IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PATRICIA GARRETT,

Plaintiff-Appellant

v.

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES,

Defendant-Appellee

UNITED STATES OF AMERICA,

Intervenor

MILTON ASH,

Plaintiff-Appellant

v.

ALABAMA DEPARTMENT OF YOUTH SERVICES,

Defendant-Appellee

UNITED STATES OF AMERICA,

Intervenor

PETITION FOR REHEARING AND REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that, to the best of his knowledge, the following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of these appeals:

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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);

Sandoval v. *Hagan*, 197 F.3d 484 (11th Cir. 1999),
rev'd on other grounds, 121 S. Ct. 1511 (2001).

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 three other United States Courts of Appeals:

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);

Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

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STATEMENT OF THE ISSUES MERITING PANEL REHEARING OR EN BANC CONSIDERATION

Whether 42 U.S.C. 2000d-7, which provides that state agencies shall not be immune under the Eleventh Amendment to private suits under Section 504 of the Rehabilitation Act of 1973, is a valid exercise of Congress's power under the Spending Clause to place conditions on the receipt of federal financial assistance.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

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 programs or activities receiving federal funds. See *Jones* v. *Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376, 1377 n.1

(11th Cir. 1982), cert. denied, 465 U.S. 1099 (1984). Congress expressly removed the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

2. In two separate cases, employees sued Alabama state agencies for disability discrimination in employment under the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973, as well as in one case under the Family and Medical Leave Act. In each case, the state agency moved to dismiss the action based on Eleventh Amendment immunity. The district court issued a single opinion dismissing both cases on the ground that none of the statutes validly abrogated defendants' Eleventh Amendment immunity.

3. On appeal, this Court granted the United States leave to intervene in each action pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statute's removal of defendants' Eleventh Amendment immunity. At the time our brief was filed, in November 1998, this Court had already upheld the abrogation of immunity in the ADA as valid Fourteenth Amendment legislation in *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426 (11th Cir. Apr. 30, 1998), reh'g en banc denied, 157 F.3d 908 (Aug. 17, 1998), and was then considering en banc the validity of the Rehabilitation Act's removal of immunity in *Onishea* v. *Hopper,* No. 96-6213 (11th Cir.) (oral argument heard Oct. 20, 1998), a suit against another Alabama state agency.

While the United States' brief primarily focused on defending the Family and Medical Leave Act's abrogation, it also addressed the ADA and Rehabilitation Act

claims. The brief for the United States noted that the district court's holding regarding the ADA needed to be reversed in light of *Kimel*. U.S. Br. 37. The United States also argued that removal of state agencies' Eleventh Amendment immunity for claims under Section 504 of the Rehabilitation Act could be upheld either (1) as valid Fourteenth Amendment legislation or (2) because "Congress validly required that states waive their Eleventh Amendment immunity from suits under the Rehabilitation Act as a condition for the receipt of federal funds." U.S. Br. 37. The United States noted that the issue was pending before the court en banc in *Onishea* and served a copy of our brief in that case on the parties. U.S. Br. 38. The en banc court subsequently decided the *Onishea* case without reaching the validity of the waiver argument. See *Onishea* v. *Hopper*, 171 F.3d 1289, 1296 n.11 (11th Cir. 1999), cert. denied, 528 U.S. 1114 (2000). Plaintiffs likewise argued, as they had in the district court, that the Rehabilitation Act could be sustained under either the Fourteenth Amendment or the Spending Clause. Pl. Br. 18-32. Defendants acknowledged that the United States had raised a waiver argument distinct from its Fourteenth Amendment argument. Alabama Dep't of Youth Services Br. 21-22.

4. In its initial decision, the panel reversed the dismissal of the ADA claims on the basis of *Kimel*. It further reasoned that "the decision under the Rehabilitation Act is also controlled by this court's decision as to the ADA in *Kimel*" because the "statutes serve the same purpose and were born of the same history of discrimination." *Garrett* v. *University of Alabama*, 193 F.3d 1214, 1218

(11th Cir. 1999). At that point, the court was addressing only the Fourteenth Amendment rationale for the statutes. The panel did not address the Spending Clause argument made by the United States and plaintiffs.

5. In January 2000, defendants petitioned the Supreme Court for a writ of certiorari with two questions: the first questioned the panel's determination that the ADA validly abrogated immunity; the second questioned the panel's determination that Section 504 of the Rehabilitation Act validly abrogated immunity. At the time the petition was filed, the Supreme Court had already granted certiorari in two other cases to address the constitutionality of the ADA's abrogation. When those cases were dismissed due to settlement, the parties in these cases filed a joint motion urging the Court to expedite consideration of the petition and grant the petition limited to the first question, regarding the ADA. The parties explained that "while [defendants] believe the petition [regarding the Rehabilitation Act] should ultimately be granted and [plaintiffs and the United States] believe it should be denied," the parties agreed that the "ADA claims are independent of the Rehabilitation Act claims." Attachment 2 at 3-4.

The Court denied the motion for expedited consideration. The United States subsequently filed a response to defendants' petition for certiorari. In our response, the United States acquiesced to the petition on the first question, regarding the ADA. But we opposed certiorari on the question regarding Section 504 of the Rehabilitation Act, arguing that even if the removal of Eleventh Amendment immunity was not valid Section 5 legislation, it could be sustained

under the Spending Power as a congressionally required waiver imposed as a condition upon the receipt of federal financial assistance. Attachment 3 at 14-18. The Court granted certiorari only as to the first question. See *University of Alabama* v. *Garrett*, 529 U.S. 1065 (2000).

6. After the Supreme Court held that the abrogation for Title I of the ADA was not valid Section 5 legislation, see *University of Alabama* v. *Garrett*, 121 S. Ct. 955 (2001), the case was reversed and remanded to the Eleventh Circuit "for further proceedings in conformity with the opinion of this Court." Attachment 4.

7. On remand, no supplemental briefing was sought. On August 16, 2001, the panel issued a per curiam published opinion affirming the district court's dismissal of the Rehabilitation Act claims. The panel stated only that because it had held in its earlier opinion "that the 'decision under the Rehabilitation Act is also controlled by this Court's decision as to the ADA,'" the Supreme Court's decision that the ADA did not validly abrogate State's immunity was controlling. The panel did not address the Spending Clause argument. Attachment 1 at 3.

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 holding of three circuits that Congress validly conditioned the receipt of federal financial assistance on the waiver of Eleventh Amendment immunity. See *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); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). Although this argument was squarely presented by the United States and private plaintiffs, the panel did not to address it. Rehearing or rehearing en banc should be granted to redress this significant omission.

1. The statutory provision removing States' Eleventh Amendment immunity from private suits may be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance. States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (1999). And "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 * * * acceptance of the funds entails an agreement to the actions." *Id*. at 686.

Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank*, the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the

Court suggested that Congress had 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 spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id.* at 687.

2. Congress clearly intended to remove States' Eleventh Amendment immunity to suits under Section 504 of the Rehabilitation Act. See 42 U.S.C. 2000d-7 (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 * * * [and] title VI of the Civil Rights Act of 1964"). Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated 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.

Section 2000d-7 makes unambiguously clear that Congress intended state agencies to be amenable to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance) if they accepted federal funds. Any state agency reading the U.S. Code 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. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.[1] Thus, the Supreme Court, in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7.

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[1] The Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

3. Every court of appeals that has addressed the issue has held that state agencies waived their immunity to private suits brought under the statutes identified in Section 2000d-7 by accepting federal financial assistance. See *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, No. 00-2435, 2001 WL 1028282, at *9-*10 (7th Cir. Sept. 7, 2001) (Title IX of the Education Amendments of 1972); *Jim C.*, *supra* (Section 504); *Stanley*, *supra* (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); *Clark*, *supra* (Section 504); 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, 121 S. Ct. 70 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same).

A panel of this court reached the same conclusion in *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999), another case against an Alabama state agency. The panel concluded that Section 2000d-7's "plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." *Id.* at 493. The panel then sustained Section 2000d-7 as a valid exercise of the Spending Clause, even assuming Congress could not have unilaterally abrogated the immunity, explaining:

> the Spending Clause power does not abrogate state immunity through unilateral federal action. Rather, states are free to accept or reject the terms and conditions of federal funds much like any contractual party. In this way, conditioning federal funds on an explicit state waiver of sovereign immunity does not violate bedrock principles of federalism. As the Supreme Court

> delineated in *New York*, Congress may offer financial incentives to induce state action so long as "Congress encourages state action rather than compelling it." *New York* v. *United States*, 505 U.S. 144, 168 (1992). Inducements rather than abrogations leave "the ultimate decision as to whether or not the State will comply" in the hands of the State and its citizens rather than the federal government. *Id*.; see also *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983) ("[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding ... simply does not intrude on their sovereignty"). Therefore, we can find no constitutional defect inherent in the explicit state immunity waiver enacted pursuant to the Spending Clause in Section 2000d-7.

Id. at 494 (some citations omitted).

Although Alabama petitioned for certiorari in *Sandoval* and succeeded in having this Court's determination regarding the existence of a private right of action to enforce certain regulations overturned, see *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001), Alabama did not seek or receive review of this Court's holding that it had waived its immunity to such claims by accepting federal financial assistance. See *id*. at 1516 ("The petition for certiorari raises, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation.").

4. No court of appeals has held that Section 2000d-7 is unconstitutional. Even those that have held that it is not valid Fourteenth Amendment legislation, as the Seventh and Eighth Circuits held in *Stanley* and *Jim C*. respectively, upheld it under the Spending Clause. And after its decision in *Garrett*, the Supreme Court denied a petition for certiorari from the Eighth Circuit's en banc decision in *Jim C*. See 121 S. Ct. 2591 (2001). After *Garrett,* the district court have also generally upheld Section 2000d-7 on Spending Clause grounds independent of its

validity under the Fourteenth Amendment. See, *e.g. Lieberman v. Delaware,* 2001 WL 1000936 (D. Del. Aug. 30, 2001); *Frederick L.* v. *Department of Pub. Welfare*, 2001 WL 830480 (E.D. Pa. July 23, 2001); *Doe* v. *Division of Youth & Family Servs.*, 148 F. Supp. 2d 462 (D.N.J. 2001); *Boudreau ex rel. Boudreau* v. *Ryan*, 2001 WL 840583 (N.D. Ill. May 2, 2001).

5. Before the panel, defendants raised only two grounds why Section 2000d-7 did not effectively remove their Eleventh Amendment immunity as Spending Clause legislation. Neither is meritorious. First, they contended (Alabama Dep't of Youth Services Br. 22) that plaintiffs had not indicated the source of the federal financial assistance or what state agency used the assistance. But neither fact is relevant to stating a claim under Section 504. See *Lussier* v. *Dugger*, 904 F.2d 661, 664-665, 668 n.8 (11th Cir. 1990); *Fitzpatrick* v. *City of Atlanta*, 2 F.3d 1112, 1125 n.15 (11th Cir. 1993). Defendants do not contest that they received "federal financial assistance" as described in the statute.[2] That is all that is all that is required to trigger the waiver of immunity from suit.

Second, defendants argued (Alabama Dep't of Youth Services Br. 22) that as a matter of state law they did not have authority to waive their immunity. But this Court has already held that, as a matter of federal law, a state may waive its

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[2] Defendant in the Garrett case admitted that it was a recipient of federal financial assistance. R.E. 1 at 3 ¶ 4 (complaint); R.E. xx at 2 ¶ 4 (answer). Defendant in the Ashe case did not respond to the allegation that it was a recipient of federal financial assistance, R.E. 1 at 2 ¶ 4 (complaint); R.E. 4 at 2-3 ¶ 4 (answer), which constitutes an admission, see Fed. R. Civ. P. 8(d).

immunity through its conduct (here, accepting federal funds) even if state law would not sanction such a waiver. See *In re Burke*, 146 F.3d 1313, 1318 (11th Cir. 1998) (state waived immunity through its conduct even though state law prohibited such waivers); cert. denied, 527 U.S. 1043 (1999); see also *Wisconsin Dep't of Corrections* v. *Schacht*, 118 S. Ct. 2047, 2056 (1998) (Kennedy, J., concurring); *McLaughlin* v. *Board of Trustees of State Colleges of Colo.*, 215 F.3d 1168, 1171 (10th Cir. 2000); *Beasley* v. *Alabama State Univ.*, 3 F. Supp. 2d 1304, 1324-1325 (M.D. Ala. 1998). This Court has also noted that despite the absolute language of Alabama's constitution, Alabama courts have held that the State has no sovereign immunity to suits arising from contracts or that involve the failure to comply with non-discretionary duties. See *Harbert Int'l, Inc.*, v. *James*, 157 F.2d 1271, 1279 (11th Cir. 1998). Thus, there is no basis to sustain the panel's judgment that the Eleventh Amendment barred these actions alleging violations of Section 504.

CONCLUSION

With respect, it is not clear from the panel's per curiam decision regarding Section 504 whether it actually considered and rejected the Spending Clause argument or, whether, because of the posture of the appeals, it overlooked that alternative basis of constitutional authority. If it is the latter, we request that the panel grant rehearing to fully consider and address the Spending Clause argument.

Alternatively, if the panel considered the merits of the Spending Clause argument, we request this Court grant rehearing en banc to overturn that decision. The panel's published opinion declares a federal statute unconstitutional and creates a split with three other circuits on the question whether the Eleventh Amendment bars private suits alleging violations of Section 504 of the Rehabilitation Act.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2001, two copies of the foregoing Petition for Rehearing or Rehearing En Banc By the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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