have in mind First Amendment concerns. It didn't have in mind trying to narrowly tailor the statutory regime so that lawyers basically can understand what they are doing in a way and communicate it to their client.

JUSTICE KENNEDY: Well, Congress often forgets about the First Amendment, but lawyers don't.

MR. BRUNSTAD: That's true, Your Honor, and that's the heart of the problem here. The problem here is that when Congress basically -- first of all, Congress didn't import the 707(b) standard into 526(a)(4).

JUSTICE GINSBURG: What are the words in 707(b)? I mean, they are both in the statute. What the lawyer has to attest to is required by statute.

MR. BRUNSTAD: That is true, Justice Ginsburg. But there is no evidence that Congress, in the legislative history or otherwise, that Congress intended the 707{b} standard to be the standard that governs what the lawyer can tell the client under section 526 (a)(4).

JUSTICE STEVENS: But isn't there another problem? Even if Congress didn't think of the problem, don't we have the duty to construe the statute to avoid constitutional problems if there is any reasonable basis for doing so?

MR. BRUNSTAD: Yes, Justice Stevens, but this statute is not reasonable susceptible to the government's interpretation.

JUSTICE STEVENS: That is an entirely different argument from the fact that Congress didn't think of this problem.

MR. BRUNSTAD: That's correct, Justice Stevens. But the problem here is that what the government has tried to do is tease out a standard from the "in contemplation of" language in 526(a)(4), and the problem is that -- two problems: One, the "in contemplation of" language only modifies half the statute, so the "or pay the attorney" prong is not even addressed by the government's construction. They kind

of ignore that.

The second problem is that the "in contemplation of" language cannot bear the weight the government would have it bear.

JUSTICE ALITO: What do you think that means? What do you think "in contemplation of bankruptcy" means?

MR. BRUNSTAD: I think it means what the Court said it meant in the Pender case interpreting section 60(d) of the former Bankruptcy Act of 1898. That is, whether bankruptcy is likely or imminent; in contemplation of bankruptcy, taking some action where a bankruptcy case is imminent or likely.

Now, it appears --

JUSTICE ALITO: Well, let's say someone goes to the lawyer and they discuss the person's debt situation and the decision is made that a bankruptcy petition is going to be filed at some future date. Do you think that everything that that person does after that point is done in contemplation of bankruptcy?

MR. BRUNSTAD: Not necessarily, Justice Alito?

JUSTICE ALITO: Well then, why not? The person drives home in contemplation of bankruptcy, the person has lunch in contemplation of bankruptcy.

MR. BRUNSTAD: Well, I think that would --
JUSTICE ALITO: Doesn't it mean -- "in contemplation of bankruptcy" means because of the expectation of filing a bankruptcy petition later?
MR. BRUNSTAD: I think that that would assume that the filing of the bankruptcy petition looms entirely in the consciousness of the debtor when the debtor does everything. But I do -- I do think that the "in contemplation of" clause, which is also used in section 529, is a neutral phrase. "In contemplation of" means nothing more than is the bankruptcy filing likely? It doesn't have any nefarious, it doesn't have any abusive context to it at all.
For example, section 329 --
JUSTICE SCALIA: Wait. It doesn't mean is it likely. "In contemplation of" means that the reason you are doing this is the contemplated bankruptcy. You don't see any causal connection in that phrase?
MR. BRUNSTAD: I do see a causal connection, but there is no element of doing something improper in the language "in contemplation of."
JUSTICE SCALIA: Well, that's true. That may be true enough. But -- but the act must be taken because you are about to file a bankruptcy petition.
MR. BRUNSTAD: Yes, Justice Scalia. But the

government relies and hinges its argument on the abusive connotation to the "in contemplation of."

JUSTICE SCALIA: That's a different question.

MR. BRUNSTAD: That doesn't exist. So what the government is trying to do is rewrite the statute by importing meaning into a phrase that has never been there and doesn't exist there.

Every time we see the "in contemplation of" phrase appearing either under the current law or under a prior law, if there was some element of abuse coupled with it that was separately stated, and of course there is no separate statement here.

Now, again I go back to the fact that this -- the practical effect of section 526(a)(4) is to make an impossible situation for attorneys. We have two regimes: One under applicable normal ethical State bar rules which say you have to give unfettered candid advice to your client; and this provision which gives you must give truncated advice; there are thing you cannot say. But whether you are in one regime or another depends upon whether the debtor is --

JUSTICE SOTOMAYOR: Is there a -- is there a difference between unethical and illegal advice?

MR. BRUNSTAD: I think --

JUSTICE SOTOMAYOR: As an attorney can you under -- give unethical advice?

MR. BRUNSTAD: Yes, I think so, Justice Sotomayor.

JUSTICE SOTOMAYOR: Under the State rules you can give unethical advice as a lawyer?

MR. BRUNSTAD: You cannot, no. That is proscribed by the State rules.

JUSTICE SOTOMAYOR: So if you are not permitted to do so, what in the First Amendment would otherwise give you that right? I mean, this is a commercial transaction of sorts. It's a fiduciary duty, but it's a commercial transaction. They are coming to you and they are paying you for certain advice, so why would the person then protect your right to give unethical advice.

MR. BRUNSTAD: It wouldn't protect your right to give unethical advice. The problem is that the statute sweeps within it's scope perfectly truthful advice about lawful activity.

JUSTICE SOTOMAYOR: We are assuming that it's not read with a limitation with respect to abusive conduct.

MR. BRUNSTAD: Correct. But just as --

JUSTICE SOTOMAYOR: Assuming that is read

into the statute or is viewed as part of "in contemplation of bankruptcy," what in the First Amendment would make that be?

MR. BRUNSTAD: The First Amendment would not protect unethical advice. The problem, though, is that the term "abusive" which the government wants to interlineate into the statute is itself inherently vague, unlike "fraudulent conduct --

JUSTICE SOTOMAYOR: Which doesn't explain why.

MR. BRUNSTAD: Because "abusive," it's like "seditious utterances." It's not something which a normal person who just looks at it would be able to understand what it means.

JUSTICE SOTOMAYOR: You don't understand what it means as a lawyer?

MR. BRUNSTAD: I have some ideas about what means. But because of the onerous sanctions that section 526(c) imposes, if I'm wrong I can be basically subject to a whole panoply of remedies, some very serious remedies and very serious punishments for making a mistake. And that's one of the problems under the First Amendment --

JUSTICE SCALIA: What if you leave "abusive" out. Let's accept your point that "abusive" is not

there and the government is reading in out of nowhere. What's -- what's the matter with the statute then?

MR. BRUNSTAD: I'll give you -- -

JUSTICE SCALIA: It just prohibits giving advice in contemplation of bankruptcy that somebody incur more debt. What's unlawful about that?

MR. BRUNSTAD: Well, I'll give you -- I'll give you a perfect example. Suppose the debtor's problem is that he lives in a house that is too expensive for him. He comes to the lawyer: I'm in financial distress. The lawyer suggests -- the lawyer would logically suggest: Why don't you sell your house and rent an apartment? But the signing of the lease is incurring debt, the lease obligation.

JUSTICE SCALIA: But that's not in contemplation of bankruptcy.

MR. BRUNSTAD: It would be, Justice Scalia, if the debtor comes to you in financial distress, is thinking about filing for bankruptcy, and wants the advice in that context.

JUSTICE SCALIA: If the only reason the lawyer gives the advice is because he knows that this -- that this debtor is planning to file bankruptcy, he says, if you are going to file bankruptcy, you better sell the house and move to an apartment, then it's no

good. Now, it may be a stupid law, but I don't see why it's -- why it's unconstitutional.

MR. BRUNSTAD: Because it's perfectly legitimate advice about perfectly lawful activity.

JUSTICE SCALIA: So it's a stupid law.

MR. BRUNSTAD: Well, what happens is that basically it interferes with the lawyer's ability through speech to communicate full and candid advice to the client.

JUSTICE SCALIA: Exactly. And that's why it's a stupid law.

MR. BRUNSTAD: And ultimately under --

JUSTICE SCALIA: Now, where is the prohibition of stupid laws in the Constitution?

(Laughter.)

MR. BRUNSTAD: Justice Scalia, I think the problem here is that this stupid law does not pass either strict scrutiny and it is substantially overbroad.

CHIEF JUSTICE ROBERTS: How much of your case depends upon the difficulty of defining what -- if you accept the idea that "in contemplation of" means abusive or fraudulent, how much of your case depends upon the proposition that it's just hard to tell, that it's -- it's a multifactored inquiry and that the lawyer

sort of has to stop and think at every turn: Well, could this be construed as recommending abuse, or is this just construed as telling clients what they can and can't do? And in some areas it's a gray area, and what should you do when it's a gray area?

Is that -- does your case depend upon that, which is, I guess, just an issue with the limiting construction proposed by the Solicitor General?

MR. BRUNSTAD: It doesn't turn on that, but that demonstrates the chilling effect. The effect of the statute has been to drive conscientious bankruptcy counsel from the practice. Why? Because it's not just difficult to apply; it's often impossible to apply. The whole statute turns on whether the debtor, the client or prospective client, is an assisted person, which depends on the relative wealth of the client, which is something very, very difficult to determine at any particular given point in time.

So the lawyer doesn't know: Am I restricted in my speech under 526(a)(4) because that applies or does 526(a)(4) not apply at all because I am not dealing with an assisted person, such that I am under normal State bar rules which requires me to give unfettered advice?

And since that is impossible to know without

detailed, careful analysis of the relative wealth of the client, the statute is basically impossible to apply.

JUSTICE KENNEDY: Well, if we assume a proper limited construction -- I know you disagree with that, but if we assume that we can limit the statute properly so that it applies just to unethical conduct, then you can't give that advice to anybody, and the fact that assisted persons is a subclass of that is irrelevant.

MR. BRUNSTAD: That would be true, Justice Kennedy, if in fact we could tease out from the abusive conduct, if people could actually understand what "abusive" meant. Does that proscribe -- what does it proscribe? It's too vague.

JUSTICE KENNEDY: Yes, but that doesn't go to your other point that there's a problem in determining the class of persons. If it's unethical, you can't give it to anybody. And the fact that the class of persons is difficult to understand is irrelevant.

MR. BRUNSTAD: Yes, Justice Kennedy, but that assumes that we can do the narrowing construction, I think as Your Honor points out. And that, again, is a fundamental problem because the standard the government would like to impose or interlineate in the statute is

entirely vague.

JUSTICE GINSBURG: You want to -- I mean, your first point is -- and we never get to that question because lawyers shouldn't be under this act at all. They shouldn't be labelled debt relief agencies.

MR. BRUNSTAD: Yes, Justice Ginsburg. Our point on the statutory construction piece is that the statute is ambiguous and that to avoid the constitutional questions -- actually, avoid two constitutional questions here, the constitutional question under 526(a)(4) and then a separate constitutional question under 528(a)(4) and (b)(2)(B) --

JUSTICE SCALIA: It's only lawyers who are protected against vague criminal statutes?

MR. BRUNSTAD: Certainly not, Justice Scalia, which is why --

JUSTICE SCALIA: So then -- so then there is no reason in particular to take lawyers out of it just to make it constitutional.

MR. BRUNSTAD: Well, our argument there, Justice Scalia, is that the statute does not unambiguously embrace attorneys. "Attorney" is not mentioned in the definition of "debt relief agency" in 101(12)(a) where you think it would be, because wherever Congress has otherwise intended to regulate attorneys in

connection with bankruptcy practice, it has used the word "attorney" specifically.

JUSTICE SCALIA: That's fine. If you -- if you are letting that argument stand on its own, that's a fine argument. But don't -- don't bring in the fact that, well then, moreover, if it's applied to attorneys, it's unconstitutional, because if it's applied to anybody it's unconstitutional according to your argument.

MR. BRUNSTAD: That is also true, Justice Scalia, because we do make a substantial overbreadth argument. The statute is substantially overbroad.

JUSTICE BREYER: Now, but when you say it isn't referred to, it seems to me to be referred to. It says "The term 'debt relief agency' means 'any person who provides any bankruptcy assistance to an assisted person." And the term "bankruptcy assistance" is defined to include "appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding."

Doesn't a lawyer provide legal representation?

MR. BRUNSTAD: A lawyer does, Justice Breyer.

JUSTICE BREYER: All right. So doesn't the

term "provide legal representation" include a lawyer?

MR. BRUNSTAD: The problem, Justice Breyer, is that I think when Your Honor was quoting from section 101(4A), Your Honor took out a whole lot of information that goes between the word "bankruptcy assistance" and "legal representation."

JUSTICE BREYER: Yes; they include other people besides lawyers.

MR. BRUNSTAD: Not only that, but I think that that language is inherently ambiguous. What is Congress getting at there?

JUSTICE BREYER: I don't know. What is it getting at with "providing legal representation with respect to a case"?

MR. BRUNSTAD: That would seem to be with respect to lawyers.

JUSTICE BREYER: It would seem to be a lawyer.

MR. BRUNSTAD: But it's precluded -- it's preceded by language, "any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, et cetera, about legal representation."

JUSTICE BREYER: Yeah. Those are other people who are covered.

MR. BRUNSTAD: Well, not just other people, but what it looks like, is it looks like what Congress was getting at was people who provide things like what attorneys provide.

Now, there are a whole host of problems with including attorneys within the definition of "debt relief agency." I mean, it's counter -- it's contrary to the purpose of what Congress seemed to be getting at. It leads to anomalous results. It does various things.

JUSTICE GINSBURG: How is it any different from including lawyers within the category "debt collectors," which lawyers objected to in this Court unsuccessfully?

MR. BRUNSTAD: Yes, Justice Ginsburg. But there it was interesting. There, there -- in the Heintz case, that was a situation where lawyers had been expressly excluded from the statutory regime, then Congress repealed the exclusion, so a clear signal to include attorneys.

Here, we have the opposite. We have a very ambiguous legislative history, where in the initial version of this legislation the House report accompanying it said lawyers were included and the language was "debt relief counseling agency." Then Congress amended the statute -- Congress amended the

proposed legislation in 1999, and thereafter in the 2001, 2003, and 2005 House reports deleted all reference to attorneys -- a very, very strange tale, which seems to signal exactly the opposite of the Heintz case.

So we have a very ambiguous legislative history that seems to give us a contrary signal. That in part is part of the ambiguity behind this statute, which I think is one of the reasons why it's perfectly -- the statute is readily susceptible to an interpretation --

JUSTICE GINSBURG: I thought that in the legislative history there were examples of lawyers overreaching, that the conduct that Congress was aiming at was engaged in by lawyers, as well as others.

MR. BRUNSTAD: There are some references in the legislative history to that, Justice Ginsburg. There are a few scattered references in the legislative history.

But again, the legislative history is very ambiguous. It seems to go in lots of different directions. Now, recall, Justice Ginsburg --

JUSTICE KENNEDY: I have heard of referring to legislative history when the statute is ambiguous. I haven't heard of referring to legislative history to make the statute ambiguous.

MR. BRUNSTAD: Yes, Justice Kennedy. I think the statute is ambiguous for a whole host of reasons, and the legislative history does not clear up the ambiguity; it actually deepens it. So the legislative history reinforces the other indicators, the textual indicators, of in fact ambiguity here.

But I think -- I think it is also important to underscore not only would the constitutional avoidance, application of that canon here, by excluding attorneys from debt relief agencies solve the problem under section 526(a)(4), but also under section 528(a)(4) and (b)(2)(B). 528 --

JUSTICE SOTOMAYOR: Before you go on on 528, could you clarify for me: What is your challenge to 528? Is it a normal --

MR. BRUNSTAD: 528, Justice Sotomayor?

JUSTICE SOTOMAYOR: 528.

MR. BRUNSTAD: Yes, Justice Sotomayor.

JUSTICE SOTOMAYOR: Is it a normal facial invalidity? Is it an overbreadth invalidity? Is it an as-applied challenge? What exactly are you claiming with respect to that --

MR. BRUNSTAD: Does Your Honor mean 526 or 528?

JUSTICE SOTOMAYOR: 528.

MR. BRUNSTAD: 528. 528, the disclosures in the advertising provision?

JUSTICE SOTOMAYOR: Yes.

MR. BRUNSTAD: We are challenging that on as-applied it violates the Constitution --

JUSTICE SOTOMAYOR: Can you tell me how you have an as-applied challenge when I don't even know what ad is at issue?

MR. BRUNSTAD: Yes, Your Honor. I think it's the same as the Cincinnati case, where in fact there was no obligation that the handbills that were being distributed were any way deceptive or misleading. That's the same situation here. The district court --

JUSTICE SOTOMAYOR: I -- I have scoured the record for a handbill, meaning -- an advertisement --

MR. BRUNSTAD: Yes.

JUSTICE SOTOMAYOR: -- by you that I could look at and say, you know, I'm looking at it and it's not misleading. So where is it in the record?

MR. BRUNSTAD: The ads are not in the record. But, as the district court found, there is no evidence suggesting that bankruptcy assistance advertisements that -- that Petitioners' bankruptcy advertisements are deceptive in any regard. The government never alleged that Petitioners engaged in any

deceptive advertising. That's --

JUSTICE SOTOMAYOR: I -- I truly have never heard of an as-applied challenge when we don't know what it is being applied to. But putting that aside, so you have an as-applied challenge; do you have a facial challenge or an overbreadth challenge?

MR. BRUNSTAD: With respect to the advertisements with the commercial speech?

JUSTICE SOTOMAYOR. Yes, the 528.

MR. BRUNSTAD: No, it's not a -- it's not a facial challenge; it's an as-applied challenge. But here -- here's the point on the evidentiary point. The government never sought to introduce that evidence because it's not at issue. There is no dispute that Petitioners' advertisement is not -- is --

JUSTICE SOTOMAYOR: Did the government bring this lawsuit below?

MR. BRUNSTAD: We brought this lawsuit as a declaratory judgment action.

JUSTICE SOTOMAYOR: So what, were they supposed to scour your advertisements to find the violation? Was that it?

MR. BRUNSTAD: No, unless there was an allegation that in some way Petitioners' advertisements were misleading. It's not. It's not a disputed

question. It's not a disputed factual question.

There is no dispute, and the district court basically found that there is no allegation that Petitioners' advertising is deceptive or untruthful in any way. So Petitioners' advertising is not of the kind that Congress was trying to target.

Now, the problem and the burden that 528 imposes is that it requires counterfactual, misleading statements that interfere with legitimate advertising messages. That's the problem. The statute is not narrowly tailored under Central Hudson to address the "make debts disappear" problem the government identifies as animating this particular statute.

Let me give a simple illustration to sort of illustrate my point. Suppose I sell bread and the government required me to say -- disclose: I am a bread supply agency; I sell products that contain wheat. Well, what if the bread I sell does not contain wheat, it's wheat-free? Forcing me to make that statement is counterfactual and misleading. That's what this statute does. If I also sell milk, it requires me to make the statement: I am the bread relief -- the bread supply agency --

JUSTICE SOTOMAYOR: Could I ask you something? When you are an attorney advertising as an

attorney who gives advice on bankruptcy, why aren't you a debt release -- relief advisor?

MR. BRUNSTAD: The problem, Justice Sotomayor, is that that statement inherently is misleading. When lawyers -- when clients look for lawyers, bankruptcy lawyers or just lawyers in general, they don't want to see someone called a debt relief agency. It conveys no meaningful information. In fact, it's misleading. What does that mean?

JUSTICE GINSBURG: They don't want to be -- lawyers don't want to be called debt collectors either, and in this, the Fair Debt Collection Act, it says that -- that communication must say the communication is from a debt collector, except that formal pleadings are not -- you don't have to identify. It seems to me that that -- that would be a harder thing for a lawyer to do, to identify herself in an advertisement as, I am a debt collector, than I am a debt relief agency.

MR. BRUNSTAD: Yes, but the debt collection statute doesn't require that in advertising. It requires that in letters and things like that that go to other parties where you are actually trying to help collect the debt. So it's a communication that the lawyer is making, for example, and a disclosure that's required.

Here putting in your advertising "I'm a debt relief agency" conveys no meaningful information to the public. In fact, it is misleading.

JUSTICE KENNEDY: Well, A, I suppose you don't have to advertise; or B, if you do, you can say in your bread hypo: Under the Federal law we have bread, but our bread is -- I don't know -- gluten-free or whatever. You can use --

MR. BRUNSTAD: Yes, Justice Kennedy.

JUSTICE KENNEDY: You can always add -- add in order to make it non-misleading.

MR. BRUNSTAD: But that would require a statement in our advertising that is actually -- to make it fundamentally dissimilar to the statement that's being actually imposed on us, we have to say -- we have to put in the advertising something like "This product contains wheat." Then we also have to say, but my product doesn't.

So, for the consumer who is looking at the information, it's inherently misleading because the two conflict.

JUSTICE SCALIA: This is a proposal for a commercial transaction, right? You are trying to get a consumer to hire you. And the First Amendment standards for proposals for commercial transactions have always

been more -- more lenient than other First Amendment contexts.

We -- we -- we regulate the content of advertising all the time.

MR. BRUNSTAD: Yes, Justice Scalia, but this statute is odd because it requires counterfactual information, it's not narrowly drawn to address the problem the government identifies.

JUSTICE SCALIA: I don't know --

JUSTICE ALITO: If a law firm -- if a law firm provides representation for debtors in bankruptcy, what is misleading about requiring them to say: We help people file for bankruptcy relief under the Bankruptcy Code?

MR. BRUNSTAD: Because the scope of 528(b)(2)(B) is so broad. If I am advertising mortgage foreclosure services having nothing to do with bankruptcy, I still must make this counterfactual statement. 528 -- for example, in my bread hypothetical, if I am also selling milk, and the government says when I am selling milk through my milk advertisement I have to say I am a bread supply agency, I sell products that contain wheat, that is misleading and irrelevant to the milk advertisement.

But this statute does the same thing. If I

am advertising eviction protection services having nothing to do with bankruptcy or mortgage foreclosure services representation having nothing to do with the bankruptcy, I have to make these counterfactual statements that are inherently misleading.

If there are no questions at the moment, I would like to reserve my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Brunstad.

Mr. Jay.

ORAL ARGUMENT OF WILLIAM M. JAY

ON BEHALF OF THE UNITED STATES

MR. JAY: Mr. Chief Justice, and may it please the Court:

I would like to begin with the threshold statutory question if I may. I have only a few points on that.

A debt relief agency is any person who provides specified services to specified clients for pay. An attorney is a person, a defined term under the Bankruptcy Code, and the Petitioners have affirmatively alleged in their complaint that they provide bankruptcy assistance to assisted persons. We think that is all that is required to determine that they are debt relief agencies under the statute.

JUSTICE GINSBURG: What about the provision that says the directors, employees, are not included?

MR. JAY: As I understand Petitioners' argument about that provision, it is that Congress would surely have made an exception for partners as well had it intended to include attorneys. We think that that is a multi-step chain of reasoning that breaks down at each step.

Congress made an exception from the definition of "debt relief agencies" for officers and employees of the business that is itself a debt relief agency. Partnerships, of course, have employees as well, and a run-of-the-mill employee of a partnership who doesn't provided the bankruptcy assistance services himself is not himself a debt relief agency.

JUSTICE GINSBURG: What about an associate?

MR. JAY: I think, Justice Ginsburg, an associate is an employee, so if the associate in a law firm provides -- doesn't provide the bankruptcy assistance herself, then she is not a debt relief agency. It's the -- because any person is defined under the Bankruptcy Code to include individual partnership or corporation. That is Section 101(41). It's the law firm that provides the services, is a person who provides the services and therefore a debt relief

agency. I suppose an individual who provides the services himself or herself might be an agency, a debt relief agency, as well.

But we don't think that the absence of a specific exception for partners of a partnership tells us anything that would derogate from the plain meaning of the defined terms in the statute. The fact that partners are liable for actions of the partnership is a commonplace of partnership law. And it's also not the case that all attorneys practice in partnerships. The Petitioner law firm is a professional corporation and one of the individual Petitioners is a director of that -- of that professional corporation.

JUSTICE BREYER: What he -- what I think his argument is, as I understand it, is if you look at the definition of "bankruptcy assistance," you will see there are seven different things that a person could do and fall within that definition. And all of those seven things are probably provided by the kinds of agencies you see advertised on television, which say: We will help you with your debts. And they probably aren't lawyers.

And, so, if you look at the six of the seven things, it's clear that all of those are provided by those television companies. And the seventh is simply

added in, namely the providing legal representation, to be a catch-all to be sure that if one of those companies actually does something that is legal representation, even though they are not lawyers, they are caught, too.

So he is saying, read the whole paragraph and then you will see they are after the companies that appear on television and they're not after lawyers. And then he says that's the history of the bill, and so forth and so on. Okay.

Now, that's the argument, and so it isn't -- can't quite be brushed off as quickly, I think, as you did.

MR. JAY: Well, I -- I am happy to respond to it in further detail. I think that the -- first, the reference to appearing in a case or proceeding on behalf of another, that can only refer to lawyers. Even if as you --

JUSTICE BREYER: Why? I mean, there could not only be lawyers. I mean, there are numerous proceedings where your brother, your mother, your cousin, your friend appears for you. They say: Bring a friend, bring one of us.

(Laughter.)

JUSTICE BREYER: We will charge you very little, we will save you money. I am a lawyer, by the

way.

(Laughter.)

MR. JAY: That's right, Justice Breyer, and I think --

JUSTICE BREYER: I have relatives who aren't, and you can bring one of them.

MR. JAY: But appearing -- appearing in a case or proceeding under this title, Your Honor, means entering an appearance in court. I think that's -- that's the natural reading of that phrase. And Petitioners have suggested that this is an attempt to catch the unauthorized practice of law. But certainly neither the plain meaning nor the legislative record suggests that people who are not lawyers were actually engaging in conduct so brazen as to show up in Federal Bankruptcy Court, enter -- file a notice of appearance and purport to be a lawyer. That is not what this statute is intended to catch.

At any rate, the legislative history I think amply supports our view. Page 21 of our brief collects a number of citations to the legislative record specifically referring to attorneys.

As for the point Mr. Brunstad made about the change in the drafting history of this bill from "debt relief counseling agency" to "debt relief agency," that

change was made in 1999. And in the House report accompanying the 1999 version of the bill, which had changed from "debt relief counseling agency" to "debt relief agency," the House report said, "It applies to attorneys, as well as to non-attorneys, such as petition preparers. That is page 120 of House Report 106-123.

So I think that amply refutes the point about the drafting history.

But in any event, if the Court were to look at legislative history, we think that the provisions of the 2005 House report accompanying the bill that actually was enacted are the most probative, and we've cited two references on page 21 of our brief that we think amply demonstrate that attorneys are included.

If the Court has no further questions about the --

CHIEF JUSTICE ROBERTS: So, if -- if -- if lawyers are debt relief agencies, I am curious how your limiting construction works. If a client comes into a lawyer and says, look, I know we are thinking of filing bankruptcy, but I want to go to Tahiti and charge it; can I do it? And the lawyer says: Oh, the law says I can't give you advice in contemplation of bankruptcy; the Solicitor General says that means I can't give you advice in aid of fraud that would deprive debtors of

assets they might otherwise get, so I can't tell you.

MR. JAY: Well --

CHIEF JUSTICE ROBERTS: Has that person violated -- has that lawyer violated the statute?

MR. JAY: I don't think so, Your Honor. The statute prohibits only advice to incur more debt in contemplation of bankruptcy.

CHIEF JUSTICE ROBERTS: Well, the person has asked, can I charge the trip to Tahiti? And the lawyer, although giving perfectly truthful advice, has effectively conveyed to his client that if he does he would be depriving debtors of assets they might otherwise get.

MR. JAY: But the lawyer in your hypothetical, Mr. Chief Justice, has not advised the client to take the trip; it has not advised the client to do that.

CHIEF JUSTICE ROBERTS: He has communicated to the client that if he takes the trip, one, he will have a good time in Tahiti; and two, he will be using assets that would otherwise end up in the hands of the debtors.

MR. JAY: I suppose that, you know, there might be a fact question about whether a particular wink and nod communication between an attorney and client

were in fact advice to engage in the transaction, that's prohibited under the Bankruptcy Code, the fraudulent or abusive transaction.

CHIEF JUSTICE ROBERTS: What if -- what if the lawyer said: I can't give you advice in contemplation of bankruptcy, but here's the Solicitor General's brief, read that.

(Laughter.)

CHIEF JUSTICE ROBERTS: And a reasonable -- my point is a reasonable person reading the brief would say, well, the reason he can't give me advice is because that might cause me to do something that would defraud the debtors, so I'm going to buy the ticket.

MR. JAY: Well, if -- if that debtor reads our brief, that debtor will also see that there are serious consequences for the debtor himself, which is precisely why Congress passed this statute providing for relief for the debtor against the attorney who provides this unethical or abusive advice.

An attorney -- sorry. A client who incurs additional debt intending to defraud the creditor may not be able to obtain a discharge of that debt and indeed may not be able to obtain a discharge in bankruptcy at all.

CHIEF JUSTICE ROBERTS: Well, that's one of

the things I'm concerned about your limiting construction, "intending to defraud the debtor." What if the person takes a trip to Tahiti every November? They've always done it. They are not intending to defraud the debtor. They are just doing what they have always done. So an attorney that gives that advice, would be -- that would be okay?

MR. JAY: Well, Mr. Chief Justice, I think the Culver case, a -- a disciplinary case that we referred to in our brief, is a good illustration of this. Fraud turns on the defrauder's intent as a -- as a general matter. And when someone --

CHIEF JUSTICE ROBERTS: So if -- so if the lawyer said that, I can't give you advice in contemplation of bankruptcy, but I can tell you that fraud turns on the debtor's intent?

MR. JAY: Well, again, Mr. Chief Justice, I -- I don't think that that would be advice to incur the additional debt. And I don't think that the -- that a debtor who read our brief or who informed himself with these hints that you're positing the attorney giving, I don't think that the debtor would take the step of -- of incurring the additional debt, precisely because there are consequences for the debtor, and it's -- it's a grave risk. That's precisely why Congress prohibited --

prohibited this form of --

CHIEF JUSTICE ROBERTS: No, but the whole point is that the attorney could be providing advice that would steer the debtor away from doing anything wrong. And yet the other -- the government would say, oh, no, no, no, no; you are trying to tell him it's okay to take the trip to Tahiti. If he says you can take the trip to Tahiti so long as your intent is not to defraud the debtor -- correct advice that could be read as telling the debtor not to do anything wrong or could be read as giving the debtor a little, as you say, a wink and a nod and saying, you know, what do you intend to do? And he says, oh, I just intend to go on vacation, not to defraud the debtors.

MR. JAY: I think, Your Honor, subject to some kind of situations of willful blindness, that the attorney in that situation would not be read by any factfinder to have advised a -- to have advised her client to incur additional debt in contemplation of bankruptcy.

And it is -- it is that that is the statutory touchstone.

JUSTICE GINSBURG: Well, let's take some of the examples that were in the amicus brief. One of them was the debtor is just told by her doctor that she has a

serious cancer that needs operation and radiation, and she is at the end of the line on resources. She has her trade tools, which she could sell to get some money, but then she won't be able to carry on her business. And she could also borrow money, but incurring that debt -- since she's on the brink of the bankruptcy, she's incurring the debt knowing that she's on the brink of bankruptcy.

Could the lawyer say, you don't have to sell your -- the lawyer could say: Sell your equipment. That wouldn't be a problem. But could the lawyer say, incur the debt?

MR. JAY: I think the lawyer under a number of circumstances could say incur the debt. Precisely --

JUSTICE GINSBURG: Well, take this circumstance. There is no other -- the person is on a brink of bankruptcy, has no resources, can get money by selling assets or by borrowing.

MR. JAY: Well, if I may, Justice Ginsburg, the hypothetical doesn't state how she's going to borrow the money. So for example, if she has an open home equity line of credit and she borrows against that home equity line of credit, it's a secured loan that is not going to be discharged in a Chapter 7 proceeding, I think that that's unobjectionable under our reading of

the statute. It's not -- it's not abusive, because it's not an abuse of the bankruptcy system.

JUSTICE GINSBURG: Suppose she doesn't have a home equity loan. Suppose she's a renter?

MR. JAY: Well, the two -- the two scenarios that our view -- that in our view are covered by the statute are taking on debt in an attempt to abuse the bankruptcy system or to defraud the creditor. And even -- even someone without -- without a home equity loan, a home equity line of credit, can take on additional debt without intending to defraud the creditor simply by -- by intending to repay it.

And that is illustrated in the Culver case, in which the attorney had advised the client to take on additional debt, to -- indeed, he gave her a credit card application and said, get some more cash advances. And she said: I don't want to take on this additional debt. And he said: Don't worry, I will represent you in bankruptcy; you won't have to repay a penny of it. And the Court of Appeals of Maryland explained that that was unethical advice under the Rule 1.2(d), the model rule that applies in just about every jurisdiction.

CHIEF JUSTICE ROBERTS: You can come up with your own hypotheticals that are a lot easier from your point of view, and Justice Ginsburg has been suggesting

some that are much more difficult because they depend on particular facts. And under your construction it seems to me that a lawyer trying to give correct, legal, ethical advice has got to pause before every sentence and think, oh, is this going to be construed in violation of subsection (a)(4)?

MR. JAY: I don't think so, Mr. Chief Justice, and I'm certainly not attempting to fight Justice Ginsburg's hypothetical. I'm attempting to illustrate that -- that the aspect of the statute that prohibits advice to defraud creditors, you know, will turn on, among other things, whether there is any intent to repay the debt.

JUSTICE ALITO: Isn't something in contemplation of bankruptcy done only -- isn't something done in contemplation of bankruptcy only if it is done because of the anticipation of filing a bankruptcy petition? So that if -- if a person takes on additional debt in order to obtain life-saving treatment, that is not done in contemplation of bankruptcy; it's not done because of the bankruptcy. It's done because there is an emergency that requires immediate expenditures.

MR. JAY: I think that that's right, Justice Alito, that in that hypothetical there is no -- the mere -- the mere fact that the bankruptcy may be looming,

even in the hypothetical, is not the animating cause. And the Court has --

JUSTICE SCALIA: If indeed "in contemplation of bankruptcy" means, as -- as you argue, that it has to be for the purpose of abusing the Bankruptcy Code -- right? If that's true, then aren't all these vagueness arguments irrelevant, because it would be illegal anyway, wouldn't it?

MR. JAY: Well --

JUSTICE SCALIA: So even without this statute, the lawyer would have to worry about -- about whether he's doing something that is unlawful.

MR. JAY: The two prongs of -- of our reading of the statute, that's right, Justice Scalia, are to abuse the Bankruptcy Code or to -- or to defraud creditors. The fraud of course is illegal --

CHIEF JUSTICE ROBERTS: But the point is you don't know. Of course you can't give advice to do something illegal. But I -- I would think that some of the questions have been suggesting that it's hard to know whether it's illegal. You yourself say it depends on the debtor's intent. So if a client came in to me and said, can I do this, and it depends on his intent, as a lawyer I would want to say: It depends on why you are doing it. But if -- but that I think could be

construed as being -- giving advice in contemplation of bankruptcy.

MR. JAY: But precisely because, Mr. Chief Justice, the definition of fraud turns on the defendant or the fraudulent actor's intent, that's true under present law, under Rule 1.2(d) which prohibits all attorneys from counseling their clients to commit fraudulent acts.

JUSTICE SCALIA: The lawyer runs that risk anyway, whether this statute applies or not. He has -- he has to decide whether what he is doing is a fraud on creditors.

MR. JAY: Or an abuse of the Bankruptcy Code. And as Justice Ginsburg pointed out in Mr. Brunstad's argument, that is something that the attorney already must be familiar with under Section 707(b) and must certify in filing any Chapter 7 bankruptcy that in -- after the attorney's professional investigation, that the granting of relief would not be an abuse of the provisions of the Bankruptcy Code.

Attorneys are -- are making that certification every day when they are filing for Chapter 7 bankruptcies.

CHIEF JUSTICE ROBERTS: This is a regulation of the attorney-client relationship to pursue an

unrelated substantive objective. You want to ensure that debtors don't do something and you think, well, the way -- it's not enough to tell debtors, don't do this. You're going to say: We are going to regulate what lawyers tell them as a way of pursuing an unrelated objective.

MR. JAY: I don't think it's unrelated, Mr. Chief Justice. The objective is in many -- in some instances criminal and in other instances it is prohibited by the Bankruptcy Code. And the reason that --

CHIEF JUSTICE ROBERTS: Well, the objective is criminal; that doesn't mean it is not being indirectly enforced by interfering with the attorney-client relationship.

MR. JAY: Well, it is certainly --

CHIEF JUSTICE ROBERTS: -- or affecting the attorney-client relationship.

MR. JAY: It is certainly true, Mr. Chief Justice, that the attorney is the sophisticated player here. It is the attorney who is the repeat player, and it is the attorney who, by being made subject to this statute, is --

CHIEF JUSTICE ROBERTS: Yes, it's a good way to enforce it, to tell people you can't get legal advice

about it.

What if a State thinks that there are too many punitive damage awards, that they are out of control, and so it passes a law saying lawyers may not tell their clients that they can get -- they can seek punitive damages?

MR. JAY: Well, Mr. Chief Justice, seeking punitive damages is not illegal --

CHIEF JUSTICE ROBERTS: Oh, if it's done with the purpose of fraud, it is. If you think, well, I'm really -- I really wasn't -- it really wasn't malicious conduct, I know that, or whatever the standard is for punitive damages, then it's illegal, just like here if you incur debt to defraud your debtors it's illegal, but if you don't it's not.

MR. JAY: Well, I think that the restriction that you're positing is that advice ever to seek punitive damages is -- is going to be --

CHIEF JUSTICE ROBERTS: Oh, no, no, no, no. Only if it's -- you know, it says you can't give that advice in contemplation of filing a lawsuit.

MR. JAY: Well, no. That would, of course, would be outside the bankruptcy context, and we are relying in part here on -- both on the avoidance doctrine and on the meaning that "in contemplation of

bankruptcy" has had for a long time.

But -- but to answer your question, I think that, if there is actually a tie between -- so that sounds exactly to me like a prohibition saying to the lawyer, don't file complaints for punitive damages that aren't supported just under the normal Rule 11 evidence standard. And I don't think that that is an impermissible attempt to --

CHIEF JUSTICE ROBERTS: No, no, no. It's a difference between filing, because there the lawyer signs the -- signs the complaint. It's giving advice to the client.

And the -- I guess what I would see as the parallel is that it's an objective outside the attorney-client relationship. It's not like saying, you can't charge more than 50 percent contingent fee or -- or whatever -- you know, designed to regulate the client -- protect the client.

It's -- it's a totally extraneous objective.

MR. JAY: Well, here, I don't think -- I don't think it's an extraneous objective. Perhaps I am misunderstanding how you -- how the Court is meaning extraneous.

The -- here, the advice is the motivating cause in some of these instances of the -- of the debtor

taking the step that's going to lead to actual harm to the debtor.

That's why Congress provided that the remedy for a violation of this is either an injunctive action by a government official, the U.S. trustee or by the Court or State attorney general, or actual damages paid to the debtor who has suffered harm from the unethical or abuse of advice given to him or her by the attorney.

So I think that saying that -- that it's extraneous to the attorney-client relationship, I think that's not the statute that -- that Congress enacted here.

It enacted a statute that protects the client from improper, unethical, abusive, or even criminal -- criminally fraudulent advice by the attorney.

JUSTICE GINSBURG: One thing that lawyers who render services for money want -- is to be sure that they will get paid, and one part of this provision, this 526(a)(4), talks about incurring debt to pay an attorney for representing the debtor.

So what can a lawyer say safely about the lawyer's getting paid?

MR. JAY: Well, I would like to note, if I may, Justice Ginsburg, that we don't think that that is

properly part of this challenge. I will be happy -- I will be happy to answer the question, but the court of appeals struck down this statute, and it said, nine times, that it was talking about the portion of the statute referring to in contemplation of bankruptcy.

And the to pay an attorney provision was not addressed in the Petitioner's brief in the court of appeals or in their brief in opposition to our cert position, so we don't -- we don't think it's properly here -- it hasn't been addressed.

But to -- to answer your question, the statute says not -- and this part of the statute is on page 5a of the appendix to our brief -- "to advise an assisted person to incur more debt to pay an attorney or bankruptcy petition preparer."

So advising the client -- you know, that the client ought to pay the fee -- you know, here's my bill, my fee is due on day X, that simply doesn't come within the terms of the statute. It's only to incur more debt to pay the attorney.

And the situation that we think Congress is getting at is the circumstance where the attorney wants to be paid up-front, again, like in the Culver case, the attorney wants his client to take out a cash advance from the credit card company, knowing -- and to give

that money to the attorney to pay his fee, precisely because the debt's going to be -- the unsecured debt to the credit card company is going to be discharged in bankruptcy.

JUSTICE SOTOMAYOR: That's -- that's the clear case. How about the person comes in, shows the attorney his or her financial state. There is no money to pay the fee. The attorney simply gives a bill and says, "I need it by Friday."

No self-respecting person would believe that the individual is going to pay that bill without borrowing money from somewhere, if you have looked at their financial statement and there is no money to be had. Would the attorney have violated the statute there?

MR. JAY: I don't think so, Justice Sotomayor, precisely because the attorney -- the attorney still hasn't issued the advice to incur more debt. I mean, the client, of course, also has the opportunity -- or the option of not paying the fee and carrying it -- carrying it forward into bankruptcy.

So, in any event, we don't think that that provision can -- can be the basis for a holding that the other provision about in contemplation of bankruptcy is substantially overbroad, which is what the court of

appeals held here.

If I may, unless the Court has further questions on --

JUSTICE SOTOMAYOR: Just one. So, basically, your bottom line is any advice to incur debt to pay an attorney is illegal?

MR. JAY: To incur more debt to pay an attorney, I think -- I think that is the import of the statute, and that's because Congress recognized that there is an incentive for attorneys to put pressure on their clients to -- to favor the attorney as creditor, to, essentially, treat the attorney as a creditor in a better position than other creditors.

JUSTICE SOTOMAYOR: Perhaps I am being -- not quite understanding you. You are underscoring the more debt, that is going to always be additional, if the advice is to incur it. So what meaning are you giving to more that I am missing?

MR. JAY: Well, in some of the examples that have come up in the briefing in this case -- you know, a refinancing transaction, for example -- you know, or a sale -- sale of the house and replacing it with a rental. We don't think that that is more debt.

JUSTICE BREYER: I don't how this works exactly. I'm not an expert. I thought that, when

someone goes bankrupt, that one of the things you ask the bankruptcy judge for is permission to pay for ongoing expenses, and that would include an attorney's fee. Otherwise, people could never be represented.

MR. JAY: It's true that the court can authorize --

JUSTICE BREYER: Well, so why is there some incentive here? All the attorney has to do is follow ordinary procedure.

MR. JAY: Precisely because, Justice Breyer, different standards apply to the -- to payments made to the attorney before the bankruptcy commences and payments made to the attorney after the bankruptcy commences.

It's a -- the standard of scrutiny after the bankruptcy commences is a -- is a bit more searching under Section 330.

If the Court has no further questions on Section 526, I do want to address Section 528, the -- the advertising disclosure requirements. And, there, we think that, as Justice Sotomayor brought out in her exchange with Mr. Brunstad, there is no evidence in this case pertaining to the particular advertisements that petitioners want to run.

They simply say, on pages 38 and 39 of the

joint appendix, that they have advertised, and they wish to continue to advertise. There is no allegation about their content. And they sought and were granted summary judgment in the district court on the theory that this statute is unconstitutional.

And so to the extent that it's anything other than a facial challenge, it's an as-applied challenge, as applied, essentially, to any attorney or, indeed, anyone who wants to run these advertisements.

We think that, as I understand the gravamen of Petitioners' argument, is that the two-sentence suggested text is incorrect, that it's -- that it's misleading because it's wrong.

And the basis for that is saying that some people who are debt relief agencies don't help people file for bankruptcy relief under the Bankruptcy Code. That is not correct.

JUSTICE ALITO: But isn't it misleading for an attorney to say, I'm a -- I'm a debt relief agency? Nobody is going to know what a debt relief agency is, unless they are familiar with this statute.

MR. JAY: Well --

JUSTICE ALITO: A perspective client looks at that, and they say, well, I don't want a debt relief agency, I want a lawyer.

MR. JAY: Well --
JUSTICE ALITO: That's misleading.
MR. JAY: Four points on that, Justice Alito.
First, the advertisement can and indeed, I'm sure always will, say that the advertiser is a lawyer. Nothing forbids the advertisement from saying that. There is no restriction on what content goes in the ad, only that it include this is disclaimer.
Second, the term "debt relief agency" is a new one. It was coined by Congress in 2005 precisely because it includes -- it includes attorneys; it includes bankruptcy petition preparers. They had to -- you know, they had to come up with an amalgamated term that includes them both. The fact that it's a new term -- it came freighted with no -- no preceding -- no baggage from its preceding history, and indeed, if the statute were on the books and allowed to take affect once this challenge is disposed of, I am confident that the meaning would become much more well-accepted.
And the Petitioners have invited the Court, and this is on page 87 of their opening brief, to look at their website. And of course that's outside the record, but to the extent that the Court looks at it, the Court will see that Petitioners refer to their

bankruptcy practice as providing debt relief. We think that's a natural way of -- of pitching what the services made available by a bankruptcy attorney are: Relief from one's debts. So we don't think there is anything wrong with that term.

But I do want to turn back to why it's not correct to say that a debt relief agency would ever not -- not help people file for bankruptcy relief under the Bankruptcy Code. That is because, as I understand Petitioners' argument, it's that an assisted person might be a creditor. That is not correct.

The definition of "assisted person" turns on having nonexempt property in excess of a certain amount. Under section 522(l) of the Bankruptcy Code, and indeed under this Court's decision in Owen v. Owen, there is no exempt property until there is a filing for bankruptcy and an assembly of the bankruptcy estate and a filing by the debtor, or someone on the debtor's behalf, filing schedules that specify what property the debtor has and which exemptions the debtor chooses to claim. That is only done when there is a debtor. Creditors don't do that. Creditors don't have nonexempt property. We don't think a creditor could be an assisted person.

JUSTICE SOTOMAYOR: How about a law firm that represents the biggest companies in the world? And

so they are never going to consciously, intentionally seek out or represent a person defined with the financial limitations of this category. But it so happens that one of their very rich clients comes in and says, I have a small -- my brother-in-law is running a small business; help him or her.

Is that firm in violation now because their advertisements did not include what 528(a) required?

MR. JAY: Well, first, Justice Sotomayor, if, for example, they do it pro bono, then it wouldn't -- then it wouldn't trigger the definition at all. But assuming that the brother-in-law pays for the services, then yes. I mean, yes --

JUSTICE SOTOMAYOR: So they have to -- for this one brother-in-law, they have to amend -- they're now violated the statute ex post facto somehow?

MR. JAY: Not ex post facto, Justice Sotomayor. They would become a debt relief agency, and thereafter, advertisements directed to the public that advertise those specific services, and if they don't have a bankruptcy practice at all, or don't advertise the services that are listed in section 528, then the disclaimer requirement doesn't apply at all. But if they then chose --

JUSTICE SCALIA: If they're -- if they're,

as the hypothetical suggests, representing only big companies, they're probably not advertising to the general public anyway.

MR. JAY: That -- that may well be. Well, they may have a website, Justice Scalia, but big firms have to deal already with multifarious disclaimer requirements in every State where they practice, and firm websites often have a lengthy set of disclaimers; you know, one required by Texas, and one required by New York, and so on. This is something that -- that multijurisdictional firms are already familiar with, and they provide these disclaimers without problem. And --

JUSTICE GINSBURG: You said that one of the aspects of this that makes it horrible is that they are not limited to saying, "We are debt relief agencies; we help people file for bankruptcy." They can say anything else. But there's no screening -- there is no administrator that a law firm can go to and say, "This is what I think is substantially similar. Is it okay?"

MR. JAY: That is true, Justice Ginsburg, and there is of course the safe harbor. By using this two-sentence statement, the advertiser is certain that there will be no problem.

But I think that -- that a substantially -- a substantially similar statement is a permissive

standard, and if there would be any constitutional doubt, it would be to resolve it in flexibility in that regard.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Brunstad, you have three minutes remaining.

REBUTTAL ARGUMENT OF G. ERIC BRUNSTAD, JR.
ON BEHALF OF MILAVETZ, GALLOP &
MILAVETZ, P.A., ET AL.

MR. BRUNSTAD: Thank you.

Justice Ginsburg, your example about the woman who is in need of medical attention falls squarely within the statute. The lawyer would be prohibited from advising her to incur debt to get needed medical attention, and the government, in trying to articulate a way around that during the course of the argument, articulated no less than five different standards.

The conduct would have to be fraudulent or unethical or abusive or criminal or improper. None of those are in the statute, and it's impossible to know which one. Chief Justice Roberts, you are absolutely right: What this statute does is it's basically trying to interfere with the attorney-client relationship, and even moreso on the side of "or pay an attorney. "

And Justice Breyer, here's how it works.

The client comes to -- the prospective client comes to the lawyer and is in trouble. And may not know whether the client has to file for bankruptcy or not. So there is a conversation that happens. And in that conversation, it may be decided that the best thing for the client to do is to file for bankruptcy, and of course, the client will have to know: How am I going to pay for this?

Well, there are two ways. One, the client can pay the attorney in full, up front, or the attorney can take payment over time. However, this all happens before bankruptcy, so there is no involvement of the Court at this point. If the attorney accepts payment over time, which many do, because it's very expensive to file for bankruptcy now and most debtors don't have the wherewithal, the attorney, by saying, I take payment over time, and the debtor accepting that, the debtor would be incurring debt in contemplation of bankruptcy. Incurring debt to the attorney. The attorney would be proscribed, under the statute, from actually giving that particular advice.

JUSTICE BREYER: What the attorney says is, Here's what we will do; when we file for bankruptcy, I will ask the Court to approve my own fees as something that is continuing after bankruptcy.

MR. BRUNSTAD: Exactly.

JUSTICE BREYER: And he says, This is what they will be.

So what is the harm --

MR. BRUNSTAD: Because you can't --

JUSTICE BREYER: -- since that's what he has to do, of making him tell his client that that's what he has to do?

MR. BRUNSTAD: Because you can't advise the client in advance to incur that debt.

JUSTICE BREYER: No, you -- you can't? This prevents you had from saying, What I'm going to do is ask the bankruptcy judge to approve what I just said?

MR. BRUNSTAD: Well, that has to happen anyway under section --

JUSTICE BREYER: Of course. And so what's wrong with the law that tells the lawyer that's what he has to tell the client?

MR. BRUNSTAD: Because there, in that situation, you would be advising the client to incur the debt. In other words, be advising the client to incur the debt, not the actual incurrence of the debt.

JUSTICE SCALIA: I don't read the hypothetical that you have given as coming within the statute. I think what -- what it means: Incurred debt

to pay an attorney, I don't think it means debt to the attorney. You are not worried about the attorney cheating himself.

MR. BRUNSTAD: Well, except debt --

JUSTICE SCALIA: Making himself an additional creditor. That's ridiculous.

MR. BRUNSTAD: But debt is --

JUSTICE SCALIA: What it talks about is inducing the client to -- to borrow money from somebody else to pay the attorney. You know, and that seems to be perfectly reasonable.

MR. BRUNSTAD: I think it includes both, Justice Scalia. For example, you couldn't advises your client to borrow $1,000 from your mother.

JUSTICE SCALIA: That's right.

MR. BRUNSTAD: And you couldn't -- and you also, I think, advise a client to basically borrow money from you, the attorney. You're extending services on credit; that's incurring a debt.

JUSTICE SCALIA: Why -- why would you worry about the attorney, you know, hurting himself?

MR. BRUNSTAD: Because the statute --

JUSTICE SCALIA: It makes no sense.

MR. BRUNSTAD: It's at least unclear, Justice Scalia, and that is the heart of the problem.

It's very unclear.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)