

# 1999-2000 ANNUAL REPORT

## COMMITTEE NO. 308 Robert J. Kasunic, Chair

### GOVERNMENT RELATIONS TO COPYRIGHTS

Scope of Committee:

**(1) The practices of government agencies and private publishers concerning the copyright of works created by government employees or created or published with financial or other assistance from government;**

(2) the acquisition and administration of copyrights owned or controlled by government agencies or government employees;

(3) use and infringement by the government of copyrighted works; and

(4) allocation of private rights in writings created through or with governmental support.

### **SUBJECT. STATE SOVEREIGN IMMUNITY FROM SUITS FOR COPYRIGHT INFRINGEMENT.**

NO PROPOSED RESOLUTION.

Past Action. The following resolutions have been adopted by the Section:

RESOLVED, that the Section opposes in principle state sovereign immunity from liability for damages and/or equitable relief in a private infringement action brought under the United States Copyright Act. (1985 SP 52-R308-1; ABA, in amended form, 1988)

RESOLVED, that the Section favors in principle having states, and state departments, state universities, and state administrative agencies, be liable for copyright infringement and favors the holding in *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979). (1987 SP 71-R308-1)

RESOLVED, that the Section favors in principle an amendment by Congress to the United States Copyright Act to make it explicit that Congress intended to abrogate state immunity from liability for infringement. (1988 SP 67-R308-1)

Discussion. On June 23, 1999, the Supreme Court narrowly decided three state sovereign immunity cases: the companion cases on Congress' ability to abrogate the sovereign immunity of the States under the Lanham Act and the Patent Act and a case of Congress' authority to enforce federal remedies against States through the state court systems. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board et al.*, 119 S. Ct. 2219 (1999), and *Alden v. Maine*, 119 S. Ct. 2240 (1999). While none of these cases address the abrogation provisions of the Copyright Act of 1976, the rationale of these decisions was applied in *Chavez v. Arte Publico Press, et al.*, \_\_\_ F.3d \_\_\_ (5th Cir. 2000) to invalidate the abrogation provisions of the Copyright Remedy Clarification Act ("CRCA") of 1990. In order to place the importance of these decisions by the Court in perspective, some background on the developments in this area is appropriate.

In 1985, the Supreme Court decided *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). The Court held that in order to abrogate state sovereign immunity, Congress must be unmistakably clear in its intent to abrogate. Four years later, when the Court of Appeals for the Federal Circuit was confronted with the question of Congress' intent to abrogate under the Patent

Act, the CAFC found that this clarity was not present. *Chew v. California*, 148 F.3d 1343 (1999). A number of other courts also found that the copyright and trademark laws failed to contain a sufficiently clear statement as required under *Atascadero*.

In 1990, Congress passed the Copyright Remedy Clarification Act (Public Law 101-553), to clarify its intent to abrogate state sovereign immunity from suits for infringement of the Copyright Act. The passage of the CRCA occurred shortly after the decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality opinion which found authority to abrogate state sovereign immunity under the Commerce Clause. Two years following the clarification of the Copyright Act, Congress passed the Patent and Plant Variety Protection Remedy Clarification Act (Public Law 102-206) ("PRCA") and the Trademark Remedy Clarification Act (Public Law 102-452) ("TRCA"). Congress sought to comply with the guidance of the Supreme Court in *Atascadero* by enacting these three separate clarifications that unequivocally expressed a clear intent to abrogate.

In 1996, the Supreme Court again revisited the issue of state sovereign immunity in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Court held that Congress was not empowered to abrogate state sovereign immunity on the basis of an Article I power of the United States Constitution. While the specific basis of congressional authority at issue in *Seminole* was the Indian Commerce Clause, the rationale of the decision created concerns for abrogation provisions enacted pursuant to other Article I powers. The *Seminole* decision expressly disapproved of the *Pennsylvania v. Union Gas* opinion on this point. The question quickly arose as to whether Congress in enacting the Lanham Act, which is based on the Commerce Clause (Article I, clause 3), or the Copyright and Patent Act, based on the Patent and Copyright Clause (Article I, clause 8, section 8), could validly abrogate state sovereign immunity after *Seminole*.

This question was answered by the Court as to the Patent Act in *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank*, 119 S. Ct 2199 (1999). In *Florida Prepaid*, the Court, reaffirming its holding in *Seminole*, clearly stated that Congress lacks authority to invoke Article I powers to abrogate state sovereign immunity provided by the Eleventh Amendment. The Court reasoned that since the Eleventh Amendment was adopted after the grant of Article I powers, it must be read as a limitation on those powers. In addition, as the Court revealed in *Alden*, state sovereign immunity preceded the Constitution and was reserved to the States under the Tenth Amendment. Therefore, in *College Savings Bank's* patent infringement action against the State of Florida, CSB, with the U.S. Government intervening in support of the PRCA's validity, argued that Congress' unequivocal intent to abrogate state sovereign immunity was a valid exercise of Fourteenth Amendment authority, rather than an exercise of Article I powers. Since the Fourteenth Amendment was subsequent to the Eleventh Amendment, appropriate legislation enacted pursuant to the Fourteenth Amendment could limit state sovereign immunity.

While Congress clearly expressed its intent to abrogate, as required by the Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court found the second consideration, whether Congress acted pursuant to a valid exercise of power, was not satisfied. Accepting that the need for uniformity is an important consideration, the Court found that uniformity was an Article I concern, rather than a relevant Fourteenth Amendment consideration. Therefore, Congress' desire for uniformity was not a sufficient basis for the exercise of Fourteenth Amendment remedial authority.

To invoke the remedial provisions of the Fourteenth Amendment, a pattern of constitutional violations must be demonstrated. While the Court confirmed that patents are "property" for purposes of the Due Process Clause, and therefore that the taking of patents without due process is a constitutional wrong, Congress' broad authority to enforce the Fourteenth Amendment is not unlimited. The Court stated that Congress is authorized to use the preventive or remedial provisions of §5 of the Fourteenth Amendment only when there is evidence of widespread and persistent deprivations of constitutional rights. The Court found that the legislative record did not identify such a pattern and, therefore, did not justify prophylactic §5 legislation. Finding also that Congress barely considered the availability of state remedies for patent infringement and did not consider that negligent or unintentional injury is not a deprivation under the Due Process Clause,

the Court held that the abrogating provisions of the Patent Remedy Act were "so out of proportion to a supposed or preventive object" they could not be upheld as a valid exercise of Fourteenth Amendment enforcement power.

In the second case, *College Savings Bank v. Florida Prepaid*, 119 S. Ct. 2199 (1999), CSB brought a §43(a) Lanham Act claim for false and misleading advertising against the State. While the Florida Prepaid patent case was an appeal from the CAFC, the CSB Lanham Act claim was an appeal from the Third Circuit. The Court addressed the validity of the Trademark Remedy and Clarification Act's abrogation provisions. After *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court stated that there are only two circumstances in which an individual may sue a State for damages: 1) Congress may authorize suit pursuant to the Fourteenth Amendment, an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-State balance, or 2) a State may waive its sovereign immunity thus consenting to suit.

Congress' attempt to abrogate state sovereign immunity by the TRCA through its Fourteenth Amendment authority was found to be "without merit," since neither 1) "a right to be free from a business competitor's false advertising about its own product" or 2) "a more generalized right to be secure in one's business interests" qualify as a property right protected by the Due Process Clause. The Court stated that the "hallmark of a protected property interest is the right to exclude others." While trademarks and proprietary information such as trade secrets have been held to qualify as property, the false advertising provisions of the Lanham Act do not encompass a right to exclude. Similarly, while the "assets of a business (including its good will) unquestionably are property," the "activity of doing business, or the activity of making a profit" that are at issue in false advertising, are not property interests. Without such a constitutional deprivation or a "property" interest, there is no Due Process violation to remedy.

CSB also argued that the State of Florida had constructively waived its sovereign immunity by acting as a market participant. Examining the issue of waiver, the Court expressly overruled the implied or constructive waiver rationale of *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964). Finding that state sovereign immunity is a constitutionally protected right and that waiver of immunity by a State must be express and unequivocal, the Court found the constructive waiver argument to be little more than abrogation under another name. Even though Florida Prepaid's actions resembled the behavior of a market participant, the bare majority, in an opinion by Justice Scalia, held this conditional distinction no more supportable "than, say, limiting abrogation or constructive waiver to the last Friday of the month. The voluntariness of waiver is destroyed, and the point of coercion passed, when Congress conditions the refusal to waive on the exclusion of the State from an otherwise lawful activity." Finding that the TRCA did not validly abrogate state sovereign immunity and that the State did not voluntarily waive its sovereign immunity by activities in interstate commerce, the Court affirmed the Third Circuit's dismissal of the action.

While these two decisions limited Congress' ability to abrogate state sovereign immunity under the Fourteenth Amendment when there were insufficient legislative findings, the Supreme Court's decision of first impression in *Alden v. Maine* further limited Congressional authority to subject non-consenting States to private suits for damages in state courts. The case involved a suit first brought in federal court by Maine public employees who argued that the State had violated the overtime provisions of the Fair Labor Standards Act of 1938. After *Seminole*, the case was dismissed and the employees filed their action for damages in state court only to have the Maine courts also apply the sovereign immunity doctrine. Having no forum in which to bring their suit, the employees appealed to the Supreme Court.

The Court found that the history and structure of the Constitution reveal that the States' immunity from suit is a fundamental aspect of sovereignty that the States enjoyed before the ratification of the Constitution. This immunity does not derive from, and is not limited by, the Eleventh Amendment, but is clarified and restored by the Eleventh Amendment. Additionally, the Court found that the Tenth Amendment confirmed this constitutional role of the States as sovereign entities. In contrast to the Tenth Amendment's reservation to the States of power not delegated to the Federal Government, the Federal Government "can claim no powers which are not granted to

it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." Since state sovereign immunity preceded the ratification of the Constitution, and since the Federal Government is not expressly granted any power to abrogate, States retain their sovereign immunity from suit by individuals for monetary damages.

The narrow terms of the Eleventh Amendment's applicability to actions brought in federal courts did not eliminate state sovereign immunity in state courts. Neither the Supremacy Clause nor the Necessary and Proper Clause of Article 1 grant Congress authority to override the sovereign immunity of the States. "When a State asserts its immunity to suit, the question is not primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States."

The Court found that the exception to the sovereign immunity doctrine that bars relief against States and their officers in both state and federal courts is limited to certain suits for declaratory and injunctive relief against state officers following *Ex parte Young*, 209 U.S. 123 (1908). Had the States not retained constitutional immunity from suits by individuals in their own courts, the *Ex parte Young* rule would not have been such an "essential part of our sovereign immunity doctrine." The Court stated that the additional limitations of good faith by the States, consent to suit by other States or by the Federal Government, and Fourteenth Amendment enforcement power of Congress, together, strike the proper balance between the supremacy of federal law and the separate sovereignty of the States.

Since it is unquestioned that the Federal Government is immune from suit in state courts as well as its own tribunals, the Court was reluctant to conclude that the States were not entitled to this reciprocal privilege. Were it otherwise, the "plenary control of State governmental processes [would] denigrate the separate sovereignty of the States." The Court also cited the possibility that suits for money damages could even threaten the financial integrity of the States. Since it had been unnecessary for the Court to decide this question during the first 210 years of constitutional history, the Court believed that interpreting the Constitution to provide Congress with the power to subject non-consenting States to private suits in their own courts is "unnecessary to uphold the Constitution and valid federal statutes as the supreme law."

These decisions create disturbing implications for the uniformity of U.S. intellectual property law. All of the Court's sovereign immunity cases were 5-4 majority decisions with vigorous dissenting opinions. While these three cases left open a number of questions, this term, the Supreme Court granted certiorari in three additional cases: *Kimel v. Florida Board of Regents*, No. 98-791; *Reno v. Condon*, No. 98-1464; and the combined appeals -- *U.S. v. Morrison*, No. 99-5 and *Brzonkala v. Morrison*, No. 99-29. None of these appeals deal with intellectual property subject matter, yet the decisions in these cases clarify issues relevant to the state sovereign immunity calculus and the scope of Congress' authority under §5 of the Fourteenth Amendment.

The question in *Kimel* was whether sovereign immunity was abrogated for purposes of the Age Discrimination in Employment Act ("ADEA"). The suit is a consolidation of suits brought by faculty members at two Florida universities, a Florida prison guard, and a university in Alabama. In a divided ruling, the Eleventh Circuit found a lack of clarity in the abrogation provisions of the ADEA. A concurring opinion held that Congress did not have authority to abrogate under §5 of the Fourteenth Amendment.

The Supreme Court upheld Florida's claim of sovereign immunity, finding that although Congress found substantial age discrimination in the private sector, it had "failed to identify a widespread pattern of age discrimination by the States." It was also clear from the record that every State had some age discrimination law in place. Although Congress clearly stated its intent to abrogate, "Congress cannot, however, decree the substance of the Fourteenth Amendment's restrictions on the States. The ultimate interpretation and determination of the Amendment's substantive meaning remains the province of the Judicial Branch. This Court has held that for

remedial legislation to be appropriate under §5, '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" The Court found that age is not a suspect classification under the Equal Protection Clause

and that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior" citing *City of Boerne v. Flores*, 521 U.S. 507, 532.

While the above factor was important to the Court's outcome, the second "key" consideration cited by the Court was the stated deficiency in the legislative record. "A review of the ADEA's legislative record as a whole reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. That failure confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." This same deficiency was cited in the *Florida Prepaid* decision.

The *Reno* suit was an appeal from the Fourth Circuit's invalidation of the Driver's Privacy Protection Act of 1994 that restricts the disclosure of personal information in motor vehicle records. The Fourth Circuit found that the Supreme Court's recent Tenth Amendment decisions "made it perfectly clear the federal government may not require State officials to administer a federal regulatory program." The Supreme Court, however, disagreed in a unanimous decision. The Court stated that the "DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require State officials to assist in the enforcement of federal statutes regulating private individuals." As a carefully crafted regulatory measure, this statute did not run afoul of the Tenth Amendment.

The Court distinguished this Act from other Tenth Amendment encroachments. "In *New York and Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment. In *New York*, Congress commandeered the State legislative process by requiring a State legislature to enact a particular kind of law. We said: 'While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. *Coyle v. Smith*, 221 U.S. 559, 565 (1911).'"

The *Morrison* appeal will determine whether Congress exceeded its authority under the Commerce Clause and §5 of the Fourteenth Amendment when it created a civil remedy for victims of gender-motivated violence in the Violence Against Women Act. An important aspect of this case is Congress' extensive legislative record documenting this violence and its connection with interstate commerce. This case will further answer questions about the scope of legislative record required for §5 preventive or remedial legislation. Justice Stevens' questions suggest that the issue of how much deference the Court will give to the review of congressional findings may also be answered.

Since the abrogating provisions in § 511 of the Copyright Act are virtually identical to the language used in the PRCA and the TRCA, the constitutional validity of 17 U.S.C. §511 is questionable. In addition, the Copyright Remedy Clarification Act was enacted by Congress to comply with *Atascadero State Hospital v. Scanlon*'s requirement of a clear and unequivocal intent to abrogate Eleventh Amendment immunity. Congress enacted the CRCA under its Article I authority in reliance on the Court's prior holding in *Pennsylvania v. Union Gas Co.* There are, however, some differences between the CRCA of 1990 and the 1992 amendments to the Patent Act and the Lanham Act. Unlike the clarifications in the PRCA and the TRCA, Congress did not expressly invoke its §5 remedial powers under the Fourteenth Amendment to enact the CRCA. In the legislative record, however, Congress did include a more detailed basis of potential harm for the CRCA than was present with the PRCA and the TRCA. It is also clear under the case law that copyrights would qualify as "property" for due process purposes.

In *Chavez v. Arte Publico Press*, 180 F.3d 674 (5th Cir. 1999), the Fifth Circuit initially agreed to review the three-judge panel decision en banc. Instead, it remanded the case to the panel in light of *Florida Prepaid*, *College Savings Bank*, and *Alden*. In the earlier opinion, 139 F.3d 504 (5th Cir.

1998), the majority of the three-judge panel found the CRCA to be an invalid abrogation after *Seminole*. A revised opinion, 139 F.3d 282 (5th Cir 1998), included a strong dissent by Judge Wisdom arguing for the continued validity of the implied waiver doctrine under *Parden*. The Supreme Court, however, expressly overruled *Parden* and the implied waiver doctrine in the *College Savings Bank* opinion.

On January 10, 2000, the Fifth Circuit decided *Rodriguez v. Texas Commission on the Arts*. In a rather cursory opinion, the court held that Congress did not have the authority to abrogate state immunity in the CRCA. On February 18, 2000, the Fifth Circuit again held that the abrogation provisions of the CRCA were an invalid exercise of congressional authority in *Chavez v. Arte Publico Press*, \_\_\_ F.3d \_\_\_ (5th Cir. 2000). The court noted that "[a]lthough the legislative history for the CRCA documents a few more instances of copyright infringement than the PRCA legislative history did of patent violations, the CRCA's history exhibits similar deficiencies." While the Copyright Office Report that was submitted to Congress revealed concern for potential harm, statements by the Register of Copyrights and by the bill's sponsor, Rep. Kastenmeier, expressed the view that widespread harm was unlikely. In addition, the Copyright Office Report revealed only seven incidents of State copyright infringement enabled by the sovereign immunity. The Fifth Circuit found the conflicting record of a "potential for future abuse" to be deficient as a Fourteenth Amendment basis of authority.

The Fifth Circuit also explored Congress' attention to the adequacy of state remedies for copyright violations. While the exclusive jurisdiction of federal courts would preclude most state remedies, the court found that Congress chose to reject the solution of concurrent jurisdiction "not because it was an inadequate remedy, but because Congress believed concurrent jurisdiction would undermine the uniformity of copyright law." Quoting the *Florida Prepaid* decision, the court found that uniformity was not a valid Fourteenth Amendment consideration, but rather "a factor which belongs to the Article I patent-power calculus." While the Copyright Office Report included a survey of state waivers of Eleventh Amendment immunity as an appendix, Congress did not cite this survey. In addition, the court stated that the survey failed to include information on state remedies for the unlawful taking of private property by States.

Finally, the Fifth Circuit found the "congruence and proportionality" test of *City of Boerne*, 521 U.S. at 520, to be fatal to the CRCA since there was no limitation to intentional deprivations as opposed to the unintended injury that is actionable under the Copyright Act. Pointing out that the Register of Copyrights acknowledged that most copyright infringement by States is unintentional, the court found that Congress failed to confine the reach of the CRCA.

Finding that the legislative record did not support the kind of "massive constitutional violations that have prompted proper remedial legislation, that it [had not] considered the adequacy of state remedies that might have provided the required due process of law, or that it sought to limit the coverage to arguably constitutional violations," the Fifth Circuit concluded that the CRCA was an improper exercise of congressional power.

The *Chavez* decision also discusses the question of whether Congress is required to explicitly invoke its authority under a specific constitutional basis. Noting that the *Florida Prepaid* decision revealed a concern for the lack of congressional language when other constitutional powers are specifically invoked, the Fifth Circuit thoughtfully summarized Supreme Court jurisprudence on this point. The Fifth Circuit found the cases to provide conflicting guidance, and therefore proceeded to the merits of the Fourteenth Amendment argument. The court's analysis is instructive. With the lack of clarity in the Supreme Court's precedents, it would appear that a legislative record that includes all potential bases of constitutional authority would avoid difficulties in asserting a particular constitutional basis of authority at a later time. When the prophylactic measures of §5 of the Fourteenth Amendment are a basis of authority, the legislative findings should include this purpose and the requisite analysis.

As Justice Stevens dissent in *Florida Prepaid* points out, the States and their instrumentalities are "heavily involved" in the intellectual property arena. They are heavy users of copyrighted works. It is also clear that State remedies against copyright infringement are either unavailable or inadequate.

Due to the invalidation of the Patent Act's abrogation provision, it appears that Congress is not going to wait for further clarification. Senator Patrick Leahy (D-Vt.) has already proposed S. 1835, the "Intellectual Property Protection Restoration Act of 1999". A recent revision of this bill, which varies slightly from S. 1835, would allow States to acquire intellectual property rights only if they "opt-in" to the system and agree to waive sovereign immunity from suit under federal intellectual property laws. States that do not waive their sovereign immunity would be denied the benefits of federal intellectual property protection. The proposal would also create a "Remedy for Constitutional Violation" that essentially codifies the doctrine of Ex Parte Young. In addition to the traditional declaratory or injunctive relief under this doctrine, this remedy would also allow a "reasonable and entire compensation" which would include monetary damages, costs, and attorneys' fees.

If a State "opts-in" to the federal intellectual property system, but then breaches its agreement by asserting sovereign immunity as a defense, the State would be denied the benefits of the federal intellectual property system. In addition, the State would be unable to recover damages in any action to enforce a federal intellectual property right in a pending or subsequent action. The bill is based on equity: States that benefit from federal intellectual property rights must also respect the rights of other intellectual property owners. While this bill is a new approach to the issue, its validity is questionable under the Supreme Court's analysis of voluntary waiver and coercion in the College Savings Bank opinion. This proposal is conditioned on waiver, and if that waiver is viewed as coerced, it will fail constitutional scrutiny. The bill does, however, include an extensive introduction of legislative findings and purposes that may assist in asserting Fourteenth Amendment remedial powers.

The Copyright Office has offered an alternative legislative approach. This proposal replaces the abrogation language of the various federal intellectual property statutes with: "State sovereign immunity is abrogated and may not be asserted in any suit against a State, instrumentality of a State, or employee of a State acting in an official capacity for non-negligent infringement of a constitutionally protected property right created pursuant to this title."

The key difference in the Copyright Office waiver-for-protection approach is that it first denies intellectual property protection to the States. For example, it amends §105 of the Copyright Act by stating: "Copyright protection under this title is not available for any work of the United States Government, of any State, or of any instrumentality of a State, but no such entity is precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." By first taking away all federal copyright protection prospectively in §105(a), Congress is utilizing its inherent power in the Patent and Copyright Clause separate and apart from the issue of state sovereign immunity. The decision to offer States federal IP protection is within the discretion of Congress' Article I powers. The refusal to offer protection should likewise be a matter of congressional discretion.

After denying prospective federal IP protection to the States, the proposal offers a conditional gift: federal IP rights in exchange for voluntary waiver of state sovereign immunity. This offer is similar to a Spending Clause incentive which Justice Scalia, in College Savings Bank, specifically stated could be a valid form of pressure against the States. This approach may avoid the coercion issue that could be fatal to the approach in S. 1835. Yet, even with the Copyright Office proposal, the questions of what constitutes an impermissible condition, or where the line between incentive and coercion is drawn, remain unclear.

Some variant on these legislative alternatives will likely be enacted and could pass constitutional scrutiny. Moreover, before a constitutional challenge could reach the Supreme Court, the Court's current narrow majority might change. The committee will continue to monitor the legislative proposals until a bill is enacted and will continue to examine the cases relevant to the state sovereign immunity and federalism calculus.