IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PATRICIA GARRETT,
Plaintiff-Appellant

UNITED STATES OF AMERICA,
Intervenor-Appellant

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM,
Defendant-Appellee

MILTON ASH,
Plaintiff-Appellant

UNITED STATES OF AMERICA,
Intervenor-Appellant

v.

ALABAMA DEPARTMENT OF YOUTH SERVICES,
Defendant-Appellee

JOSEPH STEPHENSON,
Plaintiff-Appellant

v.

ALABAMA DEPARTMENT OF CORRECTIONS, MICHAEL HALEY, in his official capacity as Director, Department of Corrections,
Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

(Caption Continued on Next Page)

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Garrett v. *Board of Trs.*, No. 02-16078-GG
Ash v. *Alabama Dep't Youth Serv.*, Nos. 02-16455-GG, 02-16408-GG
Stephenson v. *Alabama Dep't of Corr.*, No. 02-16186-EE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for the United States certifies that pursuant to Fed. R. App. P. 11th Cir. R. 26.1-1 the following is a complete list of the judges and attorneys involved in this case, and all persons, associates of persons, firms, partnerships, and corporations having an interest in the outcome of this case:

Acker, William M., United States District Court Judge;

ADAPT, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Addison, Elizabeth, Counsel for Alabama Dept. of Youth Services;

Advocates for Human Development Center Residents, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Advocates United, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Alabama Association for the Deaf, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Alabama Association for Persons in Supported Employment, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Alabama Council for the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Alabama Head Injury Foundation, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Allegheny Valley School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Alliance of Louisiana Schools for the Mentally Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Altoona-Cresson-Ebensburg Centers' Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

AMRA (formerly Association for the Mentally Retarded at Agnews), Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The American Association of People with Disabilities, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

The American Association on Mental Retardation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

American Association of Retired Persons, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

American Association of University Professors, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

American Bar Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

American Cancer Society, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The American Civil Liberties Union, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The American Council of the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

The American Foundation for the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

American Diabetes Association, Amicus Curiae;

The American Network of Community Options and Resources, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The American Psychiatric Nurses Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The Anti-Defamation League, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

ARC of Alabama, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The ARC of the United States, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in instant matter;

The Arthritis Foundation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Ash, Milton. Plaintiff/Appellant;

The Association on Higher Education and Disability, Amicus Curiae;

The Association for Hunterdon Developmental Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Association of Retarded Citizens for Missouri, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Austin State School Parent Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Banks, William C., Professor, Syracuse Univ. College of Law, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Barnett, Martha W., Counsel for American Bar Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Bartlett, Steve, Congressman, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Beard, Ellen L. (Senior Appellate Attorney, Dept. of Labor), Counsel for Intervenor, The United States of America;

Beverly Farm Foundation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Birmingham Council of the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Birmingham Independent Living Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Blumenthal, Richard (Attorney General) State of Connecticut, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Bonneville Human Development Center Parent Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Boyd, Ralph F., Jr. (Assistant Attorney General), United States Department of Justice, counsel for the United States in the present appeal.

The Brain Injury Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Brantner, Paula A., Counsel for National Employment Lawyers Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Braveman, Dean, Syracuse Univ. Law School, on Brief in Support of Respondents to the U.S. Supreme Court;

Brothers, Kenneth W., (Howrey, Simon, Arnold & White LLP), Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and

Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Brown, C. Christopher (Brown, Goldstein & Levy, LLP), Counsel for National Federation of the Blind, on Brief in Support of Respondents to the U.S. Supreme Court;

Burgdorf, Robert L., Counsel for The National Council on Disability, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Burnim, Ira, Counsel for Respondents on Brief to the U.S. Supreme Court;

Burt, Robert, Professor, Yale Univ. Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Bush, George H.W. (Former President of the U.S.), Amicus Curiae on Statement in Support of Respondents to the U.S. Supreme Court;

Byrne, Alice Ann (Office of the Attorney, Alabama State House), Former Counsel for the State of Alabama;

California Association for the Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

California Association State Hospital and Parent Councils for the Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The California Women's Law Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Caswell Center Parents and Friends Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Center, Claudia, Employment Law Center, Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Center for Law and Education, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The Center for Women Policy Studies, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Central State ICF/MR Bingham Center Family Group, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Chandler, A.B. "Ben", III (Attorney General) State of Kentucky, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Chemerinsky, Erwin, Professor, Univ. of Southern California Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Clover Bottom Developmental Center Parent-Guardian Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Co-Dependency Support Group for People with Mental Illness, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Colburn, Kathryn R. (Howrey, Simon, Arnold & White LLP) Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Colby, Sarah, Employment Law Center, Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Colorado Affiliates for the Developmentally Disabled, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Common Thread, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Concerned Families of Hazelwood Hospital, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Cook, Jeffrey T., (Sidley & Austin) Counsel for National Association of Protection and Advocacy Systems and United Cerebral Palsy Associations, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Cooper, Jacqueline G., (Sidley & Austin) Counsel for National Association of Protection and Advocacy Systems and United Cerebral Palsy Associations, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Culbreath, Susan M. (Gordon, Silberman, Wiggins & Childs), Counsel for Plaintiff/Appellant;

Curran, J. Joseph, Jr. (Attorney General) State of Maryland, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Dalton, William J., Counsel for American Cancer Society, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Dane, Ted G. (Munger, Tolles & Olson LLP) Counsel for Paralyzed Veterans of America, et al., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Denton State School Family Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Developmental Disabilities health Alliance, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Dixon Association for Retarded Citizens, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Dole, Robert, Senator, Amicus Curiae on Brief in Support of Respodnents to the U.S. Supreme Court;

Doss, Brenda, President, ARC of the United States, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

East, Brian, Advocacy, Inc., Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Easter Seals, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Ebbinghouse, Richard J., (Gordon, Silberman, Wiggins & Childs), Counsel for Appellant;

Ely, John Hart, Professor, Univ. of Miami School of Law, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Emotions Anonymous, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Employment Law Center, Amicus Curiae;

The Epilepsy Foundation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Euben, Donna R., Counsel for American Association of University Professors, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Exceptional Children's Foundation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Fairview Families and Friends, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Families and Friends United for Central Virginia Training Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Families United Incorporated, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Family Advocacy and Community Educational Services, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Feldman, Allen H. (Associate Solicitor for Special Appellate and Supreme Court Litigation, Dept. of Labor), Counsel for Intervenor, The United States of America;

Fernald League for the Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Field, Martha A., Professor, Harvard Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Fleming, Margaret, Assistant Attorney General of Alabama;

Florida's Voice of the Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Fox Center Families and Friends, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Friends and Families of the Black Mountain Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The Friends Committee on National Legislation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Friends of Choate, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Friends of Fircrest, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Friends of Rainier, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Friends of Retarded Citizens of Connecticut, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Friends of the Jacksonville Developmentally Disabled, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Galanter, Seth M. (Attorney), U.S. Department of Justice, Brief in Support of Respondents to the U.S. Supreme Court;

Garrett, Patricia, Plaintiff/Appellant;

Gay and Lesbian Advocates and Defenders, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Glenwood Parent/Family Group, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Gilbert, Alan I. (Chief Deputy and Solicitor General) State of Minnesota, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Gold, Laurence, Counsel for Respondents on Brief to the U.S. Supreme Court;

Goldstein, Daniel F., (Brown, Goldstein & Levey, LLP) Counsel for National Federation of the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Gordon, Silberman, Wiggins & Childs, Law firm of Plaintiffs/Appellants' Attorneys;

Gottesman, Michael H., Counsel for Respondents on Brief to the U.S. Supreme Court;

Gray, C. Boyden (Wilmer, Cutler & Pickering) Counsel for Former President George H.W. Bush, Amicus Curiae on Statement in Support of Respondents to the U.S. Supreme Court;

Green Line Parent/Family Group, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Greentree Applied Systems, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Gregoire, Christine O. (Attorney General) State of Washington, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Haddad, Mark E., (Sidley & Austin) Counsel for National Association of Protection and Advocacy Systems and United Cerebral Palsy Assocations, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

HalfthePlanet Foundation, Amicus Curiae;

Haley, Michael, Defendant in *Stephenson*

Handrigan, Melissa R., (Howrey, Simon, Arnold & White LLP) Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and

Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hansen, W. Karl (Assistant Attorney General) State of Minnesota, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Harkin, Tom, Senator, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hatch, Mike (Attorney General), State of Minnesota, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hatch, Orrin, Senator, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Haungs, Michael J. (McKenna & Cuneo, LLP) Counsel for American Cancer Society, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hayman, Robert, Professor, Widener Univ. Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Heitkamp, Heidi (Attorney General) State of North Dakota, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Home and School Association of the Southbury Training School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Horwitz, Morton, Professor, Harvard Law School and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Howe Association for Retarded Citizens, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hoyer, Steny, Congressman, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hubertz, Elizabeth J., Counsel for Alabama Amici Curiae, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Huggins, Lisa (Office of Counsel, The University of Alabama System, The University of Alabama at Birmingham), Counsel for Defendant/Appellee;

The Human Rights Campaign, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Hunger, Frank W. (Assistant Attorney General, Dept. of Justice), Counsel for Intervenor, The United States of America;

Hut, A. Stephen, Jr. (Wilmer, Cutler & Pickering) Counsel for Former President George H. W. Bush, Amicus Curiae on Statement in Support of Respondents to the U.S. Supreme Court;

Idaho State School and Hospital Parent-Guardian Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Illinois League of Advocates for the Developmentally Disabled, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Independent Living Center of Walker County, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Individual and Family Support Council of Alabama, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Individual and Family Support Council, Region II West, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The International Association for Psychosocial Rehabilitation Services, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Jarcho, Daniel G. (McKenna & Cuneo, LLP) Counsel for American Cancer Society, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Jeffords, Jim, Senator, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Jones, Douglas G. (United States Attorney, Dept. of Justice), counsel for Intervenor, The United States of America;

Jones, RonNell A. (Jones, Day, Reavis & Pogue), counsel for Petitioners, The Board of Trustees of the University of Alabama and The Alabama Department of Youth Services, before the U.S. Supreme Court;

The Joseph P. Kennedy, Jr. Foundation, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Kankakee Association for the Mentally Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Katsas, Gregory G. (Jones, Day, Reavis & Pogue), counsel for Petitioners, The Board of Trustees of the University of Alabama and The Alabama Department of Youth Services, before the U.S. Supreme Court;

Kennedy, Edward, Senator, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Klein, Alisa B. (Attorney, Appellate Staff, Civil Division, Dept. of Justice), Counsel for Intervenor, The United States of America;

Kramer, Judith E. (Deputy Solicitor of Labor, Dept. of Labor), Counsel for Intervenor, The United States of America;

Lado, Marianne L. Engelman, Counsel for American Bar Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Lakeland Village Associates, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Lambda Legal Defense and Education Fund, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

Law, Sylvia Ann, Professor, New York Univ. Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The Learning Disabilities Association of America, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Lee, Bill Lann (Assistant Attorney General), U.S. Department of Justice, Brief in Support of Respondents to the U.S. Supreme Court;

Leonard, Ina B. (Office of Counsel, The University of Alabama System, The University of Alabama at Birmingham), University Counsel for Defendant/ Appellee;

Lewin, Robert, Counsel for American Bar Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Lincoln Parents' Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Lubbock State School Parent Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Madrid, Patricia A. (Attorney General) State of New Mexico, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Maine Parents and Friends Association, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Maryland Parents Association of Disabled Citizens, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Masling, Sharon, Counsel for National Association of Protection and Advocacy Systems, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Massachusetts Advocates Standing Strong, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Massachusetts Coalition of Families and Advocates for the Retarded, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mattison, Deborah A. (Gordon, Silberman, Wiggins & Childs), Counsel for Plaintiff/Appellant;

Mayerson, Arlene, Counsel for Respondents on Brief to the U.S. Supreme Court;

McCallum, Elizabeth B., (Howrey, Simon, Arnold & White, LLP), Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

McEachern, Mary E., Counsel for American Bar Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Meadows Parents Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mental Health Association in Alabama, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mental Health Consumers of Alabama, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mental Health Consumer of Alabama in Huntsville, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mental Retardation Association of Nebraska, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mental Retardation Association of North Carolina, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mental Retardation Association of Utah, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mexia State School Parents Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Miller, Thomas J. (Attorney General) State of Iowa, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Millett, Patricia A. (Assistant to the Solicitor General), U.S. Department of Justice, Brief in Support of Respondents to the U.S. Supreme Court;

Minow, Martha, Professor, Harvard Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Misericordia Family Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mobile Independent Living Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Montgomery Share Group, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Morgan, Martha I., Professor, Univ. of Alabama Law School, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Mueller, Roberta, Counsel for American Bar Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Murray Parents Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Napolitano, Janet (Attorney General) State of Arizona, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

National Alliance of the DisAbled, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

National Alliance for the Mentally Ill, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

National Alliance for the Mentally Ill – Birmingham and Randolph County Chapters, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Asian Pacific American Legal Consortium, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Association of the Deaf, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Association of People with AIDS, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Association of Protection and Advocacy Systems, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

The National Association of Rights Protection and Advocacy, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

The National Council for Community Behavioral Healthcare, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Council for Independent Living, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Council on Disability, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

National Employment Lawyers Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

National Federation of the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Gay and Lesbian Task Force, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Health Law Program, Amicus Curiae;

National Federation of the Blind, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

National Mental Health Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Mental Health Consumers' Self-Help Clearinghouse, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

The National Multiple Sclerosis Society, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Organization on Disability, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Parent Network on Disabilities, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Partnership for Women and Families, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Senior Citizens Law Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court and Amicus Curiae in the instant matter;

The National Urban League; Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Women's Law Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The National Youth Advocacy Coalition, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The New Group – Montgomery, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

New Lisbon Developmental Center Family and Friends Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Nixon, Jeremiah W. (Jay) (Attorney General) State of Missouri, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

North Jersey Developmental Center Parents Council, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Northern Wisconsin Center Parents Group, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The Northwest Women's Law Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

The NOW Legal Defense and Education Fund, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

O'Brien, William T. (McKenna & Cuneo, LLP) Counsel for American Cancer Society, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Ohio League for the Mentally Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Ohio MRDD Parents Speak, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Oregon Voice of the Retarded, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Paralyzed Veterans of America, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parent Association for the Retarded of Texas, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents and Associates of the Institutionalized Retarded of Virginia, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents and Associates of Northern Virginia Training Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents and Friends of Hammond Developmental Center Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents and Friends of Ludeman Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents and Friends Volunteer Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents Association of Northwest Louisiana Developmental Center, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents Coordinating Council and Friends, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents of Adult Children Concerned for Tomorrow, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Parents of Woodhaven, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

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People First of Connecticut, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

People First of Dane County and Wisconsin, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

People First of Georgia, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

People First of Ohio, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

People First of Tennessee, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

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Southern Wisconsin Center Parent Committee, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

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State of Illinois, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Iowa, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Kentucky, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Maryland, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Massachusetts, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Minnesota, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Missouri, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of New Mexico, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of New York, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of North Dakota, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Vermont, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

State of Washington, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

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Sutton, Jeffrey S. (Jones, Day, Reavis & Pogue), counsel for Petitioners, The Board of Trustees of the University of Alabama and The Alabama Department of Youth Services, before the U.S. Supreme Court;

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Tennessee Family Solutions, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

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Volunteers of America, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Walker County (AL) Individual & Family Support Council, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Wallace, Guy (Schnedder, McCormac & Wallace) Counsel for Morton Horwitz, Martha Field, Martha Minow and Over 100 Other Historians and Scholars, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Waukegan Developmental Center Association for Retarded Citizens, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Wayman, Merl H., Counsel for National Employment Lawyers Association and American Diabetes Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Waxman, Seth P. (Solicitor General), U.S. Department of Justice, Brief in Support of Respondents to the U.S. Supreme Court;

Wendell Foster Center, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

White, Brian M., counsel for plaintiff in *Stephenson*

Wisconsin Parents Coalition for the Retarded, Inc., Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Garrett v. *Board of Trs.*, No. 02-16078-GG
Ash v. *Alabama Dep't Youth Serv.*, Nos. 02-16455-GG, 02-16408-GG
Stephenson v. *Alabama Dep't of Corr.*, No. 02-16186-EE

Women Employed, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

Women's Law Project, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court.

Woodbridge Development Center Parents Association, Amicus Curiae on Brief in Support of Respondents to the U.S. Supreme Court;

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STATEMENT REGARDING ORAL ARGUMENT

This case presents a straight-forward application of settled circuit precedent. Accordingly, the United States does not believe that oral argument is necessary. However, we have no objection to oral argument if this Court concludes that it may be helpful.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16078-GG

PATRICIA GARRETT,
Plaintiff-Appellant

UNITED STATES OF AMERICA,
Intervenor-Appellant

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM,
Defendant-Appellee

Nos. 02-16408-GG, 02-16455-GG

MILTON ASH,
Plaintiff-Appellant

UNITED STATES OF AMERICA,
Intervenor-Appellant

v.

ALABAMA DEPARTMENT OF YOUTH SERVICES,
Defendant-Appellee

No. 02-16186-EE

JOSEPH STEPHENSON,
Plaintiff-Appellant

v.

ALABAMA DEPARTMENT OF CORRECTIONS, MICHAEL HALEY, in his official capacity as Director, Department of Corrections,
Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF JURISDICTION

Plaintiffs brought these actions under, among other statutes, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The district court had jurisdiction pursuant to 28 U.S.C. 1345. The court entered a final judgment in *Garrett* (GR-90)[1] on September 4, 2002. The United States (GR-91) and Garrett (GR-92) filed timely notices of appeal on November 1, 2002. The district court entered final judgment in *Ash* on October 31, 2002 (AR-78),[2] which the United States (AR-81) and Ash (AR-82) appealed on November 20, 2002, and November 22, 2002, respectively. The district court in *Stephenson* entered final judgment on October 7, 2003 (SR-31),[3] and Stephenson filed a timely notice of appeal on November 4, 2003 (SR-32). On February 11, 2003, this Court consolidated the above appeals. This Court has jurisdiction over these appeals pursuant to 28 U.S.C. 1291.

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[1] References to "GR-__-__-__" are to the docket entry number and page range of a document in the record in *Garrett.*

[2] References to "AR-__-__-__" are to the docket entry number and page range of a document in the record in *Ash*.

[3] References to "SR-__-__-__" are to the docket entry number and page range of a document in the record in *Stephenson.*

STATEMENT OF THE ISSUES

1. Whether the holding of the Supreme Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), precludes suits under Section 504 of the Rehabilitation Act of 1973 (Section 504).

2. Whether Congress unambiguously conditioned the receipt of federal financial assistance on a state agency's waiver of Eleventh Amendment immunity to private claims under Section 504.

3. Whether the state agencies in these cases knowingly and voluntarily waived their Eleventh Amendment immunity to Section 504 claims by accepting federal funds.

4. Whether Congress may constitutionally condition receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under Section 504.

STATEMENT 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). 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 federal funding recipients. See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100 (2002).

2. 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.

3. Plaintiff Patricia Garrett filed suit against the University of Alabama (University) in 1997, alleging disability-based employment discrimination in violation of Section 504 and the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*. The case was consolidated in the district court with a similar suit brought by Plaintiff Milton Ash, which also alleged violations of the ADA and Section 504 arising from disability-based employment discrimination by the

Alabama Department of Youth Services (DYS). The district court initially entered summary judgment against both plaintiffs, holding that their claims were barred by the State's Eleventh Amendment immunity. *Garrett* v. *Board of Trs. of Univ. of Ala.*, 989 F. Supp. 1409 (N.D. Ala. 1998). The United States intervened on appeal, where this Court held that Congress had validly abrogated the State's immunity under both the ADA and Section 504. *Garrett* v. *Board of Trs. of Univ. of Ala.*, 193 F.3d 1214 (11th Cir. 1999). The Supreme Court granted certiorari to consider the validity of the ADA's abrogation of a State's Eleventh Amendment immunity, ultimately invalidating the abrogation as applied to claims under Title I of the ADA. *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001).[4] On remand, this Court initially ordered that judgment be entered against the plaintiffs on all claims, but on a petition for rehearing, this Court agreed that the Supreme Court had not addressed whether the state agencies knowingly and voluntarily waived their Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by their application for, and acceptance of, federal funds conditioned upon such a waiver. *Garrett* v. *Board of Trs. of Univ. of Ala.*, 276

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[4] The Court did not grant certiorari to review this Court's Section 504 holding and did not reach the question of whether Congress validly abrogated a State's sovereign immunity to claims under Title II of the ADA. See *Garrett*, 531 U.S. at 360 n.1.

F.3d 1227 (11th Cir. 2001). Accordingly, this Court remanded the case to the district court for consideration of the Section 504 issues. *Ibid.*

On remand, the State moved for summary judgment on Eleventh Amendment immunity grounds in both cases, while the United States moved for partial summary judgment in *Ash* on the ground that the state agency had knowingly and voluntarily waived its immunity to private claims under Section 504 by accepting federal funds that were conditioned on such a waiver. On September 4, 2002, the district court entered (GR-89) summary judgment in favor of the State in *Garrett*. The district court (GR-89-7-8) "reluctantly assume[d] *arguendo* that [the University] knowingly accepted federal dollars, fully understanding that by doing so it was exposing itself to the possibility that it could be sued under the Rehab Act." The court concluded (GR-89-8), however, that this was "not a valid assumption if the rationale of the Second Circuit in *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), is accepted." Finding the opinion "well reasoned and persuasive," the district court (GR-89-10) accepted the rationale of *Garcia*. That case, the district court decided, supported the conclusion that a State could not knowingly waive its Eleventh Amendment immunity to Section 504 claims at a time when it could have reasonably (but wrongly) believed that Congress had already abrogated its immunity for such

claims under Section 504 or similar claims under the ADA (see GR-89-10-11 (citing also *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001))).

The district court found further support for its holding in two cases that had been decided after the briefing was completed in *Garrett.* First, the court found persuasive (GR-89-11-12) a dissent filed by Judge O'Scannlain in *Vinson* v. *Thomas*, 288 F.3d 1145 (9th Cir. 2002), cert. denied, 123 S. Ct. 962 (2003), as well as Judge O'Scannlain's dissent from denial of rehearing *en banc* in *Douglas* v. *California Department of Youth*, 285 F.3d 1226 (9th Cir. 2002). Those opinions, in the district court's view (GR-89-12), "logically reached the conclusion that the Spending Clause cannot operate as a device for circumventing a State's Eleventh Amendment immunity at the whim of Congress." The district court also relied (GR-89-12-14) on the Supreme Court's decision in *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002), which held that punitive damages are not available as a remedy under Section 504. The district court recognized that this holding was not directly applicable to this case, since the plaintiff's claims for punitive damages had been dismissed long before, but concluded (GR-89-15) that "*Barnes* strongly suggests that the Supreme Court will not allow Garrett to travel a secondary route to get where she could not go in a frontal assault, even with the

United States of America at her side." In particular, the district court found (GR-89-14) that:

> the rationale of *Barnes* goes farther than simply to protect a state agency from punitive damages. As a matter of law, the purported waiver terms set forth in § 504 of the Rehab Act do not "comport with community standards of fairness," to use Justice Scalia's phrase. The concept of waiver in the Rehab Act may be fair in the view of some, but in this court's view, it does not meet community standards of fairness.

Finally, the district court held (GR-89-14) that "the ambiguity in § 504 stands in the way of a successful waiver."

The district court subsequently entered summary judgment against Plaintiff Ash's Section 504 claims as well, concluding (AR-77-1) that "there is no legitimate basis to distinguish this case from the *Garrett* case."[5]

4. In October, 1999, Plaintiff Joseph Stephenson filed suit against his former employer, the Alabama Department of Corrections, alleging violations of, among other statutes, Section 504 (see SR-1). On May 9, 2002, the State moved for summary judgment on Eleventh Amendment immunity grounds (SR-18). The district court initially denied the motion as untimely (SR-20), but subsequently

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[5] The district court also denied the United States' (AR-79) and Plaintiff's (AR-80) motions for partial summary judgment in *Ash* as moot. In addition, the district court reconsidered a prior order permitting Ash to amend his complaint to request injunctive relief against state officials (AR-76).

reversed position after the State took an interlocutory appeal from the denial of its motion (see SR-28). In light of this change in position, this Court granted the State's motion to dismiss its interlocutory appeal (see SR-28), and on remand, the district court entered summary judgment (SR-31) in a one-sentence order: "On authority of *Bd. of Trustees of the Univ. of Alabama* v. *Garrett*, 121 S.Ct. 955 (2001), SUMMARY and FINAL JUDGMENT is hereby ENTERED in favor of Defendants and against Plaintiff."[6]

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to these actions brought by private plaintiffs under Section 504 of the Rehabilitation Act of 1973 to remedy discrimination against persons with disabilities. Nothing in the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), addressed whether a State that accepts federal financial assistance thereby knowingly and voluntarily waives its Eleventh Amendment immunity to claims under Section 504. The district court's entry of judgment against Stephenson "[o]n the authority" of the Supreme Court's decision in *Garrett*, therefore, is misplaced.

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[6] This Court reviews a district court's grant or denial of summary judgment *de novo*. See *Menuel* v. *City of Atlanta*, 25 F.3d 990, 994 n.7 (11th Cir. 1994).

The district court's decisions in *Garrett* and *Ash* are also without merit. This Court has established that in enacting Section 504 and its waiver provision, Congress unambiguously conditioned receipt of federal financial assistance on a state agency's knowing and voluntary waiver of sovereign immunity to the claims identified in 42 U.S.C. 2000d-7, which includes claims under Section 504. See *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), overruled in part on other grounds, 532 U.S. 275 (2001). This Court further held that imposing this condition was within Congress's constitutional authority and did not violate any "bedrock principles of federalism." *Id*. at 494. Accordingly, a state agency's voluntary acceptance of federal funds in the face of such a condition waives its Eleventh Amendment immunity to private claims to enforce Section 504 in federal court. *Id*. at 500.

The district court nonetheless held that Section 504 was too ambiguous to elicit a valid waiver of immunity, that Congress cannot constitutionally condition federal funding on a waiver of Eleventh Amendment immunity when it lacks the power to unilaterally abrogate that immunity, and that the State's acceptance of federal funds in this case was insufficient to constitute a knowing waiver of immunity. These conclusions are barred by circuit precedent and are without any merit.

Section 2000d-7 make unambiguously clear that Congress intended to condition federal funding on a state agency's waiver of its Eleventh Amendment immunity to suit in federal court under Section 504. When a state agency voluntarily accepts federal funds in light of such a clear condition, it necessarily knowingly waives its sovereign immunity in accordance with that condition. The Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), which requires courts to look further and determine if the agency really "believed" that it was waiving immunity, interjects an unwarranted and unsupportable subjective component into the analysis. *Garcia*, therefore, conflicts with the sensible, straight-forward approach adopted by this Court and all other courts of appeals, and with the teachings of the Supreme Court in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), and *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002).

Moreover, even if a state agency's subjective beliefs were relevant, the district court was wrong in finding that the state agencies in these cases could have reasonably believed that they had no sovereign immunity to waive. The ADA does not abrogate a State's immunity to Section 504 claims under any circumstances, and Section 504 permits suits against state agencies only if they

voluntarily accept federal funds. Thus, at the time the state agencies in these cases were deciding whether or not to accept federal funding, their immunity to Section 504 claims was intact and their decision to accept funds and waive immunity was knowing and enforceable.

Finally, Congress has ample constitutional authority to condition federal financial assistance on a knowing and voluntary waiver of sovereign immunity, as this Court held in *Sandoval* and the Supreme Court made clear in *College Savings Bank,* 527 U.S. at 686-687. The district court wrongly found support for the contrary conclusion in *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002), which did not address any constitutional limits on Congress's power to condition federal funds, much less authorize courts to strike down conditions they deem to be unfair.

ARGUMENT

Although the Eleventh Amendment ordinarily precludes private lawsuits against state agencies, the Supreme Court has repeatedly affirmed the "unremarkable" proposition that "the States may waive their sovereign immunity." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 65 (1996). See also *College Sav. Bank* v. *Florida Prepaid PostSec. Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). In certain circumstances, "a state may waive its sovereign immunity by accepting federal funds." *Sandoval* v. *Hagan*, 197 F.3d 484, 492 (11th Cir. 1999), overruled

in part on other grounds, 532 U.S. 275 (2001). In particular, while "mere receipt of federal funds cannot establish that a State has consented to suit in federal court," *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 246-247 (1985), voluntary acceptance of federal funds *will* waive a State's immunity when Congress has "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." *Id*. at 247. See also *College Sav. Bank*, 527 U.S. at 678 n.2, 687.

In *Sandoval*, this Court held that Congress enacted such a valid condition on federal funds when in passed 42 U.S.C. 2000d-7, which conditions receipt of federal funding on a state agency's knowing and voluntary waiver of sovereign immunity to claims under a number of civil rights statutes, including Section 504.[7] "The provision's plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." 197 F.3d at 493. This Court further held that a state agency "voluntarily accepting * * * federal monies"

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[7] This Court also held that individuals have a private right of action to enforce the Title VI disparate impact regulation, a holding that was subsequently reversed by the Supreme Court. See *Alexander* v. *Sandoval,* 532 U.S. 275 (2001). The Supreme Court took pains, however, to point out that its review was limited to the private right of action holding. See *id*. at 279. Accordingly, *Sandoval's* Eleventh Amendment holdings remain binding law of the circuit.

in light of this clear condition "has waived any claim of sovereign immunity." *Id.* at 500.[8]

Like the state agency in *Sandoval*, Defendants waived their Eleventh Amendment immunity to Plaintiffs' claims in these cases by voluntarily accepting federal financial assistance[9] that was conditioned on a waiver of Eleventh Amendment immunity to claims under Section 504.[10] The district courts wrongly

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[8] *Sandoval* involved claims under Title VI, but, in analyzing these cases, there is no basis for reaching a different conclusion with respect to claims brought under Section 504.

[9] In the current posture of these cases, this Court may assume that each Defendant is a recipient of federal financial assistance. The district court in *Garrett* found (GR-89-6-7) that it was undisputed that the State had accepted federal funds. In its summary judgment papers in *Ash*, the State conceded (AR-65-3 & n.2) that for the purposes of summary judgment "DYS did, at least during some relevant periods of the Plaintiff's employment, receive federal funds," but did not concede that it received federal funding during the entire period encompassed by the Plaintiff's complaint. The United States, however, presented evidence documenting that DYS did, in fact, receive federal funds during the entire period relevant to this case (see AR-61). The State presented no contrary evidence (see AR-73, AR-74). The State's refusal to concede the point is insufficient to create a material issue of fact precluding partial summary judgment in Plaintiff's and United States' favor. See Fed. R. Civ. P. 56(e). Finally, in *Stephenson*, Plaintiff alleged in his amended complaint that the State received federal financial assistance (see SR-9), an allegation the State apparently accepted for purposes of its Eleventh Amendment argument in its motion for summary judgment (see SR-18).

[10] Because the state agencies in these cases waived their sovereign immunity to claims under Section 504, there is no need to decide whether Congress validly

(continued...)

reached the contrary conclusion. In *Stephenson*, the district court apparently concluded (SR-31) that the Supreme Court's decision in *Garrett* precluded Stephenson's Section 504 claims. That conclusion is incompatible with this Court's resolution of the remand in *Garrett* itself and with settled Eleventh Amendment jurisprudence. In *Garrett* and *Ash*, the district court concluded that Plaintiffs' Section 504 claims were barred by the Eleventh Amendment because (1) Congress failed to unambiguously condition receipt of federal funds on a waiver of sovereign immunity (see GR-89-14-15); (2) the State's acceptance of funds in these cases did not constitute a valid waiver of immunity (see GR-89-7-11); and (3) Section 2000d-7 constituted an unconstitutional use of Congress's Spending Clause authority (see GR-89-12-15). None of these grounds has any merit.

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[10](...continued)
abrogated the agencies' immunity to such claims. The district court's reliance (GR-89-10-11) on *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), therefore, is misplaced. The Court in *Reickenbacker* simply held that Congress may not abrogate state sovereign immunity to Section 504 claims. It declined to address whether Congress had validly conditioned receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity to claims under Section 504. See 274 F.3d at 984.

I. The Supreme Court's Decision In *Garrett* Does Not Preclude An Action Under Section 504

To the extent the district court in *Stephenson* provided any basis for its judgment, it implied that Plaintiff's claims under Section 504 were precluded by the Supreme Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). This Court rejected that very assertion in *Garrett* itself on remand. As described above, this Court initially concluded that *Garrett* precluded any further litigation in that case, either under Title I of the ADA or Section 504. See *Garrett* v. *Board of Trs. of Univ. of Ala.*, 276 F.3d 1227, 1228 (11th Cir. 2001). However, on a petition for rehearing, the State of Alabama conceded that whether the State had waived its sovereign immunity by voluntarily accepting federal financial assistance was a distinct question from whether Congress validly abrogated the State's immunity to claims under Title I of the ADA. See *ibid*. Accordingly, this Court remanded for further proceedings on the Section 504 claims. *Ibid*.

As this Court recognized, the Supreme Court's *holding* in *Garrett* does not preclude claims for damages for employment discrimination under Section 504.

And, as discussed in more detailed below, there is nothing in the *reasoning* of *Garrett* that supports the *Stephenson* court's judgment.[11]

II. Congress Unambiguously 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 district court in *Garrett* wrongly held (GR-89-14) that "ambiguity in § 504 stands in the way of a successful waiver." The court reasoned (GR-89-14-15) that:

> [w]hether Congress could "unambiguously" impose a waiver of Eleventh Amendment immunity as a condition to a particular federal grant is a question that is not before the court, because Congress in § 504 did not limit the proscriptions of the Rehab Act to State agencies; and it said nothing in the Rehab Act to make it absolutely clear to State agencies that if they continued to accept federal dollars, they would waive their Eleventh Amendment immunity, and the immunity of every other of their fellow State entities.

While it is not entirely clear why the district court thought that Section 504's waiver condition was ambiguous,[12] it is quite clear that this Court's decision in

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[11] Because we are unable to discern any further basis for the district court's decision in *Stephenson*, and because the district court in *Garrett* provided a more extensive discussion of the ramifications of the Supreme Court's decision in *Garrett* for Section 504 cases, the rest of the brief will address the *Garrett/Ash* decisions below. All further references to the "district court," therefore, will be to the district court's decision in *Garrett*.

[12] At least part of the ambiguity the district court found was apparently based in the court's mistaken belief that every agency in a State is subject to Section 504 so (continued...)

Sandoval v. *Hagan* has already settled the question. See 197 F.3d 484, 493-494 (11th Cir. 1999) (waiver condition sufficiently clear), overruled in part on other grounds, 532 U.S. 275 (2001); see also *id*. at 494-500 (substantive condition unambiguous). The issue, therefore, was not open to reconsideration by the district court below, and is not open to this panel now.

Even if the question were open, the decision in *Sandoval* is manifestly correct. As noted above, 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 condition the receipt of federal financial assistance on a waiver of a State's Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. *Id*. 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

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[12](...continued)
long as *any* state agency accepts federal funds. To the contrary, Section 504 permits a State to retain or waive immunity on an agency-by-agency basis. See 29 U.S.C. 794(a) (prohibiting discrimination under "any program or activity receiving Federal financial assistance"); *id*. at 794(b)(1)(A) (defining "program or activity" to include a "department" or "agency" "any part of which is extended Federal financial assistance"); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001).

consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247.

Section 2000d-7 embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that a condition for receiving federal funds was their consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance. Thus, in *Lane* v. *Pena*, 518 U.S. 187 (1996), the Supreme Court noted "the care with which Congress responded to our decision in *Atascadero,*" *id*. at 200, and concluded that in enacting Section 2000d-7, "Congress sought to provide the sort of unequivocal waiver that our precedents demand." *Id*. at 198. The courts of appeals have agreed. To date, ten circuits, including this one, have held that Section 2000d-7 manifests an intent to clearly condition receipt of federal funds on a State's consent to waive its sovereign immunity.[13] Nothing warrants

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[13] See *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 71 USLW 3400 (U.S. Mar 03, 2003) (No. 02-801); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *Arkansas Dep't of Educ.*, 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

(continued...)

overruling *Sandoval* and creating a split in the circuits.

III. By Accepting Federal Funds In The Face Of Section 2000d-7, The State Agencies Knowingly and Voluntarily Waived Their Sovereign Immunity To Plaintiffs' Section 504 Claims

Relying on the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center,* 280 F.3d 98, 113 (2d Cir. 2001) and Judge O'Scannlain's dissent from denial of rehearing en banc in *Douglas* v. *California Department of Youth*, 285 F.3d 1226 (9th Cir. 2002), the district court held (GR-89-8-12) that the State's acceptance of federal funds did not constitute a "knowing" waiver of sovereign immunity because the State believed that its sovereign immunity had already been abrogated. That conclusion was wrong and conflicts with the law of this Circuit.

A. The District Court's Decision Conflicts With This Court's Decision In Sandoval

In *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), overruled in part on other grounds, 532 U.S. 275 (2001), this Court followed the common-sense reasoning applied by every court of appeals (except the Second Circuit) to conclude that a state agency that accepts federal funds in the face of Section 2000d-7 knowingly and voluntarily waives its sovereign immunity to the claims

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[13](...continued)
(10th Cir. 2002) (same), petition for cert. pending, No. 02-1314; *Sandoval*, 197 F.3d at 493-494.

identified by that provision. See *id*. at 500. See also *Robinson* v. *Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002) ("[B]y accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit.") (collecting cases), petition for cert. pending, No. 02-1314. The Second Circuit recognized that its approach in *Garcia* was a departure from this unanimous precedent. See 280 F.3d at 115 n.5. While the panel in *Garcia* may have had discretion to take a different path, the district court in this case did not. The district court, like this panel, is bound by the holding in *Sandoval*.

B. Garcia *Was Wrongly Decided And Has Not Been Followed By Any Other Court Of Appeals*

Moreover, even if the issue were open to reconsideration, the Second Circuit's decision in *Garcia* was fundamentally flawed and has not been followed by any other court of appeals. Cf. *Douglas*, 285 F.3d at 1226-1231 (O'Scannlain, J., dissenting from denial of rehearing en banc) (noting that Ninth Circuit did not adopt *Garcia* approach); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 n.12 (3d Cir. 2002) (expressing skepticism about *Garcia*), cert. denied, 71 USLW 3400 (U.S. Mar 03, 2003) (No. 02-801). The Second Circuit found cases like *Sandoval*

> unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received funds. None of these

> cases considered whether the state, in accepting the funds, *believed* it was actually relinquishing its right to sovereign immunity * * * .

Garcia, 280 F.3d at 115 n.5 (emphasis added). The state agency in *Garcia* had not "believed" it was waiving immunity to Section 504 claims, the Second Circuit concluded, because when it made its decision to accept federal funds, it could have reasonably (but wrongly) believed that it was already subject to private suits for the same conduct under a different statute, Title II of the ADA. *Id*. at 114. This reasoning is flawed in two critical respects.

1. A State Agency's Acceptance Of Clearly Conditioned Federal Funds Constitutes A Knowing And Voluntary Waiver Of Sovereign Immunity

The Court in *Garcia* first erred in concluding that a State's acceptance of clearly conditioned federal funds may be insufficient to constitute a knowing waiver of Eleventh Amendment immunity. While it is true that a State's waiver of sovereign immunity must be unequivocal, this Court has properly held that such an unequivocal waiver may be found in a State's acceptance of funds that Congress has clearly conditioned on a State's consent to waive its Eleventh Amendment immunity. See *Sandoval*, 197 F.3d at 500. This objective approach is consistent with basic contract law principles under which agreement to a contract is determined by objective manifestations of assent. See Restatement

(Second) of Contracts §§ 2, 18 (1981); cf. *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2101 (2002) (observing that the Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages"). It is also consistent with recent Supreme Court cases finding unequivocal waivers of immunity in state conduct, regardless of the State's subjective intentions or beliefs.

In *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), for example, the Supreme Court acknowledged that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. But the Court explained that such a clear indication may be found when a State engages in an activity that the courts have held will result in a waiver of sovereign immunity. See *ibid*.[14] "[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 immunity-waiving activity is a State's voluntary submission to federal court jurisdiction by filing suit in federal court, or making a claim in a federal

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[14] In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-687 (1999), the Court made clear that Congress's power to designate immunity-waiving conduct is subject to important limitations. Those limitations are not, however, transgressed by Section 504. See *id*. at 686-687; pp. 29-35, *infra*.

bankruptcy proceeding. *Id*. at 621-622 The Court in *Lapides* concluded that removal of state law claims to federal court should also be recognized as immunity-waiving conduct. *Id*. at 624. Accordingly, the Court held that the State of Georgia had waived its sovereign immunity when it removed state law claims to federal court. *Ibid*.

Importantly for this case, the Supreme Court held that Georgia waived its sovereign immunity through removal even though it was undisputed that the State did not "believe[] it was actually relinquishing its right to sovereign immunity." *Garcia*, 280 F.3d at 115 n.5. See *Lapides*, 535 U.S. at 622-623. In fact, the State Attorney General asserted that he lacked the authority under state law to waive the State's Eleventh Amendment immunity. *Id*. at 622. The Court nonetheless held that the State's conduct waived its immunity because "[m]otives are difficult to evaluate, while jurisdictional rules should be clear," *id*. at 621, and because the rule the Court was enforcing is based on "the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire." *Id*. at 620. A simple objective rule, the Court concluded, adequately protects a State's interest in controlling whether and when to waive sovereign immunity, since a State desiring to maintain its immunity need only abstain from removing state law claims to federal court.

So, too, the Court has applied a simple objective rule in determining whether a State has knowingly and voluntarily waived its sovereign immunity by accepting federal funds. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court reaffirmed that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that *acceptance of the funds entails an agreement to the actions*." *Id*. at 687 (emphasis added). Thus, the Court explained, "a waiver may be found *in a State's acceptance* of a federal grant." *Id*. at 678 n.2 (emphasis added). A State that permits its agencies to apply for federal funds, knowing that the receipt of such funds is conditioned on, and will result in, a waiver of its sovereign immunity as a matter of federal law, cannot plausibly complain that its waiver was "unknowing" or that enforcement of the waiver is unfair. See *Lapides*, 535 U.S. 624. At the same time, the rule promotes "the judicial need to avoid inconsistency, anomaly, and unfairness," *id*. at 620, as well as Congress's important interest in ensuring that valid federal funding conditions are actually observed and enforced.

2. No State Agency Could Reasonably Believe That Its Immunity To Claims Under Section 504 Was "Already Lost" Before The Agency Accepted Federal Funds

In any case, there is no basis for concluding that the State's decision in these cases was "unknowing" in any traditional sense. It simply is not true that at the time the State was considering whether to accept federal funds, "by all reasonable appearances state sovereign immunity had already been lost." *Garcia*, 280 F.3d at 114. Sovereign immunity must be assessed on a claim-by-claim basis. It is quite possible that a single transaction or course of conduct may give rise to claims under a number of different statutes and that the State may have immunity to some claims but not others. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12, 124-125 (1984). Accordingly, the question is whether the State could have reasonably believed that its sovereign immunity to *Section 504 claims* "had already been lost" at the time it was deciding whether or not to accept federal funds. It could not. At the time the State made its decision to accept federal funds, its immunity to claims under Section 504 was intact. Congress made quite plain that nothing in the ADA abrogated a State's sovereign immunity to claims under Section 504.[15] Instead, Congress provided that state agencies would be

[15] See 42 U.S.C. 12202 (ADA abrogation provision, providing that a "State shall not be immune * * * from an action in Federal or State court of competent

(continued...)

subject to suit under Section 504 if, *but only if*, they accepted federal funds.[16] Until an agency accepts federal funds, therefore, its immunity to Section 504 claims remains undisturbed.

Accordingly, at the time the state agencies were considering whether to accept federal financial assistance in these cases, they were faced with a clear choice – decline funds and maintain immunity to Section 504 claims, or accept funds and waive their immunity. The agencies may not have thought that waiving sovereign immunity to Section 504 claims was much of a sacrifice at the time – since they may have thought they would be liable for damages for similar conduct under Title I of the ADA even if they declined federal funds – but this does not mean that their decision was unknowing. Neither the Second Circuit nor the district court cited any authority for the proposition that an agreement is "unknowing" simply because a party miscalculates the practical consequences of

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[15](...continued)
jurisdiction for a violation of *this* chapter") (emphasis added). Indeed, Congress explicitly provided the ADA did not alter the pre-existing Section 504 scheme in any respect. See 42 U.S.C. 12201(b).

[16] Section 2000d-7(a)(1) provides 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." Section 504, in turn, prohibits discrimination "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

its agreement.[17] Indeed, even in the criminal context, the "Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver" of a constitutional right. *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987). See also *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."). In these cases, the State was on notice that regardless of the efficacy of the ADA abrogation provision, it would be subject to suit under Section 504 if it accepted federal funds. Its decision to accept federal funds was therefore knowing, and its waiver of sovereign immunity valid and enforceable.

IV. Congress Constitutionally Conditioned The Receipt Of Federal Financial Assistance On A Knowing And Voluntary Waiver Of Eleventh Amendment Immunity To Private Suits Under Section 504

The district court also suggested (GR-89-12-15) that Congress may not use its Spending Clause power to condition federal financial assistance on the waiver of Eleventh Amendment immunity to Section 504 suits, because doing so violates

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[17] Notably, Defendants have not relied on the contract law principle of mistake of law, perhaps because that doctrine ordinarily would require Defendants to show that the mistake would have made a difference to their decision to accept federal funds and because they normally would be required to return the funds in order to avoid their obligations under the contract. See Restatement (Second) of Contracts §§ 153, 158, 376, 384 (1981).

principles of federalism and "community standards of fairness." This conclusion is wrong on both counts.

A. Congress May Use Its Spending Clause Authority To Condition Federal Funds On A Knowing And Voluntary Waiver Of Eleventh Amendment Immunity

Relying on a dissent from Judge O'Scannlain in the Ninth Circuit, the district court concluded that "the Spending Clause cannot operate as a device for circumventing a State's Eleventh Amendment immunity at the whim of Congress." (see GR-89-12 (citing *Douglas* v. *California Dep't of Youth Auth.*, 285 F.3d 1226 (9th Cir. 2002) (O'Scanlain, J., dissenting from denial of rehearing en banc))). In so holding, the district court misinterpreted Judge O'Scannlain's position,[18] disregarded binding Circuit precedent, and reached the wrong conclusion.

This Court held in *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), overruled in part on other grounds, 532 U.S. 275 (2001), that "under the Spending Clause power, the federal government may condition a waiver of state sovereign immunity upon the receipt of federal monies." Recognition of this power "is consonant with recent doctrinal developments in sovereign immunity." *Id*. at 494.

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[18] Judge O'Scannlain specifically agreed that "[w]hen exercising its Article I spending power, Congress may condition its grant of funds to the States, even by requiring States to take actions that Congress could not directly require them to take, such as waiving their sovereign immunity." See *Douglas*, 285 F.3d at 1228-1229.

Indeed, *Sandoval* noted that the Supreme Court had just recently "reaffirmed the constitutionality of conditioning federal funds upon a waiver of state sovereign immunity" in its opinion in *College Savings Bank* v. *Florida Prepaid PostSecondary Education Expense Board*, 527 U.S. 666 (1999). See *Sandoval*, 197 F.3d at 494 (citing *College Sav. Bank*, 527 U.S. at 686-687). Thus, this Court explained that in the typical case such as this, "conditioning federal funds on an explicit state waiver of sovereign immunity does not violate bedrock principles of federalism," *ibid*., because:

> [u]nlike the Commerce Clause power, *see* Art. I, § 8, cl. 2, 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. * * * 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. at 494 (citations and quotation marks omitted). Accordingly, this court found "no constitutional defect inherent in the explicit state immunity waiver enacted pursuant to the Spending Clause in Section 2000d-7." *Ibid*. Every other court of appeals to have considered the question has reached the same conclusion.[19]

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[19] See *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001) ("Congress may require as a condition of accepting [federal] funds that a state agree to waive its sovereign immunity."); *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 24-25 (1st Cir. 2001) (same), cert. denied, 123 S. Ct. 73

(continued...)

B. The Supreme Court's Decision In Barnes *Did Not Implicitly Overrule This Court's Decision In* Sandoval

The district court, nonetheless, read the Supreme Court's decision in *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002), as "strongly suggest[ing] that the Supreme Court will not allow Garrett to travel a secondary route to get where she could not go in a frontal assault" (see GR-89-15). In particular, the district court understood *Barnes* to hold that Congress may not enact conditions on federal funding programs that do not "comport with community standards of fairness" (see GR-89-14). While the Supreme Court said nothing in *Barnes* regarding the fairness of Section 504's waiver provision, the district court decided that "in this court's view, it does not meet community standards of fairness," and therefore was unenforceable (see *ibid.*). The district court was wrong. There is nothing unfair in

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[19](...continued)
(2002); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) (same), cert. denied, 71 USLW 3400 (U.S. Mar 03, 2003) (No. 02-801); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (same); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001) (same), cert. denied, 122 S. Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (same); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) (same), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 819, opinion amended, 271 F.3d 910 (9th Cir. 2001) (same), cert. denied, 122 S. Ct. 2591 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002) (same), petition for cert. pending, No. 02-1314; *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999) (same), rev'd on other grounds, 532 U.S. 275 (2001).

the waiver required by Section 504 and nothing in *Barnes* that supports the district court's holding or its disregard of circuit precedent.

In *Barnes*, the Supreme Court was called upon to decide whether punitive damages were available under Section 504. Congress had not declared what forms of relief should be available, so the Court looked to traditional contract law to decide the question. 122 S. Ct. at 2100-2101. The appropriate remedies for a violation of Section 504, the Court decided, are "not only [] those remedies explicitly provided in the relevant legislation, but also [] those remedies traditionally available in suits for breach of contract." *Id.* at 2101. This included, the Court observed, compensatory damages and injunctions, but not punitive damages. *Ibid.*

That might have ended the case, but the Court entertained the possibility of another source of permissible remedies: the doctrine of implied contract terms. Under that theory, a remedy that would not traditionally be available under contract law, like punitive damages, might nonetheless be allowed if it were seen as a term that was "reasonably implied" into the contract between the parties. One difficulty with this theory, the Court observed, is that there is no settled basis for determining what terms are "reasonably implied" into a contract and which are not:

> Some authorities say that reasonably implied contractual terms are those that the parties would have agreed to if they had adverted to the matters in question. More recent commentary suggests that reasonably implied contractual terms are simply those that comport with community standards of fairness.

Id. at 2102 (citations and internal punctuation omitted). The Court concluded that it need not choose between these theories, or even decide whether the doctrine of implied contract terms was relevant, because under any version of the theory, punitive damages would not be authorized. *Ibid*.

As is clear from the above description, *Barnes* had nothing to do with the Eleventh Amendment[20] or any constitutional limitation on Congress's Spending Clause authority.[21] The Court's reference to "community standards of fairness"

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[20] The defendants in *Barnes* were police officers and the Kansas City Board of Police Commissioners, none of whom was entitled to Eleventh Amendment immunity. See *Barnes*, 122 S. Ct. at 2099; *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 369 (2001).

[21] For this reason, *Barnes* provided no basis for disregarding this Court's holding in *Sandoval*. See *United States* v. *Smith*, 122 F.3d 1355, 1359 (11th Cir.) (circuit precedents are binding on the district courts and subsequent panels "unless and until they are overruled en banc or by the Supreme Court"), cert. denied, 522 U.S. 1021 (1997); *United States* v. *Chubbuck*, 252 F.3d 1300, 1305 n. 7 (11th Cir. 2001) (to justify departure from law of the circuit, a Supreme Court's holding must be squarely on point and clearly contradictory), cert. denied, 535 U.S. 955 (2002); *Morris* v. *City of West Palm Beach*, 194 F.3d 1203, 1207 n. 6 (11th Cir. 1999) (same).

was simply a potential device for filling a void in the statute,[22] not an invitation to lower courts to strike down any federal funding condition the court deems unfair. When the question has been squarely before it, the Supreme Court has set forth the constitutional limitations on Congress's power to condition federal funds. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Complying with "community standards of fairness" is not among them. See *ibid*. The Supreme Court has never held that complying with community standards of fairness is a such a conduction but has, instead, explained the question of what conditions are fair and appropriate is one for Congress, subject to little, if any, second-guessing by the courts. See *id*. at 207 n. 2. The district court's decision in this case exceeded the proper scope of the court's authority.

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[22] With respect to a State's liability for suits for damages under Section 504 – the issue in this case – there is no statutory void to fill. Section 2000d-7 expressly subjects federal funding recipients to such suits, and the Court in *Barnes* made clear that damages are an appropriate remedy under Section 504. See 122 S. Ct. at 2101. Even if there were a gap to fill, the Court did not decide whether to adopt the "community standards of fairness" standard even for that limited gap-filling purpose. See *id*. at 2102.

CONCLUSION

The district court in each of the consolidated cases erred in holding that the State had not waived its Eleventh Amendment immunity to Plaintiffs' Section 504 claims. Accordingly, this Court should reverse the district courts' grants of summary judgment in favor of the Defendants and its denial of the United States' motion for partial summary judgment on sovereign immunity grounds in *Ash*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d) and Eleventh Circuit Rule 29-2, the attached brief was prepared using WordPerfect 9 and contains 8,291 words of proportionally spaced type.

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CERTIFICATE OF SERVICE

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