



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

October 25, 2001

Patricia Mack Bryan, Esq.
Senate Legal Counsel
United States Senate
Senate Hart Office Building
Room 642
Washington, D.C. 20510-7250

Re: In re: Robert J. Gosselin, No. 00-2255

Dear Ms. Bryan:

I am writing to advise you that I have determined not to intervene in the First Circuit in the above case.

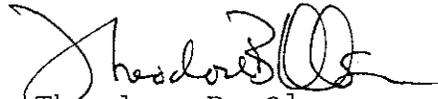
Section 106(a) of the Bankruptcy Code, 11 U.S.C. 106(a), purports to abrogate a State's sovereign immunity from a suit brought pursuant to the Bankruptcy Code. Relying on Section 106(a), a petitioner filed a suit against the Commonwealth of Massachusetts to discharge income taxes owed to the State. The district court invalidated Section 106(a) on Eleventh Amendment grounds. The petitioner appealed to the First Circuit, and the First Circuit notified the Attorney General that the constitutionality of Section 106(a) had been drawn into question.

The Third, Fourth, and Fifth Circuits have each held that Section 106(a) violates the Eleventh Amendment. Sacred Heart Hospital v. Pennsylvania, 133 F.3d 237 (3d Cir. 1998); Schlossberg v. Maryland, 119 F.3d 1140 (4th Cir. 1997); Department of Transportation v. PNL, 123 F.3d 241 (5th Cir. 1997). Those courts have reasoned that Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996), precludes Congress from abrogating state sovereign immunity through Congress's power under the Bankruptcy Clause. They have also concluded that Section 106(a) cannot be justified as an exercise of Congress's power under Section 5 of the Fourteenth Amendment. The government participated in both Schlossberg and PNL. Following those decisions, the Solicitor General declined to petition for a writ of certiorari, and notified the Senate and the House of Representatives of his decision.

Since then, the Supreme Court has issued several additional decisions that affect the scope of Congress's power to abrogate a State's immunity from suit. The most pertinent is Florida Prepaid v. College Savings, 527 U.S. 627 (1999). That decision expressly confirms that Congress may not abrogate state sovereign immunity through an Article I power. It also reaffirms that there are significant limits on Congress's authority to abrogate a State's immunity from suit under Section 5 of the Fourteenth Amendment. In light of the current consensus in the courts of appeals on the constitutionality of Section 106(a), and current Supreme Court precedent bearing on that issue, I have decided not to intervene in this case.

A copy of the district court's decision is enclosed. Please let me know if I can be of further assistance in this matter.

Very truly yours,


Theodore B. Olson
Solicitor General

Enclosure