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

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

(Caption Continued on Next Page)

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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

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

ARGUMENT

I. THIS COURT'S DECISION IN *SANDOVAL* V. *HAGAN* REMAINS BINDING PRECEDENT IN THIS CIRCUIT AND PRECLUDES MOST OF THE STATE'S ARGUMENTS

This Court has already decided most of the legal issues raised by the State in this case. As discussed in our opening brief (U.S. Br. 14-15, 18-21), in *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999), rev'd in part on other grounds, 532 U.S. 275 (2001), this Court held that in enacting 42 U.S.C. 2000d-7, Congress constitutionally conditioned receipt of federal funds on a knowing and voluntary waiver of sovereign immunity to the claims identified in that provision, which include claims under Section 504. See *id*. at 494.[1] The State disagrees, asserting (see Univ. Br. 10-18) that the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), prohibits Congress from using its Spending Clause authority to elicit waivers of sovereign immunity. The opinion in *Sandoval*, however, carefully considered *College Savings Bank* and concluded, instead, that the decision "reaffirmed the constitutionality of conditioning federal funds upon the waiver of

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[1] In *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001), the Supreme Court reversed this Court's holding that individuals have a private right of action to enforce the Title VI disparate impact regulation. The Court did not, however, review this Court's Eleventh Amendment holding. See *id*. at 279.

state sovereign immunity." 197 F.3d at 494. Similarly, although the State argues here that voluntary acceptance of clearly conditioned federal funds is insufficient to constitute a knowing and effective waiver of sovereign immunity (see Univ. Br. 5-10; Dep. Br. 23-26), the Court in *Sandoval* concluded that the State, "by voluntarily accepting these federal monies has waived any claim of sovereign immunity" and that, therefore, the plaintiff's "suit is not barred by the Eleventh Amendment." *Id*. at 500.

The State's only attempt to avoid the binding effect of these holdings is to argue (Univ. Br. 28-31) that *Sandoval* was wrongly decided and has been overruled by the Supreme Court's subsequent decision in *Federal Maritime Commission* v. *South Carolina Ports Authority*, 535 U.S. 743 (2002). As discussed in our prior brief (U.S. Br. 18-32), and elsewhere in this brief, see pp. 4-7, *infra, Sandoval* was correctly decided. But this panel would not be at liberty to disregard this circuit precedent even if it were convinced that the decision in *Sandoval* was wrong; circuit precedents are binding "unless and until they are overruled en banc or by the Supreme Court." *United States* v. *Smith*, 122 F.3d 1355, 1359 (11th Cir.), cert. denied, 522 U.S. 1021 (1997). *Federal Maritime Commission* concerned the limited question of whether the Eleventh Amendment applies to administrative adjudications before federal agencies. See 535 U.S. at

753. No party claimed that the State in that case had waived its sovereign immunity, or that Congress had conditioned receipt of federal funds on such a waiver. The State claims to find a conflict in the Court's general discussion of the basic principles of Eleventh Amendment immunity (see Univ. Br. 29 (citing 535 U.S. at 752, 755, 764 n.16)). But that discussion simply reiterated established principles already considered by the Court in *Sandoval*. The Court's decision in *Federal Maritime Commission,* therefore, provides no basis for disregarding on-point circuit precedent.

II. THE CONSTITUTION PERMITS CONGRESS TO CONDITION RECEIPT OF FEDERAL FUNDS ON A KNOWING AND VOLUNTARY WAIVER OF ELEVENTH AMENDMENT IMMUNITY

The decision in *Sandoval* was also correct. The State insists (Univ. Br. 10-18) that Congress cannot condition acceptance of federal funds on a knowing and voluntary waiver of a State's sovereign immunity because "[c]onditioning the receipt of federal funding * * * on a waiver of a state's constitutional and sovereign immunity from suit is, *in and of itself, coercive*" (Univ. Br. 15 (emphasis added)). Therefore, in the State's view, Congress may *never* condition acceptance of federal funds on a State's knowing and voluntary waiver of its sovereign immunity. This assertion is simply wrong.

In *College Savings Bank*, the Court stated that "[f]orced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin," 527 U.S. at 683, but at the same time also reaffirmed that Congress may constitutionally condition acceptance of federal funds on a knowing and voluntary waiver of a State's sovereign immunity, see *id*. at 678 n.2, 686-687. The coercion the Court found in *College Savings Bank* exists when "what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." *Id*. at 687. The State's "constructive waiver" in that case was coerced because Congress threatened that any State that refused to waive its sovereign immunity would be barred from participation in interstate commerce. *Id*. at 679-680. On the other hand, "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id*. at 686-687. Clearly conditioning a gift or gratuity on a waiver of sovereign immunity, the Court explained, is "fundamentally different" from an unconstitutional "forced waiver." *Id*. at 686. Accordingly, 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 686 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

Thus, both this Court and the Supreme Court have consistently recognized that "those who seek federal financial assistance, whether it be states, non-profit organizations or individuals, have a choice whether to participate in a federal program." *Autery* v. *United States*, 992 F.2d 1523, 1527 n.7 (11th Cir. 1993), cert. denied, 511 U.S. 1081 (1994). See also *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143-144 (1947). While the Supreme Court in *Dole*, stated that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Steward Mach. Co*. v. *Davis*, 301 U.S. 548, 590 (1937)), it also cautioned that every congressional spending statute "is in some measure a temptation." *Ibid*. "[T]o hold that motive or temptation is equivalent to coercion," the Court warned, "is to plunge the law in endless difficulties." *Ibid*. The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid*. (quoting *Steward Mach.*, 301 U.S. at 590).

Importantly, the State does *not* argue that the amount of the funds, or other circumstances of the cases at bar, render the offer of financial assistance unconstitutionally coercive. In fact, in the district court, the State specifically disavowed any case-specific claim of coercion in order to obtain a stay of discovery on that issue (see GR-78). Instead, the State argues that a statute that conditions acceptance of federal funds on a knowing waiver of sovereign immunity is inherently coercive in *all* cases. That proposition is inconsistent with *College Savings Bank* and *Dole*, and precluded by this Court's recognition that "a state may waive its sovereign immunity by accepting federal funds." *Florida Ass'n of Rehab. Facilities, Inc.*, v. *Florida Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1226 n.13 (11th Cir. 2000). See also *Sandoval*, 197 F.3d at 494.

III. SECTION 504 AND SECTION 2000d-7 ARE VALID SPENDING CLAUSE LEGISLATION

The State also argues that Section 504 and Section 2000d-7 exceed Congress's authority under the Spending Clause for two reasons, neither of which has any merit. [2]

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[2] In addition, the State argues (Department Br. 15-18) that Congress has not validly abrogated its immunity to claims under Title II of the ADA. That issue is not before this Court, since none of the appellants has appealed the dismissal of any ADA claims and the district court did not rule on that question, in compliance with the limited scope of this Court's remand order. See *Garrett* v. *Board of Trs.*

(continued...)

A. Section 504's Nondiscrimination And Waiver Provisions Are Directly Related To Important Congressional Interests Implicated By Every Federal Spending Program

The State contends (Univ. Br. 24-27) that Section 504 and Section 2000d-7 violate the Supreme Court's "relatedness" requirement for Spending Clause legislation, or rather that they violate Justice O'Connor's understanding of that requirement expressed in her dissenting opinion in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The majority opinion in *Dole* held that "conditions on federal grants might be illegitimate if they are unrelated" to the purposes of the federal funding. 483 U.S. at 207. In *Dole*, the Court concluded that "one of the main purposes" of the federal highway grants was to promote "safe interstate travel." *Id*. at 208. Because underage drinking interfered with that goal, requiring States to raise their minimum drinking age was "reasonably calculated to address this particular impediment to a purpose for which the funds are expended." *Id*. at 209. That was enough to satisfy the majority's construction of the "relatedness" requirement. It was not enough, however, to satisfy Justice O'Connor. In her dissenting view, Congress's power under the Spending Clause should be limited to directing "how

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[2](...continued)
of Univ. of Ala., 276 F.3d 1227, 1229 (11th Cir. 2001) (remanding to consider "the argument that defendants have voluntarily waived their Eleventh Amendment immunity under § 504 of the Rehabilitation Act.").

the money should be spent." *Id*. at 215-216. Because requiring States to raise their minimum drinking age did not direct how federal highway funds should be spent, Justice O'Connor would have held the statute unconstitutional. *Id*. at 218.

The State apparently concedes that Section 504 and Section 2000d-7 meet the "relatedness" requirement of the majority opinion in *Dole*, and makes no attempt to show that they do not. Instead, the State argues (Univ. Br. 26-27) that the provisions are not valid Spending Clause legislation because, "[l]ike the 21-year old drinking age, the requirement that a state entity waive its immunity in exchange for federal funding is not a condition determining how Rehabilitation Act money will be spent." Although the majority in *Dole* did not undertake to define the "outer bounds of the 'germaneness' or 'relatedness' limitation," *id*. at 208 n.3, it rejected Justice O'Connor's position that Congress, in attaching conditions to federal funds under its Spending Clause authority, was limited to directing how the funds could be spent, since the drinking age condition would fail that standard. And while the State is unwilling to acknowledge that Justice O'Connor's view failed to carry the day, Justice O'Connor herself has. In writing for the Court in *New York* v. *United States*, 505 U.S. 144 (1992), Justice O'Connor explained that the constitutional standard requires only that the funding conditions "bear some relationship to the purpose of the federal spending," *id*. at 167, not that

the conditions direct how the funds be spent. Because this Court lacks the authority to follow the dissenting, rather than the majority, opinion in *Dole*, the State's "relatedness" objection must be rejected.[3]

In any case, Section 504's nondiscrimination and waiver conditions are at least as directly related to the purposes of federal funding as was the condition approved in *Dole*. The State does not contest that the substantive requirements of Section 504 are related to the purposes of federal spending, but instead argues that Section 2000d-7 fails *Dole*'s relatedness test (see Univ. Br. 25-26). But the enforcement provisions of Section 504, including the waiver condition, further the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons. The requirement that a state funding recipient waive its Eleventh Amendment immunity as a condition of accepting federal financial assistance is also related to these important federal interests. The

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[3] The State's suggestion (Univ. Br. 26) that this Court may ignore the majority opinion in *Dole* based on speculation that Justice O'Connor's view will some day command a majority is baseless. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (lower courts are not to "conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (internal punctuation omitted).

United States relies on private litigants to assist in enforcing federal programs, and in particular in enforcing federal nondiscrimination mandates. The requirement that state funding recipients waive their sovereign immunity to suits under Section 504 as a condition of accepting federal financial assistance both (1) provides a viable enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept federal funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipient's failure to follow the law. Section 2000d-7, therefore, "bear[s] some relationship to the purpose of the federal spending." *New York,* 505 U.S. at 167. See also *Lovell* v. *Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) (rejecting relatedness challenge to Section 504), cert. denied, 123 S. Ct. 871 (2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002) (same), cert. denied, 123 S. Ct. 1353 (2003).

B. Section 504's Waiver Provision Does Not Violate Any Independent Constitutional Bar Imposed By The Eleventh Amendment

The State also argues (Univ. Br. 22-24) that Section 2000d-7 is invalid Spending Clause legislation because it violates the Eleventh Amendment. In *Dole*, the Court explained that Congress may not use its Spending Clause power to induce a State to take actions that would violate the Constitution. *Dole*, 483 U.S.

at 210. "Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." *Id*. at 210-211. On the other hand, the Court held that this "independent constitutional bar" limitation was not transgressed when Congress required States to raise their minimum drinking ages as a condition of receiving federal highway funds. Although the State argued that the Twenty First Amendment reserved to the States sole authority to regulate drinking ages,[4] requiring a State to waive that right and exercise its authority in accordance with a federal policy in order to qualify for federal funds "would not violate the constitutional rights of anyone." *Id*. at 211.

Similarly, agreeing to waive sovereign immunity as a condition for receiving federal funds does not violate the Constitution. The Eleventh Amendment prohibits only "suits by private parties against *unconsenting* States." *Seminole Tribe of Fl.* v. *Florida*, 517 U.S. 44, 72 (1996) (emphasis added). Accordingly, the Court "ha[s] long recognized that a State's sovereign immunity is

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[4] At several points in its brief, the State wrongly asserts this case is distinguishable from *Dole* because *Dole* did not involve any waiver of a constitutional right (see Univ. Br. 16-17, 23-24). That is incorrect. The Court in *Dole* accepted, for the purposes of that case, the State's assertion that it had a constitutional right under the Twenty First Amendment to be the sole regulator of alcohol within its boundaries. 483 U.S. at 206.

a personal privilege which it may waive at pleasure." *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675 (1999) (internal quotation marks omitted). Because the Constitution permits a State to waive its Eleventh Amendment immunity, Congress does not invite the State to violate the Eleventh Amendment in asking it to knowingly and voluntarily waive its sovereign immunity in exchange for federal funds.

IV. THE STATE'S WAIVER OF SOVEREIGN IMMUNITY IN THESE CASES WAS EFFECTIVE

The State does not contest (Univ. Br. 8) that 42 U.S.C. 2000d-7 unambiguously conditions receipt of federal financial assistance on a knowing and voluntary waiver of its sovereign immunity to suits under Section 504.[5] The State's voluntary acceptance of federal funds in the face of that clear condition constituted a knowing waiver of sovereign immunity. The State's arguments to the contrary are without merit.

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[5] The district court in *Garrett/Ash* seemingly held that Section 504 was ambiguous (see GR-89-14). The United States addressed that conclusion in our opening brief (see U.S. Br. 18-21), and the State has not defended the district court holding on this ground.

A. Acceptance Of Federal Funds In The Face Of The Clear Conditions Of 42 U.S.C. 2000d-7 Constitutes A Knowing Waiver Of Eleventh Amendment Immunity To Private Suits Under Section 504

The State initially argues (Univ. Br. 27) that acceptance of federal funds can never constitute an effective waiver of sovereign immunity because *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), held that "the doctrine of constructive waiver is generally inapplicable in the context of sovereign immunity." This means, in the State's view (Univ. Br. 27), that "where there is no *express* waiver of state immunity by the state itself, sovereign immunity remains intact" (emphasis added). The State misunderstands the holding of *College Savings Bank*.

The State correctly observes (Univ. Br. 19) that the Court found in that case "a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id*. at 680-681. The Court did not, however, conclude from this that a State may never effectively waive its sovereign immunity through its conduct. Instead, the Court significantly limited Congress's ability to declare what conduct may result in an enforceable waiver. The Court overruled the doctrine of "constructive waiver" arising from *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), by

holding that Congress may not declare that participation in interstate commerce shall constitute a waiver of a State's sovereign immunity. A State cannot be found to have waived its sovereign immunity by engaging in "otherwise lawful activity," the Court held, because prohibiting States from engaging in lawful conduct unless they waive their sovereign immunity constitutes unlawful coercion. *College Sav. Bank*, 527 U.S. at 686-687.

At the same time, the Court reaffirmed prior cases that recognize a number of ways in which a State may, by its conduct, validly waive its sovereign immunity. For example, the Court reaffirmed that a State waives its sovereign immunity through its conduct when it "voluntarily invokes our jurisdiction," 527 U.S. at 675-676. [6] The Court also reaffirmed the rule of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), which held that a State waived its sovereign immunity by participating in an interstate compact when Congress had clearly conditioned its approval of the compact on a waiver of Eleventh Amendment immunity. See *College Sav. Bank*, 527 U.S. at 686-687; *Petty*, 359 U.S. at 281-282. And most importantly for this case, the Court reaffirmed that "Congress may, in the exercise of its spending power, condition its

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[6] Similarly, the Supreme Court in *Lapides* v. *Board of Regents*, 535 U.S. 613, 619-624 (2002), recently concluded that a State waived its sovereign immunity through its conduct when it removed state law claims to federal court.

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*." 527 U.S. at 686 (emphasis added). The Court recognized that the same analysis applies to a waiver of sovereign immunity as a condition for federal funding. See *id*. at 678 n.2.

A waiver may be found in a State's application for and "acceptance" of a federal grant that is clearly conditioned on a waiver of its sovereign immunity, because a State's acceptance of funds in the face of clearly stated funding conditions necessarily constitutes a "clear declaration," *id*. at 676, that the State has agreed to the condition.[7] To conclude otherwise would require presuming that a State might solicit federal funds without having any intention of complying with their legally imposed conditions, a presumption that is both implausible and disrespectful of the States. Thus, the Fifth Circuit has properly concluded that "after *College Savings*, Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on a waiver of immunity." *AT&T*

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[7] This is consistent with basic contract law principles which ordinarily turn on manifestation of assent rather than subjective agreement. See Restatement (Second) of Contracts §§ 2, 18 (1981).

Communications v. *Bellsouth Telecomm., Inc.*, 238 F.3d 636, 645 (5th Cir. 2001).[8]

B. Garcia *And* Pace *Conflict With Binding Circuit Precedent And Were Wrongly Decided*

The State also argues (Univ. Br. 5-10, 20-22; Department Br. 19-26) that its acceptance of federal funds is not, in itself, sufficient to show a *knowing* waiver of sovereign immunity and that, in these cases, it could not have knowingly waived its immunity because it reasonably believed that Congress had already abrogated any immunity it had to waive. The State is correct that two Circuits have now reached this conclusion under similar circumstances. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194 (5th Cir. Mar. 24, 2003); *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113-114 (2d Cir. 2001). We believe that those decisions, however, were wrongly decided and conflict with the majority view of the courts of appeals and with this Court's decision in *Sandoval*.

1. Circuit Precedent Bars Adoption Of Garcia *And* Pace

In *Sandoval*, this Court determined whether a state agency waived its Eleventh Amendment immunity by asking two objective questions. First, because

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[8] For the same reasons, the State is wrong in suggesting (Department Br. 24-25) that a State's waiver of sovereign immunity is ineffective unless the funding conditions established by statute are repeated in a grant-specific document signed by the State.

"a Spending Clause waiver requires an 'unequivocal indication that a State has consented to federal jurisdiction,'" the Court asked whether the statute "evince[d] a 'clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'" *Sandoval*, 197 F.3d at 493 (citations omitted). Because Section 2000d-7 meets that requirement, the only question remaining was whether the State applied for and accepted federal funds in the face of that clearly expressed condition. *Id*. at 500.

The State argues (Univ. Br. 6-7) that this inquiry was insufficient and that this Court should follow the Fifth and Second Circuits, which additionally inquire into "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). Under that standard, the State argues (Univ. Br. 7), it did not knowingly waive its sovereign immunity in these cases because it believed that Congress had already validly abrogated the State's Eleventh Amendment immunity to Section 504 claims. As discussed next, such an inquiry is unnecessary because the clarity of the conditions expressed in Section 2000d-7 ensures that any application for, and acceptance of, federal funds, and the consequent waiver of sovereign immunity, is knowing. But even if *Garcia* and *Pace* were persuasive, this Court's decision in *Sandoval* precludes adoption of the

State's argument. The test applied in *Garcia* and *Pace* not only finds no basis in standards adopted by this Court in *Sandoval*, but would have led to the opposite result in *Sandoval* itself – the State in that case could also have asserted that it believed that Section 2000d-7 had already abrogated its immunity to claims under Title VI, since at the time of *Sandoval*, this Court had not (and has never since) held that Congress lacks the constitutional authority to abrogate a State's sovereign immunity to claims under Title VI. Accordingly, this panel cannot adopt the holdings of *Pace* and *Garcia* without disregarding circuit precedent.

2. Garcia *And* Pace *Were Wrongly Decided*

The decisions in *Garcia* and *Pace* are founded on a series of mistakes that should not be repeated by this Court. As an initial matter, both cases fail to recognize that the Supreme Court has already established that a State's application for and acceptance of clearly conditioned federal funds constitutes a knowing and voluntary waiver of sovereign immunity. In *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), the district court "properly recognized that the mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Id*. at 246-247. "The court erred, however, in concluding that because various provisions of the Rehabilitation Act are addressed to the States, a State necessarily consents to suit in federal court by participating in programs funded

under the statute." *Id*. at 247. The problem with this reasoning, the Supreme Court explained, was that the Rehabilitation Act, as it was written at the time, "falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Ibid*. "Thus," the Court explained, "there was no indication that the State of California consented to federal jurisdiction." *Ibid*.

As this and other courts have recognized, the clear implication of the Court's teaching in *Atascadero* was that acceptance of federal funds in the face of a statute that *succeeded* in "manifesting a clear intent to condition participation * * * on a State's consent to waive its constitutional immunity," *would* constitute a State's knowing waiver of that immunity. *Ibid*. The purpose of the Court's clear statement rule is to ensure that if a State voluntarily applies for and accepts federal funds that are conditioned on a waiver of sovereign immunity, the courts may fairly conclude that the State has "excercise[d] [its] choice knowingly, cognizant of the consequences of [its] participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). When a funding statute meets the clear statement standard, therefore, a State cannot plausibly claim that its acceptance of the funding conditions was unknowing.

The courts in *Pace* and *Garcia*, however, refused to find a waiver in a State's acceptance of a federal grant, no matter how clearly that grant was conditioned on a waiver of the State's sovereign immunity. Instead, the courts concluded that States accepting funds before the Supreme Court's recent federalism cases could have reasonably *believed* that their immunity to claims under Section 504 had already been abrogated, either by Title II of the ADA or 42 U.S.C. 2000d-7. That conclusion, however, is simply wrong.

First, no State could reasonably believe that anything in the ADA abrogated a State's immunity to claims under Section 504. As discussed in our opening brief (U.S. Br. 27), a State's immunity is claim-specific; whether the State was immune to suits under the ADA is a distinct question from whether it was immune to claims for similar conduct under Section 504. Cf. 42 U.S.C. 12101(b) & 12202. Thus, even the Courts in *Pace* and *Garcia* would hold that States currently accepting federal funds have waived their sovereign immunity to claims under Section 504 even though they are immune to claims under the ADA in those Circuits. See *Pace*, 2003 WL 1455194, *6 n.15; *Garcia*, 280 F.3d at 114 n.4.

The Court in *Garcia*, however, seemed to imply that the ADA could nonetheless render a waiver of sovereign immunity to Section 504 claims unknowing simply because a State already subject to suit under the ADA would

have little to gain, as a practical matter, from not applying for federal funds in order to maintain its immunity to Section 504 claims. 280 F.3d at 114. But this conception of "knowingness" is completely foreign to the law. As a matter of contract law, an agreement is not rendered unenforceable simply because one of the parties wrongly believes that he is not giving up much in exchange for the benefit he is receiving. For example, the purchaser of a business cannot claim that her agreement to the sale was unknowing simply because she grossly overestimated the future earnings (and, therefore, present value) of the company. See Restatement (Second) of Contracts § 151, illust. 2 (1981).[9] Similarly, as a matter of constitutional law, a waiver of a constitutional right is not rendered unknowing simply because a party miscalculates the practical implications of the

[9] Under limited circumstances, contract law provides relief when a party has made a mistake with respect to a "basic assumption on which he made the contract" if the mistake "has a material effect on the agreed exchange of performances that is adverse to him" and enforcement of the contract would be unconscionable or the other party had reason to know of the mistake. See Restatement (Second) of Contracts § 153. The State has not relied on the contract law principle of mistake of law, however, perhaps because that doctrine ordinarily would require the State to show that the mistake would have made a difference to its decision to accept federal funds, see *ibid*., and because the State normally would be required to return the funds in order to avoid its obligations under the contract, see *id*. at §§ 158, 376, 384.

waiver.[10] Accordingly, even if the State in these cases had a reasonable (albeit incorrect) belief that its immunity to claims under Section 504 was not worth much at the time it agreed to waive that immunity in exchange for federal funds, that does not mean that its waiver was unknowing. So long as the State was on notice that by accepting federal funds, it was relinquishing its right to assert sovereign immunity to Section 504 claims, its waiver was knowing and enforceable. Cf. *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986).

The State insists, however (Univ. Br. 21), that even setting aside the ADA, it could not have known that accepting funds would waive its sovereign immunity to Section 504 claims because it reasonably believed that its immunity to those claims had already been abrogated by 42 U.S.C. 2000d-7. But this claim, too, is

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[10] See, *e.g.*, *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (citation and quotation marks omitted); *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Brady* v. *United States*, 397 U.S. 742 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * * [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.").

ultimately baseless because at the time the State was deciding whether to accept federal funds, Section 2000d-7 had *not* abrogated the State's immunity to Section 504 claims. Congress made plain, on the face of the statute, that unless and until a State accepts federal funds, it retains its sovereign immunity to claims under Section 504. A State that has not yet accepted federal funds for the relevant time period, is not subject to the requirements of Section 504 or to suit under Section 2000d-7.

In each of the cases before this Court, then, the State was faced with a clear choice. It could decline federal funds, in which case it was clear that neither the ADA nor Section 504 would subject the State to suit under the Rehabilitation Act. Or the State could accept funds and submit to private suits under Section 504.[11] In choosing to accept federal funds that were clearly available only to those States willing to submit to enforcement proceedings in federal court, the State knowingly and voluntarily waived its sovereign immunity.

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[11] At most, the State might claim that it was not sure whether accepting federal funds would lead to a loss of immunity properly labeled a "waiver" or better understood as "in effect consent[ing] to the abrogation of that immunity." *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974). But even if the State thought that Section 2000d-7 was an "abrogation" provision, it was clear that the provision would be invoked only if the State voluntarily accepted federal funding, since Section 504, by its terms, applies only to programs "receiving Federal financial assistance." 29 U.S.C. 794(a).

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

The State further suggests (Univ. Br. 19-20) that it did not effectively waive its sovereign immunity because the state officials who solicited and accepted federal funds in these cases lack state law authority to waive the State's Eleventh Amendment immunity. "[W]hether a particular set of state * * * activities amounts to a waiver of the State's Eleventh Amendment immunity," however, "is a question of *federal* law." *Lapides* v. *Board of Regents*, 535 U.S. 613, 623 (2002) (emphasis added). In *Lapides*, the Court held that Georgia waived its Eleventh Amendment immunity by voluntarily removing state law claims to federal court, even though the State argued that its Attorney General lacked the authority under state law to waive the State's immunity. *Id*. at 621-624. The Court acknowledged that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court concluded, however, that such a clear indication may be found when a State engages in an activity that the courts have held, as a matter of federal law, will result in a waiver of sovereign immunity. See *id*. at 1644. Removing state law claims to federal court, the Court held, constitutes one such immunity-waiving activity. *Id*. at 1646. The Court specifically held that in

such circumstances, a state official's state law authority to engage in the immunity-waiving conduct is sufficient, as a matter of federal law, to constitute an effective waiver of sovereign immunity. See *id*. at 1645-1646 (overruling *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945)).

So, too, federal law recognizes acceptance of clearly-conditioned federal funds as a knowing and voluntary waiver of sovereign immunity in order to enforce Congress's authority to create conditions on federal funding and to avoid the "inconsistency, anomaly, and unfairness" that would result if States could accept such funds and then later avoid their conditions. See *Lapides*, 535 U.S. at 620. A State desiring to prevent its agencies from waiving immunity under this rule may simply withdraw the agencies' authority to apply for or accept federal funding. Conversely, a State that permits its agencies to apply for federal funds that are clearly conditioned on a waiver of a State's sovereign immunity, knowing that this will result in a waiver of the State's sovereign immunity as a matter of federal law, cannot complain of unfair treatment when that rule is enforced. See *id*. at 623-624.

V. THERE IS A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 504

Although the district court did not address whether Plaintiffs had a private right of action against state recipients of federal financial assistance for violations of Section 504, the State, as an alternative ground for affirmance, urges this Court to hold that they do not. In particular, the State argues that this Court should rely on the dissenting opinion in *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), to hold that implied causes of action are prohibited by the Eleventh Amendment and, therefore, no private right of action exists under Section 504. This argument is meritless.

Both this Court and the Supreme Court have repeatedly held that there is a private right of action under Section 504. See, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002); *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 & n.4 (1999); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992); *Doe* v. *Garrett*, 903 F.2d 1455, 1459-1460 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991); *Rogers* v. *Bennet*, 873 F.2d 1387, 1390 (11th Cir. 1989); *Treadwell* v. *Alexander*, 707 F.3d 473, 475 (11th Cir. 1983); *Jones* v. *MARTA*, 681 F.2d 1376, 1377 & n.1 (11th Cir. 1982), cert. denied, 465 U.S. 1099 (1984). This Court may not disregard these precedents based on the State's

interpretation of a dissenting opinion in a Supreme Court case. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *United States* v. *Chubbuck*, 252 F.3d 1300, 1305 n. 7 (11th Cir. 2001), cert. denied, 535 U.S. 955 (2002).

In any case, even if this Court were free to consider the State's argument, it lacks any merit. Congress has made plain in the text and structure of the relevant statutes its intent to provide a private right of action against recipients of federal funds, including state recipients, for violations of Section 504. The Supreme Court has consistently held that Section 2000d-7 "ratified *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)]'s holding" that a private right of action exists for the statutes identified therein. *Alexander*, 532 U.S. at 280; see *Barnes*, 536 U.S. at 185; *Franklin*, 503 U.S. at 72; *id*. at 78 (Scalia, J., concurring). Furthermore, Section 2000d-7 does not stand alone. In 1978, Congress enacted Section 505(a)(2) of the Rehabilitation Act, which provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d *et seq*.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. 794a(a)(2). Just last Term, the Supreme Court made clear that, based on Section 505(a)(2), "[b]oth [Section 504 of the Rehabilitation Act and Title II of the Disabilities Act] are enforceable through private causes of action" as

evidenced by the incorporation of "the remedies available in a private cause of action brought under Title VI." *Barnes*, 536 U.S. at 185.

CONCLUSION

The district court in each of the consolidated cases erred in holding that the State had not knowingly and voluntarily 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*.

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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 6,535 words of proportionally spaced type.

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CERTIFICATE OF SERVICE

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