No. 00-9223

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCISCO GARCIA,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Intervenor

S.U.N.Y. HEALTH SCIENCES CENTER OF BROOKLYN, ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES AS INTERVENOR
FOR REHEARING OR REHEARING EN BANC

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

College Sav. Bank v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666 (1999);

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985);

995 Fifth Ave. Assocs., L.P. v. *New York State Dep't of Taxation & Fin.*, 963 F.2d 503 (2d Cir.), cert. denied, 506 U.S. 947 (1992)

I express a belief, based on a reasoned and studied professional judgment, that these appeals involve a question of exceptional importance concerning the validity of 42 U.S.C. 2000d-7 as a valid condition on the receipt of federal financial assistance and that the panel opinion conflicts with the authoritative decisions of four other United States Courts of Appeals:

Douglas v. *California Youth Auth.*, No. 99-17140, 2000 WL 1412937 (9th Cir. Nov. 14, 2001)

Nihiser v. *Ohio E.P.A.*, No. 97-3933, 2001 WL 1220723 (6th Cir. Oct. 11, 2001)

Jim C. v. *Arkansas Dep't of Educ.*, 235 F.3d 1079 (8th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 2591 (2001);

Stanley v. *Litscher*, 213 F.3d 340 (7th Cir. 2000)

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STATEMENT OF THE ISSUES MERITING PANEL REHEARING OR EN BANC CONSIDERATION

Whether a state agency's acceptance of federal financial assistance constituted an effective waiver of immunity to suits under Section 504 of the Rehabilitation Act of 1973 where Congress clearly conditioned the receipt of federal financial assistance on the State's waiver of its Eleventh Amendment immunity for such suits.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This suit was brought by an individual against a state defendant seeking monetary relief for discrimination on the basis of disability under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The district court entered summary judgment for defendant on the merits; the panel affirmed the district court's dismissal of each count of the suit, but relied on the Eleventh Amendment as the basis for its decision.

1. 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). A "program or activity" is 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 generally 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]." *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 n.17 (1987). An accommodation is not reasonable if it either imposes "undue financial and 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 recipients of federal financial assistance. See *Rothschild* v. *Grottenthaler*, 907 F.2d 286, 289 (2d Cir. 1990). In 1986, Congress amended the statute specifically to provide that States would not be entitled to invoke their Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

In 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* Title II of the Act, 42 U.S.C. 12131-12134, imposes a non-discrimination obligation on state and local governments. Closely modeled on, although not identical to, Section 504, Congress adopted the "rights, remedies, and procedures" of Section 504 as the rights, remedies, and procedures of Title II. 42 U.S.C. 12133. At the same time, Congress expressly preserved all existing causes of action. 42 U.S.C. 12201(b).

2. Plaintiff in this case alleged that while a student at defendant's school, he was subjected to discrimination made unlawful by Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Plaintiff sought damages under each statute. Defendant pressed Eleventh Amendment immunity as a defense to each claim. The district court ruled against defendant on the

Eleventh Amendment issue; the court followed extant Second Circuit precedent upholding the abrogations in both Title II and Section 504 as valid legislation under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. See *Garcia* v. *SUNY*, 2000 WL 1469551, at *5 (E.D.N.Y. Aug. 21, 2000). On the merits, the district court granted summary judgment for defendant, holding that while there were disputes of fact as to whether plaintiff was a person with a "disability," the accommodation requested was not "reasonable." See *id.* at *11.

3. On plaintiff's appeal, defendant raised the Eleventh Amendment as an alternative ground for affirmance. After the Supreme Court's decision in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the panel asked for supplemental briefing on the Eleventh Amendment issues. This Court granted the United States leave to intervene pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statutes' removal of defendant's Eleventh Amendment immunity.

On September 25, 2001, the panel issued its opinion affirming, on different grounds, the district court's dismissal of the disability discrimination damage claims. The panel determined that the abrogation for Title II of the Americans with Disabilities Act could not be sustained "in its entirety" as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause by "appropriate" legislation. Slip op. 6070. Reasoning that Title II is only valid Section 5 legislation if it does not prohibit "conduct that is constitutionally permissible," *id.* at 6073, the panel construed the remedial

provisions of Title II so as not to exceed Congress's constitutional authority to abrogate immunity for damages against a State. It thus required plaintiff to show action was taken with "discriminatory animus or ill will towards the disabled," because those "are generally the same actions that are proscribed by the Fourteenth Amendment." *Id*. at 6072. The panel acknowledged that this Court had previously held that plaintiffs need only show deliberate indifference to their statutory rights to recover damages from non-state defendants and expressly noted in its concluding remarks that "nothing we have said affects the applicability of the deliberate indifference standard to Title II claims against non-state governmental entities." *Id*. at 6079. But because plaintiff sued a state agency and did not allege animus or ill-will, the court affirmed the dismissal of the Title II claim.[1]

With regard to the Section 504 claim for damages, the panel opinion concluded that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity" to Section 504 claims. Slip op. 6076. However, the opinion held, the waiver was not effective because the state agency did not "know" in 1995 (the latest point the alleged discrimination had occurred) that the abrogation in Title II of the Americans with Disabilities Act was not effective and thus would have "believed" that Title II's abrogation for Title II claims made the

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[1] Although the United States disagrees with this holding, we do not seek further review of it at this time.

waiver for Section 504 redundant. *Id*. at 6078 & n.5. "[A] state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had already been lost." *Id*. at 6077. The panel reserved the question whether acceptance of federal funds would constitute a knowing waiver in the years after *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), when there was "a colorable basis for the state to suspect that an express congressional abrogation [for Title II was] invalid." *Id*. at 6077 n.4.

ARGUMENT AND AUTHORITIES

The panel's decision that the Eleventh Amendment bars private suits against state agencies for violations of Section 504 of the Rehabilitation Act conflicts with the holdings of four circuits that Congress validly conditioned the receipt of federal financial assistance on the waiver of Eleventh Amendment immunity. See *Douglas* v. *California Youth Auth.*, No. 99-17140, 2000 WL 1412937 (9th Cir. Nov. 14, 2001); *Nihiser* v. *Ohio E.P.A.*, No. 97-3933, 2001 WL 1220723 (6th Cir. Oct. 11, 2001); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 2591 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). The panel itself acknowledged that its opinion was contrary to the view of other circuits. Slip op. 6078 n.5. Rehearing or rehearing en banc should be granted because the panel decision creating this conflict is wrong and deprives individuals with disabilities of remedies Congress intended to

provide in order to redress and deter unlawful discrimination.

1. The non-discrimination obligations of Section 504 of the Rehabilitation Act of 1973 only apply to those state agencies that choose to accept federal financial assistance. Like other Spending Clause statutes, the choice whether to be subject to conditions imposed by Section 504 resides in the recipient, who is always free to decline federal funds and the attendant "strings." See *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986).

The Supreme Court held in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), that Congress had not made clear its intent that state agencies receiving federal financial assistance be amenable to private suit for violations of Section 504. The Court noted, however, that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247. Congress responded to *Atascadero* in 1986 by enacting 42 U.S.C. 2000d-7, which provides in relevant part that 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 * * * , title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. 2000d-7(a)(1).

The effective date for Section 2000d-7 was October 21, 1986. See 42 U.S.C. 2000d-7(b). Thus, state entities that chose to receive federal financial assistance after that date were put on clear notice by the statute that they would be subject to the substantive obligations of Section 504 and that they could not invoke their immunity as a defense to private suits seeking to enforce those obligations. See, *e.g.*, *Mrs. C.* v. *Wheaton*, 916 F.2d 69, 76 (2d Cir. 1990).

The panel opinion agreed that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." Slip op. 6076. There is no question that defendant received federal financial assistance after 1986 and continues to do so. As four other circuits have held, that ends the inquiry. Defendant has waived its immunity.[2] Forewarned by the text of the statute that taking federal financial assistance will constitute a waiver of immunity, taking the assistance itself constituted a knowing waiver. See *995 Fifth Ave. Assocs., L.P.* v.

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[2] Courts of appeals have reached the same conclusion in cases involving the effect on Section 2000d-7 in regard to the other non-discrimination legislation identified in that statute. See *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553-555 (7th Cir. 2001) (Title IX of the Education Amendments of 1972); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI of the Civil Rights Act of 1964), rev'd on other grounds, 121 S. Ct. 1511 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); see also *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (addressing same language in the Individuals with Disabilities Education Act, 20 U.S.C. 1403), cert. denied, 531 U.S. 824 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same).

New York State Dep't of Taxation & Fin., 963 F.2d 503, 506-509 (2d Cir.) (filing claim in bankruptcy court constitutes waiver of immunity when statute so provides), cert. denied, 506 U.S. 947 (1992).

2. The panel opinion held that although state agencies knew at the time that the receipt of funds would constitute a waiver of Eleventh Amendment immunity to Section 504 suits, they should no longer be held to that waiver because, in the panel's view, the law has changed. In this case, the panel reasoned, the state agency "believed" and "understood" at the time it accepted the federal funds in 1995 that its waiver of immunity for Section 504 claims was simply duplicative of the abrogation Congress enacted in Title II of the Americans with Disabilities Act. Whether or not a State thought the waiver was redundant, however, a State could not have thought that it was *not* waiving immunity to suit under Section 504. The language of Section 2000d-7 is absolutely clear in this regard.

Indeed, Congress did not repeal Section 504 or Section 2000d-7 when it enacted the Americans with Disabilities Act of 1990. To the contrary, Congress preserved the existing Section 504 cause of action. See 42 U.S.C. 12201(b). Even if Title II and Section 504 do impose identical substantive obligations, the claims remain distinct causes of action. No one would contend, for instance, that the abrogation for Title II would permit a plaintiff to bring suit under Section 504, despite their closely related nature. The dignitary interests of the States, a critical component in Eleventh Amendment jurisprudence, requires separate provisions removing immunity for each claim, even if they overlapped in every substantive

and remedial respect. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (Eleventh Amendment immunity must be assessed claim by claim). Thus, a State's understanding about Title II is irrelevant to the Section 504 waiver issue.

Moreover, the panel opinion's holding produces anomalous results. Under the opinion's reasoning, a state agency that accepted funds after Congress enacted Section 2000d-7 in 1986 did waive its immunity to suit. The continued acceptance of federal funds constituted a knowing waiver at least until 1990 – when Title II was enacted – and possibly until 1992 – when Title II became effective. But at that time, the reasoning goes, although Section 504 and Section 2000d-7 remained the same, the state's knowing waiver became unknowing. Indeed, the panel would have a State's Section 504 waiver depend upon the current state of the case law adjudicating the abrogation provision of the ADA. Compare *Anita Founds., Inc.* v. *ILGWU Nat'l Ret. Fund*, 902 F.2d 185, 189 (2d Cir. 1990) (noting "the established rule that a change in the law does not render an agreement void").

The panel opinion's holding also denies the United States the benefit of its bargain. As the statute makes clear, one of the conditions for receipt of federal funds is the waiver of immunity to suits alleging discrimination under Section 504. It is not fair for a state agency to accept federal funds knowing of that condition, but then claim that it is not be bound by that condition because it misunderstood the significance the condition would have in the future. Indeed, if the state agency's waiver is found to be ineffective for the relevant period, it would seem

that the state agency has no entitlement to retain federal funds that were conditioned, in part, on the waiver of immunity. Cf. *United States* v. *Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir.) (per curiam) (defendant may not retain benefit of plea bargain, in which he waives various rights in exchange for lower sentence, if he succeeds in contesting bargain's validity), cert. denied, 509 U.S. 931 (1993); *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998) (noting general rule that in order to avoid a contract that is voidable on the grounds of mistake, a party must "tender back any benefits received under the contract").

3. In any event, the panel's requirement that the State know not only that it is waiving immunity at the time, but that it be able to negate the waiver because of changes in the law, is unprecedented. The opinion's only support for this requirement is a statement in the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999): "[t]he classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'" *College Savings Bank* does not support the panel decision, for in this case, the state agency knew it had the right to immunity from suit for Section 504 claims and intentionally relinquished that right in exchange for federal funds.

College Savings Bank involved a statute, enacted under the Commerce Clause, that regulated false and misleading advertising. The Court held that Congress could not condition a state's participation in activities of interstate

commerce on a waiver of its immunity to private suit for violations of the statute. The Court, however, reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on a State's agreement to waive its Eleventh Amendment immunity from suit. 527 U.S. at 686. Similarly, the *College Savings* opinion suggested, Congress has the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and its power to provide financial assistance were in the nature of a grant or "gift" on which Congress could place conditions that a State was free to accept or reject. *Id.* at 687. See also *McGinty* v. *New York*, 251 F.3d 84, 95 (2d Cir. 2001) (stating that, under *College Sav. Bank,* "Congress may, pursuant to its spending power, extract a constructive waiver of Eleventh Amendment immunity by placing conditions on the grant of funds to states"); *995 Fifth Ave.,* 963 F.2d at 506-509 (holding that a State waives immunity by participating in bankruptcy proceedings when statute makes consequences of participation clear).

The panel opinion notes that Congress can condition the receipt of funds on a waiver of immunity, so long as the waiver is voluntary, but it takes what we believe to be a mistaken view of what that term means in the context of a Spending Clause statute. As the Supreme Court explained in *Pennhurst State*

School & Hospital v. *Halderman*, 451 U.S. 1 (1981), the clarity required in cases like *Atascadero*, and provided by Section 2000d-7, exists to ensure that, as a matter of law, recipients "exercise their choice knowingly, cognizant of the consequence of their participation." *Id.* at 17. Any State reading the U.S. Code (and we can assume they read the relevant statutes before accepting federal financial assistance) would have known that after the effective date of Section 2000d-7 it could be sued in federal court for violations of Section 504 if it accepted federal funds. And once it chose to receive federal financial assistance, it was bound by its voluntary waiver. See *College Sav. Bank*, 527 U.S. at 686 (Congress may condition 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").

4. Even accepting that the Court in *College Savings Bank* intended to incorporate the entire jurisprudence of waiver of constitutional rights into the Eleventh Amendment context, the panel's holding was unprecedented. For the Court has made clear that in some contexts an individual can waive his constitutional rights even without knowing that he possesses the rights. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 234 (1973) ("knowledge of a right to refuse [a police officer's request to engage in a search] is not a prerequisite of a voluntary consent"); cf. *Newton* v. *Rumery*, 480 U.S. 386 (1987) (plaintiff may waive the right to bring a 42 U.S.C. 1983 action for unknown constitutional violations). In other instances, an individual can be found to waive his rights as a

matter of law, without any inquiry into his state of mind, when a valid rule makes clear that certain inactions constitute a waiver. For example, a party to a civil action waives his Seventh Amendment right to a jury trial if he does not expressly demand it within 10 days of the commencement of the action. See Fed. R. Civ. P. 38(d). Similarly, a defendant in a civil action waives objections to personal jurisdiction and service of process, both of which derive from the protections of the Due Process Clause, if he does not raise them in his first motion to dismiss. See Fed. R. Civ. P. 12(h)(1).

Even in the area of constitutional rights in the criminal context, such as the Sixth Amendment right to a jury trial mentioned in *College Savings Bank*, a criminal defendant is bound to a voluntary plea agreement waiving his constitutional rights even though he did not predict future changes in the law that, if known, might have altered his decision. See *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"). This Court, consistent with the other courts of appeals, has also held that criminal defendants can "knowingly and voluntarily" waive their right to appeal criminal sentences even before they are sentenced for the crime, *i.e.*, when they do not "know" what the district court will actually do. See, *e.g.*, *United States* v. *Rosa*, 123 F.3d 94, 102 (2d Cir. 1997) (upholding waiver of appeal rights as knowing and voluntary "although it is possible that Rosa did not foresee what actually occurred at sentencing"); see also

United States v. *Johnson*, 67 F.3d 200, 202-203 (9th Cir. 1995) (holding that defendant knowingly and voluntarily waived right to appeal even based on changes in law enacted after sentencing was carried out); *United States* v. *Rutan*, 956 F.2d 827, 830 & n.2 (8th Cir. 1992) (defendant's "assertion that he cannot waive an unknown right is baseless" because "[a]n accused does not know that the government will be able to prove its case, how witnesses will testify, or that he will be able to competently represent himself, yet he may freely waive his rights to jury trial, to confront witnesses, and to counsel"). We are aware of no case in which the Supreme Court has held that a party who voluntarily waives a right in exchange for benefits can vitiate the waiver simply by showing that subsequent legal changes involving other statutes may (or may not) have affected the party's decision whether to waive its right.

CONCLUSION

This Court should grant rehearing or rehearing en banc to address this important issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 40 and 32(a)(7), the attached Petition By The United States As Intervenor For Rehearing Or Rehearing En Banc was prepared using WordPerfect 9 and contains 4,084 words of proportionally spaced type.

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2001, two copies of the foregoing Petition By the United States as Intervenor for Rehearing or Rehearing En Banc were served by Federal Express on the following counsel:

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