

FILED

Samuel L. Kay, Clerk
United States Bankruptcy Court
Augusta, Georgia
By jpayton at 4:09 pm, Sep 11, 2009

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:) Chapter 7 Case
) Number 08-10280
SUZETTE M. WILSON,)
)
Debtor)

_____)
)
DONALD F. WALTON,)
UNITED STATES TRUSTEE, REGION 21,)
)
Plaintiff)

v.) Adversary Proceeding
) Number 09-01011

BOBBY HARDWICK AND CAROL &)
KISHA ENTERPRISES, INC.,)
)
Defendants)
_____)

ORDER

Bobby Hardwick, pro se, d/b/a Carol and Kisha Enterprises¹ ("Hardwick") seeks dismissal of the complaint filed by the United States Trustee ("UST") which alleges violations of 11 U.S.C. §110 in connection with the preparation of Suzette M. Wilson's ("Debtor") bankruptcy petition. The Court has jurisdiction over this adversary

¹ While the Trustee's complaint lists "Carol & Kisha Enterprises, Inc." as a defendant, the motion to dismiss was filed pro se by "Hardwick dba Carol and Kisha Enterprises" and the bankruptcy petition lists both "Carol & Kisha Enterprises" and "Carol and Kisha Enterprises," each without the corporate designation.

pursuant to 28 U.S.C. §1334 and it is a core proceeding under 28 U.S.C. §157(b)(2)(A).²

Hardwick argues the complaint must be dismissed for lack of subject matter jurisdiction because 11 U.S.C. §110 is unconstitutional and alternatively, if it is constitutional, Hardwick is not a bankruptcy petition preparer as defined by the statute. For the reasons discussed below, I find 11 U.S.C. §110 is constitutional and the statute is applicable to Hardwick and therefore deny the motion to dismiss.

FACTS

Prior to filing for bankruptcy relief, Debtor sought the assistance of Carol & Kisha Enterprises in preparing her bankruptcy petition. Hardwick asserts Carol & Kisha Enterprises is no longer a corporation but is merely the company name under which he does business. Hardwick acknowledges he is not an attorney and admits Debtor "donated" \$375.00 to him for his assistance in helping Debtor

² Because I determine no valid constitutional challenge to the statute exists, I retain jurisdiction and resolve this proceeding as a core proceeding. See In re Headrick, 203 B.R. 805, 808 n. 5 (Bankr. S.D. Ga. 1996) (J. Dalis) (bankruptcy court must do a report and recommendation to district court if a valid constitutional challenge exists but retains if the constitutional challenge is not valid); In re Harris, 1998 WL 34064509 *1 (Bankr. S.D. Ga. September 30, 1998) (J. Davis) (reporting and recommending to the district court that 11 U.S.C. §106 is unconstitutional); but see In re King, 280 B.R. 767, 777 (Bankr. S.D. Ga. 2002) (J. Walker) (concluding bankruptcy court, as a unit of the district court has the power to declare a statute unconstitutional).

prepare her chapter 7 petition and schedules. Hardwick signed Debtor's petition under penalty of perjury stating:

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. §110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§110(b), 110(h) and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. §110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

(Petition, underlying case No. 08-10280, Dckt. No. 1, p. 3.)

The UST's complaint sets forth several errors, deficiencies and omissions made by Hardwick in preparing Debtor's petition which the UST asserts violates 11 U.S.C. §110.³ In Count

³ 11 U.S.C. §110 states:

(a) In this section--

(1) "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing; and

(2) "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

(b)(1) A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address. If a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the bankruptcy petition preparer shall be required to--

(A) sign the document for filing; and
(B) print on the document the name and address of that officer, principal, responsible person, or partner.

(2)(A) Before preparing any document for filing or accepting any fees from a debtor, the bankruptcy petition preparer shall provide to the debtor a written notice which shall be on an official form prescribed by the Judicial Conference of the United States in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure.

(B) The notice under subparagraph (A)--

(i) shall inform the debtor in simple language that a bankruptcy petition preparer is not an attorney and may not practice law or give legal advice;

(ii) may contain a description of examples of legal advice that a bankruptcy petition preparer is not authorized to give, in addition to any advice that the preparer may not give by reason of subsection (e)(2); and
(iii) shall--

(I) be signed by the debtor and, under penalty of perjury, by the bankruptcy petition preparer; and

(II) be filed with any document for filing.

(c)(1) A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.

(2)(A) Subject to subparagraph (B), for

purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

(B) If a bankruptcy petition preparer is not an individual, the identifying number of the bankruptcy petition preparer shall be the Social Security account number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.

(d) A bankruptcy petition preparer shall, not later than the time at which a document for filing is presented for the debtor's signature, furnish to the debtor a copy of the document.

(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

(2)(A) A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including any legal advice described in subparagraph (B).

(B) The legal advice referred to in subparagraph (A) includes advising the debtor--

(i) whether--

(I) to file a petition under this title; or
(II) commencing a case under chapter 7, 11, 12, or 13 is appropriate;

(ii) whether the debtor's debts will be discharged in a case under this title;

(iii) whether the debtor will be able to retain the debtor's home, car, or other property after commencing a case under this title;

(iv) concerning--

(I) the tax consequences of a case brought under this title; or

(II) the dischargeability of tax claims;

(v) whether the debtor may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;

(vi) concerning how to characterize the nature of the debtor's interests in property or the debtor's debts; or

(vii) concerning bankruptcy procedures and rights.

(f) A bankruptcy petition preparer shall not use the word "legal" or any similar term in any advertisements, or advertise under any category that includes the word "legal" or any similar term.

(g) A bankruptcy petition preparer shall not collect or receive any payment from the debtor or on behalf of the debtor for the court fees in connection with filing the petition.

(h) (1) The Supreme Court may promulgate rules under section 2075 of title 28, or the Judicial Conference of the United States may prescribe guidelines, for setting a maximum allowable fee chargeable by a bankruptcy petition preparer. A bankruptcy petition preparer shall notify the debtor of any such maximum amount before preparing an document for filing for a debtor or accepting any fee from the debtor.

(2) A declaration under penalty of perjury by the bankruptcy petition preparer shall be filed together with the petition, disclosing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and any unpaid fee charged to the debtor. If rules or guidelines setting a maximum fee for services have been promulgated or prescribed under paragraph (1), the declaration under this paragraph shall include a certification that the bankruptcy petition preparer complied with the notification requirement under paragraph (1).

(3) (A) The court shall disallow and order the immediate turnover to the bankruptcy trustee any fee referred to in paragraph (2) found to be in excess of the value of any services--

(i) rendered by the bankruptcy petition preparer during the 12-month period immediately preceding the date of the filing of the petition; or

(ii) found to be in violation of any rule or guideline promulgated or prescribed under paragraph (1).

(B) All fees charged by a bankruptcy petition preparer may be forfeited in any case in which the bankruptcy petition preparer fails to comply with this subsection or subsection (b), (c), (d), (e), (f), or (g).

(C) An individual may exempt any funds recovered under this paragraph under section 522(b).

(4) The debtor, the trustee, a creditor, the United States trustee (or the bankruptcy administrator, if any) or the court, on the initiative of the court, may file a motion for an order under paragraph (2).

(5) A bankruptcy petition preparer shall be fined not more than \$500 for each failure to comply with a court order to turn over funds within 30 days of service of such order.

(i)(1) If a bankruptcy petition preparer violates this section or commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any), and after notice and a hearing, the court shall order the bankruptcy petition preparer to pay to the debtor--

(A) the debtor's actual damages;

(B) the greater of--

(i) \$2,000; or

(ii) twice the amount paid by the debtor to

the bankruptcy petition preparer for the preparer's services; and

(C) reasonable attorneys' fees and costs in moving for damages under this subsection.

(2) If the trustee or creditor moves for damages on behalf of the debtor under this subsection, the bankruptcy petition preparer shall be ordered to pay the movant the additional amount of \$1,000 plus reasonable attorneys' fees and costs incurred.

(j)(1) A debtor for whom a bankruptcy petition preparer has prepared a document for filing, the trustee, a creditor, or the United States trustee in the district in which the bankruptcy petition preparer resides, has conducted business, or the United States trustee in any other district in which the debtor resides may bring a civil action to enjoin a bankruptcy petition preparer from engaging in any conduct in violation of this section or from further acting as a bankruptcy petition preparer.

(2)(A) In an action under paragraph (1), if the court finds that--

(i) a bankruptcy petition preparer has--
(I) engaged in conduct in violation of this section or of any provision of this title;
(II) misrepresented the preparer's experience or education as a bankruptcy petition preparer; or
(III) engaged in any other fraudulent, unfair, or deceptive conduct; and
(ii) injunctive relief is appropriate to prevent the recurrence of such conduct, the court may enjoin the bankruptcy petition preparer from engaging in such conduct.

(B) If the court finds that a bankruptcy petition preparer has continually engaged in conduct described in subclause (I), (II), or (III) of clause (i) and that an injunction

prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, has not paid a penalty imposed under this section, or failed to disgorge all fees ordered by the court the court may enjoin the person from acting as a bankruptcy petition preparer.

(3) The court, as part of its contempt power, may enjoin a bankruptcy petition preparer that has failed to comply with a previous order issued under this section. The injunction under this paragraph may be issued on the motion of the court, the trustee, or the United States trustee (or the bankruptcy administrator, if any).

(4) The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable attorneys' fees and costs of the action, to be paid by the bankruptcy petition preparer.

(k) Nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law.

(1)(1) A bankruptcy petition preparer who fails to comply with any provision of subsection (b), (c), (d), (e), (f), (g), or (h) may be fined not more than \$500 for each such failure.

(2) The court shall triple the amount of a fine assessed under paragraph (1) in any case in which the court finds that a bankruptcy petition preparer--

(A) advised the debtor to exclude assets or income that should have been included on applicable schedules;

(B) advised the debtor to use a false Social Security account number;

I, the UST asserts Hardwick violated 11 U.S.C. §110(b)(2)(B) by failing to file the required notice informing Debtor about the legal limitations of a bankruptcy petition preparer. In Count II, the UST alleges Hardwick violated 11 U.S.C. §110(c) by failing to provide his social security number. In Count III, the UST asserts Hardwick violated 11 U.S.C. §110(e) by giving legal advice to Debtor. Count IV alleges a violation of 11 U.S.C. §110(f) for using the word

(C) failed to inform the debtor that the debtor was filing for relief under this title;
or

(D) prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer.

(3) A debtor, trustee, creditor, or United States trustee (or the bankruptcy administrator, if any) may file a motion for an order imposing a fine on the bankruptcy petition preparer for any violation of this section.

(4)(A) Fines imposed under this subsection in judicial districts served by United States trustees shall be paid to the United States trustees, who shall deposit an amount equal to such fines in the United States Trustee Fund.

(B) Fines imposed under this subsection in judicial districts served by bankruptcy administrators shall be deposited as offsetting receipts to the fund established under section 1931 of title 28, and shall remain available until expended to reimburse any appropriation for the amount paid out of such appropriation for expenses of the operation and maintenance of the courts of the United States.

"legal" in advertisements. Count V seeks the turnover of fees Debtor paid Hardwick pursuant to 11 U.S.C. §110(h), alleging the fees exceed the value of the services rendered. Count VI seeks an injunction prohibiting Hardwick from acting as a bankruptcy petition preparer in the Southern District of Georgia.

In response to the UST's complaint, Hardwick filed a pro se counter claim and motion to dismiss moving to dismiss the complaint "based on the fact that [11] U.S.C. [§]110...is unconstitutional in that it violate[s] [Hardwick's] First and 14th amendment right to freedom of expression and due process of and equal protection of law."⁴ (Motion to Dismiss, Dckt. No. 5.) Hardwick also argues §110 is unconstitutional because it is vague, overbroad and fails to state a legitimate government interest. Even if the statute is found constitutional, Hardwick argues the complaint should be dismissed because he is not a bankruptcy petition preparer as defined by §110 since he received a "donation," not compensation for his services.

CONCLUSIONS OF LAW

Hardwick's motion to dismiss is brought under Federal Rule

⁴ Hardwick's motion to dismiss specifically refers to 11 U.S.C. §110(c) as unconstitutional however, at the hearing he argued subsections (a), (c), (f), (g) and (h) also were unconstitutional and therefore I will address the constitutionality of each of these subsections as well as the subsections relied upon by the UST in his complaint which are subsections (a), (b)(2), (c), (e), (f) and (h).

of Civil Procedure 12(b)(1) for a purported lack of subject matter jurisdiction. Federal Rule of Civil Procedure 12(b)(1) applies to bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 7012(b). For purposes of a motion to dismiss, the factual allegations of the complaint are taken as true and are construed favorably to the pleader. Solis-Ramirez v. U.S. Dept. of Justice, 758 F.2d 1426, 1429 (11th Cir. 1985). However, conclusions of law asserted in the complaint need not be accepted as true, as the court shall make its own determination of legal issues. Id. at 1429.

Hardwick attacks the constitutionality of 11 U.S.C. §110 asserting the statute as written is vague and overbroad and violates his right to free speech, due process of law and equal protection. "When considering challenges to the constitutionality of a statute, the Court begins with the presumption that acts of Congress are constitutional." Martini v. We The People Forms & Serv. Ctr. USA, Inc. (In re Barcelo), 313 B.R. 135, 140 (Bankr. E.D.N.Y. 2004) quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). "[L]aws regulating economic activity not involving constitutionally protected conduct are subject to a quite lenient test for constitutional sufficiency." Zolg v. Kelly (In re Kelly), 841 F.2d 908, 915 (9th Cir. 1988); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

With this background, it is important to note one of the

purposes of 11 U.S.C. §110 is consumer protection. The legislative history states:

Bankruptcy petition preparers not employed or supervised by any attorney have proliferated across the country. While it is permissible for a petition preparer to provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors. These preparers often lack the necessary legal training and ethics regulation to provide such services in an adequate and appropriate manner. These services may take unfair advantage of persons who are ignorant of their rights both inside and outside the bankruptcy system.

140 Cong. Rec. 10770 (October 4, 1994).

Vagueness and Overbreadth.

A statute is vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application." Scott v. United States (In re Doser), 412 F.3d 1056, 1062 (9th Cir. Idaho 2005) quoting United States v. Hugs, 384 F.3d 762, 768 (9th Cir. 2004). "Fair notice is provided when prohibitions are clearly defined, but such definition does not limit courts to a mechanical application which would lack relevance to the subject of the regulation." Gould et. al. v. Clippard, 340 B.R. 861, 884 (M.D. Tenn. 2006). As stated in Gould:

[N]umerous courts have carefully examined and parsed the text of the subsections [of 11 U.S.C. §110] and found that both the prohibited conduct and the resultant sanctions are clearly defined, identifiable under

ordinary facts and circumstances, and amenable to application without a subjective analysis. In re Rose, 314 B.R. 663, 688-690 (Bankr. E.D. Tenn. 2004) (§110 not vague because ordinary person can deduce meaning); In re Barcelo, 313 B.R. 135, 144-45 (Bankr. E.D.N.Y. 2004) (general terms do not render statute unconstitutionally vague when it would be impossible for Congress to codify a list); In re Doser, 292 B.R. 652, 658 (D. Idaho 2003) (statute provides definitions which constitutionally place person of ordinary intelligence on notice of prohibited conduct); In re Moore, 290 B.R. 287, 297-98 (Bankr. E.D.N.C. 2003) (§110(h) clearly . . . limits [bankruptcy petition preparers] to typing documents as directed by customers); In re Bush, 275 B.R. 69, 84-85 (Bankr.D. Idaho 2002) (same); In re Guttierrez, 248 B.R. 287, 299 (Bankr. W.D. Tex. 2000) (same).

Gould, 340 B.R. at 885. Congress clearly defined the term "bankruptcy petition preparer" in §110(a) and put someone of ordinary intelligence on notice that their behavior will be regulated pursuant §110. Each challenged subsection of §110 clearly sets forth its application in sufficient detail and the definition of a bankruptcy petition preparer is straightforward. "Section 110(a) clearly defines a Bankruptcy Petition Preparer as 'a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing in a bankruptcy case.' 11 U.S.C. §110(a). Thus, it is clear to whom the provisions of the statute apply and anyone performing the services of a Bankruptcy Petition Preparer are on notice of what

conduct is forbidden by statute." In re Doser, 412 F.3d 1056, 1062 (9th Cir. 2005).

Likewise, §110(b) is not vague as it is clear that notice must be given to the debtor stating the bankruptcy petition preparer is not an attorney and may not give legal advice. The subsection clearly states who is required to sign the notice and further states the notice must be filed with court. 11 U.S.C. §110(b).

Section 110(c) also is not vague as it expressly requires the social security number of the bankruptcy petition preparer and if the bankruptcy petition preparer is a corporation then, the social security number of the officer is required; and it authorizes a fine for noncompliance. See Ferm v. United States Trustee (In re Rausch), 194 F.3d 954 (9th Cir. Nev. 1999) ("Rausch III"); In re Coy, 324 B.R. 393 (Bankr. M.D. Fla. 2005); Ferm v. United States Trustee (In re Rausch), 213 B.R. 364 (D. Nev. 1997) ("Rausch II"); In re Ali, 230 B.R. 477 (Bankr. E.D.N.Y. 1999).

The other challenged subsections of §110 clearly put a person of ordinary intelligence on notice of prohibited conduct and set forth the sanctions for noncompliance -- §110(e) (no legal advice), §110(f) (advertisements cannot include the word "legal"), §110(g) (bankruptcy petition preparer may not collect any payment

for court fees), and §110(h) (disallows "any fee ... found to be in excess of the value of services rendered for the documents prepared"). 11 U.S.C. §§110(e), (f), (g) and (h)(2); See In re Doser, 292 B.R. at 658. Hardwick correctly notes the statute does not define what constitutes an "excessive" fee, but this does not render the statute unconstitutionally vague; rather, having the Court make the determination regarding fees is consistent with other statutes governing compensation of attorneys and trustees. See In re Rose, 314 B.R. at 689. Courts are very accustomed to assessing fees and awarding compensation and this terminology is not unconstitutionally vague. See 11 U.S.C. §330 (awarding "reasonable compensation" for professionals).

Hardwick also correctly points out that the statute does not detail the training required to be a bankruptcy petition preparer. Section 110 is not a licensing statute; rather, it is designed to protect consumers by clearly setting forth allowed and disallowed conduct and the consequences for failure to comply. Failure to set forth required training does not render the statute unconstitutional.

Hardwick next argues the statute is overbroad and therefore unconstitutional. With regards to a challenge that a statute is constitutionally overbroad, the Supreme Court has stated:

[T]o prevail on a facial attack the plaintiff

must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.' Properly understood, the latter kind of facial challenge is an exception to ordinary standing requirements, and is justified only by the recognition that free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power. Both exceptions, however, are narrow ones: the first kind of facial challenge will not succeed unless the court finds that 'every application of the statute created an impermissible risk of suppression of ideas,' and the second kind of facial challenge will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'

N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)) (internal citations omitted). "The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." In re Rose, 314 B.R. 663, 691 (Bankr. E.D. Tenn. 2004) quoting N.Y. v. Ferber, 458 U.S. 747 (1982).

Several courts have found §110 constitutional and not overly broad. See In re Rose, 314 B.R. at 688-90; In re Doser, 292

B.R. at 658. The Court in Doser explained:

In the case of a statute where 'despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct[,] the Court will not strike the statute for being overbroad. Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 964-65, 104 S.Ct. 2839, 2851, 81 L.Ed.2d 786 (1984) (quotations omitted). Such is the case here. Section 110 is limited to proscribing unfair and deceptive conduct by [bankruptcy petition preparers]. The Court may easily construe §110 to avoid constitutional problems. New York v. Ferber, 458 U.S. 747, 769-70, 102 S.Ct. 3348, 3361-62, 73 L.Ed.2d 1113 (1982). Section 110 is limited to a narrow range of conduct, and the Court concludes that §110 is not overbroad.

Doser, 292 B.R. at 658. After review of each challenged subsection of §110, I find the statute addresses and proscribes specific conduct of bankruptcy petition preparers, and I agree with the other courts that have considered this issue and found §110 is not overbroad.

Hardwick urges the Court to follow Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) where the Supreme Court held a city ordinance was unconstitutionally vague because it did not specifically state what conduct was "annoying" and therefore a crime. Coates, 402 U.S. at 614. The Supreme Court held the term "annoying" conduct was overbroad and could encompass far too many different types of legally permissible conduct. Coates, 402 U.S. at 614. Unlike the ordinance in Coates, §110 defines with great

specificity prohibited conduct. The statute does not leave it to anyone's whim as to what is a violation. The statute plainly defines the requirements. For example, §110(c) plainly requires the disclosure of a bankruptcy petition preparer's social security number and §110(b) requires the bankruptcy petition preparer provide the debtor with a notice stating that the bankruptcy petition preparer cannot provide legal advice. 11 U.S.C. §§110(b) and (c). Furthermore, a bankruptcy petition preparer "shall not use the word 'legal' in any advertisements" and "shall not collect or receive any payment from the debtor . . . for court fees in connection with filing the petition." See 11 U.S.C. §§110(f) and (g). Unlike the ordinance in Coates, the challenged provisions of §110 clearly set forth the required conduct. For these reasons, I find Hardwick's argument that §110 is unconstitutionally overbroad is without merit.

Free Speech.

Next, Harwick argues §110(f) is unconstitutional because it prohibits his use of the word "legal" in his advertisements and therefore violates his right to free speech. I disagree. Section 110(f) addresses bankruptcy petition preparers' advertisements. Advertisements are commercial speech for purposes of constitutional challenges. In re Kaitanqian, 218 B.R. 102, 107 (Bankr. S.D. Cal. 1998). "The First Amendment . . . has never been held to protect commercial speech that is inherently misleading or deceptive." Id.;

In re R.M.J., 455 U.S. 191, 203 (1982) ("inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the [government] may impose appropriate restrictions"). Section 110(f) seeks to avoid public confusion and prohibits advertisements that might mislead the public into thinking legal services are provided by bankruptcy petition preparers. In re Calzadilla, 151 B.R. 622, 626 (Bankr. S.D. Fla. 1993); In re Kaitanqian, 218 B.R. at 107 (use of word "paralegal" in advertisements is misleading). Therefore, the prohibition of bankruptcy preparers using the word "legal" in their advertisements does not violate Hardwick's right to free speech.

Hardwick argues he would not be able to advertise the fact that he cannot give legal advice if he is not allowed to use the word "legal" in his advertisements. This misconstrues the statute. The statute merely provides that advertisements for bankruptcy petition preparers may not include the word "legal" or any similar term it does not prevent Harwick from informing his customers of the limited scope of his services. In fact, §110(b) provides the proper avenue for Hardwick to disclose to his clients that he is not allowed to give legal advice. See 11 U.S.C. §110(b)(2)(A) (bankruptcy petition preparers must provide debtors with a written notice informing them that they cannot provide legal advice); see also 11 U.S.C. §110(e). For these reasons, I find the

statute does not infringe upon Hardwick's First Amendment right to free speech.

Right to Privacy and Due Process of Law.

Hardwick also asserts §110(c)'s requirement to provide his social security number violates his right to privacy. The Supreme Court has held the right to privacy involves two different interests: "One is the interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Fadio v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981) (recognizing a right to privacy to not disclose intimate details of one's life).⁵ The first strand is implicated by the requirement to disclose one's social security number. The Eleventh Circuit, along with other courts, has been careful not expand liberty and privacy interests too broadly:

[W]e 'have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore

⁵ In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Doe v. Moore, 410 F.3d 1337, 1343 (11th Cir. 2005) quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted); see also Lambert v. Hartman, 517 F.3d 433, 445 (6th Cir. 2008) (right to informational privacy extends only to interests that implicate a fundamental liberty interest). The bankruptcy court in In re Rausch stated that privacy rights recognized by United States Supreme Court are limited to those which are "fundamental" or "implicit in concept of ordered liberty" and pertain to "intimate facets of an individual's life in the areas of marriage, procreation, contraception, family relationships, child rearing and education." In re Rausch, 197 B.R. 109, 114 (Bankr. D. Nev. 1996) ("Rausch I") aff'd Ferm v. United States Trustee (In re Rausch), 213 B.R. 364 (D. Nev. 1997) ("Rausch II") aff'd sub nom. Ferm v. United States Trustee, (In re Crawford), 194 F.3d 954 (9th Cir. 1999) ("Rausch III") cert. denied Ferm v. United States Trustee, 528 U.S. 1189 (2000). "These special liberties include, 'the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity and to abortion.'" Doe v. Moore, 410 F.3d at 1343. Disclosure of Hardwick's social security number as required by §110

does not fall within this category of fundamental privacy interests. See Cassano v. Carb, 436 F.3d 74, 75 (2nd Cir. 2006) (finding no constitutional right to privacy covering the collection of social security numbers); McElrath v. Califano, 615 F.2d 434, 441 (7th Cir. 1980) (stating, "the contention that disclosure of one's social security number violates the right to privacy has been consistently rejected"). A social security number is not "inherently sensitive or intimate information and its disclosure does not lead directly to injury, embarrassment or stigma." Rausch III, 194 F.3d at 960.⁶

Even assuming there is a constitutionally protected right to privacy in one's social security number, the government's legitimate interest outweighs any such right. The proper "inquiry is whether there is a legitimate state interest in disclosure that outweighs the threat to [one's] privacy interest." James v. City

⁶ While identity theft is a legitimate concern, it does not rise to a constitutionally protected right. Similar to the current situation, Congress enacted §3710 of the Internal Revenue Service Restructuring Reform Act of 1998 allowing a tax preparer to use an alternate identification number rather than one's social security number as required in 26 U.S.C. §6109; however, Congress did not similarly amend §110 when amending the Bankruptcy Code in 2005. See 26 U.S.C. §6109(a)(4); In re Coy, 324 B.R. 393, 399 (Bankr. M.D. Fla. 2005) (noting §3710 of the Internal Revenue Service Restructuring Reform Act of 1998 amended §6109 to permit the use of an identification number other than the social security number and noting Congress has not so acted when proposing changes to 11 U.S.C. §110 in 2005). Hardwick's remedy is through legislative action, not a constitutional challenge.

of Douglas, Ga., 941 F.2d 1539, 1544 (11th Cir. 1991). As the legislative history shows, Congress explicitly required the disclosure of bankruptcy petition preparers' social security numbers in an effort to prevent fraud on unsophisticated debtors and stop the proliferation of unscrupulous bankruptcy petition preparers. See 140 Cong. Rec. 10770 (October 4, 1994); Rausch II, 213 B.R. at 367 ("Congress enacted 11 U.S.C. §110(c) as a consumer protection measure to police fraud and abuse by bankruptcy petition preparers."). The disclosure not only will limit the number of bankruptcy petition preparers to ones willing to disclose the information, it also allows for accurate monitoring of bankruptcy petition preparers. As one court has expressed:

Congress recognized the reality that debtors sought assistance in document preparation from non-attorneys, and '[r]ather than prohibiting such assistance and, as a realistic matter, watching it flourish more dangerously underground, Congress chose to force it into the light by defining persons who provide such assistance and regulating their conduct in . . . §110.' With these realities at hand, the primary focus of §110 was the provision of 'a remedy against a growing number of non-attorneys who were rendering quasi-legal (and legal) services in bankruptcy cases to the detriment of both the bankruptcy system and the consuming public. . . .'

[C]orrespondingly, courts require strict compliance with §110 in order to 'create a paper trail to identify non-attorneys who prepare documents to be filed by bankruptcy debtors.'

In re Rose, 314 B.R. 663, 680 (Bankr. E.D. Tenn. 2004) (internal citations omitted). Unlike an attorney, who may be disciplined through licensing and disbarment proceedings, there is no such mechanism to monitor the conduct of bankruptcy petition preparers. Congress addressed this concern by requiring petition preparers to disclose their social security numbers which provides a tracking mechanism for their activities. Because there is a legitimate government interest in requiring bankruptcy petition preparers to provide their social security numbers, §110 is constitutional. See Jeter v. Office of the United States Trustee, (In re Adams), 214 B.R. 212, 216 (B.A.P. 9th Cir. 1997); Rausch III, 194 F.3d 954, 960 (9th Cir. 1999); In re Turner, 193 B.R. 548, 553 (Bankr. N.D. Cal. 1996) (holding statutory requirement that bankruptcy petition preparer disclose his social security number on documents for filing did not violate constitutional right to privacy).

At the hearing, Hardwick also argued the statute violated Section 7(b) of the Privacy Act of 1974.⁷ Mr. Hardwick said he was

⁷ Section 7 of the Privacy Act states:

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to-

(A) any disclosure which is required by

to be notified whether or not the disclosure of his social security number was mandatory and by what authority disclosure was required.⁸ Hardwick's reliance on Section 7 of the Privacy Act is misplaced since the Act applies to federal, state and local agencies. Schwier v. Cox, 340 F.3d 1284, 1288 (11th Cir. 2003). The Court is not an "agency" as defined by the Privacy Act. See 5 U.S.C. §§552a and

Federal statute, or
(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

88 Stat. at 2194.

⁸ Hardwick's argument appears to be under section 7(b) of the Privacy Act which addresses the disclosures to be provided when requesting one's social security number. However to the extent Hardwick also contends section 7(a) was violated, this argument must fail as section 7(a)(2) excludes from the Act any disclosure required by a Federal statute. In Re Turner, 193 B.R. 548, 553 (Bankr. N.D. Cal. 1996) (stating since §110(c) is a federal statute which requires disclosure of a petition preparer's social security number, the prohibition in §7(a) of the Privacy Act is inapplicable); Davis v. C.I.R., 2000 WL 924630 *4 (U.S. Tax Ct. July 10, 2000) (noting, "section 7(a)(1) of the Privacy Act is not applicable to 'any disclosure which is required by Federal statute'" and therefore requiring social security number did not violate the Privacy Act).

552(f) (stating "agency" as used in the Privacy Act "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"); Rausch II, 213 B.R. 364, 368-69 (D. Nev. 1997) (noting the definition of an "agency" in the Privacy Act does not include courts of the United States).

However, even assuming the court, the UST or the clerk of the bankruptcy court is an agency under the Privacy Act, §110 still does not violate the Act. As the Turner court has said:

[N]o 'request' has been made for [a bankruptcy petition preparer's social security number]. Instead, through §110(c), Congress has directed that bankruptcy petition preparers subscribe their [social security numbers] on documents for filing. The UST is enforcing a Congressional directive, not 'requesting' anyone's [social security number].

In re Turner, 193 B.R. 548, 553 (Bankr. N.D. Cal. 1996). Furthermore, assuming a "request" was made, the petition which Hardwick signed sufficiently disclosed that a social security number is required. The petition form further warns, "a bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C.

§110 and 18 U.S.C. §156." (Petition, underlying case No. 08-10280, p. 3, Dckt. No. 1.) Therefore, Hardwick was notified that the disclosure was mandatory required under 11 U.S.C. §110. Furthermore, if Hardwick objects to disclosing his social security number he can opt to not be a bankruptcy petition preparer. For these reasons, I find no merit to Mr. Hardwick's allegations regarding section 7 of the Privacy Act of 1974.

Right to Work.

Hardwick also argues §110 denies him the right to pursue his calling as a bankruptcy petition preparer and therefore violates the equal protection clause of the constitution and his due process rights. In Greene v. McElroy, 360 U.S. 474, 492 (1959), the Supreme Court stated: "[T]he right to hold specific private employment and to follow a chosen profession free from *unreasonable* government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." Greene, 360 U.S. at 492 (emphasis added). The Supreme Court established long ago that reasonable government regulation is allowed to protect citizens from "ignorance and incapacity, as well as deception and fraud" and "there is no arbitrary deprivation of such right [to pursue the lawful occupation of one's choice] where its exercise is not permitted because of a failure to comply with conditions imposed by the [government] for the protection of society." Dent

v. West Virginia, 129 U.S. 114, 121-122 (1889); Pirollo v. City of Clearwater, 711 F.2d 1006, 1011 (11th Cir. 1983) (city noise ordinance did not violate right to pursue calling where plaintiff could still pursue calling consistent with the city's restrictions); In re Kaitanqian, 218 B.R. 102, 107 (Bankr. S.D. Cal. 1998) (Equal Protection argument failed as there is no fundamental right to be a bankruptcy petition preparer). In Dent, the Supreme Court upheld a statute requiring a physician to obtain a certificate from the state board of health showing graduation from a reputable medical college. Dent, 129 U.S. at 115. Likewise, Hardwick has no fundamental right to be a bankruptcy petition preparer without reasonable government regulation. Unlike in Greene where the government's revocation of plaintiff's security clearance precluded the plaintiff's employment in the aeronautics field, §110 is not a total ban on bankruptcy petition preparers and does not prevent Hardwick from being a bankruptcy petition preparer. Like the requirement in Dent, §110 promotes the government's legitimate interest in preventing fraud and deception upon unsophisticated debtors. The legitimate government interest of protecting its citizens from fraud and deception outweighs the burden on Hardwick, and therefore I dismiss this argument.

Discrimination.

At the hearing Hardwick, who is an African American, also alleged he was being prosecuted because of his race. Section 110 does not classify bankruptcy petition preparers by race or gender. See Jeter v. Office of the United States Trustee (In re Adams), 214 B.R. 212, 218 (9th Cir. B.A.P. 1997) (holding §110(c) does not violate the Equal Protection rights). Since there is not an inherently invidious racial classification, the inquiry is whether there is a rational relation between: (i) requiring non-attorney bankruptcy petition preparers to provide their social security numbers, restrict their advertisements, and prohibit certain conduct; and (ii) a legitimate governmental interest. Id. As previously discussed, I find that a rational relation exists as the government is protecting its citizens from the acts of certain unscrupulous bankruptcy petition preparers and preventing fraud and deceptive practices and the statute has no racial connotations whatsoever.

To the extent Hardwick is raising the argument of selective prosecution or racial profiling, he has not met his burden. To support a defense of selective prosecution, one must establish that (1) others similarly situated have generally not been prosecuted and (2) the government's discriminatory selection of him is invidious, or in bad faith based on constitutionally

impermissible considerations, such as race or religion. Durruthy v. Pastor, 351 F.3d 1080, 1091 (11th Cir. 2003). Hardwick failed to present any evidence to support this allegation.⁹ Furthermore, nothing on the face of the documents indicates Hardwick's race. The UST says he brought the claim because of violations of the statute not because of Hardwick's race. There is no indication the UST knew Hardwick's race when he filed his complaint. For these reasons, I find Hardwick's claim of racial discrimination, or profiling, fails.

Bankruptcy Petition Preparer.

Hardwick's final argument is that even if I find the statute to be constitutional the complaint should be dismissed because he is not a bankruptcy petition preparer under 11 U.S.C. §110(a). A bankruptcy petition preparer is defined as "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing." 11 U.S.C. §110(a). Hardwick signed Debtor's petition under penalty of perjury stating:

I declare under penalty of perjury that: (1) I am
a bankruptcy petition preparer as defined in 11

⁹ His mere allegation that the Debtor is African American and therefore the UST must have known he is African American is without merit.

U.S.C. §110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§110(b), 110(h) and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. §110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

(Petition, underlying case No. 08-10280, Dckt. No. 1, p. 3.)

Hardwick acknowledges he signed and prepared the petition, but argues the work was not done for compensation. Hardwick contends the \$375.00 given to him by Debtor was a "donation" for his services, not compensation. I do not find this argument to be credible. First, Hardwick acknowledges he prepared the documents and received \$375.00. Hardwick says he told Debtor he would prepare the petition for free but Debtor would have to wait until Hardwick had time; however, he could do the work quicker if a "donation" was made. Second, Hardwick signed Debtor's petition under penalty of perjury declaring he was a bankruptcy petition preparer. Finally, even if the Debtor intended the \$375.00 as a donation, it was compensation within the meaning of §110(a). See In re Paskel, 201 B.R. 511, 516 (Bankr. E.D. Ark. 1996) (stating the fact that "the debtor or [the defendant] may have intended the funds as a donation to another entity does not obviate the

fact that [the defendant] prepared the documents in exchange for compensation" as the statute does not require the petition preparer personally benefit from the funds). Given the facts of the current case, I find the \$375.00 given to Mr. Hardwick was compensation for his services and therefore he is a bankruptcy petition preparer within the meaning of §110.

For these reasons, I find 11 U.S.C. §110 is constitutional and Hardwick is a bankruptcy petition preparer. Therefore, Hardwick's Motion to Dismiss is ORDERED DENIED.¹⁰



SUSAN D. BARRETT
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 11th Day of September, 2009.

¹⁰ Hardwick's Motion to Dismiss included two additional motions. Hardwick demanded a jury trial which will be addressed at the pre-trial conference. Second, Hardwick requested this Court "to stay any constitutional issue(s) this court deny or find a lack of jurisdiction over, pending [Hardwick's] de novo appeal to the United States District Court for the Southern District of Georgia, Augusta Division and/or appeal to the United States Appeals Court for the Eleventh Circuit." (Motion to Dismiss, Dckt. No. 5, p. 5.) At the hearing, this Court denied this aspect of Hardwick's motion as premature, and it must be properly renewed to be considered.