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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

7 Mr. Brunstad.

8 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

9 ON BEHALF OF MILAVETZ, GALLOP &

10 MILAVETZ, P.A., ET AL.

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

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

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

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

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

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

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

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

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

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

25 MR. BRUNSTAD: Yes, Justice Ginsburg.

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

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

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

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

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

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

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

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

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

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

15 MR. BRUNSTAD: In a sense.

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

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

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

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

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

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

18 MR. BRUNSTAD: That's true, Your Honor, and
19 that's the heart of the problem here. The problem here
20 is that when Congress basically -- first of all,
21 Congress didn't import the 707(b) standard into
22 526(a)(4).

23 JUSTICE GINSBURG: What are the words in
24 707(b)? I mean, they are both in the statute. What the
25 lawyer has to attest to is required by statute.

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

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

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

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

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

1 of ignore that.

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

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

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

14 Now, it appears --

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

21 MR. BRUNSTAD: Not necessarily, Justice
22 Alito?

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

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

2 JUSTICE ALITO: Doesn't it mean -- "in
3 contemplation of bankruptcy" means because of the
4 expectation of filing a bankruptcy petition later?

5 MR. BRUNSTAD: I think that that would
6 assume that the filing of the bankruptcy petition looms
7 entirely in the consciousness of the debtor when the
8 debtor does everything. But I do -- I do think that the
9 "in contemplation of" clause, which is also used in
10 section 529, is a neutral phrase. "In contemplation of"
11 means nothing more than is the bankruptcy filing likely?
12 It doesn't have any nefarious, it doesn't have any
13 abusive context to it at all.

14 For example, section 329 --

15 JUSTICE SCALIA: Wait. It doesn't mean is
16 it likely. "In contemplation of" means that the reason
17 you are doing this is the contemplated bankruptcy. You
18 don't see any causal connection in that phrase?

19 MR. BRUNSTAD: I do see a causal connection,
20 but there is no element of doing something improper in
21 the language "in contemplation of."

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

25 MR. BRUNSTAD: Yes, Justice Scalia. But the

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

3 JUSTICE SCALIA: That's a different
4 question.

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

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

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

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

25 MR. BRUNSTAD: I think --

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

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

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

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

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

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

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

24 MR. BRUNSTAD: Correct. But just as --

25 JUSTICE SOTOMAYOR: Assuming that is read

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

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

9 JUSTICE SOTOMAYOR: Which doesn't explain
10 why.

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

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

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

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

1 there and the government is reading in out of nowhere.

2 What's -- what's the matter with the statute then?

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

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

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

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

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

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

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

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

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

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

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

12 MR. BRUNSTAD: And ultimately under --

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

15 (Laughter.)

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

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

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

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

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

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

25 And since that is impossible to know without

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

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

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

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

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

1 entirely vague.

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

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

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

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

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

20 MR. BRUNSTAD: Well, our argument there,
21 Justice Scalia, is that the statute does not
22 unambiguously embrace attorneys. "Attorney" is not
23 mentioned in the definition of "debt relief agency" in
24 101(12)(a) where you think it would be, because wherever
25 Congress has otherwise intended to regulate attorneys in

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

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

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

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

21 Doesn't a lawyer provide legal
22 representation?

23 MR. BRUNSTAD: A lawyer does, Justice
24 Breyer.

25 JUSTICE BREYER: All right. So doesn't the

1 term "provide legal representation" include a lawyer?

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

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

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

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

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

17 JUSTICE BREYER: It would seem to be a
18 lawyer.

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

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

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

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

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

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

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

1 proposed legislation in 1999, and thereafter in the
2 2001, 2003, and 2005 House reports deleted all reference
3 to attorneys -- a very, very strange tale, which seems
4 to signal exactly the opposite of the Heintz case.

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

11 JUSTICE GINSBURG: I thought that in the
12 legislative history there were examples of lawyers
13 overreaching, that the conduct that Congress was aiming
14 at was engaged in by lawyers, as well as 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 have 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 528,
14 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 -- that Petitioners' bankruptcy
24 advertisements are deceptive in any regard. The
25 government never alleged that Petitioners engaged in any

1 deceptive advertising. That's --

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

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

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

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

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

9 MR. BRUNSTAD: Yes, Justice Kennedy.

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

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

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

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

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

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

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

9 JUSTICE SCALIA: I don't know --

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

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

25 But this statute does the same thing. If I

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

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

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

10 Mr. Jay.

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

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

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

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

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

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

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

16 JUSTICE GINSBURG: What about an associate?

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

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

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

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

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

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

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

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

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

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

23 (Laughter.)

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

1 way.

2 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

2 MR. JAY: Well --

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

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

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

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

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

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

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

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

8 (Laughter.)

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, that's one of

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

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

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

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

1 prohibited this form of --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 even in the hypothetical, is not the animating cause.

2 And the Court has --

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

9 MR. JAY: Well --

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

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

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

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

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

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

13 MR. JAY: Or an abuse of the Bankruptcy
14 Code. And as Justice Ginsburg pointed out in
15 Mr. Brunstad's argument, that is something that the
16 attorney already must be familiar with under Section
17 707(b) and must certify in filing any Chapter 7
18 bankruptcy that in -- after the attorney's professional
19 investigation, that the granting of relief would not be
20 an abuse of the provisions of the Bankruptcy Code.

21 Attorneys are -- are making that
22 certification every day when they are filing for Chapter
23 7 bankruptcies.

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

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

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

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

16 MR. JAY: Well, it is certainly --

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

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

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

1 about it.

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

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

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

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

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

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

1 bankruptcy" has had for a long time.

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

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

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

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

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

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

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

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

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

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

17 JUSTICE GINSBURG: One thing that lawyers
18 who render services for money want -- is to be sure that
19 they will get paid, and one part of this provision, this
20 526(a)(4), talks about incurring debt to pay an attorney
21 for representing the debtor.

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

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

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

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

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

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

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

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

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

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

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

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

1 appeals held here.

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

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

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

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

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

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

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

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

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

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

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

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

25 They simply say, on pages 38 and 39 of the

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

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

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

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

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

22 MR. JAY: Well --

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

1 MR. JAY: Well --

2 JUSTICE ALITO: That's misleading.

3 MR. JAY: Four points on that, Justice
4 Alito.

5 First, the advertisement can and indeed, I'm
6 sure always will, say that the advertiser is a lawyer.
7 Nothing forbids the advertisement from saying that.
8 There is no restriction on what content goes in the ad,
9 only that it include this is disclaimer.

10 Second, the term "debt relief agency" is a
11 new one. It was coined by Congress in 2005 precisely
12 because it includes -- it includes attorneys; it
13 includes bankruptcy petition preparers. They had to --
14 you know, they had to come up with an amalgamated term
15 that includes them both. The fact that it's a new term
16 -- it came freighted with no -- no preceding -- no
17 baggage from its preceding history, and indeed, if the
18 statute were on the books and allowed to take affect
19 once this challenge is disposed of, I am confident that
20 the meaning would become much more well-accepted.

21 And the Petitioners have invited the Court,
22 and this is on page 87 of their opening brief, to look
23 at their website. And of course that's outside the
24 record, but to the extent that the Court looks at it,
25 the Court will see that Petitioners refer to their

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

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

12 The definition of "assisted person" turns on
13 having nonexempt property in excess of a certain amount.
14 Under section 522(1) of the Bankruptcy Code, and indeed
15 under this Court's decision in *Owen v. Owen*, there is no
16 exempt property until there is a filing for bankruptcy
17 and an assembly of the bankruptcy estate and a filing by
18 the debtor, or someone on the debtor's behalf, filing
19 schedules that specify what property the debtor has and
20 which exemptions the debtor chooses to claim. That is
21 only done when there is a debtor. Creditors don't do
22 that. Creditors don't have nonexempt property. We
23 don't think a creditor could be an assisted person.

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

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

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

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

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

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

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

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

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

5 Mr. Brunstad, you have three minutes
6 remaining.

7 REBUTTAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

8 ON BEHALF OF MILAVETZ, GALLOP &

9 MILAVETZ, P.A., ET AL.

10 MR. BRUNSTAD: Thank you.

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

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

25 And Justice Breyer, here's how it works.

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

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

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

1 MR. BRUNSTAD: Exactly.

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

4 So what is the harm --

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

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

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

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

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

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

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

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

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

4 MR. BRUNSTAD: Well, except debt --

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

7 MR. BRUNSTAD: But debt is --

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

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

15 JUSTICE SCALIA: That's right.

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

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

22 MR. BRUNSTAD: Because the statute --

23 JUSTICE SCALIA: It makes no sense.

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

1 It's very unclear.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 The case is submitted.

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

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