No. 02-11168

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JULIE DUNLOP ESPINOZA,

Plaintiff-Appellee,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the straightforward application of settled circuit precedent regarding the proper application of 42 U.S.C. 2000d-7 to a state agency. The United States does not believe oral argument is necessary in this case. If oral argument is held, however, the United States wishes to appear along with Plaintiff-Appellee to address any questions the Court may have.

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JURISDICTIONAL STATEMENT

Plaintiff filed this case alleging violations of, among other statutes, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794. The district court had jurisdiction pursuant to 28 U.S.C. 1331. On September 30, 2002, the district court denied Appellant's motion to dismiss Plaintiff's Section 504 claims as barred by the State's Eleventh Amendment immunity. On October 15, 2002, Appellant filed a timely notice of appeal. This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Congress validly conditioned the receipt of federal financial assistance on a knowing and voluntary waiver of Texas' Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794 (Section 504).

2. Whether Section 504's waiver provision is a valid exercise of Congress's Spending Clause authority.

3. Whether the state agency's acceptance of funds was effective to waive its Eleventh Amendment immunity.

STATEMENT OF THE CASE

1. Plaintiff sued the Texas Department of Public Safety (Department), alleging (E.R. 3-2)[1] that the agency discriminated against her on the basis of her disability in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. 794a, and other state and federal laws, when it required her to submit to a comprehensive examination in order to qualify for a driver's license. Plaintiff initially sought damages, attorneys fees, declaratory relief, and a temporary and permanent injunction (see *ibid.*). The Department moved (*ibid.*) to dismiss Plaintiff's Section 504 claims as barred by its Eleventh Amendment immunity. Subsequently, Plaintiff moved to amend her complaint (see E.R. 3-7) to remove her claims for damages against the Department and to add its director in his

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[1] References to "E.R. __- __" refer to Appellant's Record Excerpts at the tab and page or paragraph number indicated.

official capacity as a defendant, for purposes of seeking prospective injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). The district court simultaneously ruled on both motions, granting the motion to amend the complaint and denying the Department's motion to dismiss (E.R. 3-11). With respect to the latter motion, the court held (E.R. 3-5-6) that Congress validly conditioned receipt of federal funds on the Department's waiver of sovereign immunity to Section 504 claims and that, by receiving federal funds under such conditions, the Department had waived its sovereign immunity. The Department took this interlocutory appeal to challenge the denial of its Eleventh Amendment immunity defense.

2. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). This "antidiscrimination mandate" was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation,

communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

Section 504 applies to a "program or activity," a term defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is, those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it imposes "undue financial" or "administrative burdens" on the grantee, or requires "a fundamental alteration in the nature of [the] program." *Ibid*. Section 504 may be enforced through private suits against States or state agencies providing programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100 (2002).

3. In 1985, the Supreme Court held that Section 504 did not, with sufficient clarity, demonstrate Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities and reaffirmed that "mere receipt" of federal funds was insufficient to constitute a waiver. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7(a)(1) provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Section 504 of the Rehabilitation Act to remedy discrimination on the basis of disability. As this Court recently held in *Pace* v. *Bogalusa City School Board*, – F.3d –, 2003 WL 1455194 (Mar. 24, 2003), by enacting 42 U.S.C. 2000d-7, Congress clearly conditioned receipt of federal financial assistance on a knowing and voluntary waiver of a State's Eleventh Amendment immunity to private suits under Section 504. The Department's arguments to the contrary were made to, and rejected by, the *Pace* panel.

Putting state agencies to this choice was within Congress's Spending Clause authority. Congress has a significant interest in ensuring that the benefits secured through federal funding are available to all of a State's citizens without regard to disability, and in ensuring that federal taxpayers do not subsidize agencies that engage in discrimination. The nondiscrimination requirement of Section 504, therefore, is directly related to the purposes of *all* federal funding programs, not just those funded under the Rehabilitation Act itself. Nor does Congress engage in unconstitutional coercion in requiring a state agency to forego disability

discrimination to be eligible for any federal funding. That the Department has chosen to take advantage of the substantial financial assistance Congress has made available, or that it has chosen to rely heavily on federal rather than state, local, or private funding, does not render Section 504 unconstitutionally coercive. To hold otherwise would mean that state agencies that solicit substantial federal assistance could avoid all federal funding conditions while those agencies that accept less assistance remain subject to Section 504.

By accepting federal funds validly conditioned on a knowing and voluntary waiver of sovereign immunity, the Department subjected itself to private litigation under Section 504. It does not matter that the state officials who solicited the federal funds may not have had actual state law authority to waive sovereign immunity; it is enough that state law authorized the Department to accept federal funds that were clearly conditioned on a knowing and voluntary waiver of immunity. Although the Department claims that its acceptance of federal funds between May and July 2000, could not have constituted a knowing waiver of immunity, that assertion is irrelevant to this case in its present posture. Because Plaintiff seeks only prospective relief to end an alleged ongoing violation of Section 504, the relevant question is whether the Department voluntarily and knowingly waived its immunity to such claims when it most recently accepted federal funding. The Department does not assert that its present acceptance of funds was unknowing, and the decision in *Pace* precludes any such assertion.

ARGUMENT

I. CONGRESS CLEARLY CONDITIONED RECEIPT OF FEDERAL FINANCIAL ASSISTANCE ON A STATE AGENCY'S KNOWING AND VOLUNTARY WAIVER OF SOVEREIGN IMMUNITY TO PRIVATE ACTIONS UNDER SECTION 504

The Eleventh Amendment bars private suits against a state agency, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999).[2] In *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), this Court held that Congress did not have the power under Section 5 of the Fourteenth Amendment to unilaterally abrogate a State's Eleventh Amendment immunity to suits under Section 504.[3] *Reickenbacker* reserved the question, raised in this appeal, whether Congress validly conditioned a State or state agency's

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[2] The Eleventh Amendment does not bar private suits seeking prospective injunctive relief against state officials in their official capacities to end an ongoing violation of Section 504. See *Ex parte Young*, 209 U.S. 123 (1908); *University of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001); *Pace* v. *Bogalusa City Sch. Bd.*, – F.3d –, 2003 WL 1455194 *2 n.4 (5th Cir. Mar. 24, 2003). While the Department objected to Plaintiff's motion to amend her complaint to add *Ex parte Young* claims against Director Davis on the grounds that those claims failed to fall within the limits of that doctrine (see E.R. 3-7-8), the district court rejected those arguments (E.R. 3-8-11) and the Director has not appealed from that decision (see E.R. 2-1 (notice of appeal filed solely by the Department)). Even if the Department were a proper party to raise objections relating to *Ex parte Young*, the Department has not raised any such objections in its opening brief. See *Pyles* v. *Johnson*, 136 F.3d 986, 996 n.9 (5th Cir.) ("An appellant abandons all issues not raised and argued in his *initial* brief on appeal.") (internal quotations and citation omitted), cert. denied, 524 U.S. 933 (1998).

[3] Although we respectfully disagree with that decision, we recognize that it is binding on this panel.

receipt of federal financial assistance on its knowing and voluntary waiver of its Eleventh Amendment immunity to Section 504 claims. See *id*. at 984. That question was recently answered in the affirmative by this Court in a decision issued after the Department filed its brief in this appeal. See *Pace* v. *Bogalusa City Sch. Bd.*, – F.3d –, 2003 WL 1455194, *3-*4 (5th Cir. Mar. 24, 2003). The Department's claim to the contrary, therefore, must be rejected.

In its brief in this appeal, the Department argued (Br. 10-22) that Section 2000d-7(a) is not a valid waiver provision because it represents an unsuccessful attempt to abrogate a State's sovereign immunity, rather than a condition on receipt of federal funds. The Department recognizes (Br. 12) that this Court previously held that Section 2000d-7 was a valid waiver provision in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), but insists that *Pederson* is distinguishable because it involved the application of Section 2000d-7 to claims under Title IX and that, in any event, the Supreme Court's subsequent decision in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001) "implicitly called *Pederson* into question" (Br. 13). This Court considered, and rejected, these same arguments[4] in *Pace*:

> This court has held that in the context of Title IX, 42 U.S.C § 2000d-7 clearly, unambiguously, and unequivocally conditions a state's receipt of

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[4] In fact, the State of Texas filed an amicus brief raising these arguments in *Pace*. See Brief of Amicus Curiae The State of Texas In Support of Affirmance at 6-18, *Pace* v. *Bogalusa City Sch. Bd.*, – F.3d –, 2003 WL 1455194 (5th Cir. Mar. 24, 2003) (No. 01-31026).

> federal educational funds on its waiver of sovereign immunity. *Pederson* v. *Louisiana State University*, 213 F.3d 858, 876 (2000). Today, we extend that portion of the *Pederson* holding to § 504 of the Rehabilitation Act as well. * * * We reject the state's argument that the Supreme Court's decision in *Garrett* implicitly overruled *Pederson*.

2003 WL 1455194, *3-*4.[5]

That holding is in accord with the decisions of nine other courts of appeals that have held that Section 2000d-7 manifests an intent to condition receipt of federal funds on a State's knowing and voluntary waiver of its sovereign immunity. See *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Stanley* v.

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[5] The Court also rejected the argument, raised again by the Department here (see Br. 12-14), that a single provision cannot operate both as an abrogation and a conditional waiver provision. The Court in *Pace* recognized that in enacting Section 2000d-7, "Congress clearly expresses the intent to abrogate state sovereign immunity" to Section 504 claims, using language that was identical to the language of the abrogation provision in the Americans with Disabilities Act, 42 U.S.C. 12202. See 2003 WL 1455194, *2, *4. The Court nonetheless held that "§ 2000d-7 may *also* be viewed as a conditional waiver provision enacted pursuant to Congress's spending power." 2003 WL 1455194, *4 (emphasis added). Accordingly, there is no conflict between the recognition in *Pace* and *Pederson* that Section 2000d-7 operates as a valid waiver provision as applied to Section 504 and Title IX, and this Court's decision in *Lesage* v. *Texas*, 158 F.3d 213, 216 (5th Cir. 1998), rev'd in part on other grounds, 528 U.S. 18 (1998), which held that Section 2000d-7 validly abrogates a State's Eleventh Amendment immunity to claims under Title VI.

Litscher, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), petition for cert. pending, No. 02-1314; *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

II. SECTION 504 IS VALID SPENDING CLAUSE LEGISLATION

The Department further argues that even if Congress clearly conditioned a State or state agency's receipt of federal funds on compliance with Section 504 and its waiver provision, these conditions exceeded Congress's authority under the Spending Clause. That claim is also mistaken.

A. Section 504 Validly Applies To State Agencies Accepting Funds Under Any Federal Spending Program

The Department asserts (Br. 23-25) without citation to any record evidence,[6] that it does not receive any federal funds under the Rehabilitation Act, and claims, therefore, that it cannot constitutionally be subject to the conditions of Section

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[6] There is no record evidence regarding the sources of the Department's federal funding, and the Department's effort (Br. 24 n.6) to present byzantine factual evidence of questionable admissibility to this Court for initial evaluation on an interlocutory appeal should be rejected. The Department had the opportunity below to introduce evidence to support its motion to dismiss for lack of jurisdiction, see Fed. R. Civ. P. 12(b)(1), but it declined to do so. The United States has had no occasion to inquire whether the Department's new factual assertions on appeal are accurate or not. However, this Court need not resolve this factual question since the Department's legal theory is baseless.

504. The legal basis for the Department's cursory assertion is unclear.[7] The Department suggests (Br. 23-25) that this limitation is inherent in the contract nature of Spending Clause legislation. But the general discussion of Spending Clause legislation in Justice White's opinion for two Justices in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582, 596 (1983), upon which the Department relies, does not explicitly set forth constitutional limitations on Congress's exercise of its spending powers, much less the particular restriction the Department advances. Indeed, as many courts have held, Section 504 presents precisely the sort of ordinary *quid pro quo* described by Justice White in *Guardians* and other cases: in exchange for the benefits of federal funding, States must agree to be subject to enforcement proceedings in federal court. See, *e.g.*, *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) ("This requirement is comparable to the ordinary quid pro quo that the Supreme Court has repeatedly approved."), cert. denied, 533 U.S. 949 (2001); see also *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (Title VI valid Spending Clause legislation); *South Dakota* v. *Dole*, 483 U.S. 203, 206-207 (1987) (citing *Lau* as example of

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[7] If the Department is arguing that, as a matter of statutory interpretation, Section 504 only applies to agencies that receive funds under the Rehabilitation Act, that argument is meritless. On its face, Section 504 clearly applies to agencies that receive federal funds from any source. See 29 U.S.C. 794(a) (prohibiting discrimination "under any program or activity receiving *Federal financial assistance*") (emphasis added); see also 28 C.F.R. 41.3(e) (term "Federal financial assistance" includes "*any* grant, loan or contract" and other forms of assistance) (emphasis added).

Congress's exercise of its power to "attach conditions on the receipt of federal funds").

Limits on Congress's Spending Clause authority do not arise from vague notions of what constitutes a fair or appropriate bargain, but rather on specific constitutional provisions that demarcate the constitutional balance between state and federal interests. As discussed next, those limitations are not transgressed by Section 504. The Department's attempt (Br. 25) to evade the limitations of those doctrines by generalized references to the contractual nature of the Spending Clause programs must be rejected.

B. Section 504's Nondiscrimination Provision Is Directly Related To Important Congressional Interests Implicated By Every Federal Spending Program

The Department next argues (Br. 25-27) that Section 504 violates the constitutional requirement that conditions on federal funds bear a relationship to the purposes of the funding program. In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the Supreme Court noted that its prior cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id*. at 207. The Court subsequently interpreted this requirement as mandating that the funding conditions "bear some relationship to the purpose of the federal spending." *New York* v. *United States*, 505 U.S. 144, 167 (1992). See also *United States* v. *Lipscomb*, 299 F.3d 303, 322 (5th Cir. 2002) (Wiener, J.) ("The required degree of this relationship is one of reasonableness or minimum

rationality.") (citation omitted). Section 504's conditions easily meet this standard.

In distributing funds for the "general Welfare,"[8] Congress is within its constitutional rights to require that the benefits of those expenditures be enjoyed *generally*, without regard to disability. This interest flows with every federal dollar and exists regardless of the type of benefits secured with the federal funds. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003).[9]

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[8] See U.S. Const. Art. I, § 8.

[9] To take the Department's example (Br. 26-27), Congress has an interest, related to the expenditure of federal highway funds, in ensuring that the benefits of such highway projects can be enjoyed by individuals with disabilities as well as other citizens. Section 504 may, therefore, require that a state agency accepting federal highway funds take reasonable steps to ensure that individuals with disabilities are able to enjoy the benefits of, for example, a highway rest stop, by installing curb ramps and making restrooms accessible to wheel chair users. See, *e.g.*, 28 C.F.R. 41.58(a). Those requirements are directly related to Congress's purpose in disbursing highway funds to provide transportation benefits to all of a State's citizens. Imposing these requirements directly advances the stated purposes of Section 504, which include promoting the "inclusion, integration, and full participation" of individuals with disabilities in the social and economic activities of the nation. See 29 U.S.C. 701(c)(3). The Section 504 conditions bear at least as direct a relationship to the purposes of federal highway funding as did the Spending Clause conditions approved by the Supreme Court in two other highway funding cases. See *Dole*, 483 U.S. at 208-209 (federal highway funds conditioned on States' raising their minimum drinking ages to twenty-one); *Oklahoma* v. *U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947) (federal highway funds conditioned on employees of funded agency abstaining from certain political activities under the Hatch Act, 18 U.S.C. 61 *et seq.*).

Moreover, beyond its interest in determining how the benefits of federal funding are distributed, Congress has a legitimate general interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," discrimination on the basis of criteria that Congress has determined to be irrelevant to the receipt of public services, such as race, gender and disability. See *Lau*, 414 U.S. at 569 (internal quotation marks omitted). This is the same interest that animates both Title VI and Title IX,[10] which prohibit race and sex discrimination in certain programs that receive federal funds. Like Section 504, Title VI, which prohibits discrimination by any state program that receives federal financial assistance from any source; it is not limited to prohibiting discrimination by recipients of "Title VI funds" (there are no such funds) or funds directed at addressing racial or national origin discrimination. In *Lau*, the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact of school policies on limited English proficiency students, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citations omitted).[11] See also *Grove City Coll.* v. *Bell*, 465

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[10] See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.2 (1987).

[11] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), the Court noted that it has

(continued...)

U.S. 555, 575 (1984) (Title IX case) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.").

Because Congress's interest in preventing discrimination in programs that receive funds from any federal source, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance.[12] Contrary to Defendant's suggestion (Br. 25), there is little distinction between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending. See *Lipscomb*, 299 F.3d at 321-322 (Wiener, J.). The Supreme Court has upheld as valid exercises of the Spending Clause, other conditions that are not tied to a particular federal spending program. See *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in

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[11](...continued)
"rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not cast doubt on the Spending Clause holding in *Lau*.

[12] The purposes articulated by Congress in enacting Title VI (purposes equally attributable to Title IX and Section 504) were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); *id.* at 7061-7062 (Sen. Pastore); *id.* at 2468 (Rep. Celler); *id.* at 2465 (Rep. Powell).

whole or in part by the United States could take "any active part in political management"); *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds).

C. The Department Was Not Unconstitutionally Coerced Into Accepting Federal Funds And Their Attached Conditions

The Department claims (Br. 27-30) that it is excused from complying with the nondiscrimination requirements it agreed to when it solicited and accepted federal funds because it accepted those funds and conditions under duress and coercion. That alleged coercion consists solely in the size of the federal grants offered in exchange for the State's promised compliance with the attached conditions, and in the Department's decision to rely substantially on federal, rather than state, local or private funds, for its education programs. The Louisiana defendants, and the State of Texas as amicus, made the same arguments in *Pace*.[13] This Court nonetheless concluded that the "Louisiana defendants' actions were voluntary," although the acceptance of funds, in that case, "did not manifest a *knowing* waiver." 2003 WL 1455194, *4. As discussed in the next section of this

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[13] See Letter Brief on Behalf of State Defendants at 7, *Pace* v. *Bogalusa City School Board*, – F.3d –, 2003 WL 1455194 (5th Cir. Mar. 24, 2003) (No. 01-31026) (arguing the State was coerced because it was forced to chose between maintaining immunity and "over $804,269,621 in federal funding for education, which is over three-fourths of Louisiana's entire budget for Education"); Brief of Amicus Curiae The State of Texas In Support of Affirmance at 22-24.

brief, the State's acceptance of the funds relevant to this case was knowing. And as in *Pace*, the Department's acceptance of federal funding was also voluntary.

The Department has identified no case ever holding a federal statute unconstitutional on coercion grounds. While the Supreme Court in *Dole* stated that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)), it also cautioned that every congressional spending statute "is in some measure a temptation." *Ibid.* "[T]o hold that motive or temptation is equivalent to coercion," the Court warned, "is to plunge the law in endless difficulties." *Ibid.* The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590). This Court has observed that "Congress traditionally has been sustained in enacting such programs to encourage local participation in the achievement of federal legislative goals." *Adolph* v. *Federal Emergency Mgmt. Agency*, 854 F.2d 732, 735-736 (5th Cir. 1988). "[T]o comply with a condition attached to a federal benefit is not to be equated with federal coercion." *Id.* at 736 n.3.

Any argument that Section 504 is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to difficult or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel.*

Morrow v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id*. at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id*. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[14]

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[14] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "[w]hether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." Appellants' Jurisdictional Statement at 2-3, *North Carolina ex rel. Morrow* v. *Califano*, 435 U.S. 962 (1978) (No. 77-971). Because the "correctness of that

(continued...)

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools' not denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[15]

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[14](...continued)
holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976).

[15] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude an entity from restructuring its operations to separate its federally supported
(continued...)

Thus, courts have upheld in certain circumstances conditions on federal funding that require state agencies to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Nor does the amount of funding at issue in this case, or the State's purported dependence on it, render the offer of assistance unconstitutionally coercive.[16] For example, in

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[15](...continued)
activities from other activities, Congress may constitutionally condition federal funding to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

[16] The Department's argument (Br. 28-30) turns on its factual assertions that federal funds constitute approximately $224 million, or about 67%, of its budget, and that Department "has no choice but to submit to the terms of the Rehabilitation Act." These facts are not found in the complaint or in the record on this interlocutory appeal from a denial of a motion to dismiss. Indeed, it appears that the Department made no coercion argument in the district court and did not move, pursuant to Fed. R. Civ. P. 12(b)(1), to admit evidence outside the complaint to support its present assertions. As the D.C. Circuit has observed, "[e]ven a rough assessment of the degree of temptation would require extensive and complex factual inquiries," *Oklahoma* v. *Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981), particularly regarding the Department's assertion that it has no alternatives to accepting federal funding. The United States certainly does not concede that the Department has no choice but to accept federal funds, and has not undertaken to evaluate the accuracy of the Department's financial figures. Because this case comes to this court on an appeal from a motion to dismiss, there is no occasion for this Court to evaluate these factual claims, and the Department's proffer of evidence, in the first instance. Cf. *Byrd* v. *Corporacion Forestal Y Industrial De Olancho, S.A.*, 182 F.3d 380, 386-388 (5th Cir. 1999) (court of appeals lacks jurisdiction to resolve material factual disputes in interlocutory
(continued...)

Texas v. *United States*, 106 F.3d 661 (5th Cir. 1997), this Court rejected the claim that Congress unconstitutionally coerced the State of Texas into providing emergency medical care to undocumented aliens by conditioning receipt of Medicaid funding on that requirement:

> The Supreme Court has recognized that the Tenth amendment permits Congress to attach conditions to the receipt by the states of federal funds that have the effect of influencing state legislative choices. "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties." This we will not do.

Id. at 666 (quoting *Dole*, 483 U.S. at 211) (footnotes and other citations omitted). Other courts have likewise held that conditions attached to large federal grant programs, such as Medicaid, are not coercive.[17]

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[16](...continued)
appeal of denial of motion to dismiss based on foreign sovereign immunity). However, because this Court may properly hold that the Department fails to state a valid coercion claim, even assuming the truth of its financial assertions, the United States will address the argument in this brief.

[17] See, *e.g.*, *West Virginia* v. *United States Dep't of Health & Human Serv.*, 289 F.3d 281, 284 & n.2 (4th Cir. 2002) (enforcing Medicaid requirement where State received more than $1 billion in federal funds, representing approximately 75% of the State's Medicaid budget); *California* v. *United States*, 104 F.3d at 1092 (Medicaid conditions not coercive); *Padavan* v. *United States*, 82 F.3d 23, 29 (2d Cir. 1996) (same); *Schweiker*, 655 F.2d at 413-414 (same); see also *Jim C.,* 235 F.3d at 1082 (enforcing Section 504 where state Department of Education received "$250 million or 12 per cent. of the annual state education budget" in federal funds); *Kansas* v. *United States*, 214 F.3d 1196, 1198, 1201-1202 (10th Cir. 2000) (enforcing condition in federal welfare program that provided $130 million, constituting 66% of state funds for child support enforcement program), cert. denied, 531 U.S. 1035 (2000).

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000). [18]

For these reasons, several Circuits have recently rejected coercion arguments against Section 504. See *Koslow*, 302 F.3d at 174 (while "declining all federal funds" for a particular state agency "would doubtless result in some fiscal hardship – and possibly political consequences – it is a free and deliberate choice"); *Lovell*, 303 F.3d at 1051; *Jim C.*, 235 F.3d at 1081-1082 ("The sacrifice of all federal education funds * * * would be politically painful, but we cannot say

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[18] Spending Clause statutes are often analogized to contracts. In this vein, we note that when a plaintiff is seeking to void a contract on the grounds of "economic duress," it must show "acts on the part of the defendant which produced" the financial circumstances that made it impossible to decline the offer, and that it is not enough to show that the plaintiff wants, or even needs, the money being offered. *Undersea Eng'g & Constr. Co.* v. *International Tel. & Tel. Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); accord *United States* v. *Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994).

that it compel's Arkansas's choice."). There is no basis for this Court to reach a contrary conclusion here.

III. THE DEPARTMENT'S WAIVER OF SOVEREIGN IMMUNITY WAS EFFECTIVE

The Department's final pair of arguments attempts to show that even if Congress validly conditioned a State's receipt of federal funds on a knowing and voluntary waiver of its sovereign immunity, the Department's acceptance of federal funds did not constitute an effective waiver.

A. The Department's Authority To Solicit And Accept Federal Funds Conditioned On A Waiver Of Sovereign Immunity Is Sufficient, As A Matter Of Federal Law, To Support A Waiver Of Immunity Through Acceptance Of Federal Funds

The Department first argues (Br. 30-35) that the voluntary acceptance of federal financial assistance did not constitute an effective waiver because the Department was not authorized under state law to waive Eleventh Amendment immunity. This contention is meritless.

For the purposes of this argument, the Department assumes (Br. 30) that Congress validly conditioned receipt of federal funds on a waiver of sovereign immunity. Under this assumption, the Department was not eligible for federal financial assistance unless it was willing and able to comply with all the conditions attached to those funds, including the waiver of sovereign immunity to claims under Section 504. The Department now asserts to this Court that it has never been eligible for those funds because it is not able to comply with the requirement that it submit to suit in federal court to adjudicate its compliance with

the nondiscrimination requirements of Section 504 (and, presumably, Title VI and Title IX as well). If that were true, the Department's eligibility for future financial assistance from the federal government would be in grave doubt, for federal agencies do not have the authority to excuse state agencies from complying with Section 2000d-7 or other congressionally mandated funding conditions. See, *e.g.*, 34 C.F.R. 75.900, 76.900.

Fortunately for the Department, its purported lack of authority under state law to waive its sovereign immunity does not, as a matter of federal law, prevent the Department from effecting a valid waiver of its sovereign immunity by accepting federal funding. As explained below, so long as the Department has authority under state law to accept the conditioned federal funds (which it does not dispute), its acceptance constitutes an effective waiver of immunity.

The Department's argument to the contrary is not based on any legal authority that directly addresses waivers of immunity occasioned by state officials' solicitation of federal funds validly conditioned on a waiver of sovereign immunity. Instead, the Department relies (Br. 31-33) on general statements by this Court in *Magnolia Venture Capital Corp.* v. *Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998), cert. denied, 525 U.S. 1178 (1999), and the Supreme Court in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). Neither decision is directly on point, and recent Supreme Court authority prevents applying any broad dicta from these cases to relieve the Department of its waiver in this case.

In *Ford*, the plaintiffs argued that the State Attorney General had waived the State's sovereign immunity in the course of litigation. The State conceded "that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding." *Id*. at 467. The Court then presumed, without discussion, that the "issue thus becomes one of their power under state law to do so." *Ibid*. In *Magnolia*, this Court looked to *Ford* in deciding whether a state agency had waived its sovereign immunity in a private contract with a corporation. See 151 F.3d at 444. This Court concluded that the contract did not validly waive the State's immunity because the state agency lacked legal authority to waive immunity. In so doing, this Court characterized *Ford* as standing for the general proposition that "the state's waiver must be accomplished by someone to whom that power is granted under state law." *Ibid*.

That statement was clearly dicta as applied to the very different context presented by this case. A waiver of sovereign immunity in a contract between a State and a corporation does not implicate the important interests of a co-sovereign. Thus, neither this Court's decision in *Magnolia*, nor the Supreme Court's decision in *Ford,* had occasion to consider or address the relevance of Congress's unique interest in vindicating its constitutional authority to condition federal funds on a waiver of sovereign immunity. Accordingly, even under ordinary circumstances, *Magnolia* would not conclusively determine the outcome in this case.

In any event, *Magnolia's* interpretation of *Ford*, and indeed *Ford* itself, was substantially overruled last Term by the Supreme Court's decision in *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002). In that case, the Court held that Georgia's Attorney General waived the State's Eleventh Amendment immunity by voluntarily choosing to remove state law claims to federal court, even though the Attorney General lacked the authority under state law to waive the State's immunity. *Id*. at 622-623. The Court acknowledged that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court concluded, however, that such a clear indication may be found when a State engages in an activity that the courts have held, as a matter of federal law, will result in a waiver of sovereign immunity. See *id*. at 620-621. "[W]hether a particular set of state * * * activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law," the Court explained. *Id*. at 623. The law has long recognized, the Court observed, that one such activity is a State's voluntary submission to federal court jurisdiction by filing suit in federal court, or making a claim in a federal bankruptcy proceeding. *Id*. at 621. The Court in *Lapides* concluded that removal of state law claims to federal court should also be included among these recognized immunity-waiving activities. *Id*. at 624.

Relying on *Ford Motor Co*., Georgia objected that even if such an activity were recognized as a waiver of sovereign immunity as a general matter, it should not be recognized as a waiver when the state official removing the case to federal

court lacks the specific authority under state law to waive the State's immunity. *Id*. at 626. The Court rejected this limitation on the waiver rule. *Id*. at 623. The Court recognized this decision was at odds with *Ford*'s apparent assumption that a state official's actions may not waive a state's immunity absent state law authority to waive sovereign immunity. But the waiver rule it was applying, the Court explained, is premised upon "the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Id*. at 620. "Finding *Ford* inconsistent with [that] basic rationale," the Court "overrule[d] *Ford* insofar as it would otherwise apply." *Id*. at 623.

The Department attempts to portray *Lapides* as a limited exception to a still-valid generalization from *Ford Motor Co*. that state officials cannot waive sovereign immunity without specific state-law authorization. But this attempt must fail because the Court in *Lapides* made clear that to the extent *Ford Motor Co*. was ever properly understood to announce this broad principle, such simple generalizations must now yield to a more nuanced consideration of the basis for any given waiver rule.

The Department's argument is inconsistent with the basic rationale of *Lapides* and of the rule of federal law that finds a waiver of sovereign immunity in a State's acceptance of a conditioned federal grant. That rule is not based on the need to accommodate a State's decision to relinquish its sovereign immunity in particular cases. Thus, both this Court and the Supreme Court have consistently

treated waivers under funding statutes as resulting from a general rule of federal law, like that created in *Lapides*, rather than from a case-specific inquiry into the intentions of the state agency accepting the funds.[19] This is so, because the rule arises from the need to enforce Congress's authority to create conditions on federal funding and to avoid the "inconsistency, anomaly, and unfairness" that would result if States could accept such funds and then later avoid their conditions. See *Lapides*, 535 U.S. at 620. It would be anomalous to hold that Congress may condition federal funds on a waiver of sovereign immunity, yet allow a state agency to enjoy the benefits of those funds without being bound to that valid condition. And it would be unfair to permit a State to take financial advantage of its false representations to federal funding agencies, when States that make *bona fide* applications are required to bear the full weight of the responsibilities required under Section 504, including submission to federal court adjudications.

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[19] See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("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.*") (emphasis added); *id.* at 678 n.2 (agreeing that "a waiver may be found in a State's acceptance of a federal grant."); *AT&T Communications* v. *Bellsouth Telecom., Inc.*, 238 F.3d 636, 645 (5th Cir. 2001) ("[W]aiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on a waiver of immunity.").

Because the rule regarding waivers based on acceptance of federal funding is primarily based on this need for certainty, consistency, and fairness, the rationale of *Lapides* supports the conclusion that the rule must be enforced even if the agency accepting the conditioned funds does not have state law authority to waive sovereign immunity. This conclusion appropriately accommodates both Congress's interest in ensuring compliance with legitimate funding conditions attached to substantial federal outlays, and the States' ability to preserve their Eleventh Amendment immunity from suit. A State desiring to prevent its agencies from waiving immunity under this rule may simply withdraw the agencies' authority to apply for or accept federal funding. Conversely, a State that permits its agencies to apply for federal funds, knowing that this will result in a waiver of sovereign immunity as a matter of federal law, cannot complain of unfair treatment when that rule is enforced. Indeed, it is difficult to realistically conclude that a State in such circumstances has not authorized the waiver, since the waiver is a necessary consequence of the authorized acceptance of federal funds. See *Lapides*, 535 U.S. at 623.

Finally, applying the rationale of *Lapides* to this case does not conflict with the holding of this Court's decision in *Magnolia*, or the holdings of the other cases upon which the Department relies. *Lapides* does not disturb cases that require state law authority to waive sovereign immunity when the waiver is recognized by federal law in order to accommodate "a State's actual preference or desire." *Id*. at 620. This category clearly includes case-specific waivers of sovereign immunity

by state officials during litigation, see *Freimanis* v. *Sea-Land Serv., Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981) (waiver through consent judgment); *Dagnall* v. *Gegenheimer*, 631 F.2d 1195, 1196 (5th Cir. 1980) (waiver through pretrial stipulation), or a waiver provided in a private contract, see *Magnolia*, 151 F.3d at 439. In such cases, courts must ensure the waiver actually reflects the State's desire to relinquish its sovereign immunity, rather than a mistaken or unauthorized undertaking by one of the State's officials. But where, as here, the basis of the waiver is a rule of federal law based on a need for fairness and certainty, *Lapides* prevents the extension of *Magnolia* to allow a State to obtain an unwarranted exception from valid conditions attached to federal funds.

B. The Department's Waiver Of Sovereign Immunity Was Not Rendered Unknowing By Its Alleged Belief That Its Immunity Had Already Been Abrogated

The Department's final argument (Br. 36-38) is that it did not knowingly waive its sovereign immunity because at the time it solicited the federal funds relevant to this case, it reasonably believed that its immunity to Section 504 claims had already been abrogated. In particular, the Department argues (Br. 37 n.9) that its "acceptance of funds for May 2000 through July 2000, when the events giving rise to this case took place," could not have been knowing because during that time period, it reasonably believed that Section 2000d-7 validly abrogated its sovereign immunity, given that this Court had upheld a similar abrogation provision of Title II of the ADA. See *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir. 1998), cert. denied, 525 U.S. 819 (1998).

The Court in *Pace* v. *Bogalusa City School Board*, – F.3d. –, 2003 WL 1455194 (5th Cir. Mar. 24, 2003), accepted the basic legal premise of this argument, holding that prior to 2001 (when the Supreme Court decided *Garrett* and this Court decided *Reickenbacker*), a State in the Fifth Circuit

> had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA. Believing that the acts validly abrogated their sovereign immunity, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds.

2003 WL 1455194, *5. The United States respectfully disagrees with that conclusion,[20] but as discussed next, that disagreement has no relevance to the proper outcome in this case.

The Department wrongly assumes (Br. 37 n.9) that the relevant time period for application of *Pace* to this case is the time of Plaintiff's initial interactions with the Department in the spring and summer of 2000. That would be correct if Plaintiff was seeking damages for the alleged discrimination that took place at that time. However, Plaintiff has dropped her claims for damages and now seeks only prospective injunctive relief (see E.R. 3-7). Plaintiff's request for prospective relief must be predicated on her claim that the Department continues to discriminate against her in violation of Section 504. See, *e.g.*, *Plumley* v. *Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir. 1997) ("To obtain standing

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[20] The United States and the private plaintiff in *Pace* have until May 8, 2003, to petition for rehearing or rehearing en banc.

for injunctive relief, a plaintiff must show that there is reason to believe that he would directly benefit form the equitable relief sought. In other words, a plaintiff must face a threat of present or future harm.") (citation omitted); *Society of Separationists, Inc.* v. *Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992) (same), cert. denied, 506 U.S. 866 (1992). Because Plaintiff seeks an injunction to end an alleged ongoing violation of Section 504, the question is whether the Department is *currently* operating under a valid waiver of sovereign immunity to claims under Section 504. The Department does not dispute that it has continued to accept federal funds since the date of the initial events at issue in this case (see Br. 6, 28). The decision in *Pace* makes clear that by accepting federal funds after the Supreme Court's decision in *Garrett* and this Court's decision in *Reickenbacker*, the Department knowingly waived its Eleventh Amendment immunity to Plaintiff's claims for prospective relief. See 2003 WL 1455194, *5-*6 & n.15.

CONCLUSION

The judgment of the district court denying defendant's motion to dismiss the Section 504 claim should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is being challenged in *Miller* v. *Texas Technological University* (No. 02-10190); *Johnson* v. *Louisiana Department of Education* (No. 02-30318); *August* v. *Mitchell* (No. 02-30369); *Danny R.* v. *Spring Branch Independent School District* (No. 02-20816); and *Thomas* v. *University of Houston* (No. 02-20988).

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 8,748 words.
2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

_____
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CERTIFICATE OF SERVICE

I certify that two copies of the above Brief of the United States as Intervenor, along with a computer disk containing an electronic version of the brief, were served by overnight mail, postage prepaid, on April 22, 2003, on the following parties:

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