

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MILAVETZ, GALLOP & :

4 MILAVETZ, P.A., ET AL., :

5 Petitioners :

6 v. : No. 08-1119

7 UNITED STATES; :

8 - - - - - x

9 and

10 - - - - - x

11 UNITED STATES, :

12 Petitioner :

13 v. : No. 08-1225

14 MILAVETZ, GALLOP & :

15 MILAVETZ, P.A., ET AL. :

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17 Washington, D.C.

18 Tuesday, December 1, 2009

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20 The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States

22 at 10:02 a.m.

23 APPEARANCES:

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25 of Milavetz, Gallop & Milavetz, P.A., et al.

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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. Now, Congress --

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

1 statute, prohibit attorneys from advising (a) criminal
2 conduct in reference to a bankruptcy, or (b) civil
3 conduct -- conduct that is improper under the civil code
4 because it's a fraud on creditors?

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

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

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

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

1 MR. BRUNSTAD: Yes, Justice Ginsburg.

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

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

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

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

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

21 JUSTICE KENNEDY: So you think the
22 attestation clause cannot be the basis for sanctioning
23 an attorney?

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

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

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

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

18 MR. BRUNSTAD: In a sense.

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

21 MR. BRUNSTAD: I think it goes more towards
22 the attorney checking the information that the debtor
23 has basically provided in the petition and elsewhere, to
24 make sure that the information that's provided is
25 accurate and that the bankruptcy petition is not being

1 proposed in essence for an abusive purpose.

2 JUSTICE KENNEDY: Well, I won't take up too
3 much more of your argument, but it just seems to me odd
4 that you can enforce an attestation clause, but not a
5 statute that does the same thing. And I don't
6 understand the principle for that. You say it's a
7 gateway and it's designed to facilitate the bankruptcy
8 process. Well, the government could say the same thing
9 about its statute.

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

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

21 (Laughter.)

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

1 526(a)(4).

2 JUSTICE GINSBURG: What are the words in
3 707(b)? I mean, they are both in the statute. What the
4 lawyer has to attest to is required by statute.

5 MR. BRUNSTAD: That is true, Justice
6 Ginsburg. But there's no evidence that Congress -- in
7 the legislative history or otherwise, that Congress
8 intended the 707(b) standard to be the standard that
9 governs what the lawyer can tell the client under
10 section 526(a)(4).

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

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

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

22 MR. BRUNSTAD: That's correct, Justice
23 Stevens. But the problem here is that what the
24 government has tried to do is tease out a standard from
25 the "in contemplation of" language in 526(a)(4), and the

1 problem is that -- two problems: One, the "in
2 contemplation of" language only modifies half the
3 statute, so the "or pay the attorney" prong is not even
4 addressed by the government's narrowing construction.
5 They kind of ignore that.

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

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

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

18 Now, it appears --

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

25 MR. BRUNSTAD: Not necessarily, Justice

1 Alito.

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

5 (Laughter.)

6 MR. BRUNSTAD: Well, I think that would --

7 JUSTICE ALITO: Doesn't it mean -- "in
8 contemplation of bankruptcy" means because of the
9 expectation of filing a bankruptcy petition later?

10 MR. BRUNSTAD: I think that that -- that
11 that would assume that the -- the filing of the
12 bankruptcy petition looms entirely in the consciousness
13 of the debtor when the debtor does everything. But I do
14 -- I do think that the "in contemplation of" clause,
15 which is also used in section 329, is a neutral phrase.
16 "In contemplation of" means nothing more than: Is the
17 bankruptcy filing likely? It doesn't have any nefarious
18 -- it doesn't have any abusive context to it at all.

19 And, for example, section 329 --

20 JUSTICE SCALIA: But, wait. It doesn't mean
21 is it likely. "In contemplation of" means that the
22 reason you are doing this is the contemplated
23 bankruptcy. You don't see any causal connection in that
24 phrase?

25 MR. BRUNSTAD: I do see a causal connection,

1 but there's no element of doing something improper in
2 the language "in contemplation of."

3 JUSTICE SCALIA: Well, that's true. That
4 may be true enough. But -- but the act must be taken
5 because you are about to file a bankruptcy petition.

6 MR. BRUNSTAD: Yes, Justice Scalia, but the
7 government relies and hinges its argument on the abusive
8 connotation to the "in contemplation of" --

9 JUSTICE SCALIA: That's -- that's a
10 different question.

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

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

20 Now, again I go back to the fact that this
21 -- the practical effect of section 526(a)(4) is to make
22 an impossible situation for attorneys. We have two
23 regimes, one under applicable normal ethical State bar
24 rules which say you have to give unfettered candid
25 advice to your client; this provision which says you

1 must give truncated advice, there are thing you
2 cannot say. But whether you are in one regime or
3 another depends upon whether the debtor is --

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

6 MR. BRUNSTAD: I think --

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

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

11 JUSTICE SOTOMAYOR: Under -- under the State
12 rules, you can give unethical advice as a lawyer?

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

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

23 MR. BRUNSTAD: It wouldn't protect your
24 right to give unethical advice. The problem is that
25 this statute sweeps within its scope perfectly truthful

1 advice about lawful activity.

2 JUSTICE SOTOMAYOR: We're -- we're assuming
3 that it's not read with a limitation with respect to
4 abusive conduct.

5 MR. BRUNSTAD: Correct, but, Justice --

6 JUSTICE SOTOMAYOR: Assuming that is read
7 into the statute or is viewed as part of "in
8 contemplation of bankruptcy," what in the First
9 Amendment would make that be?

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

15 JUSTICE SOTOMAYOR: You haven't explained
16 why.

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

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

23 MR. BRUNSTAD: I have some ideas about what
24 means. But because of the onerous sanctions that
25 section 526(c) imposes, if I'm wrong I can be basically

1 subject to a whole panoply of remedies, some very
2 serious remedies and very serious punishments for making
3 a mistake. And that's one of the problems. Under the
4 First Amendment --

5 JUSTICE SCALIA: What if you leave "abusive"
6 out. Let's -- let's accept your point that "abusive" is
7 not there and the government is reading in out of
8 nowhere. What's -- what's the matter with the -- with
9 the statute then?

10 MR. BRUNSTAD: Well, I'll give you -- -

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

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

22 JUSTICE SCALIA: But that's not in
23 contemplation --

24 MR. BRUNSTAD: That's proscribed.

25 JUSTICE SCALIA: -- of bankruptcy.

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

5 JUSTICE SCALIA: If the only reason the
6 lawyer gives the advice is because he knows that this --
7 that this debtor is planning to file bankruptcy, he
8 says, if you are going to file bankruptcy, you better
9 sell the house and move to an apartment, then it's no
10 good. Now, it may be a stupid law, but I don't see why
11 it's -- why it's unconstitutional.

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

14 JUSTICE SCALIA: So it's a stupid law.

15 MR. BRUNSTAD: Well, what happens is that
16 basically it interferes with the lawyer's ability --

17 JUSTICE SCALIA: Right.

18 MR. BRUNSTAD: -- through speech to
19 communicate full and candid advice to the client.

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

22 MR. BRUNSTAD: And also under --

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

25 (Laughter.)

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

5 CHIEF JUSTICE ROBERTS: How much of your
6 case depends upon the difficulty of defining what -- if
7 you accept the idea that "in contemplation of" means
8 abusive or fraudulent, how much of your case depends
9 upon the proposition that it's just hard to tell, that
10 it's -- it's a multifactored inquiry and that the lawyer
11 sort of has to stop and think at every turn: Well,
12 could this be construed as recommending abuse, or is
13 this just construed as telling clients what they can and
14 can't do? And in some areas it's a gray area, and what
15 should you do when it's a gray area?

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

19 MR. BRUNSTAD: It doesn't turn on that, but
20 that demonstrates the chilling effect. The effect of
21 the statute has been to drive conscientious bankruptcy
22 counsel from the practice. Why? Because it's not just
23 difficult to apply; it's often impossible to apply. The
24 whole statute turns on whether the debtor, the client or
25 prospective client, is an assisted person, which depends

1 on the relative wealth of the client, which is something
2 that's very, very difficult to determine at any
3 particular given point in time.

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

10 And since that's impossible to know without
11 detailed, careful analysis of the relative wealth of the
12 client, the statute is basically impossible to apply.

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

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

25 JUSTICE KENNEDY: Yes, but that doesn't go

1 to your other point that there's a problem in
2 determining the class of persons. If it's unethical,
3 you can't give it to anybody. And the fact that the
4 class of persons is difficult to understand
5 is irrelevant.

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

12 JUSTICE GINSBURG: You want to -- I mean,
13 your first point is -- and we never get to that question
14 because lawyers shouldn't be under this Act at all.
15 They shouldn't be labeled "debt relief agencies."

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

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

25 MR. BRUNSTAD: Certainly not, Justice

1 Scalia.

2 JUSTICE SCALIA: I mean, it's perfectly okay
3 for the rest of the world to have to cope with this
4 vagueness, but once you take lawyers out of it, it's
5 okay?

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

8 JUSTICE SCALIA: So then -- so then there's
9 no reason in particular to take lawyers out of it just
10 to make it constitutional.

11 MR. BRUNSTAD: Well, our argument there,
12 Justice Scalia, is that the statute does not
13 unambiguously embrace attorneys. "Attorney" is not
14 mentioned in the definition of "debt relief agency" in
15 101(12A), where you think it would be, because wherever
16 Congress has otherwise intended to regulate attorneys in
17 connection with bankruptcy practice, it has used the
18 word "attorney" specifically.

19 JUSTICE SCALIA: That's fine. If you're --
20 if you're letting that argument stand on its own, that's
21 a fine argument. But don't -- don't bring in the fact
22 that, well, and moreover, if it's applied to attorneys,
23 it's unconstitutional. Because if it's applied to
24 anybody, it's unconstitutional, according to your
25 argument.

1 MR. BRUNSTAD: That is also true, Justice
2 Scalia, because we do make a substantial overbreadth
3 argument.

4 JUSTICE BREYER: Now, but when you say --

5 MR. BRUNSTAD: The statute is substantially
6 overbroad.

7 JUSTICE BREYER: You say it isn't referred
8 to. It seems to me to be referred to. It says "The
9 term 'debt relief agency' means 'any person who provides
10 any bankruptcy assistance to an assisted person." And
11 the term "bankruptcy assistance" is defined to include
12 "appearing in a case or proceeding on behalf of another
13 or providing legal representation with respect to a case
14 or proceeding."

15 Doesn't a lawyer provide legal
16 representation?

17 MR. BRUNSTAD: A lawyer does, Justice
18 Breyer.

19 JUSTICE BREYER: All right. So doesn't the
20 term "provide legal representation" include a lawyer?

21 MR. BRUNSTAD: The problem, Justice Breyer,
22 is that I think when Your Honor was quoting from section
23 101(4A), Your Honor took out a whole lot of information
24 that goes between the word "bankruptcy assistance" --

25 JUSTICE BREYER: Yes.

1 MR. BRUNSTAD: -- and "legal
2 representation."

3 JUSTICE BREYER: Yes. They include other
4 people besides lawyers.

5 MR. BRUNSTAD: Not only that, but I think
6 that that language is inherently ambiguous. What is
7 Congress getting at there? If Congress wanted to --

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

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

13 JUSTICE BREYER: Yes, it would seem to be a
14 lawyer.

15 MR. BRUNSTAD: But it's precluded -- it's
16 preceded by language, "any goods or services sold or
17 otherwise provided to an assisted person" --

18 JUSTICE BREYER: Yes.

19 MR. BRUNSTAD: -- "with the express or
20 implied purpose of providing information," et cetera,
21 about legal representation.

22 JUSTICE BREYER: Yes. Those are other
23 people who are covered.

24 MR. BRUNSTAD: Well, not just other people,
25 but what it looks like is it looks like what Congress

1 was getting at was people who provide things like what
2 attorneys provide.

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

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

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

18 Here, we have the opposite. We have a very
19 ambiguous legislative history, where in the initial
20 version of this legislation, the House report
21 accompanying it said lawyers were included and the
22 language was "debt relief counseling agency." Then
23 Congress amended the statute -- Congress amended the
24 proposed legislation in 1999 and, thereafter, in the
25 2001, 2003, and 2005 House reports, deleted all

1 reference to attorneys -- a very, very strange tale,
2 which seems to signal exactly the opposite of the Heintz
3 case.

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

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

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

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

22 JUSTICE KENNEDY: I've heard of referring
23 to legislative history when the statute is ambiguous. I
24 haven't heard of referring to legislative history to
25 make the statute ambiguous.

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

7 But I think -- I think it is also important
8 to underscore not only would the constitutional
9 avoidance -- application of that canon here by excluding
10 attorneys from "debt relief agencies" solve the problem
11 under section 526(a)(4), but also under section
12 528(a)(4) and (b)(2)(B). 528 --

13 JUSTICE SOTOMAYOR: Before you go on, on
14 528, could you clarify for me what is your challenge to
15 528? Is it a normal --

16 MR. BRUNSTAD: 528, Justice Sotomayor?

17 JUSTICE SOTOMAYOR: 528.

18 MR. BRUNSTAD: Yes, Justice Sotomayor.

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

23 MR. BRUNSTAD: Does Your Honor mean 526 or
24 528?

25 JUSTICE SOTOMAYOR: 528.

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

3 JUSTICE SOTOMAYOR: Yes.

4 MR. BRUNSTAD: We are challenging that on
5 as-applied. It violates the Constitution.

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

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

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

16 MR. BRUNSTAD: Yes.

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

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

1 any deceptive advertising. That's the point.

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

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

9 JUSTICE SOTOMAYOR. Yes, the 528.

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

16 JUSTICE SOTOMAYOR: Did the government bring
17 this lawsuit below?

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

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

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

1 question. It's not a disputed factual question.

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

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

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

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

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

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

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

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

1 required.

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

5 JUSTICE KENNEDY: Well, (a) I suppose you
6 don't have to advertise, or (b) if you do, you can say
7 in your bread hypo: Under the Federal law, we have
8 bread, but our bread is -- I don't know -- gluten-free
9 or whatever. You can use --

10 MR. BRUNSTAD: Yes, Justice Kennedy.

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

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

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

23 JUSTICE SCALIA: This is a proposal for a
24 commercial transaction, right? You are trying to get a
25 consumer to hire you. And the First Amendment standards

1 for proposals for commercial transactions have always
2 been more -- more lenient than other First Amendment
3 contexts.

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

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

10 JUSTICE SCALIA: I don't know --

11 JUSTICE ALITO: Well, if a law firm -- if a
12 law firm provides representation for debtors in
13 bankruptcy, what is misleading about requiring them to
14 say: We help people file for bankruptcy relief under
15 the Bankruptcy Code.

16 MR. BRUNSTAD: Because the scope of
17 528(b)(2)(B) is so broad. If I am advertising mortgage
18 foreclosure services having nothing to do with
19 bankruptcy, I still must make this counterfactual
20 statement. 528 -- for example, in my bread
21 hypothetical, if I am also selling milk, and the
22 government says when I am selling milk through my milk
23 advertisement I have to say I am a bread supply agency,
24 I sell products that contain wheat, that's completely
25 misleading and irrelevant to the milk advertisement.

1 But this statute does the same thing. If I
2 am advertising eviction protection services having
3 nothing to do with bankruptcy or mortgage foreclosure
4 services representation having nothing to do with the
5 bankruptcy, I have to make these counterfactual
6 statements that are inherently misleading.

7 If there are no questions at the moment, I'd
8 like to reserve my time.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Brunstad.

11 Mr. Jay.

12 ORAL ARGUMENT OF WILLIAM M. JAY
13 ON BEHALF OF THE UNITED STATES

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

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

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

1 agencies under the statute. No --

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

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

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

17 JUSTICE GINSBURG: What about an associate?

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

1 person that provides the services and therefore a debt
2 relief agency. I suppose an individual who provides the
3 services himself or herself might be an agency -- a debt
4 relief agency, as well.

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

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

24 And so, if you look at the six of the seven
25 things, it's clear that all of those are provided by

1 those television companies. And the seventh is simply
2 added in, namely the providing legal representation, to
3 be a catch-all to be sure that if one of those companies
4 actually does something that is legal representation,
5 even though they are not lawyers, they are caught, too.

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

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

14 MR. JAY: Well, I -- I'm happy to respond
15 to it in further detail. I think that the -- first, the
16 reference to appearing in a case or proceeding on behalf
17 of another, that can only refer to lawyers. Even if as
18 you posit, Justice --

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

24 (Laughter.)

25 JUSTICE BREYER: We will charge you very

1 little. We will save you money. And I am a lawyer, by
2 the way, but --

3 (Laughter.)

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

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

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

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

24 As for the point Mr. Brunstad made about the
25 change in the drafting history of this bill from "debt

1 relief counseling agency" to "debt relief agency," that
2 change was made in 1999. And in the House report
3 accompanying the 1999 version of the bill, which had
4 changed from "debt relief counseling agency" to "debt
5 relief agency," the House report said it applies to
6 attorneys, as well as to non-attorneys, such as petition
7 preparers. That's page 120 of House Report 106-123.

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

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

16 If the Court has no further questions about
17 the --

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

1 of fraud that would deprive debtors of assets they might
2 otherwise get, so I can't tell you.

3 MR. JAY: Well --

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

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

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

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

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

24 MR. JAY: I suppose that, you know, there
25 might be a fact question about whether a particular

1 wink-and-nod communication between an attorney and
2 client were in fact advice to engage in a transaction
3 that's prohibited under the Bankruptcy Code, the
4 fraudulent or abusive transaction. But --

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

9 (Laughter.)

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, that's one of
2 the things I'm concerned about your limiting
3 construction, "intending to defraud the debtor." What
4 if the person takes a trip to Tahiti every November?
5 They've always done it. They're not intending to
6 defraud the debtor. They're just doing what they have
7 always done. So an attorney that gives that advice,
8 would be -- that would be okay?

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

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

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

1 grave risk. That's precisely why --

2 JUSTICE SOTOMAYOR: But what --

3 MR. JAY: -- Congress prohibited --
4 prohibited this form of --

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

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

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

1 JUSTICE GINSBURG: Well, let's take some of
2 the examples that were in the amicus brief. One of them
3 was the debtor is just told by her doctor that she has a
4 serious cancer that needs operation and radiation, and
5 she is at the end of the line on resources. She has her
6 trade tools, which she could sell to get some money, but
7 then she won't be able to carry on her business. And
8 she could also borrow money, but incurring that debt --
9 since she's on the brink of the bankruptcy, she's
10 incurring the debt knowing that she's on the brink of
11 bankruptcy.

12 Could the lawyer say, you don't have to sell
13 your -- the lawyer could say: Sell your equipment.
14 That wouldn't be a problem. But could the lawyer say,
15 "Incur the debt"?

16 MR. JAY: I think the lawyer under a number
17 of circumstances could say, "Incur the debt." Precisely
18 because --

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

23 MR. JAY: Well, if I may, Justice Ginsburg,
24 the hypothetical doesn't state how she's going to borrow
25 the money. So, for example, if she has an open home

1 equity line of credit and she borrows against that home
2 equity line of credit, it's a -- it's a secured loan
3 that is not going to be discharged in the Chapter 7
4 proceeding, I think that that's unobjectionable under
5 our reading of the statute. It's not -- it's not
6 abusive, because it's not an abuse of the bankruptcy
7 system.

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

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

18 And that's illustrated in the Culver case,
19 in which the attorney had advised the client to take on
20 additional debt, to -- indeed, he gave her a credit card
21 application and said: Get some more cash advances. And
22 she said: I don't want to take on this additional debt.
23 And he said: Don't worry, I'll represent you in
24 bankruptcy; you won't have to repay a penny of it. And
25 -- and the Court of Appeals of Maryland explained that

1 that was unethical advice under the Rule 1.2(d), the
2 model rule that applies in just about every jurisdiction
3 --

4 CHIEF JUSTICE ROBERTS: Yes, you can come up
5 with your own hypotheticals that are a lot easier from
6 your point of view, and Justice Ginsburg has been
7 suggesting some that are much more difficult because
8 they depend on particular facts. And under your
9 construction it seems to me that a lawyer trying to give
10 correct, legal, ethical advice has got to pause before
11 every sentence and think, oh, is this going to be
12 construed in violation of subsection (a)(4)?

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

20 JUSTICE ALITO: Isn't --

21 MR. JAY: Yes.

22 JUSTICE ALITO: Isn't something in
23 contemplation of bankruptcy done only -- isn't something
24 done in contemplation of bankruptcy only if it is done
25 because of the anticipation of filing a bankruptcy

1 petition? So that if -- if a person takes on additional
2 debt in order to obtain life-saving treatment, that is
3 not done in contemplation of bankruptcy; it's not done
4 because of the bankruptcy. It's done because there's
5 an emergency that requires immediate expenditures.

6 MR. JAY: I think that that's right, Justice
7 Alito, that in that hypothetical there is no -- the mere
8 -- the mere fact that the bankruptcy may be looming --
9 even in the hypothetical, it's not the animating cause.

10 JUSTICE SCALIA: If --

11 MR. JAY: And the Court has --

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

18 MR. JAY: Well --

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

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

1 CHIEF JUSTICE ROBERTS: Well, but the point
2 is you don't know. Of course, you can't give advice to
3 do something illegal. But I -- I would think that some
4 of the questions have been suggesting that it's hard to
5 know whether it's illegal. You yourself say it depends
6 on the debtor's intent. So if a client came in to me
7 and said, can I do this, and it depends on his intent,
8 as a lawyer I would want to say: It depends why you
9 are doing it. But if -- but that I think could be
10 construed as being -- giving advice in contemplation of
11 bankruptcy.

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

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

22 MR. JAY: Or an abuse of the Bankruptcy
23 Code. And as Justice Ginsburg pointed out in
24 Mr. Brunstad's argument, that's something that the
25 attorney already must be familiar with under section

1 707(b) and must certify in filing any chapter 7
2 bankruptcy that in -- after the attorney's professional
3 investigation, that the granting of relief would not be
4 an abuse of the provisions of the Bankruptcy Code.

5 Attorneys are -- are making that
6 certification every day when they file chapter 7
7 bankruptcies.

8 CHIEF JUSTICE ROBERTS: This is a regulation
9 of the attorney-client relationship to pursue an
10 unrelated substantive objective. You want to ensure
11 that debtors don't do something, and you think, well,
12 the way -- it's not enough to tell debtors, don't do
13 this. You're going to say: We are going to regulate
14 what lawyers tell them as a way of pursuing an unrelated
15 objective.

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

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

25 MR. JAY: Well, it's certainly --

1 CHIEF JUSTICE ROBERTS: Or affecting the
2 attorney-client relationship.

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Oh, if it's done --

19 MR. JAY: -- and it's not contrary to law.

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

1 if you don't, it's not.

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

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

8 MR. JAY: Well, no. That would -- of course
9 would be outside the bankruptcy context, and we are
10 relying in part here on -- both on the avoidance
11 doctrine and on the meaning that "in contemplation of
12 bankruptcy" has had for a long time.

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

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

24 And the -- I guess what I would see as the
25 parallel is that it's an objective outside the

1 attorney-client relationship. It's not like saying you
2 can't charge more than 50 percent contingent fee or --
3 or whatever -- you know, designed to regulate the
4 client -- protect the client.

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

6 MR. JAY: Well, here, I don't think it -- I
7 don't think it's an extraneous objective. Perhaps I am
8 misunderstanding how you -- how the Court means
9 "extraneous."

10 The -- here, the advice is the motivating
11 cause in some of these instances of the -- of the debtor
12 taking the step that's going to lead to actual harm to
13 the debtor.

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

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

24 It enacted a statute that protects the
25 client from improper, unethical, abusive, or even

1 criminal -- criminally fraudulent advice by the
2 attorney.

3 JUSTICE GINSBURG: One thing that lawyers
4 who render services for money want -- is to be sure that
5 they will get paid, and one part of this provision, this
6 526(a)(4), talks about incurring debt to pay an attorney
7 for representing the debtor.

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

10 MR. JAY: Well, I would like to note, if I
11 may, Justice Ginsburg, that we don't think that that is
12 properly part of this challenge. I'll be happy -- I
13 will be happy to answer the question, but the court of
14 appeals struck down this statute, and it said, nine
15 times, that it was talking about the portion of the
16 statute referring to "in contemplation of bankruptcy."

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

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

1 bankruptcy petition preparer."

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

7 And the situation that we think Congress is
8 getting at is the circumstance where the attorney wants
9 to be paid up-front. Again, like in the Culver case,
10 the attorney wants his client to take out a cash advance
11 from the credit card company, knowing -- and to give
12 that money to the attorney to pay his fee, precisely
13 because the debt is going to be -- the unsecured debt to
14 the credit card company is going to be discharged in
15 bankruptcy.

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

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

1 there?

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

8 So, in any event, we don't think that that
9 provision can -- can be the basis for a holding that the
10 other provision about in contemplation of bankruptcy is
11 substantially overbroad, which is what the court of
12 appeals held here.

13 If I may, unless the Court has further
14 questions about section 526 --

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

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

25 JUSTICE SOTOMAYOR: Perhaps I'm being --

1 not quite understanding you. You're underscoring the
2 more debt. That is going to always be additional, if
3 the advice is to incur it. So what meaning are you
4 giving to "more" that I am missing?

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

10 JUSTICE BREYER: I don't how this works
11 exactly. I'm not an expert. But I thought that, when
12 someone goes bankrupt, that one of the things you ask
13 the bankruptcy judge for is permission to pay for
14 ongoing expenses, and that would include an attorney's
15 fee. Otherwise, people could never be represented.

16 MR. JAY: It's true that the court can
17 authorize administrative expenses --

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

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

1 It's a -- the standard of scrutiny after the
2 bankruptcy commences is a -- is a bit more searching
3 under section 330.

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

11 They simply say, at pages 38 and 39 of the
12 joint appendix, that they have advertised, and they wish
13 to continue to advertise. There's no allegation about
14 their content. And they sought and were granted summary
15 judgment in the district court on the theory that this
16 statute is unconstitutional.

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

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

25 And the basis for that is saying that some

1 people who are debt relief agencies don't help people
2 file for bankruptcy relief under the Bankruptcy Code.
3 That is not correct.

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

8 MR. JAY: Well --

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

12 MR. JAY: Well --

13 JUSTICE ALITO: That's misleading.

14 MR. JAY: Four points on that, Justice
15 Alito.

16 First, the advertisement can and indeed, I'm
17 sure always will, say that the advertiser is a lawyer.
18 Nothing forbids the advertisement from saying that.
19 There's no restriction on what content goes in the ad,
20 only that it include this disclaimer.

21 Second, the term "debt relief agency" is a
22 new one. It was coined by Congress in 2005 precisely
23 because it includes -- it includes attorneys; it
24 includes bankruptcy petition preparers. They had to --
25 you know, they had to come up with an amalgamated term

1 that includes them both. The fact that it's a new term
2 -- it came freighted with no -- no preceding -- no
3 baggage from its preceding history, and indeed, if the
4 statute were on the books and allowed to take effect
5 once this challenge is disposed of, I'm confident that
6 the meaning would become much more well accepted.

7 And the Petitioners have invited the Court -
8 - and this is on page 87 of their opening brief -- to
9 look
10 at their Website. And, of course, that's outside the
11 record, but to the extent that the Court looks at it,
12 the Court will see that Petitioners refer to their
13 bankruptcy practice as providing debt relief. We think
14 that's a natural way of -- of pitching what the services
15 made available by a bankruptcy attorney are: relief
16 from one's debts. So we don't think there's anything
17 wrong with that term.

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

24 The definition of "assisted person" turns on
25 having nonexempt property in excess of a certain amount.

1 Under section 522(1) of the Bankruptcy Code and, indeed,
2 under this Court's decision in Owen v. Owen, there is no
3 exempt property until there's a filing for bankruptcy
4 and an assembly of the bankruptcy estate and a filing by
5 the debtor of -- or someone on the debtor's behalf,
6 filing schedules that specify what property the debtor
7 has and which exemptions the debtor chooses to claim.
8 Well, that's only done when there is a debtor. And
9 creditors don't do that. Creditors don't have nonexempt
10 property. We don't think a creditor can be an assisted
11 person under --

12 JUSTICE SOTOMAYOR: How about a law firm
13 that represents the biggest companies in the world? And
14 so they are never going to consciously, intentionally
15 seek out or represent a person defined with the
16 financial limitations of this category. But it so
17 happens that one of their very rich clients comes in and
18 says, I have a small -- my brother-in-law is running a
19 small business; help him or her.

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

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

1 then yes. I mean, yes, and that's --

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

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

13 JUSTICE SCALIA: If they're -- if they're,
14 as the hypothetical suggests, representing only big
15 companies, they're probably not advertising to the
16 general public anyway.

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

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

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

12 But I think that -- that a substantially --
13 a substantially similar statement is a permissive
14 standard, and if there would be any constitutional
15 doubt, it would be to resolve it in favor of flexibility
16 in that -- in that regard.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MR. JAY: Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Mr. Brunstad, you
20 have 3 minutes remaining.

21 REBUTTAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

22 ON BEHALF OF MILAVETZ, GALLOP &

23 MILAVETZ, P.A., ET AL.

24 MR. BRUNSTAD: Thank you.

25 Justice Ginsburg, your example about the

1 woman who is in need of medical attention falls squarely
2 within the statute. The lawyer would be prohibited from
3 advising her to incur debt to get needed medical
4 attention, and the government, in trying to articulate a
5 way around that, during the course of the argument,
6 articulated no less than five different standards. The
7 conduct would have to be fraudulent or unethical or
8 abusive or criminal or improper. None of those are in
9 the statute, and it's impossible to know which one.

10 Chief Justice Roberts, you're absolutely
11 right: What this -- what this statute does is it
12 basically is trying to interfere with the attorney-
13 client relationship, and even more so on the side of "or
14 pay an attorney."

15 And, Justice Breyer, here's how it works.
16 The client comes to -- the prospective client comes to
17 the lawyer and is in trouble. And may not know whether
18 the client has to file for bankruptcy or not. So
19 there's a conversation that happens. And in that
20 conversation, it may be decided that the best thing for
21 the client to do is to file for bankruptcy, and, of
22 course, the client will have to know: How am I going to
23 pay for this?

24 Well, there are two ways. One, the client
25 can pay the attorney in full, up front, or the attorney

1 can take payment over time. However, this all happens
2 before bankruptcy, so there's no involvement of the
3 court at this point. If the attorney accepts payment
4 over time, which many do, because it's very expensive to
5 file for bankruptcy now and most debtors don't have the
6 wherewithal, the attorney, by saying, I take payment
7 over time, and the debtor accepting that, the debtor
8 would be incurring debt in contemplation of bankruptcy,
9 incurring debt to the attorney. The attorney would be
10 proscribed, under the statute, from actually giving that
11 particular advice.

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

16 MR. BRUNSTAD: Exactly.

17 JUSTICE BREYER: And he says this is what
18 they will be.

19 So, what's the harm --

20 MR. BRUNSTAD: Because you can't --

21 JUSTICE BREYER: -- since that's what he has
22 to do --

23 MR. BRUNSTAD: Because you can't --

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

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

3 JUSTICE BREYER: No, you could -- you can't?

4 MR. BRUNSTAD: Under the statute --

5 JUSTICE BREYER: This prevents you from
6 saying --

7 MR. BRUNSTAD: Yes.

8 JUSTICE BREYER: -- what I'm going to do is
9 ask the bankruptcy judge to approve what I just said?

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

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

15 MR. BRUNSTAD: Because there, in that
16 situation, you would be advising the client to incur the
17 debt. Remember, it's the advising the client to incur
18 the debt, not the actual incurrence of the debt, that --

19 JUSTICE SCALIA: I don't read the -- the
20 hypothetical that you have given as coming within the
21 statute. I think when it -- when it means incurred debt
22 to pay an attorney, I don't think it means debt to the
23 attorney. You are not worried about the attorney
24 cheating himself.

25 MR. BRUNSTAD: Well, except debt --

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

3 MR. BRUNSTAD: But debt is --

4 JUSTICE SCALIA: What it talks about is --
5 is inducing the client to -- to borrow money from
6 somebody else to pay the attorney. And what -- you
7 know, and that seems to be perfectly reasonable.

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

11 JUSTICE SCALIA: That's right.

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

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

18 MR. BRUNSTAD: Because the statute --

19 JUSTICE SCALIA: It makes no sense.

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:03 a.m., the case in the

1 above-entitled matter was submitted.)

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