U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 3, 2005

Geraldine R. Gennet, Esquire
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: Central Virginia Community College v. Katz,
S. Ct. No. 04-885

Dear Ms. Gennet:

I am writing to advise you that I have decided against intervening in this case to defend the constitutionality of 11 U.S.C. 106(a), which abrogates state sovereign immunity from certain suits brought pursuant to the Bankruptcy Code.

In conflict with all the other circuits that have addressed the question, the Sixth Circuit upheld the constitutionality of Section 106(a) as a valid exercise of Congress's authority under the Bankruptcy Clause. The Supreme Court granted Central Virginia Community College's petition to decide whether Congress has authority under the Bankruptcy Clause to abrogate a State's immunity from suit.

In a letter dated March 6, 1998, Solicitor General Seth P. Waxman notified the House and the Senate that he would not seek certiorari in the first of the court of appeals cases invalidating Section 106(a). In a letter dated October 25, 2001, Solicitor General Theodore B. Olson notified the House and Senate that he would not intervene in a case in the First Circuit to defend the constitutionality of Section 106(a). And in a letter dated November 26, 2003, Solicitor General Olson notified the House and Senate that he would not intervene in a case in the Supreme Court to defend the constitutionality of Section 106(a).

Like my predecessors, I have concluded that Section 106(a) cannot be defended consistent with a series of Supreme Court precedents. The Court held in Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996), that Congress lacks authority under Article 1 to abrogate a State's immunity from suit. Since then, the Court has repeatedly reaffirmed that holding. See Florida Prepaid Postsecondary Ed. Expense Bd. v College Savings, 527 U.S. 627, 636 (1999) ("Seminole Tribe makes clear

that Congress may not abrogate state sovereign immunity pursuant to Article I powers."); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 80 (2001) ("Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."); Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) ("Congress may not * * * base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); see also Federal Maritime Comm'n v. South Carolina Ports Authority, 535 U.S. 743, 752 (2002) (Under Seminole Tribe, "even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). In light of that series of squarely applicable precedents, there is no viable defense for Section 106(a). At the same time, Congress's authority to abrogate a State's immunity from suit under Section 5 of the Fourteenth Amendment raises distinct questions as evidenced by the government's recently filed brief defending the constitutionality of Congress's decision to abrogate the States' immunity in Title II of the Americans with Disabilities Act. See United States v. Georgia, No. 04-1203 (filed July 29, 2005).

Please let me know if I can be of any further assistance in this matter.

Very truly yours,

Paul D. Clement
Solicitor General