No. 98-149

In the Supreme Court of the United States

OCTOBER TERM, 1998

COLLEGE SAVINGS BANK, PETITIONER

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in subjecting state entities to suit in federal court for engaging in false advertising of their own commercial products, Congress validly exercised its authority under Section 5 of the Fourteenth Amendment.

2. Whether a state entity waives its Eleventh Amendment immunity from suit in federal court by marketing a prepayment tuition plan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 131 F.3d 353. The opinion of the district court (Pet. App. 28a-92a) is reported at 948 F. Supp. 400.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1997. A petition for rehearing was denied on February 17, 1998. On April 21, 1988, Justice Souter extended the time for filing a petition for a writ of certiorari to and including July 17, 1998. The petition for a writ of certiorari was filed on July 17, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. College Savings Bank (petitioner), markets CollegeSure(R) CD's, a deposit contract for financing future college expenses. Pet. App. 2a. Petitioner obtained a patent for its financing methodology. *Ibid.* The State of Florida created the Florida Prepaid Postsecondary Education Expense Board (respondent) to market and sell tuition prepayment programs designed to cover future college expenses. *Id* at 3a. Petitioner and respondent compete in selling their tuition plans. *Ibid.*

Petitioner filed suit against respondent in the United States District Court for the District of New Jersey, alleging that respondent had made false and misleading statements about its own tuition prepayment program, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a). Pet. App. 3a.* Although respondent is a state entity, the Trademark Remedy Clarification Act of 1992 (TRCA), Pub. L. No. 102-542, 106 Stat. 3567, subjects state entities to suit under the Lanham Act. Following this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), respondent moved to dismiss petitioner's Lanham Act claim, contending that the TRCA is unconstitutional insofar as it attempts to abrogate a state entity's Eleventh Amendment immu-

* Petitioner filed a separate action against respondent, alleging that respondent had infringed its patent. Pet. App. 3a. That action is not at issue here. We note, however, that the district court rejected respondent's Eleventh Amendment challenge to that action, the Federal Circuit affirmed that decision, and respondent has filed a petition for a writ of certiorari from the Federal Circuit's judgment (No. 98-531).

nity. Pet. App. 4a. The United States intervened to defend the constitutionality of the TRCA. *Ibid.*

The district court dismissed petitioner's Lanham Act claim on Eleventh Amendment grounds. Pet. App. 28a-92a. The district court held that the TRCA did not fall within Congress's power under Section 5 of the Fourteenth Amendment to protect property interests against state deprivations without due process of law. The district court reasoned that "[a]n interest in being free from alleged false advertising simply does not qualify as a property right for purposes of the Due Process Clause of the Fourteenth Amendment." Pet. App. 89a. The district court also rejected the argument that, by marketing a prepaid tuition plan, respondent waived its immunity from suit under the doctrine of *Parden* v. *Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184 (1964). The district court concluded that *Seminole Tribe* implicitly overruled the *Parden* waiver doctrine. Pet. App. 68a-73a.

3. The court of appeals affirmed. Pet. App. 1a-27a. The court of appeals held that, as applied in this case, the TRCA is not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment to prevent deprivations of property without due process. *Id.* at 17a. The court concluded that the claim asserted in this case—the right to be free from false claims made by a competitor about its own product—is not a property right protected by the Fourteenth Amendment. *Id.* at 14a. The court also concluded that, while a business is a property interest protected by the Fourteenth Amendment, a competitor's false claims about its own product does not result in a deprivation of that interest within the meaning of the Fourteenth Amendment. *Id.* at 15a-17a.

The court of appeals also held that respondent did not waive its immunity from suit under the *Parden* waiver doctrine. The court held that the *Parden* waiver doctrine does not apply to core governmental activity, and it concluded that providing financing for state education is a core governmental activity. Pet. App. 22a. The court of appeals did not reach the question whether *Seminole Tribe* implicitly overruled the *Parden* waiver doctrine. *Id.* at 24a.

ARGUMENT

Petitioner contends (Pet. 10) that review is warranted because the court of appeals invalidated an Act of Congress. That characterization vastly overstates the court of appeals' holding. The court of appeals held only that "the TRCA, as applied in this case, is an unconstitutional exercise of Congress' powers." Pet. App. 17a. The court of appeals "carefully confined" its holding to petitioner's "narrow allegations" that respondent had misrepresented its own products. *Ibid.* The court of appeals "express[ed] no opinion as to whether the TRCA may be applied constitutionally in a case involving a trademark infringement or involving a misrepresentation about a competitor's goods or services." *Ibid.* The court of appeals' limited ruling that the Eleventh Amendment bars the narrow claim brought by petitioner does not conflict with any other appellate decision. This Court's review is not warranted.

1. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Court held that Congress has authority under Section 5 of the Fourteenth Amendment to abrogate a State's immunity from suit. In *Seminole Tribe*, the Court did not disturb that holding. 517 U.S. at 59, 65-66. Relying on *Fitzpatrick*, petitioner contends (Pet. 13-22) that

subjecting States to suit in federal court for engaging in unfair competition in the form of false advertising is a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment. In particular, petitioner argues that subjecting States to suit in federal court for engaging in such unfair competition may be viewed as a permissible effort on the part of Congress to prevent States from depriving businesses of their property without due process of law.

The Fourteenth Amendment, however, "does not protect a business against the hazards of competition." *Hegeman Farms Corp.* v. *Baldwin*, 293 U.S. 163, 170 (1934). Moreover, in providing for protection against unfair competition in the form of false advertising, Congress did not purport to create a property right in being free from that form of competition. An action for unfair competition "is not predicated upon a violation of the plaintiff's property right, but upon the defendants' failure to conform to an affirmative code of ethics arising out of the competitive relationship." 1A L. Altman, *Callmann on Unfair Competition, Trademarks and Monopolies* § 5.01, at 4 (4th ed. 1994). And, as this Court has explained, "[t]he law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting *consumers* from confusion as to source * * * not the protection of producers." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989).

Petitioner's argument reduces to the contention that the Fourteenth Amendment is implicated any time that a state entity engages in a tort that causes injury to a person or his property. This Court has made clear, however, that the Fourteenth Amendment "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that at-

tend living together in society." *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986). The Court has also repeatedly held that a tort does not rise to the level of a deprivation of property or liberty for Fourteenth Amendment purposes merely because the defendant is a state entity. *Baker* v. *McCollan*, 443 U.S. 137, 146 (1979) ("false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official"); *Daniels* v. *Williams*, 474 U.S. at 333 ("injuries inflicted by governmental negligence are not addressed by the United States Constitution"); *cf. Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) ("[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner"). It was, accordingly, reasonable for the court of appeals to refuse to view the Lanham Act's prohibition on the false advertising of one's own commercial products as an exercise of Congress's power under Section 5 to prevent deprivations of property without due process of law.

Petitioner errs in contending (Pet. 11) that the decision in this case conflicts with the Federal Circuit's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343 (1998), petition for cert. pending, No. 98-531. In the latter case, the Federal Circuit held that Congress had authority under Section 5 of the Fourteenth Amendment to subject States to suit in federal court for patent infringement, in part on the ground that patent rights are a species of property protected by the Fourteenth Amendment. *Id.* at 1349-1350. There is no inconsistency between that holding and the holding of the court below that Congress did not have authority under Section 5 to subject States to suit in federal court for misrepresenting their own products, on the ground that protection of a competitor against such misrepresenta-

tion is not a species of property protected by the Fourteenth Amendment.

2. Petitioner also contends (Pet. 22-27) that, by marketing a prepayment tuition plan, respondent waived its immunity from suit under the *Parden* waiver doctrine. That contention does not warrant review.

a. In *Parden*, the Court held that States that operate railroads waive their immunity from suit under the Federal Employers' Liability Act. The Court reasoned as follows:

> [B]y enacting the FELA * * * Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U.S. at 192.

In *Employees of the Department of Public Health & Welfare* v. *Missouri*, 411 U.S. 279, 284 (1973), the Court held that the *Parden* waiver doctrine applies when a State operates a business for profit in an area where private persons and corporations normally run the enterprise, but not when the State operates non-proprietary, non-profit institutions. In *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468, 478 (1987), the Court held that *Parden* is inapplicable when Congress fails to express its intent to subject the States to suit in unmistakably clear language. And in *Seminole Tribe*, the Court indicated that *Parden* rests on the "unremarkable * * * proposition that the States may waive their sovereign immunity." 517 U.S. at 65.

Extrapolating from this Court's decisions, the court of appeals in this case concluded that the *Parden* waiver doctrine applies when:

> (1) Congress enacts a law providing that a state will be deemed to have waived its Eleventh Amendment immunity if it engages in the activity covered by the federal legislation; (2) the law does so through a clear statement that gives notice to the states; (3) a state then engages in that activity covered by the federal legislation; and (4) the activity in question is not an important or core government function.

Pet App. 21a. The court then found that the first three requirements were met, but that the fourth was not. With respect to the fourth factor, the court reasoned that providing education is a traditional and core function of state governments and that the State's maintenance of a program that helps students and their families to pay for and finance a college education is a part of that overall goal. *Id.* at 22a-24a.

b. We disagree with the court of appeals' conclusion that respondent's marketing of its prepaid tuition plan is a core state function that falls outside the legitimate scope of the *Parden* waiver doctrine. Respondent was "created as a body corporate with all the powers of a body corporate," including the power to engage in commercial transactions with the public and the power to "[s]ue and be sued." Fla. Stat. Ann. § 240.551(5) (West 1998). Respondent markets its product outside the State of Florida and permits the transfer of deposited funds to out-of-state colleges. See *id.* § 240.551(7)(e). Respondent employs a marketing agent and advertises its investment contracts through press releases and annual "marketing materials." *Id.*

§ 240.551(5)(i). Respondent may collect administrative fees and impose penalties for delinquent payments, *id.* § 240.551(5)(c)13, and it has the authority to increase contract prices as necessary to meet its costs, Pet. App. 49a. As of June 1995, respondent had amassed total assets of nearly $1.5 billion and a surplus in excess of $184 million. *Ibid.* Respondent's earnings are invested in the program itself and may not otherwise be used by the State. Fla. Stat. Ann. § 240.551(4) and (10) (West 1998). Those circumstances sufficiently show that respondent is engaged in the operation of an essentially commercial enterprise and that it is not performing a core state function.

Review on that narrow issue, however, is not warranted. Petitioner does not challenge the court of appeals' holding that the *Parden* doctrine does not apply when the activity in question is a core state function; the court's conclusion that the activity at issue in this case is a core state function is essentially fact-bound; and there is no conflict between the court's conclusion on that issue and the decision of any other court of appeals. In these circumstances, the question whether respondent is engaged in the kind of activity that falls within the scope of the *Parden* waiver doctrine does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARK B. STERN
MICHAEL E. ROBINSON
Attorneys

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