No. 02-1318

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LESLIE N. BIGGS, a minor, by her parents and next friends, Nancy and Allen Biggs, Jr.; NANCY BIGGS; ALLEN BIGGS, JR.,

Plaintiff-Appellants

v.

BOARD OF EDUCATION OF CECIL COUNTY, MARYLAND,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

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v.

BOARD OF EDUCATION OF CECIL COUNTY, MARYLAND,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

Defendant has challenged (Br. 45-71) the constitutionality of the abrogation provision in the Americans with Disabilities Act, 42 U.S.C. 12202, (ADA) as applied to claims under Title II of the Act, as well as the validity of 42 U.S.C. 2000d-7, which conditions receipt of federal funds on waiver of sovereign immunity for claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). Because Plaintiffs are entitled to the same relief under either Title II of the ADA or Section 504, this Court need not decide the constitutionality of the Title II abrogation provision if it concludes that Defendant

has waived immunity to Plaintiffs' Section 504 claims. See *Litman* v. *George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999) (deciding whether State waived immunity before considering constitutionality of abrogation), cert. denied, 528 U.S. 1181 (2000). For the reasons set forth in our opening brief, and explained in further detail below, Defendant has waived immunity to claims under Section 504 in this case.[1]

DEFENDANT WAIVED SOVEREIGN IMMUNITY TO SECTION 504 CLAIMS BY APPLYING FOR AND RECEIVING FEDERAL FUNDS

Defendant argues that it did not waive its sovereign immunity[2] to Section 504 claims by accepting federal funding because: (A) it accepted funds under a mistaken impression that its immunity had already been abrogated (see Br. 63-66); (B) Congress exceeded its authority in requiring the waiver (Br. 66-68); and (C) the waiver was obtained through unconstitutional coercion (Br. 69-70). None of these arguments has merit.

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[1] Even if Defendant had not waived immunity, Congress validly abrogated the Board's immunity from claims under the Title II of the ADA, as set forth in our opening brief.

[2] The United States has taken no position on whether the Board is an arm of the State and, therefore, entitled to invoke Eleventh Amendment immunity.

A. Accepting Federal Funds Constitutes A Clear And Unequivocal Waiver Of Sovereign Immunity When Congress Has Unambiguously Conditioned Receipt Of Those Funds On A Waiver Of Immunity

All parties agree that "a court may not find a waiver absent an 'unequivocal indication that the State intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment.'" *Litman*, 186 F.3d at 550. This Court explained in *Litman* that a State may make such an "unequivocal indication" through direct expression or through its actions. *Ibid*. For example, a State may "directly and affirmatively waive its Eleventh Amendment immunity in a state statute or constitutional provision." *Ibid*. Or it may waive immunity through its actions, such as making a "voluntary appearance in federal court," *Lapides* v. *Board of Regents*, 122 S. Ct. 1640, 1643 (2002), or accepting federal funds when Congress has "express[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Litman*, 186 F.3d at 550 (citations and quotation marks omitted). See also *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 686-687 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985).

Defendant does "not dispute[] that Congress expressed a clear intent to condition receipt of Section 504 funds with a State's waiver of its sovereign immunity" (Br. 63). The Board acknowledges (Br. 69-70 & n.26) that it requested

and accepted federal funds in the light of this condition. Nonetheless, the Board insists that it did not "knowingly waive its sovereign immunity" because it mistakenly believed that Section 504 and/or Title II of the ADA had already abrogated that immunity (see Br. 63-66). This argument is meritless.

As an initial matter, Defendant cannot claim that its waiver of immunity was "unknowing" in any traditional sense. The Board understood that if it accepted federal funds, it could not assert immunity to Section 504 claims, since Congress and the courts had made this consequence clear. See 42 U.S.C. 2000d-7; *Litman*, 186 F.3d at 555; *Booth* v. *Maryland*, 112 F.3d 139, 145 (4th Cir. 1997), cert. denied, 524 U.S. 905 (1998). Defendant simply argues that, in retrospect, it might not have accepted federal funds had it known that Congress lacked the power to abrogate its immunity directly under Section 504[3] or Title II.[4] This assertion is

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[3] It is difficult to understand the significance Defendant attaches to Congress's purported inability to "abrogate" immunity under Section 504, as opposed to its authority to condition receipt of funds on a waiver of immunity. Section 2000d-7 removes immunity only for those entities that voluntarily accept federal funds. Whether this is called an "abrogation" or a "condition," Defendant knew that it would lose immunity by accepting funds. See *Litman*, 186 F.3d at 554. It is difficult to imagine how the decision to accept funds could be affected by court rulings that might affect the proper labels (*i.e.*, Section 2000d-7 must be a "condition" because Congress lacked authority to impose an "abrogation") but not the bottom-line fact that accepting funds subjects the recipient to liability for damages in federal court.

[4] To the extent Defendant claims to have believed that Title II abrogated its immunity to claims under Section 504, that belief was plainly unreasonable. The (continued...)

implausible as a matter of fact: Defendant has continued to seek out and accept funds up to the present fiscal year, even though it now clearly believes that those abrogation provisions are invalid (see Br. 45, 59; Br. Attach. 2). Moreover, the assertion is irrelevant as a matter of law. Defendant is able to point to no case (other than *Garcia* v. *S.U.N.Y Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001)) that would support the novel assertion that an agreement is "involuntary" or "unknowing" simply because a party wrongly believed that it was already obligated to do what the agreement required. Nor is there any basis to conclude that the Board's alleged misunderstanding of the legal landscape is a basis for relieving it of its waiver. See *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("[A] voluntary plea of guilty intelligently made in the light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").[5]

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[4](...continued)
abrogation provision in the ADA, by its terms, only removes immunity for claims under the ADA. See 42 U.S.C. 12202. And it has always been clear that plaintiffs may sue under either statute. See 42 U.S.C. 12201(b).

[5] Defendant does not, for example, rely on the contract law principle of mistake of law, perhaps because that doctrine ordinarily would require the Board to show that the mistake would have made a difference to its decision to accept federal funds and because the Board normally would be required to return the funds in order to avoid its obligations under the contract. See Restatement (Second) Contracts §§ 153, 158, 376, 384.

Instead, decisions of this Court and the Supreme Court establish that a State waives its immunity if: (1) Congress clearly expressed its intent to require the State to waive immunity as a condition of receiving the funds; and (2) the State accepted the funds in light of these clearly-expressed conditions. See *Litman*, 186 F.3d at 552-553.[6] The test turns on the State's objective manifestation of assent to these conditions, not on its subjective intent. See, *e.g.*, *College Savings Bank*, 527 U.S. at 678 n.2, 686; *Atascadero*, 473 U.S. at 238 n.1.[7]

Defendant, relying on the Second Circuit's decision in *Garcia*, argues that the Supreme Court's decision in *College Savings Bank* requires courts to go further and "consider whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required" (Br. 65 (quoting *Garcia*, 280 F.3d at 115 n.5)). In *College Savings Bank*, the Court over-ruled *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), which had allowed Congress to condition a State's participation in interstate commerce on its waiver of immunity. See 527 U.S. at 680. But the Court specifically distinguished *Parden*-style waivers from waivers

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[6] Of course, the conditions must be imposed by valid Spending Clause legislation. See *Litman*, 186 F.3d at 552-553. Defendant's challenge to the validity of Section 2000d-7 is discussed *infra.*, at 9-16.

[7] This is consistent with basic contract law principles which ordinarily turn on manifestation of assent rather than subjective agreement. See Restatement (Second) Contracts §§ 2, 18.

based on acceptance of clearly-conditioned federal funds. See 527 U.S. at 678 n.2, 686-687. And the Court in *College Savings Bank* did *not* hold, as Defendant assumes, that waivers based on acceptance of funds turn on a State's subjective intentions. To the contrary, the Court stated that:

> Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that *acceptance of the funds entails an agreement* to the actions.

Id. at 686 (emphasis added). The Court specifically agreed that "a waiver may be found in an a State's *acceptance of a federal grant*," *id*. at 678 n.2 (emphasis added, citation omitted), without suggesting that a further inquiry was required to determine whether the State *really* intended to waive immunity through its actions.

If there were any ambiguity about whether a State's actions may be sufficient to waive immunity without regard to its subjective intentions, that ambiguity was removed by the Supreme Court's recent decision in *Lapides* v. *Board of Regents*, 122 S. Ct. 1640 (2002). In that case, the Supreme Court held that the State of Georgia waived its immunity by removing a case to federal court, *even though* the State had no intention of "actually relinquishing its right to sovereign immunity," *Garcia*, 280 F.3d at 115 n.5, since the State clearly did not believe that removal amounted to a waiver of immunity. In fact, the State argued that its Attorney General lacked the legal authority to waive immunity. See 122 S.

Ct. at 1645. Nonetheless, the Court held that the State's removal of the case to federal court was "a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's" immunity. *Id.* at 1645-1646. The Court specifically rejected the State's request to examine the State's subjective beliefs and reasons in order to determine whether its actions amounted to an unequivocal waiver. *Id.* at 1644-1645. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645.

Defendant's argument in this case is even less persuasive than the State's argument in *Lapides*. Here, the Board cannot claim that it did not know that it would subject itself to suit by accepting federal funds (whereas the State of Georgia could plausibly claim that it did not believe that removing the case to federal court would waive immunity). Defendant only claims that it might not have taken this immunity-waiving action if it knew then, what it knows now. For that claim to succeed, this Court must adopt a jurisdictional rule that is anything but clear,[8] and conflicts with the straight-forward analysis employed in *Lapides*.

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[8] It would require courts to inquire into a State's subjective motives for deciding to accept funding: at the time it accepted funds, did the State believe that its immunity had already been abrogated? Was that belief reasonable in light of the case law in existence at that time? At what point in the development of the cases would such a belief no longer be tenable? At the time the State accepted funds, did it value the federal funding so much that it would have waived immunity even in the absence of a valid abrogation?

Thus, "whether a particular set of * * * activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law." *Id*. at 1645. In both funding and removal cases, federal law provides that a State waives immunity when it takes an action (removal or acceptance of clearly-conditioned funds) that the Court has held will waive the State's immunity. This clear rule fully protects States' right to chose whether or not to waive sovereign immunity. See *Wisconsin Dep't of Corr*. v. *Schacht*, 524 U.S. 381, 397 (1998) (Kennedy, J., concurring). And it is a rule that avoids the "inconsistency and unfairness that a contrary rule of law would create," *Lapides*, 122 S.Ct. at 1645, if States could accept federal funding then later disavow their obligation to abide by the conditions Congress clearly attached to those funds.

B. Congress May Condition Federal Funds On State Waivers Of Immunity Even When Congress Could Not Directly Abrogate The State's Immunity

Defendant next argues (Br. 66-68) that the Section 504 waiver requirement in 42 U.S.C. 2000d-7 is unconstitutional because Congress may not, under the Spending Clause, require a State to waive its immunity in exchange for federal funding when Congress would not have the power to unilaterally abrogate the State's immunity under the Fourteenth Amendment. Based on clear authority from the Supreme Court, this Court has already rejected the same challenge to the constitutionality of Section 2000d-7.

In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), Congress required States receiving federal highway funds to raise their minimum drinking age to 21. The State of South Dakota sued the United States, arguing that this condition was invalid because the Twenty-first Amendment reserved the authority to regulate alcohol to the States. The State contended that "'Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment.'" *Id*. at 209 (citation omitted). The Supreme Court rejected this claim, holding that even if the Twenty-first Amendment prohibited Congress from directly regulating drinking ages, Congress still had the power to require States to raise their minimum drinking ages as a condition of receiving federal funds. *Id*. at 206. The Court explained that "objectives not thought to be within" Congress's power to regulate directly "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id*. at 207. Thus, there is no "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." *Id*. at 210.

This Court applied these principles to the waiver of sovereign immunity required by Section 2000d-7 in *Litman* v. *George Mason University*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). In that case, the defendants accepted federal funds and, therefore, pursuant to Section 2000d-7, waived immunity for claims under Title IX of the Education Amendments of 1972, 20

U.S.C. 1681 *et seq*. (as well as claims under Section 504). When the defendants challenged Congress's power to require the waiver in exchange for federal funds, the district court held that

> while Congress does not have the authority pursuant to its Article I powers to simply *abrogate* the States' Eleventh Amendment immunity, Congress does have the power to require the States to *waive* their immunity pursuant to a valid exercise of its spending power. * * * [T]he Eleventh Amendment presented no independent constitutional bar to Congress' employing its spending power in this manner.

Id. at 548 (citations and quotation marks omitted). On appeal, this Court agreed. See *id*. at 554-555. In particular, this Court held that Congress's power under the Spending Clause "extended beyond the original enumerations of congressional powers granted by the Constitution," so that "conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity." *Ibid*. For that reason, this Court held that Section 2000d-7 was a valid exercise of Congress's Spending Power and that by accepting federal funds, a State waives immunity to claims identified in that provision. *Id*. at 555.

There is, in the end, nothing inconsistent in holding that Congress may not *force* States to abandon their immunity, but that States may *voluntarily agree* to waive their immunity in exchange for federal benefits. The central principle of sovereign immunity doctrine is not that States should never be subject to suit in

federal court, but rather that absent a valid congressional abrogation, States must be allowed to decide for themselves whether to assert or set aside their immunity. Once a State has voluntarily waived immunity by accepting federal funds, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

C. Defendant's Waiver Of Immunity Was Not Obtained Through Coercion

Defendant argues that its waiver of immunity was not voluntary, but instead coerced, because: (1) the Board was required to waive immunity in order to receive any federal funding (Br. 69-70); (2) the Board receives substantial federal funds it could not easily replace (Br. 70); and (3) if it refuses to waive immunity the Board will be "prohibited under Section 504 from engaging in conduct that * * * would otherwise be lawful" (Br. 70). The first two reasons are insufficient to show unconstitutional coercion and the third is premised on a misunderstanding of law.

First, Defendant argues (Br. 69-70) that its waiver was coerced because it "faced the decision of either losing 100% of its federal funding for education, or waiving its sovereign immunity." To the extent Defendant is complaining that it is not eligible to receive conditioned funds until it agrees to all the conditions, the

Board is describing an obvious and completely reasonable feature of *every* funding statute. To the extent Defendant is alluding to a portion of the opinion in *Virginia* v. *Riley*, 106 F.3d 559 (4th Cir. 1997), it misses the mark. In that case, this Court overturned the Department of Education's attempt to withhold Virginia's allotment of funds under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, for violation of a federal regulation. The majority of the Court held that this regulation was not a reasonable interpretation of the statute. See *id.* at 561, 563-568. A minority of the Court went on to conclude, in dicta, that permitting the Department to withhold the entire allotment of funds based on non-compliance with a single regulation affecting a very small number of students would raise serious questions under the Tenth Amendment. See *id.* at 561, 569-571. The problem did not arise, however, from the fact that the State was required to promise to meet all the conditions of the funding statute before it received any federal funds. Instead, the question was raised by what the plurality believed to be a disproportionate response to a limited violation of that promise (*i.e.*, losing 100% of the financing for an infraction that affected "less than one-tenth of one percent" of the covered students). *Id.* at 569. That issue does not arise here, however, since neither the Government nor the private plaintiffs seek to withhold or take back the County's entire allotment of federal funds for the violations alleged in this case. Instead, plaintiffs seek the entirely proportionate remedy

authorized by the statute – the damages caused by the alleged violation. The plurality in *Riley* suggested that this sort of proportionate remedy would raise no Tenth Amendment issue. *Id*. at 569.

Second, Defendant suggests (Br. 70 & n.26) that it was coerced into waiving its immunity because the Board was required to choose between maintaining immunity and obtaining an additional $5.7 million dollars in federal funding, an amount equal to approximately 5% of its annual budget (see Br. Attach. 1). Defendant asserts (Br. 70), without providing any evidence, the "impossibility[] of making up for those lost funds." But the Supreme Court has never held that the generosity of a federal grant, or a jurisdiction's decision to rely heavily on federal instead of state or local funding, could turn an unobjectionable offer of assistance into a coerced extraction of immunity. The plurality in *Riley* specifically rejected this mode of analysis:

> The percentage of the total monies expended by the State * * * that is represented by the federal grant is irrelevant in assessing the coerciveness of the inducement, at least as it appears from the Court's opinion in *Dole*. Were it otherwise, the same federal grant in the same amount would be unconstitutionally coercive as to one State, but not as to another which expends a greater amount for the purposes served by the grant; indeed, were it otherwise, there would be created a perverse incentive for the States to spend less in areas in which they expected to receive federal monies, in order to render more vulnerable under the coercion theory any conditions that were imposed.

106 F.3d at 570.[9]

Defendant's final coercion argument is based on a misreading of *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). As discussed above, the Court in that case rejected the argument that Congress could require States to waive their immunity in order to participate in interstate commerce. The Court concluded that although Congress may induce States to waive their immunity, "the point of coercion is automatically passed – and the voluntariness of the waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *Id*. at 687. Based on this holding, Defendant argues (Br. 70) that "if the State refused to waive its immunity, it would be prohibited under Section 504 from engaging in conduct that * * * would otherwise be lawful." But this is simply not correct. If the Board refused to waive immunity and did not accept any federal funding, it would incur no obligation under that Act. See 29 U.S.C. 794. That is, the only consequence of not waiving immunity is not receiving funds. This is precisely the sort of exchange the Court in *College Savings Bank* found within Congress's power when it acknowledged that "a waiver [of immunity] may be found in a

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[9] Moreover, even if such a comparison were appropriate, the relatively small portion of Defendant's budget represented by the federal grant amounts to nothing more than a "relatively mild encouragement" and does not even approach unconstitutional coercion. *South Dakota*, 483 U.S. at 211.

State's acceptance of a federal grant" because "conditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." *Id*. at 678 n.2.

While the Supreme Court has held out the possibility that Congress might abuse its Spending Power to the point of employing unconstitutional "coercion," it has never found a statute unconstitutional on this ground. The Court has repeatedly warned against too easily construing generosity as coercion, noting that every conditioned federal grant "is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *South Dakota*, 483 U.S. at 211 (quoting *Charles C. Steward Mach. Co*. v. *Davis*, 301 U.S. 548, 589-590 (1937)). Respecting this admonition, no court of appeals has ever held a federal grant program to be unconstitutionally coercive. Defendant gives no sufficient reason for this Court, or this statute, to be the first.

CONCLUSION

The Eleventh Amendment was no bar to the district court's jurisdiction over this action. The district court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the type-volume limitations set out in Fed. R. App. P. 32(a)(7)(B). The brief is proportionately spaced, has a typeface of 14 points, was prepared using WordPerfect 9.0, and contains 3,897 words.

August 15, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2002, two copies of the foregoing Reply Brief for the United States as Intervenor were served by first -class mail, postage prepaid, on the following counsel:

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