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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Section 43(a) of the Lanham Trade-Mark Act, 15 U.S.C. 1125(a), establishes a private right of action for damages against any "person" who engages in false advertising of goods or services in interstate commerce. The Act unambiguously provides that States and state instrumentalities are among the "person[s]" subject to suit in federal court. The questions presented are as follows:

1. Whether the Florida Prepaid Postsecondary Education Expense Board impliedly waived its Eleventh Amendment immunity from suit in federal court by its marketing and sale of prepayment tuition plans.

2. Whether Congress's decision to subject the States to suit in federal court for engaging in the false advertising of commercial products can be sustained as an exercise of congressional power under Section 5 of the Fourteenth Amendment.

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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. An earlier opinion of the district court in this case is reported at 919 F. Supp. 756.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1997. A petition for rehearing was denied on February 17, 1998. Pet. App. 93a-94a. On April 21, 1998, Justice Souter extended the time for filing a petition for a writ of certiorari to and including July 17, 1998. The petition was filed on July 17, 1998, and was

granted on January 8, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> SECTION 1. * * * No State shall * * * deprive any person of life, liberty, or property, without due process of law.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 1122 of Title 15, United States Code, provides:

> **Liability of States, instrumentalities of States, and State officials**
>
> **(a) Waiver of sovereign immunity**
>
> Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in

Federal court by any person, including any governmental or nongovernmental entity for any violation under this chapter.

(b) Remedies

In a suit described in subsection (a) of this section for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any person other than a State, instrumentality of a State, or officer or employee of a State or instrumentality of a State acting in his or her official capacity. Such remedies include injunctive relief under section 1116 of this title, actual damages, profits, costs and attorney's fees under section 1117 of this title, destruction of infringing articles under section 1118 of this title, the remedies provided for under sections 1114, 1119, 1120, 1124 and 1125 of this title, and for any other remedies provided under this chapter.

4. Section 1125(a) of Title 15, United States Code, provides:

Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,

> connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.
>
> (2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capcity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

STATEMENT

1. The Lanham Trade-Mark Act (Lanham Act), 15 U.S.C. 1051 *et seq.*, contains a variety of provisions designed to safeguard the integrity of this country's commercial markets. Section 43(a) of the Act, 15 U.S.C. 1125(a), establishes a private right of action against any "person" who, *inter alia*, "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. 1125(a)(1)(B).

As amended in 1992, see Trademark Remedy Clarification Act (TRCA), Pub. L. No. 102-542, § 3(c), 106 Stat. 3568, the Lanham Act defines the term "person" to include "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." 15 U.S.C. 1125(a)(2). The 1992 amendment (see § 3(b), 106 Stat. 3567) further provides that state entities "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this chapter." 15 U.S.C. 1122(a). State defendants are subject to the same remedies, including money damages, as are available in suits against nongovernmental parties. 15 U.S.C. 1122(b).

2. Petitioner College Savings Bank (CSB) markets certificates of deposit (CDs) under the trademark "CollegeSure." The CollegeSure CDs are deposit contracts for financing future college expenses. CSB received a patent for its financing methodology, which is designed to guarantee investors sufficient funds to cover the future costs of tuition for college. See Pet. App. 2a, 29a & n.1.

The Florida legislature created the Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid or Board) as part of a legislative initiative to foster greater educational opportunities at the State's colleges and universities. See Fla. Stat. Ann. § 240.551 (West 1996 & Supp. 1999). Since 1988, the Board has administered the Florida Prepaid Postsecondary Education Expense Program (Program), a tuition-prepayment program available to "qualified beneficiaries" as defined by Florida law. Pet. App. 29a-30a & n.2. Those "qualified beneficiaries" include any student who is a

Florida resident at the time the advance payment contract is formed, as well as any non-resident student who is the child of a non-custodial parent who is a resident of Florida at the time of contract formation. *Id.* at 30a n.2. During the first seven years of its operations, Florida Prepaid accumulated a surplus of more than $184 million. *Id.* at 49a.

CSB filed two separate actions against Florida Prepaid in the United States District Court for the District of New Jersey. In the first suit, CSB alleged that Florida Prepaid had infringed CSB's patent. Pet. App. 28a. The district court rejected Florida Prepaid's Eleventh Amendment challenge to that action, holding that Congress had validly abrogated the Board's immunity from suits for patent infringement pursuant to its powers under Section 5 of the Fourteenth Amendment. *Id.* at 79a-87a. The United States Court of Appeals for the Federal Circuit affirmed that decision. See *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343 (1998) (Pet. App. 95a-120a). This Court granted Florida Prepaid's petition for a writ of certiorari in that case on January 8, 1999, the same day that it granted CSB's petition in the instant case. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank & United States*, No. 98-531.

The instant case arises out of the second action filed by CSB against Florida Prepaid. In that proceeding, CSB claimed that Florida Prepaid 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). See Pet. App. 3a, 31a.[1]

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[1] The district court summarized the allegations in CSB's complaint as follows:

3. In April 1996, following this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), Florida Prepaid moved to dismiss CSB's Lanham Act claims, asserting that the suit was barred by the Eleventh Amendment. Pet. App. 3a-4a, 39a-40a. The United States intervened to defend the constitutionality of the TRCA provisions (see p. 5, *supra*) that authorize the Lanham Act claims to be brought in federal court. See *id.* at 4a, 40a. The district court ordered the complaint dismissed in its entirety. See *id.* at 91a-92a.[2]

a. The district court first determined that Florida Prepaid is an "arm of the State" of Florida and is therefore entitled to assert the State's Eleventh Amendment immunity. Pet. App. 42a-58a. The court acknowledged that Florida Prepaid had amassed substantial assets with little if any assistance from the State of Florida. *Id.* at 49a. The court observed, however, that any judgment against Florida Prepaid could be paid only through a special legislative appropriation, and it explained that Florida Prepaid's lack of statutory

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> Specifically, CSB alleges that defendant falsely represented the Florida Prepaid program in the following respects: (1) that the State of Florida guarantees all contract beneficiaries to have the full amount necessary to fund a college education at a participating college or university; (2) that any tax liability on a Florida Prepaid contract is deferred until the student reaps the benefits of the contract, *i.e.*, is enrolled at college; (3) that Florida Prepaid's investments are backed by the "full faith and credit" of the United States; and (4) that defendant failed to disclose, in its 1995 Annual Report, the existence of CSB's patent infringement action against it.

Pet. App. 31a (citations omitted).

[2] As noted above (see p. 6, *supra*), the district court denied Florida Prepaid's motion to dismiss a separate complaint alleging infringement of CSB's patent.

authority to satisfy judgments against it weighed in favor of treating the agency as an arm of the State. *Id.* at 50a-53a. The court noted as well that under Florida law, Florida Prepaid is treated as a state instrumentality and has only those powers specifically conferred by statute. *Id.* at 53a-54a. The court also attached significance to the fact that the Board is composed of four officers of the State of Florida and three additional members appointed by the Governor and confirmed by the state Senate. *Id.* at 55a.

b. The district court next rejected the contention, advanced both by CSB and by the United States, that Florida Prepaid had impliedly waived its Eleventh Amendment immunity from suit in federal court. Pet. App. 60a-73a. CSB and the United States argued that under this Court's decision in *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), a State may be deemed to have waived its Eleventh Amendment immunity if it engages in commercial activity at a time when federal law provides for suit in federal court in cases arising out of that activity. The district court held the *Parden* waiver doctrine inapplicable on its own terms because "Florida Prepaid is performing a role traditionally undertaken by state governments—making available affordable educational benefits." Pet. App. 68a. The court also held that *Parden* had been "overruled by implication" by this Court's decision in *Seminole Tribe*. *Id.* at 72a.

c. Finally, the district court concluded that Section 5 of the Fourteenth Amendment does not authorize Congress to abrogate Florida Prepaid's Eleventh Amendment immunity from suits alleging false advertising in violation of the Lanham Act. Pet. App. 87a-91a. The court reasoned that the "right to be free from false advertising" is not a "property" right within the mean-

ing of the Fourteenth Amendment's Due Process Clause. *Id.* at 89a. Because "the false advertising prong of the Lanham Act does not implicate any of the substantive guarantees of the Fourteenth Amendment," the court stated, it "cannot be the basis for the abrogation of Eleventh Amendment immunity." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-27a.

a. The court first held that on the facts of this case, Section 5 of the Fourteenth Amendment does not provide a valid basis for congressional abrogation of Florida Prepaid's Eleventh Amendment immunity. Pet. App. 6a-17a.[3] The court "focus[ed] on the question of whether the TRCA protects a property right recognized under the Fourteenth Amendment." *Id.* at 13a. The court acknowledged that "[t]he tort of unfair competition found in the Lanham Act does protect some intangible property rights," but found that "no such intangible property is involved in the present case." *Id.* at 14a. The court explained that "CSB's Lanham Act claim concerns allegedly false statements about a competitor's own product," and that a "right to be free of false advertising" could not properly be regarded as "an intangible property right protected under the Fourteenth Amendment." *Ibid.* The court concluded that "because this case does not involve a property interest protected by the Fourteenth Amendment, the TRCA, as applied in this case, is an unconstitutional exercise of Congress' powers." *Id.* at 17a.[4]

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[3] In the court of appeals, CSB did not challenge the district court's holding that Florida Prepaid is an "arm of the State" for Eleventh Amendment purposes.

[4] 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." Pet. App. 17a.

b. The court of appeals also rejected the contention that Florida Prepaid had waived its Eleventh Amendment immunity by engaging in commercial activities covered by the Lanham Act. Pet. App. 18a-25a. The court explained that

> the *Parden* doctrine holds that a state's Eleventh Amendment immunity can be constructively waived if: (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.

Id. at 21a. The court acknowledged that "the first three requirements of the *Parden* doctrine have been or will be met" in the instant case. *Ibid.* The court concluded, however, that Florida Prepaid was engaged in a core governmental function because its operation "directly furthers the goal of education by providing a system of financing for college and university education." *Id.* at 22a. Because the court of appeals found the *Parden* waiver doctrine to be inapplicable by its terms, it declined to address the question whether *Parden* was implicitly overruled by this Court's decision in *Seminole Tribe*. *Id.* at 26a-27a.

SUMMARY OF ARGUMENT

1. This Court has repeatedly recognized that a State may waive its Eleventh Amendment immunity and consent to suit in federal court. When Congress unambiguously provides that specified conduct will have the

legal effect of subjecting the States to suit in federal court, and a State thereafter voluntarily elects to engage in that conduct, the State has impliedly waived its Eleventh Amendment immunity. In a variety of contexts, Congress has validly provided that States may obtain the benefits afforded by federal law only if they consent to be sued in federal court.

In *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), this Court held that Congress may condition a State's right to operate a commercial railroad upon the State's amenability to suit in federal court. Although *Parden* has since been qualified in important respects, its core holding remains sound. So long as (1) Congress has unequivocally stated that a State which engages in specified activities will be subject to suit in federal court; and (2) the activities are of a sort that the State can realistically choose to abandon, the State's conduct is properly regarded as a voluntary waiver of Eleventh Amendment immunity.

Both of those requirements are satisfied in the instant case. As amended in 1992, the Lanham Act makes unmistakably clear that state entities operating in interstate commerce are subject to the Act's substantive and remedial provisions in the same manner as their private competitors. And while state governments have historically assumed responsibility for the actual operation of schools, the marketing of investment products of the sort at issue here is neither a traditional nor a necessary means of facilitating the State's educational mission. Florida Prepaid obtains significant beneits from the Lanham Act's fair-competition requireents, and it should not be permitted to invoke its status as a state entity to gain a competitive advantage over other marketers of investment products.

2. Because the TRCA provisions at issue in this case represent a valid exercise of congressional authority to condition a State's participation in commercial activity on a waiver of Eleventh Amendment immunity, this Court need not determine whether those provisions could also be sustained as an exercise of Congress's powers under Section 5 of the Fourteenth Amendment. If the Court does address that question, however, we agree with the court of appeals that a state commercial entity which engages in false and misleading advertising of its own product does not thereby "deprive" a competitor of "property" within the meaning of the Fourteenth Amendment. The "right" to be free of false advertising of that nature does not possess the hallmarks—in particular, the right to exclude others—that are characteristic of property rights. Florida Prepaid's alleged misrepresentations concerning its own products effected no intrusion upon any tangible or intangible interest over which CSB possesses exclusive dominion.

ARGUMENT

I. FLORIDA PREPAID VOLUNTARILY WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE LANHAM ACT BY OPERATING A COMMERCIAL ENTERPRISE AND ADVERTISING ITS PRODUCTS IN INTERSTATE COMMERCE

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. This Court has understood the Amendment as confirming a broad, preexisting principle "that a State will * * * not be subject to suit in federal court unless it has consented to suit." *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991); accord, *e.g.*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 54 (1996).

This Court has repeatedly recognized that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985); accord, *e.g.*, *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State * * * is a personal privilege which it may waive at pleasure."); *Seminole Tribe*, 517 U.S. at 54. The most obvious way in which a State can waive its Eleventh Amendment immunity is by passage of state legislation expressing the State's consent to be sued in federal court. See *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 306-308 (1990); cf. *Atascadero*, 473 U.S. at 241. As we explain below, however, that is not the only way. When Congress unambiguously provides that specified conduct will have the legal effect of subjecting the States to suit in federal court, and a State thereafter voluntarily elects to engage in that conduct, the State has impliedly waived its Eleventh Amendment immunity.

Congress has unambiguously determined that States and state entities engaged in commercial enterprises should be subject to the fair-competition requirements of the Lanham Act. Congress has further specifically determined that such state entities, like their private competitors, should be subject to suit in federal court for violations of the Act. In the instant case, Florida Prepaid elected to sell and advertise a commercial

investment product in competition with private businesses. Having chosen to engage in that activity, with clear notice of its legal consequences, Florida Prepaid may not claim a constitutional exemption from the rules that bind its competitors.

A. Where Congress Unambiguously Provides That States Engaging In Specified Conduct Will Be Subject To Suit In Federal Court, And A State Thereafter Voluntarily Engages In That Conduct, The State Has Impliedly Waived Its Eleventh Amendment Immunity

In arguing that Florida Prepaid has waived its Eleventh Amendment immunity, CSB principally relies on this Court's decision in *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), which held that a State could be deemed to have waived its immunity from suit in federal court by operating a commercial railroad. Florida Prepaid suggests (see Br. in Opp. 19-27) that this Court's decision in *Parden* is an outlier—a constitutional anomaly. That suggestion is incorrect. Though later decisions have qualified *Parden* in significant respects, its core holding is fully consistent with prevailing Eleventh Amendment doctrine. *Parden* is simply one example of a broader principle, repeatedly recognized by this Court and the federal courts of appeals, that a State may impliedly waive its Eleventh Amendment immunity by voluntarily engaging in conduct that Congress has clearly provided will subject the State to suit in federal court.

1. When Congress legislates pursuant to its powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, it may condition the acceptance and receipt of federal funds on a State's compliance with conditions that Congress could not impose unilaterally. *South Dakota* v.

Dole, 483 U.S. 203, 207-211 (1987); see also *New York* v. *United States*, 505 U.S. 144, 167, 171-172 (1992). One such condition may be a waiver of Eleventh Amendment immunity. As the court of appeals explained in *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998), "[o]ne way for a state to waive its [Eleventh Amendment] immunity is to accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'" 123 F.3d at 1271 (quoting *Atascadero*, 473 U.S. at 247).

The court of appeals in *Clark* found that "the Rehabilitation Act manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." 123 F.3d at 1271. The court relied in part on this Court's characterization of the pertinent Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, provision as "an unambiguous waiver of the States' Eleventh Amendment immunity." *Ibid.* (quoting *Lane* v. *Peña*, 518 U.S. 187, 200 (1996)). The court concluded that "[b]ecause California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment." *Ibid.* See also Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 Minn. L. Rev. 793, 822-832 (1998) (concluding that Congress retains the power to condition the provision of federal funds on a State's agreement to waive its Eleventh Amendment immunity).[5]

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[5] In both *Atascadero* and *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court held that the state defendants had not waived their Eleventh Amendment immunity by accepting federal funds. In each of those cases, however, the Court based its decision on the

2. In *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court considered an issue of Eleventh Amendment waiver in the context of a bistate entity created pursuant to the Compact Clause, U.S. Const. Art. I, § 10, Cl. 3. Tennessee and Missouri agreed to create the Tennessee-Missouri Bridge Commission and submitted the proposed compact to Congress. The compact signed by the parties provided that the Commission would have the power "to sue and be sued in its own name," *Petty*, 359 U.S. at 277 (quoting Act of Oct. 26, 1949, ch. 758, 63 Stat. 931), but it did not refer specifically to the possibility of suit in federal court. The Act of Congress authorizing the compact, however, contained a proviso stating that nothing in the compact "shall be construed to affect, impair, or diminish any right, power, or jurisdiction * * * of any court * * * of the United States." *Ibid.* (quoting 63 Stat. 930) (emphasis omitted).

The plaintiff in *Petty* filed suit against the Commission pursuant to the Jones Act, 46 U.S.C. App. 688. 359 U.S. at 278. This Court "assume[d] *arguendo* that th[e] suit must be considered as one against the

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fact that the relevant federal funding statute did not make clear that the acceptance of federal money would subject the State to suit in federal court. See *Atascadero*, 473 U.S. at 247 (relevant statute "falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity"); *Edelman*, 415 U.S. at 672-674. Neither decision suggests that Congress is foreclosed from conditioning federal largesse on a State's waiver of Eleventh Amendment immunity, so long as Congress makes clear to the States that consequence of their decision to accept federal money. Compare *Lane*, 518 U.S. at 198 (explaining that Congress amended the Rehabilitation Act of 1973 in response to *Atascadero* in order "to provide the sort of unequivocal waiver that [the Court's] precedents demand").

States."[6] *Id.* at 279. The Court held, however, that Missouri and Tennessee, by accepting the compact subject to the conditions imposed by Congress, had "waived any immunity from suit which they otherwise might have." *Id.* at 280; see also *id.* at 281-282 ("The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached.").

3. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, authorizes state commissions to exercise regulatory authority over certain aspects of the telecommunications industry. See, *e.g.*, 47 U.S.C. 252(e) (Supp. II 1996). Where a state commission exercises that authority, "any party aggrieved by [its] determination may bring an action in an appropriate Federal district court" to obtain judicial review of the state commission's decision. 47 U.S.C. 252(e)(6) (Supp. II 1996); see *MCI Telecommunications Corp.* v. *Illinois Commerce Comm'n*, No. 98-2127, 1999 WL 65021, at *5 (7th Cir. Feb. 10, 1999). If the state commission declines to exercise that authority, the Federal Communications Commission (FCC) is required to "issue an order preempting the State commission's jurisdiction" and to "assume the responsibility of the State commission" with respect to the matter in question. 47 U.S.C. 252(e)(5) (Supp. II 1996).

As the Seventh Circuit has explained, "the Act provides state commissions with a realistic and genuine choice whether to involve themselves in the regulatory process * * *, or whether to let the FCC assume

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[6] The Court has since concluded that a Compact Clause entity will not ordinarily be regarded as "one of the United States" for purposes of the Eleventh Amendment. See *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40-42 (1994).

those functions." *MCI Telecommunications*, at *9. "[B]y electing to assume responsibility for the" pertinent regulatory functions, the court concluded, "the defendants waived the State's immunity from suit in federal court provided by the Eleventh Amendment." *Ibid.* The court explained that:

> [t]here is * * * a fundamental difference between the sort of abrogation that the Supreme Court found constitutionally objectionable in *Seminole Tribe* and the concept of constructive waiver with which we deal in this case. That difference turns on the voluntariness of the state's choice in the waiver situation—a choice between waiving its immunity or foregoing participation in the federal statutory scheme at issue. When Congress gives states a genuine choice, clearly stated, as to whether or not to waive their sovereign immunity, the doctrine of constructive waiver survives *Seminole Tribe*.

Id. at *7 (emphasis added); accord *US West Communications, Inc.* v. *TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997), appeal pending, No. 98-35203 (9th Cir.).

4. The Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, gives States the choice whether to participate in a joint state-federal scheme that provides employment opportunities for the blind. A state agency that seeks to participate must agree to submit to agency arbitration to resolve any disputes with blind licensees. 20 U.S.C. 107b(6). Federal judicial review of arbitral decisions is available under the Administrative Procedure Act, 5 U.S.C. 551-559, 701-706. 20 U.S.C. 107d-2(a).

In *Premo* v. *Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998), the court of appeals

held that by participating in the Randolph-Sheppard program, a state agency had impliedly waived its Eleventh Amendment immunity from suit in federal court. The court explained that "[a] state will be deemed to have waived its sovereign immunity when (1) the state expressly consents to suit; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity." *Id.* at 770. The court reviewed the pertinent statutory provisions and found "overwhelming" evidence that Congress had "conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory [arbitral] awards." *Ibid.* The court of appeals therefore concluded that "by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court." *Id.* at 771; see also *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1166 (6th Cir. 1992) ("A state can waive its immunity explicitly when it opts to participate in a federal program in which Congress clearly has conditioned participation on such a waiver.").

5. The Bankruptcy Code also presents States with a choice, framed expressly in terms of conditional waiver. The Code provides that "[a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to" specified claims. 11 U.S.C. 106(b). The term "governmental unit" is defined to include the States. 11 U.S.C. 101(27). A state creditor is under no compulsion to participate in the bankruptcy proceedings by filing a proof of claim. But if a state entity decides to seek the benefits of participating in the bankruptcy proceeding, it must

accept the consequence imposed by Congress: waiver of its Eleventh Amendment immunity.

In *WJM, Inc.* v. *Massachusetts Department of Public Welfare*, 840 F.2d 996 (1988), the First Circuit relied on *Atascadero* in stating that "Congress *may* effectively condition a state's participation in a federal program on a state's consent to federal jurisdiction, so long as Congress manifests a clear intent to this effect." *Id.* at 1003. The court concluded that former 11 U.S.C. 106(a) (1988)—the predecessor to current Section 106(b) — "manifests such a clear intent." *Ibid.*; accord *In re 995 Fifth Ave. Assocs., L.P.*, 963 F.2d 503, 506-509 (2d Cir.) (applying predecessor version), cert. denied, 506 U.S. 947 (1992). Cf. *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) (plurality opinion) (noting "narrow scope of waiver[]" in predecessor of Section 106(b)). In *In re Straight*, 143 F.3d 1387 (10th Cir.), cert. denied, 119 S. Ct. 446 (1998), the court of appeals distinguished the "narrow waiver" of Eleventh Amendment immunity contained in Section 106(b) from the abrogation of immunity that was held invalid in *Seminole Tribe*. *Id.* at 1392. The court explained that Section 106(b) was not properly regarded as an abrogation provision because "a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim. The choice is left to the state." *Ibid.* But see *In re Creative Goldsmiths*, 119 F.3d 1140, 1147 (4th Cir. 1997) (stating in dicta that Section 106(b) is unconstitutional under *Seminole Tribe*), cert. denied, 118 S. Ct. 1517 (1998).

B. In Light Of The Unambiguous Provisions Of The TRCA, Florida Prepaid's Operation Of A Commercial Enterprise And Advertisement Of Its Products In Interstate Commerce Constituted An Implied Waiver Of Its Eleventh Amendment Immunity

For the reasons that follow, Florida Prepaid's sale and advertisement of investment products is properly regarded as an implied waiver of its immunity from suit in federal court. That conclusion is consistent with the general principles of implied waiver discussed in Point I.A, *supra*. It is also consistent with this Court's decision in *Parden*. Although subsequent decisions have qualified *Parden* in significant respects, its core holding—that a State's decision to operate a commercial enterprise in competition with private persons may under appropriate circumstances be treated as an implied waiver of Eleventh Amendment immunity—remains sound and controls the present case.

1. The defendant in *Parden* was a railroad owned and operated by the State of Alabama. It was sued for damages by one of its employees pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq*. 377 U.S. at 184. The defendant asserted that under the Eleventh Amendment it was immune from suit in federal court. *Id*. at 185.

This Court acknowledged that under its prior Eleventh Amendment decisions, "an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State." 377 U.S. at 186. It observed, however, that "the immunity may of course be waived," and it concluded that

"Alabama has consented to the present suit." *Ibid.* The Court explained:

> It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, 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.

Id. at 192; see also *id.* at 196 ("when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation").

Four Members of the Court dissented. The dissenting opinion began by stating:

> I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its

> regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.

377 U.S. at 198 (White, J., joined by Douglas, Harlan, and Stewart, JJ., dissenting). The Court was thus unanimous in concluding that Congress possesses constitutional authority to condition a State's operation of a commercial railroad on a waiver of immunity from suit in federal court. The dissenting Justices stated, however, that Congress in enacting the FELA had not manifested an "unequivocal determination" to require a waiver of Eleventh Amendment immunity as a condition to state participation in commercial activities, *id.* at 199, and that the Act should therefore be construed not to authorize suits against state defendants, *id.* at 199-200.

The Court's holding in *Parden* has been significantly qualified by two subsequent decisions. In *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Court held that employees at state hospitals and related institutions could not bring suit in federal court against their state employers under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 411 U.S. at 282-285. The Court distinguished *Parden* on the ground that the earlier decision "involved the railroad business which Alabama operated 'for profit[,]' * * * in the area where private persons and corporations normally ran the enterprise." *Id.* at 284. Institutions such as hospitals, by contrast, had traditionally been operated by state officials on a nonprofit basis. *Ibid.* The Court noted that *Parden* had involved "a rather isolated state activity," and it declined to extend that

decision in a manner that could potentially affect employees "in every office building in a State's governmental hierarchy." *Id.* at 285. In *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Court held that federal statutes will not be construed to subject the States to suit in federal court absent an unequivocal expression of that intent. *Id.* at 476-478 (plurality opinion); *id.* at 495-496 (Scalia, J., concurring in part and concurring in the judgment). The *Welch* plurality quoted with approval the conclusion of the *Parden* dissenters that "[o]nly when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of [the Eleventh Amendment] defense." *Id.* at 477 (quoting *Parden*, 377 U.S. at 198-199 (White, J., dissenting)).

2. In the instant case, Florida Prepaid chose to sell and to advertise commercial investment products in competition with private enterprises. The question whether that conduct effected a knowing and voluntary waiver of Eleventh Amendment immunity turns on two subsidiary inquiries. First, a State's conduct can be treated as a knowing waiver of Eleventh Amendment immunity only if Congress has unambiguously provided that a State that engages in such conduct will be subject to suit in federal court. Second, the State's waiver can be regarded as truly voluntary only if the conduct in question involves activities that the State can realistically choose to abandon.

So long as those requirements are satisfied, nothing in *Seminole Tribe* casts doubt upon Congress's ability to condition a State's participation in commercial enterprises on a waiver of Eleventh Amendment immunity.

Seminole Tribe addressed the question "whether Congress has the power to abrogate unilaterally the States' immunity from suit" in federal court. 517 U.S. at 59. The Court held that when Congress acts pursuant to the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, "the Eleventh Amendment prevents congressional authorization of suits by private parties against *unconsenting* States." 517 U.S. at 72 (emphasis added). The Court did not suggest that *Parden* was inconsistent with that principle. To the contrary, it cited *Parden* for the "unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." *Id.* at 65.

Both of the requirements set forth above are satisfied in the present case.

a. "Unless the state is clearly informed that its actions will result in the loss of immunity [there cannot be] a knowing and voluntary waiver of state sovereign immunity." *Chavez* v. *Arte Publico Press*, 157 F.3d 282, 294 (5th Cir. 1998) (Wisdom, J., dissenting), reh'g en banc granted, No. 93-2881 (Oct. 1, 1998). "Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of [the Eleventh Amendment] defense." *Welch*, 483 U.S. at 477 (plurality opinion) (quoting *Parden*, 377 U.S. at 198-199 (White, J., dissenting)). As the court of appeals in this case correctly recognized, see Pet. App. 21a, the pertinent Lanham Act provisions satisfy that requirement.

As amended by the Trademark Remedy Clarification Act (TRCA), Pub. L. No. 102-542, § 3(c), 106 Stat. 3568, the Lanham Act provides that the "person[s]" subject to the Act include "any State, instrumentality of a State

or employee of a State or instrumentality of a State acting in his or her official capacity." 15 U.S.C. 1125(a)(2). Most significantly, the TRCA added to the Lanham Act a new Section 40(a) (see § 3(b), 106 Stat. 3567), entitled "Waiver of sovereign immunity," which provides:

> Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this chapter.

15 U.S.C. 1122(a).[7] That provision constitutes an unequivocal expression of congressional intent that state entities may be sued in federal court for Lanham Act violations. Compare *Lane* v. *Peña*, 518 U.S. 187, 198, 200 (1996).

b. A State does not voluntarily waive its Eleventh Amendment immunity by engaging in activities that it cannot realistically choose to abandon, such as the operation of a police force. By engaging in such activities, "the state has shown no intention, one way or the other, to waive its immunity. The state has merely shown its intent to operate as a state." *Chavez*, 157 F.3d at 294 (Wisdom, J., dissenting). See *Department of Pub. Health & Welfare*, 411 U.S. at 284 (distinguishing the state railroad at issue in *Parden*, which

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[7] State defendants are subject to the same remedies, including money damages, as are available in suits against nongovernmental parties. 15 U.S.C. 1122(b).

was run for profit in a field "where private persons and corporations normally ran the enterprise," from state institutions (mental hospitals, cancer hospitals, and training schools for delinquents) that did not operate for profit and that performed functions traditionally undertaken by the States).

The conduct at issue in the present case is genuinely voluntary. The court of appeals concluded that "the *Parden* doctrine of waiver does not apply to the present case" because "[e]ducation is a core function of a state government." Pet. App. 22a. But while state governments have historically assumed responsibility for the actual operation of schools, the marketing of investment products of the sort at issue here is neither a traditional nor a necessary means of facilitating the State's educational mission. Indeed, Florida Prepaid did not commence operations until 1988. Like the railroad in *Parden*, the Board operates "in the area where private persons and corporations normally ran the enterprise." *Department of Pub. Health & Welfare*, 411 U.S. at 284. And while the Florida legislature unquestionably believed that Florida Prepaid would serve the public interest, the Program has also been highly profitable, amassing a surplus of more than $184 million during the first seven years of its operations. Pet. App. 49a. See *Department of Pub. Health & Welfare*, 411 U.S. at 284 (contrasting for-profit railroad involved in *Parden* with nonprofit state hospitals and similar institutions).[8]

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[8] Some portions of the Court's opinion in *Parden* suggest that a State may be deemed to have waived its Eleventh Amendment immunity whenever it engages in activities subject to congressional regulation. See, *e.g.*, 377 U.S. at 196 ("when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation"). We do

3. As in many other contexts, Florida Prepaid's waiver of its Eleventh Amendment immunity was a reasonably related price exacted for receiving the benefits afforded by the federal statutory scheme. "The underlying purpose of [the Lanham Act's prohibition against false and misleading statements] is to protect both consumers and competitors from a wide variety of misrepresentations of products and service." *20th Century Wear, Inc.* v. *Sanmark-Stardust, Inc.*, 747 F.2d 81, 91 n.13 (2d Cir. 1984), cert. denied, 470 U.S. 1052 (1985). When it entered the marketplace and advertised its products in interstate commerce, Florida Prepaid obtained significant benefits from the Lanham Act's fair-competition requirements. The Lanham Act serves to deter Florida Prepaid's competitors (including CSB) from engaging in false advertising and other forms of unfair competition. The Act also provides Florida Prepaid with a cause of action for damages in the event that it is injured by a competitor's violation. In addition, the existence of the federal scheme may give all advertisers enhanced credibility in the eyes of the public.

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not rely on so broad a rule. A State will sometimes have no realistic alternative but to engage in activities bearing a sufficient connection to interstate commerce so as to subject them to congressional regulation. To treat the State's participation in such activities as an implied waiver of Eleventh Amendment immunity would effectively eliminate the distinction between waiver and abrogation. See *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 44 (1989) (Scalia, J., concurring in part and dissenting in part). In our view, an implied waiver of Eleventh Amendment immunity may be found only when (1) Congress has unambiguously provided that States engaging in specified conduct will be subject to suit in federal court, and (2) a State's decision to engage in the specified conduct may realistically be deemed a voluntary choice.

When a State chooses to operate a commercial enterprise of a sort traditionally run by private persons, the Eleventh Amendment does not entitle it to invoke its status as a State to gain a competitive advantage. Congress has determined that the Lanham Act's purposes can be fully effectuated only if state entities operating in interstate commerce are subject to the same substantive and remedial provisions as their private competitors. As relevant here, the Act simply makes susceptibility to suit a condition of the State's entry into a commercial market. Having chosen to operate a commercial enterprise well removed from the State's traditional sphere, Florida Prepaid should not be permitted a constitutional exemption from the restrictions that bind its competitors.

4. "The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise * * * and compete with private interests engaged in a like activity." *Puget Sound Power & Light Co.* v. *Seattle*, 291 U.S. 619, 624 (1934). The Court has also recognized that where a State acts as a "market participant" in interstate commerce, it may prefer its own citizens over potential buyers and/or sellers from other States, even though the Commerce Clause precludes such favoritism when the State acts in its regulatory capacity. See *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 206-208 (1983); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 434-439 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 804-810 (1976). That rule as respects interstate commerce is based in part on the fact that "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when

acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves*, 447 U.S. at 439 (footnote omitted); *White*, 460 U.S. at 207-208 n.3.

The investment products offered by Florida Prepaid are generally available only to Florida residents and the children of Florida residents. See Pet. App. 30a n.2. That preference is permissible because Florida Prepaid acts as a market participant rather than in the exercise of regulatory authority. Having elected to enjoy the advantages of that status, Florida Prepaid suffers no unconstitutional intrusion on sovereign prerogatives if it is "burdened with the same restrictions"—including susceptibility to suit in federal court—that are "imposed on private market participants." *Reeves*, 447 U.S. at 439.

II. A STATE'S MISREPRESENTATION OF ITS OWN PRODUCT IN OPERATING A BUSINESS DOES NOT DEPRIVE COMPETITORS OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST

Because the TRCA provisions at issue in this case represent a valid exercise of congressional authority to condition a State's participation in commercial activity on a waiver of Eleventh Amendment immunity, this Court need not determine whether those provisions could also be sustained as an exercise of Congress's powers under Section 5 of the Fourteenth Amendment. If the Court does address that question, however, we agree with the court of appeals (see Pet. App. 14a) that a state commercial entity which engages in false and misleading advertising of its own product does not thereby "deprive" a competitor of "property" within

the meaning of the Fourteenth Amendment, even if the competitor suffers pecuniary harm as a result of the Lanham Act violation.[9]

This Court has emphasized the importance of identifying with some precision the property interest that lies at the heart of any due process or takings claim. See, *e.g.*, *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986). It is clear that some intangible interests—such as debts and other rights to payment—are protected property rights. *Ibid.* Other intangible rights—such as patents and trademarks—are defined by statute as the right to be free from specified conduct by others. See, *e.g.*, 15 U.S.C. 1057(b) (certificate of federally registered mark evidences "the registrant's exclusive right to use the registered mark in commerce"); 35 U.S.C. 154(a)(1) (patent gives its owner "the right to exclude others from making, using, offering for sale, or selling the invention"); 35 U.S.C. 271 (defining infringement); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 415 (1945) ("That a patent is property, protected against appropriation both by individuals and by government, has long been settled.").

The "right" to be free from false representations concerning a competitor's products, however, bears none of the hallmarks of a property interest.[10] "Property" is

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[9] The position of the United States regarding the scope of congressional enforcement authority under Section 5 will be set forth in other respects in the government's brief in *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank & United States*, cert. granted, No. 98-531 (Jan. 8, 1999).

[10] The only provision of the Lanham Act that is alleged to have been violated in this case is the prohibition (see 15 U.S.C. 1125(a)(1)(B)) of false representations concerning the alleged violator's own product. See Pet. App. 3a, 17a. The court of appeals

another way of referring to a particular "bundle of rights." See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). The hallmark of a property interest is the right to exclude others. *Ibid.* (cited in *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994)). Legally recognized intellectual property such as patents, trademarks, copyrights, and trade secrets clearly satisfies that standard. See *Stewart* v. *Abend*, 495 U.S. 207, 220 (1990) ("[a]n author holds a bundle of exclusive rights in the copyrighted work"); *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 185-186 (1988) ("Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the trademark owner a bundle of such rights."); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1011 (1984) ("With respect to a trade secret, the right to exclude others is central to the very definition of the property interest."); *Hartford-Empire*, 323 U.S. at 412, 415. By contrast, Florida Prepaid's alleged misrepresentations concerning its own products effected no intrusion upon any tangible or intangible interest over which CSB possesses exclusive dominion.

The fact that petitioner claims (Pet. 15) to have suffered a "loss of revenue and profits" as a result of the alleged Lanham Act violation does not alter the foregoing analysis. Petitioner's argument would suggest that every unlawful government action resulting in consequential economic damage to a private person effects a deprivation of property within the meaning of the Due

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therefore properly reserved the question whether the relevant TRCA provisions could be regarded as an appropriate exercise of Congress's Section 5 authority "in a case involving a trademark infringement or involving a misrepresentation about a competitor's goods or services." *Id.* at 17a. Nor does the case involve palming off one's product as that of a competitor.

Process Clause. This Court's decisions do not support so broad a conception of the scope of "property" interests protected by the Due Process Clause. Cf. *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (medical malpractice claim does not rise to level of Eighth Amendment violation); *Daniels* v. *Williams*, 474 U.S. 327, 330 (1986) (allegation of negligence insufficient to state claim for deprivation of liberty without due process).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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