No. 02-10190

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUCINDA G. MILLER; ELAINE KING-MILLER,

Plaintiffs-Appellees

v.

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER,

Defendant-Appellant

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

SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF THE ISSUES

1. Whether Congress clearly conditioned the receipt of federal financial assistance on a state agency's knowing and voluntary waiver of Eleventh Amendment immunity to private actions under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504).

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

3. Whether a state agency that solicits federal funds that are validly conditioned on a waiver of sovereign immunity may nonetheless assert sovereign immunity on the grounds that the agency lacked authority under state law to waive that immunity.

4. Whether the University's acceptance of federal funds in this case constituted a knowing waiver of its Eleventh Amendment immunity to claims under Section 504.

STATEMENT OF THE CASE

1. Plaintiffs brought claims against the Texas Tech University Health Sciences Center (University) under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794. That provision states 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). The provision applies to a "program or activity," a term defined to include "all of the operations" of a state agency, State, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Section 504 may be enforced through

private suits against States or state agencies providing programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

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 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.

2. On February 7, 2002, the district court denied the State's motion to dismiss Plaintiffs' Section 504 claims as barred by the Eleventh Amendment. *Miller* v. *Texas Tech Univ. Health Sciences Ctr.*, No. Civ. A. 00-364-J, 2002 WL 31972191, at *2-*3 (N.D. Tex. Feb. 7, 2002).

The court held that the State had waived its sovereign immunity to Section 504 claims by accepting federal financial assistance that was clearly conditioned on such a waiver. The State took an interlocutory appeal to challenge the denial of its claim of sovereign immunity and the United States intervened in the appeal to defend the constitutionality of the Section 504 waiver provision.

On March 24, 2003, a panel of this Court issued its opinion in *Pace* v. *Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003). Following *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), the panel held that Congress did not have the power under Section 5 of the Fourteenth Amendment to unilaterally abrogate a State's Eleventh Amendment immunity to suits under Section 504. See 325 F.3d at 613. The panel next considered whether the State had nonetheless waived its sovereign immunity to Section 504 claims by accepting federal funds. Applying the Circuit's prior decision in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the panel held that 42 U.S.C. 2000d-7 "clearly, unambiguously, and unequivocally conditions a state's receipt of federal * * * funds on its waiver of sovereign immunity." *Pace*, 325 F.3d at 615. Nonetheless, the panel held that the State did not knowingly waive its sovereign immunity by applying for and accepting federal funds. Expanding upon the reasoning of *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir.

2001), the panel held that "[p]rior to *Reickenbacker*, the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA." *Pace*, 325 F.3d at 616. And for that reason, the panel concluded, "the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." *Ibid*.

On May 13, 2003, the panel in this case followed the precedent set in *Pace* and held that the State defendants had not knowingly waived the State's sovereign immunity to the Section 504 claims in this case because those claims arose prior to *Reickenbacker*. See *Miller* v. *Texas Tech Univ. Health Sciences Ctr.*, 330 F.3d 691, 695 (5th Cir. 2003). Subsequently, this Court granted the United States' and the plaintiff's petitions for rehearing en banc in *Pace*. On August 12, 2003, this Court also granted rehearing en banc in this case. The Court also granted rehearing en banc in the consolidated cases of *Johnson* v. *Louisiana Department of Education*, No. 02-30318, and *August* v. *Mitchell*, No. 02-30369, which raise many of the same issues raised by Texas in this appeal. The United States filed its supplemental en banc brief in *Pace* on August 13, 2003, and in *Johnson/August* on October 20, 2003.

SUMMARY OF ARGUMENT

The Eleventh Amendment bars private suits against a state agency, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). In this case, the State waived its Eleventh Amendment immunity to Section 504 claims by applying for and accepting federal funds that were clearly conditioned on a waiver of the State's sovereign immunity.

The State disagrees, for several reasons. First, the State argues that Congress did not clearly and unambiguously condition receipt of federal funds on a state agency's knowing and voluntary waiver of sovereign immunity. The panel correctly rejected that claim, as has every other court of appeals to consider the question. Section 2000d-7 makes clear that Congress intended to condition federal funding on a State's waiver of Eleventh Amendment immunity to suit in federal court under Section 504. That is all the clear statement rule requires.

Second, the State argues that its acceptance of funds did not constitute an enforceable waiver of sovereign immunity because Section 504 is an invalid exercise of Congress's power under the Spending Clause. In particular, the State argues that Section 504 violates the requirement that conditions attached to federal funds must "bear some relationship to the purpose of the federal spending." *New York* v. *United States*, 505 U.S. 144, 167 (1992). This argument is meritless.

Congress has a significant interest in ensuring that the benefits secured through federal funding are available to all of a State's citizens without regard to disability, and in ensuring that federal taxpayers do not subsidize agencies that engage in discrimination. The nondiscrimination requirement of Section 504, therefore, is directly related to the purposes of *all* federal funding programs, not just those funded under the Rehabilitation Act itself.

Third, the State argues that the University's acceptance of federal funding could not waive the State's sovereign immunity because the officials who solicited the funds lack specific state law authority to make such a waiver. This argument is also meritless. By authorizing the University to solicit federal funds that were clearly conditioned on a waiver of sovereign immunity, the State authorized the waiver of sovereign immunity that followed from the University's voluntary acceptance of the federal funds.

Finally, the State briefly defends the panel's holding that the State did not knowingly waive its sovereign immunity because it could have reasonably believed that its immunity had already been abrogated. Consistent with the overwhelming majority of cases from other circuits, this Court had previously held that under Section 2000d-7, acceptance of clearly conditioned federal funds would constitute a waiver of sovereign immunity to the claims identified in that

provision. See *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000). The circumstances of this case provide no basis for departing from that precedent. In particular, even if the State believed that Congress had the power to abrogate its sovereign immunity to Section 504 claims, the State could *not* reasonably believe that Section 2000d-7 would abrogate its sovereign immunity even if it declined federal funds. Instead, Congress made clear that Section 2000d-7 would subject the State to suit if, but only if, it accepted the funds. Accordingly, at the time it was deciding whether to accept federal funding, the State's sovereign immunity was intact and the State faced a clear choice. Having made that choice in favor of accepting federal assistance, the State cannot now avoid the conditions it agreed to in applying for and accepting those funds.

ARGUMENT

Finding that a State has waived its sovereign immunity "require[s] an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 n.1 (1985). That consent to suit must be knowing and voluntary. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.,* 527 U.S. 666, 680-681 (1999). A State may provide an "unequivocal indication" of its consent to suit in various ways, and the constitutional test for a

knowing and voluntary waiver varies somewhat depending on the type of waiver involved. See *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 24-25 (1st Cir. 2001), cert. denied, 537 U.S. 813 (2002). For example, a state legislature may waive the State's sovereign immunity through a statute, in which case the waiver is valid if the State's consent to suit is clearly expressed in the text of the statute; expressions in the legislative history, for example, will not suffice. See *College Sav. Bank*, 527 U.S. at 676; *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). State officials may also waive the State's sovereign immunity through litigation conduct, such as filing a claim in federal court or declining to raise sovereign immunity as a defense. See *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002); *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 389 (1998). "The relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver." *Lapides*, 535 U.S. at 620.

This case involves a third type of waiver, which is accomplished when a State voluntarily participates in a federal program for which Congress has validly and clearly conditioned participation on a knowing and voluntary waiver of sovereign immunity. See *Atascadero*, 473 U.S. at 238 n.1, 247 (participation in federal spending program); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (participation in interstate compact); *AT&T Communications* v.

Bellsouth Telecomm., Inc., 238 F.3d 636, 644-645 (5th Cir. 2001) (participation in interstate regulatory program). Spending Clause waivers are valid if (1) Congress clearly and unambiguously conditioned federal financial assistance on a State's knowing and voluntary waiver of sovereign immunity to private suit in federal court, (2) Congress did so pursuant to a valid exercise of its Spending Clause authority, and (3) the State voluntarily applied for and received the conditioned federal funds. See *Atascadero*, 473 U.S. at 238 n.1, 247; *South Dakota* v. *Dole*, 483 U.S. 203, 206-208 (1987); cf. *AT&T Communications*, 238 F.3d at 644-645. Because each of these criteria was met in this case, the University's sovereign immunity to private claims under Section 504 was validly waived.

I. CONGRESS CLEARLY CONDITIONED RECEIPT OF FEDERAL FUNDS ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504

When Congress intends to condition receipt of federal funds on a knowing and voluntary waiver of Eleventh Amendment immunity, it must do so clearly and unambiguously. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). The *Pace* panel correctly held that Congress met this standard when it enacted 42 U.S.C. 2000d-7, the waiver provisions for Section 504. See *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609, 615, 617 (5th Cir. 2003). In fact, every court of appeals to have

considered the question, ten circuits in all, has held that Section 2000d-7 constitutes a clear and unambiguous waiver condition.[1] The State's argument to the contrary is meritless.

As the *Pace* panel observed, Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero* that Congress had not provided sufficiently clear statutory language to condition the receipt of federal financial assistance on a waiver of States' Eleventh Amendment immunity for Section 504 claims. See 325 F.3d at 615. In *Lane* v. *Pena*, 518 U.S. 187 (1996), the Supreme Court noted "the care with which Congress responded to our decision in *Atascadero*" and concluded that in enacting Section 2000d-7, "Congress sought to provide the sort of unequivocal waiver that our precedents demand." *Id*. at 200, 198.

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[1] See *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000)*; Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (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, 537 U.S. 1105 (2003)*; Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

Section 2000d-7 provides the unequivocal notice demanded by the Supreme Court's precedents because it is sufficiently clear to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation" in the federal spending program. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The provision makes clear to States that the "consequences of their participation" in the relevant federal spending program is that the State or state agency that received the federal funds would be subject to private suit in federal court under Section 504. See *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). The State argues (Br. 16-17) that Congress did not express the condition with sufficient clarity because it did not use words like "consent" and "waiver," words Congress has used in some other statutes. This Court rejected the same argument in *Pederson*, 213 F.3d at 876, as have other courts. See, *e.g.*, *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Oak Park Bd. of Educ*. v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.), cert. denied, 531 U.S. 824 (2000). The Constitution does not require Congress to use any particular terms or formulation so long as the condition and consequences of participation are clear. See *Pederson*, 213 F.3d at 876; *Litman*, 186 F.3d at 554. Thus, for example, in *AT&T Communications* v. *Bellsouth Telecomm., Inc.*, 238 F.3d 636 (5th Cir. 2001), this Court held that the

Telecommunications Act of 1996 validly conditioned a State's right to regulate certain interstate telecommunications services on a knowing and voluntary waiver of sovereign immunity through language that does not use the words "waiver" or "condition." See *id*. at 646 (discussing Section 252(e)(6) of the Telecommunications Act of 1996, 47 U.S.C. 151 *et seq.*). Instead, like Section 2000d-7, the Telecommunications Act provision simply provides that States participating in the federal program will be subject to private suit in federal court. *Ibid*.

The State nonetheless argues (Br. 7-8) that Section 2000d-7 cannot constitute a clear waiver condition because it represents an attempt to abrogate the State's sovereign immunity. This Court rejected that argument in *Pederson* as well. See 213 F.3d at 876. It is true that the language of Section 2000d-7 could operate to abrogate a State's sovereign immunity, to the extent such an abrogation is within Congress's constitutional power. This Court, for example, held in *Lesage* v. *Texas*, 158 F.3d 213, 217-218 (5th Cir. 1998), overruled on other grounds, 528 U.S. 18 (1999), that Section 2000d-7 operates as a valid abrogation provision as applied to claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. Section 2000d-7 is able to perform the unusual role as an abrogation provision when applied to Title VI, and as a waiver provision when

applied to Section 504 or Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*., because it applies only to those agencies that accept federal financial assistance. See *Lesage*, 158 F.3d at 217-218 (Title VI); *Pederson*, 213 F.3d at 876 (Title IX). Because Section 2000d-7 is limited in this way, it may be justified under more than one source of congressional power depending on the statutory right it is enforcing. See *Lesage*, 158 F.3d at 217-218; *Ussery* v. *Louisiana*, 150 F.3d 431, 436 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999). And because the provision makes clear that Congress's intent to subject recipient agencies to suit only if the state agency voluntarily chooses to accept federal funds, it satisfies the clear statement rule of *Atascadero* and *Pennhurst*. It is true that, depending on the application, the consequence of accepting federal funds could be described as either a "waiver" (as in *Pederson*) or as an "abrogation" (as in *Lesage*). But that does not violate any clear statement rule. What must be clear are the "consequences" of participation, not the legal description for those consequences. See *Pennhurst*, 451 U.S. at 17; *AT&T Communications*, 238 F.3d at 644 (constitutional question is simply whether "the state has been put on notice clearly and unambiguously * * * that the state's particular conduct or transaction will subject it to federal court suits brought by

individuals"). The consequences of accepting federal funds under Section 2000d-7 are unambiguously clear.

II. SECTION 504 SATISFIES THE "RELATEDNESS" REQUIREMENT FOR SPENDING CLAUSE LEGISLATION

The State further argues (Br. 24-27) that even if Congress clearly conditioned a State or state agency's receipt of federal funds on compliance with Section 504 and its waiver provision, these conditions exceeded Congress's authority under the Spending Clause. That claim is also mistaken. See *Shepard* v. *Irving*, No. 02-1712, 2003 WL 21977963, at *3 (4th Cir. Aug. 20, 2003) (unpublished); *A.W.* v. *Jersey City Pub. Schs.*, 341 F.3d 234, 241-242 (3d Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003).

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

The State asserts (Br. 25-26) without citation to any record evidence, that it does not receive any federal funds under the Rehabilitation Act,[2] and claims,

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[2] There is no record evidence regarding the sources of the University's federal funding. See *Miller* v. *Texas Tech Univ. Health Sciences Ctr.*, No. Civ. A. 00-364-J, 2002 WL 31972191, at *3 (N.D. Tex. Feb. 7, 2002). The State's effort (Br. 25 n.8) to present byzantine factual evidence of questionable admissibility to this

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therefore, that it cannot constitutionally be subject to the conditions of Section 504. The legal basis for the State's cursory assertion is unclear.[3] The State suggests (Br. 25-26) that this limitation is inherent in the contract nature of Spending Clause legislation. To the extent the State relies (Br. 25-26) on *Barnes* v. *Gorman*, 536 U.S. 181 (2002), that case provides no support for its position. The Court had no occasion in *Barnes* to consider, and did not purport to discuss, any constitutional requirements for Spending Clause legislation, much less the one the State proposes. See *id*. at 184-190. Instead, as many courts have held, Section 504 presents precisely the sort of ordinary *quid pro quo* described by the Court in *Barnes* and other cases: in exchange for the benefits of federal

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[2](...continued)
Court for initial evaluation on an interlocutory appeal should be rejected. The State had the opportunity below to introduce evidence to support its motion to dismiss for lack of jurisdiction, see Fed. R. Civ. P. 12(b)(1), but it declined to do so. The United States has had no occasion to inquire whether the State's new factual assertions on appeal are accurate or not. However, this Court need not resolve this factual question since the State's legal theory is baseless.

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

funding, States must agree to be subject to enforcement proceedings in federal court. See, *e.g.*, *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) ("This requirement is comparable to the ordinary quid pro quo that the Supreme Court has repeatedly approved."), cert. denied, 533 U.S. 949 (2001); see also *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (Title VI valid Spending Clause legislation); *South Dakota* v. *Dole*, 483 U.S. 203, 206-207 (1987) (citing *Lau* as example of Congress's exercise of its power to "attach conditions on the receipt of federal funds").

Limits on Congress's Spending Clause authority do not arise from vague notions of what constitutes a fair or appropriate bargain, but rather on specific constitutional provisions that demarcate the constitutional balance between state and federal interests. As discussed next, those limitations are not transgressed by Section 504. The State's attempt (Br. 26) to evade the limitations of those doctrines by generalized references to the contractual nature of the Spending Clause programs must be rejected.

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

The State next argues (Br. 26-27) that Section 504 violates the constitutional requirement that conditions on federal funds bear a relationship to

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

In distributing funds for the "general Welfare,"[4] Congress is within its constitutional rights to require that the benefits of those expenditures be enjoyed *generally*, without regard to disability. This interest flows with every federal dollar and exists regardless of the type of benefits secured with the federal funds. See *Koslow*, 302 F.3d at 175-176; *Lovell*, 303 F.3d at 1051. To take the State's example (Br. 27), Congress has an interest, related to the expenditure of federal research grants, in ensuring that the benefits of such grants can be enjoyed by

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[4] See U.S. Const. Art. I, § 8.

individuals with disabilities as well as other citizens. Section 504 may, therefore, require that a University accepting federal research funding take reasonable steps to ensure that individuals with disabilities are able participate in the projects as researchers, by installing a wheelchair ramp to the laboratory, for example. See 28 C.F.R. 41.56.

Moreover, beyond its interest in determining how the benefits of federal funding are distributed, Congress has a legitimate general interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," discrimination on the basis of criteria that Congress has determined to be irrelevant to the receipt of public services, such as race, gender and disability. See *Lau*, 414 U.S. at 569 (internal quotation marks omitted). This is the same interest that animates both Title VI and Title IX,[5] which prohibit race and sex discrimination in certain programs that receive federal funds. Like Section 504, Title VI prohibits discrimination by any state program that receives federal financial assistance from any source; it is not limited to prohibiting discrimination by recipients of "Title VI funds" (there are no such funds) or funds directed at addressing racial or national origin discrimination. In *Lau*, the Supreme Court

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

held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact of school policies on limited English proficiency students, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citations omitted).[6] See also *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) (Title IX case) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.").

Because Congress's interest in preventing discrimination extends to programs that receive funds from any federal source, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance.[7] Contrary to Defendant's suggestion (Br. 26), there is little distinction

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[6] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), the Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not cast doubt on the Spending Clause holding in *Lau*.

[7] The purposes articulated by Congress in enacting Title VI (purposes equally attributable to Title IX and Section 504) were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See

(continued...)

between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending. See *Lipscomb*, 299 F.3d at 321-322 (Wiener, J.). The Supreme Court has upheld as valid exercises of the Spending Clause, other conditions that are not tied to a particular federal spending program. See *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 144 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds).

III. THE UNIVERSITY'S STATE LAW AUTHORITY TO ACCEPT FEDERAL FUNDS THAT WERE CLEARLY CONDITIONED ON A WAIVER OF SOVEREIGN IMMUNITY WAS SUFFICIENT AS A MATTER OF FEDERAL LAW TO SUPPORT THE WAIVER

The State further argues (Br. 28-40) that the voluntary acceptance of federal financial assistance did not constitute an effective waiver because the University

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[7](...continued)
110 Cong. Rec. 6544 (1964) (Sen. Humphrey); *id.* at 7061-7062 (Sen. Pastore); *id.* at 2468 (Rep. Celler); *id.* at 2465 (Rep. Powell).

was not authorized under state law to waive Eleventh Amendment immunity.[8] This contention is meritless.

For the purposes of this argument, the State assumes (Br. 28) that Congress validly conditioned receipt of federal funds on a waiver of sovereign immunity. Under this assumption, the University was not eligible for federal financial assistance unless it was willing and able to comply with all the conditions attached to those funds, including the waiver of sovereign immunity to claims under Section 504. In fact, federal regulations require that every application for federal education funds include an "assurance" of eligibility to that effect. See 34 C.F.R. 104.5(a). Relying on such assurances, the federal government has distributed millions of dollars to the University. See *Miller* v. *Texas Tech Univ. Health Sciences Ctr.*, No. Civ. A. 00-364-J, 2002 WL 31972191, at *2 (N.D. Tex. Feb. 7, 2002). Yet the State now asserts to this Court that those representations were false because the University has never been able to comply with the requirement that it be subject to suit in federal court to adjudicate its compliance with the nondiscrimination requirements of Section 504 (and, presumably, Title VI and Title IX as well). If that were true, the University's eligibility for future financial

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[8] The State of Texas has raised a similar argument in *Frew* v. *Hawkins*, No. 02-628, which was argued in the Supreme Court on October 7, 2003.

assistance from the federal government would be in grave doubt, for federal agencies do not have the authority to excuse state agencies from complying with Section 2000d-7 or other congressionally mandated funding conditions. See, *e.g.*, 34 C.F.R. 75.900, 76.900.

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

A. Ford Motor Co. *v.* Department Of Treasury *And* Magnolia Venture Capital Corp. *v.* Prudential Securities, Inc. *Do Not Apply To Spending Clause Waiver Cases*

The State's argument to the contrary is not based on any legal authority that directly addresses waivers of immunity occasioned by state officials' solicitation of federal funds validly conditioned on a waiver of sovereign immunity. Instead, the State relies (Br. 29-30) on general statements by this Court in *Magnolia Venture Capital Corp.* v. *Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998), cert. denied, 525 U.S. 1178 (1999), and the Supreme Court in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). Neither decision is directly on

point, and recent Supreme Court authority prevents applying any broad dicta from these cases to relieve the State of its waiver in this case.

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

That statement was clearly dicta as applied to the very different context presented by this case. A waiver of sovereign immunity in a contract between a State and a corporation does not implicate the important interests of a co-sovereign. Thus, neither this Court's decision in *Magnolia*, nor the Supreme Court's decision in *Ford,* had occasion to consider or address the relevance of

Congress's unique interest in vindicating its constitutional authority to condition federal funds on a waiver of sovereign immunity. Accordingly, even under ordinary circumstances, *Magnolia* would not conclusively determine the outcome in this case.

B. Ford *Has Been Overruled In Substantial Part*

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

State's voluntary submission to federal court jurisdiction by filing suit in federal court, or making a claim in a federal bankruptcy proceeding. *Id*. at 621. The Court in *Lapides* concluded that removal of state law claims to federal court should also be included among these recognized immunity-waiving activities. *Id*. at 624.

Relying on *Ford*, Georgia objected that even if such an activity were recognized as a waiver of sovereign immunity as a general matter, it should not be recognized as a waiver when the state official removing the case to federal court lacks the specific authority under state law to waive the State's immunity. *Lapides*, 535 U.S. at 626. The Court rejected this limitation on the waiver rule. *Id*. at 623. The Court recognized this decision was at odds with *Ford*'s apparent assumption that a state official's actions may not waive a state's immunity absent state law authority to waive sovereign immunity. But the waiver rule it was applying, the Court explained, is premised upon "the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Id*. at 620. "Finding *Ford* inconsistent with [that] basic rationale," the Court "overrule[d] *Ford* insofar as it would otherwise apply." *Id*. at 623.

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

C. State Law Authority To Apply For And Receive Clearly Conditioned Federal Funds Constitutes Sufficient Authority To Waive Sovereign Immunity

The State's argument is inconsistent with the basic rationale of *Lapides* and of the rule of federal law that finds a waiver of sovereign immunity in a State's acceptance of a conditioned federal grant. That rule is not based on the need to accommodate a State's decision to relinquish its sovereign immunity in particular cases. Thus, both this Court and the Supreme Court have consistently treated waivers under funding statutes as resulting from a general rule of federal law, like that created in *Lapides*, rather than from a case-specific inquiry into the intentions of the state agency accepting the funds.[9] This is so, because the rule arises from

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[9] See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.,* 527 U.S. 666, 686 (1999)("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take and that *acceptance of the funds entails an*

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the need to enforce Congress's authority to create conditions on federal funding and to avoid the "inconsistency, anomaly, and unfairness" that would result if States could accept such funds and then later avoid their conditions. See *Lapides*, 535 U.S. at 620. It would be anomalous to hold that Congress may condition federal funds on a waiver of sovereign immunity, yet allow a state agency to enjoy the benefits of those funds without being bound to that valid condition. And it would be unfair to permit a State to take financial advantage of its false representations to federal funding agencies, when States that make *bona fide* applications are required to bear the full weight of the responsibilities required under Section 504, including submission to federal court adjudications.

Because the rule regarding waivers based on acceptance of federal funding is primarily based on this need for certainty, consistency, and fairness, the rationale of *Lapides* supports the conclusion that the rule must be enforced even if the agency accepting the conditioned funds does not have state law authority to waive sovereign immunity. This conclusion appropriately accommodates both Congress's interest in ensuring compliance with legitimate funding conditions

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[9](...continued)
agreement to the actions.") (emphasis added); *AT&T Communications* v. *Bellsouth Telecomm., Inc.*, 238 F.3d 636, 645 (5th Cir. 2001) ("[W]aiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on a waiver of immunity.").

attached to substantial federal outlays, and the States' ability to preserve their Eleventh Amendment immunity from suit. A State desiring to prevent its agencies from waiving immunity under this rule may simply withdraw the agencies' authority to apply for or accept federal funding. Conversely, a State that permits its agencies to apply for federal funds, knowing that this will result in a waiver of sovereign immunity as a matter of federal law, cannot complain of unfair treatment when that rule is enforced. Indeed, it is difficult to realistically conclude that a State in such circumstances has not authorized the waiver, since the waiver is a necessary consequence of the authorized acceptance of federal funds. See *Lapides*, 535 U.S. at 623.

Finally, applying the rationale of *Lapides* to this case does not conflict with the holding of this Court's decision in *Magnolia*. *Lapides* does not disturb cases that require state law authority to waive sovereign immunity when the waiver is recognized by federal law in order to accommodate "a State's actual preference or desire." *Lapides*, 535 U.S. at 620. This category clearly includes a waiver provided in a private contract. See *Magnolia*, 151 F.3d at 439. In such cases, courts must ensure the waiver actually reflects the State's desire to relinquish its sovereign immunity, rather than a mistaken or unauthorized undertaking by one of the State's officials. But where, as here, the basis of the waiver is a rule of federal

law based on a need for fairness and certainty, *Lapides* prevents the extension of *Magnolia* to allow a State to obtain an unwarranted exception from valid conditions attached to federal funds.

IV. THE STATE'S WAIVER OF ELEVENTH AMENDMENT IMMUNITY WAS KNOWING

The State concludes its brief with a short defense (Br. 40-42) of the panel's actual holding in this case. As the United States explained in our supplemental en banc brief in *Pace*, the panel's conclusion that the State's waiver was unknowing is wrong.

Based on clear guidance from the Supreme Court's decisions, this Court in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), and the overwhelming majority of other courts, have held that voluntary acceptance of clearly conditioned federal funds constitutes a valid waiver of sovereign immunity.[10] The panel in this case seemed to agree that this is the rule, at least in

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[10] Eight Circuits have so held in Section 504 cases. See *Garrett* v. *University of Ala.*, 344 F.3d 1288, 1293 (11th Cir. 2003); *Shepard* v. *Irving*, No. 02-1712, 2003 WL 21977963, at *3 (4th Cir. Aug. 20, 2003) (unpublished); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949

(continued...)

ordinary cases. See *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 330 F.3d 691, 694 (5th Cir. 2003). However, the panel declined to find a knowing waiver based on the acceptance of federal funds here because it concluded that at the time of acceptance in this particular case, the State could have reasonably believed that Congress had already abrogated its sovereign immunity to Section 504. See *id*. at 694-695. Following, and expanding upon, the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the *Pace* panel had noted that Section 2000d-7, along with the abrogation provision of the ADA, could be read to indicate Congress's intent to abrogate the State's sovereign immunity. Prior to the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and this Court's decision in *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), a State could have thought that Congress had the constitutional power to enact such abrogation provisions under its Commerce Clause authority. Thus, the *Pace* panel concluded,

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[10](...continued)
(2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). Other courts of appeals have held the same with respect to the other statutes identified in Section 2000d-7. See, *e.g.*, *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553-555 (7th Cir. 2001) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI), rev'd in part on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000).

when it was deciding whether to accept the federal funds relevant to this case, the State could have reasonably believed that its sovereign immunity to claims under Section 504 was lost even before it accepted federal funds. "Believing that the acts validly abrogated their sovereign immunity, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." 325 F.3d at 616. The panel in this case followed the same reasoning and reached the same result. See *Miller*, 330 F.3d at 694-695.

In the five months since the panel issued its decision in this case, five courts of appeals have declined to follow *Pace*'s "knowing" waiver rationale. See *Garrett* v. *University of Ala.*, 344 F.3d 1288, 1293 (11th Cir. 2003); *Doe* v. *Nebraska*, 345 F.3d 593 (8th Cir. 2003); *Pugliese* v. *Dillenberg*, No. 01-16544, 2003 WL 22289938 (9th Cir. Oct. 7, 2003); *Shepard* v. *Irving*, No. 02-1712, 2003 WL 21977963, at *3 n.2 (4th Cir. Aug. 20, 2003) (unpublished); *M.A.* v. *State-Operated Sch. Dist. of Newark*, 344 F.3d 335, 349-351 (3d Cir. 2003); *A.W.* v. *Jersey City Pub. Sch.*, 341 F.3d 234, 250-254 (3d Cir. 2003).

While these opinions have disagreed with the *Pace* panel decision for a number of persuasive reasons, we believe that the most significant flaws are (1) the decision fails to apply the proper test for a knowing waiver of sovereign immunity, and (2) it wrongly concludes that, in the circumstances of this case, a

State could reasonably believe that it had no sovereign immunity to waive by accepting federal funds.[11]

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

There is no doubt that an effective waiver of sovereign immunity must be "knowing." See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). The dispute is over the proper test for determining whether the State's waiver was, in fact, knowing. With the exception of the Second Circuit and the panels here, the courts of appeals have uniformly applied a simple, straight-forward test: if Congress clearly conditions federal funds on a waiver of sovereign immunity, and a State nonetheless voluntarily accepts federal financial assistance, a knowing waiver of sovereign immunity is conclusively established.[12]

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[11] What follows is largely a verbatim recitation of the United States' brief in *Pace*, included here for the convenience of the Court.

[12] See *Pederson*, 213 F.3d at 876 ("A state may waive its immunity *by voluntarily participating* in federal spending programs when Congress expresses a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.") (citation and quotation marks omitted) (emphasis added); *id*. at 875 (holding that "in enacting § 2000d-7 Congress permissibly conditioned a state university's receipt of [federal] funds on an unambiguous waiver of the university's Eleventh Amendment immunity, and that, *in accepting*

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This test was derived from the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In that case, 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 only flaw the Court identified in the district court's reasoning 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*.

As this Court in *Pederson* 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

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[12](...continued)
such funding, the university has consented to litigate private suits in federal court.") (internal punctuation and citation omitted) (emphasis added). See also cases cited in n. 10 *supra*.

immunity," *Atascadero*, 473 U.S. at 247, *would* constitute a State's knowing waiver of that immunity. See *Pederson*, 213 F.3d at 876. 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 valid 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).

Accordingly, in *College Savings Bank*, the Court found "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," 527 U.S. at 680-681, but at the same time 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 * * * *acceptance of the funds entails an agreement to the actions*." *Id*. at 686 (emphasis added). A State's acceptance of funds in the face of clearly stated funding conditions constitutes a "clear declaration," *id*. at 676, that the State has agreed to the condition.[13] In

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[13] This is consistent with basic contract law principles which ordinarily turn on manifestation of assent rather than subjective agreement. See Restatement

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AT&T Communications v. *Bellsouth Telecommunications, Inc.*, 238 F.3d 636 (5th Cir. 2001), this Court applied the same straight-forward, objective test, properly concluding that if Congress clearly conditions a federal gift or gratuity on a knowing and voluntary waiver of sovereign immunity, a valid waiver is established if "the state elects to engage in the conduct or transaction after such legal notice has been given." *Id*. at 644.

The *Pace* panel suggested that cases like *Pederson* and *AT&T Communications* tend "to conflate the voluntariness and knowingness aspects of waiver." 325 F.3d at 617. To the contrary, these cases simply reach the common-sense conclusion that if a State voluntarily accepts funds that are clearly conditioned on a waiver of sovereign immunity, the State cannot later be heard to complain that it did not know that its actions would waive its sovereign immunity.

The Supreme Court endorsed such reasoning in *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), where it found that a State had knowingly and voluntarily waived its sovereign immunity by removing state law claims to federal court. As noted above, the Court began by acknowledging that it has "required a 'clear' indication of the State's intent to waive its

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[13](...continued)
(Second) of Contracts §§ 2, 18 (1981).

immunity." *Id*. at 620. The Court concluded that such a "clear" indication may be found when a State engages in conduct that federal law declares will constitute a waiver of sovereign immunity. "[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. And federal law made clear that "voluntary appearance in federal court" would constitute a waiver of sovereign immunity. *Id*. at 619. Removing state law claims to federal court in the face of this principle, the Court held, waived the State's sovereign immunity. *Id*. at 620.

Importantly, it was undisputed that the State in *Lapides* 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. Under Georgia law, the State argued, the Attorney General lacked authority to waive the State's sovereign immunity. And under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State asserted, it could reasonably believe that absent that state law authority, no action by the Attorney General in litigation would constitute a valid waiver of the State's sovereign immunity. See *Lapides*, 535 U.S. at 621-622.[14] Therefore, the State argued, the Attorney General's removal of the case to federal court should

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[14] In fact, this portion of the Court's holding in *Ford* was good law until the Supreme Court overruled it in *Lapides* itself. See *Lapides*, 535 U.S. at 622-623.

not be found to constitute a "clear declaration" of the State's intent to waive its sovereign immunity.

The panel's rationale in *Pace* would have required the Supreme Court to accept Georgia's argument and hold that the State did not knowingly waive its sovereign immunity, since the State reasonably believed that removing the case to federal court would not constitute a valid waiver. The Supreme Court, however, rejected the argument and held that the State had validly waived its sovereign immunity. See *Lapides*, 535 U.S. at 622-623. The waiver rule it was applying, the Court explained, was necessary to accommodate not only the State's interest in not being subject to suit without its consent, but also the broader interest in creating a waiver rule that can be "easily applied by both federal courts and the States themselves" and that "avoids inconsistency and unfairness." *Id*. at 623-624. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id*. at 621. Finding that removal of state law claims represents a knowing waiver of sovereign immunity as a matter of law properly accommodated the competing interests. "[O]nce the States know or have reason to expect that removal will constitute a waiver," the Court explained, "then *it is easy enough to presume* that an attorney authorized to represent the State can bind it to the jurisdiction of the

federal court (for Eleventh Amendment purposes) by the consent to removal." *Id*. at 624 (emphasis added) (citation and quotation marks omitted).

So, too, in this case, federal law has long made clear that a State's acceptance of clearly conditioned federal funds shall constitute a knowing and effective waiver of sovereign immunity. See, *e.g.*, *Atascadero*, 473 U.S. at 247. The clarity of this rule, and of the funding condition, is sufficient to ensure that the State's waiver of its sovereign immunity is knowing. At the same time, ensuring that States accepting federal assistance are bound by the funds' valid conditions is necessary to vindicate Congress's constitutional authority to enact such conditions.

B. The State Could Not Reasonably Believe That Its Sovereign Immunity To Section 504 Claims Was Already Abrogated Even Before The State Accepted Federal Funds

The panels in *Pace* and this case departed from the standard test for a knowing Spending Clause waiver because they believed that prior to *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the State could accept federal funds yet not know that doing so would waive its sovereign immunity. This was because, in the panels' view, prior to *Garrett* the State could have reasonably believed that Congress had already taken away its sovereign immunity to Section 504 claims long before the State had a chance to waive it

through acceptance of the clearly conditioned federal funds. See *Pace*, 325 F.3d at 616. This reasoning is flawed because even if the State thought Congress had the constitutional power to unconditionally abrogate the State's sovereign immunity, the State could not reasonably believe that Congress had done so in enacting Section 2000d-7 or the ADA abrogation provision.

The State could only reasonably believe that it did not "retain[] any sovereign immunity to waive," *ibid*., if it reasonably believed that its sovereign immunity was abrogated whether it accepted federal funds or not. Otherwise, if the State knew that it would be subject to suit only if it accepted the federal funds, then it must have understood that until it accepted the funds it still "retained * * * sovereign immunity to waive by accepting conditioned federal funds," *id*. at 616, and that it would retain that immunity into the future if it turned down the federal funding. The question, then, is not simply whether the State could reasonably think that Congress had the constitutional *power* to abrogate its sovereign immunity, even if it declined the federal funds. The question is whether it was reasonable to think that Congress had *used* that power to enact an abrogation provision that applied, even if the State turned down the federal funding. Answering that question requires looking at the terms of the statutory provisions Congress enacted.

When the relevant statutory provisions are examined, it is clear that even prior to *Garrett* the State could not reasonably believe that Congress had attempted to abrogate its sovereign immunity to Section 504 claims even if the State declined federal funding.

1. Nothing In The ADA Affects A State's Sovereign Immunity To Claims Under Section 504

The State could not reasonably believe that anything in the ADA would abrogate its sovereign immunity to claims under Section 504, even if it assumed that the ADA abrogation provision was within Congress's constitutional power. By its terms, the ADA provision abrogates a State's sovereign immunity only to "an action in Federal or State court of competent jurisdiction for a violation of *this chapter*." 42 U.S.C. 12202 (emphasis added). No State could think that a violation of Section 504 could count as a "violation of this chapter."

The *Pace* panel's decision does not explain how a State could believe that the ADA's abrogation provision could have any effect on its sovereign immunity to claims under Section 504. Indeed, the State has never argued that it had such a belief (see Br. 41 (alleging solely that State believed its sovereign immunity had been abrogated by Section 2000d-7)).[15] However, the Second Circuit's decision in

[15] The panel in this case cited to the ADA abrogation provision only in the course (continued...)

Garcia, upon which the panel relied, did conclude that a State could believe, prior to *Garrett*, that the ADA abrogation provision had abrogated its sovereign immunity to Section 504 claims. See 280 F.3d at 114. In the interest of completeness, therefore, we will briefly address the Second Circuit's reasoning.

The Second Circuit wrote that

> [a]t the time that New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority. * * * Since, as we have noted, the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had already been lost.

Ibid. (citations omitted). The Court concluded that New York's waiver of sovereign immunity to claims under Section 504 was unknowing because a State already subject to suit under the ADA would have little to gain, *as a practical matter*, from maintaining its sovereign immunity to Section 504 claims. *Ibid*.[16]

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[15](...continued)
of explaining why the State could have believed that Section 2000d-7 validly abrogated its sovereign immunity to Section 504 claims. See 330 F.3d at 695. That argument is discussed *infra* 45-47

[16] The Second Circuit may also have concluded that because Section 504 and Title II's substantive requirements overlap, abrogation of the State's Title II immunity necessarily abrogated the State's immunity to Section 504 claims as well. Any such conclusion, however, would be wrong. Sovereign immunity does not exist

(continued...)

But such a belief would not make the waiver unknowing. What must be known for a waiver to be valid is the existence of the legal right to be waived and the legal consequence of the waiver, not the practical implications of waiving the right. See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986). Thus, the question in *Garcia* was simply whether the State knew it had a pre-existing right to assert Eleventh Amendment immunity to claims under Section 504, and whether it was on notice that accepting the conditioned funds would result in the loss of the right to assert sovereign immunity to Section 504 claims in the future. Nothing in the ADA could affect, much less negate, the State's knowledge of either of these two facts.

To hold that the waiver was nonetheless "unknowing" simply because the State miscalculated that value of retaining its sovereign immunity is to employ a

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[16](...continued)
writ large, being retained, waived or abrogated as a whole. Instead, a State's Eleventh Amendment immunity is claim-specific. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12, 124-125 (1984). For example, it is frequently the case that a state employment dispute will involve allegations of violations under Title VII and its state law equivalent. However, whether the State is immune to the Title VII claims has no relevance to the distinct question of whether it is immune to the substantively similar state law claims in federal court. Compare *Ussery* v. *Louisiana*, 150 F.3d 431 (5th Cir. 1998) (State not immune to Title VII suits), cert. dismissed, 526 U.S. 1013 (1999), with *Pennhurst*, 465 U.S. at 124-125 (State immune to state law claims); see also *Pace*, 325 F.3d at 618 n.15 (after *Garrett*, State is immune to claims under Title II, but waives immunity to Section 504 claims if it accepts federal funds); 42 U.S.C. 12201(b).

conception of "knowingness" that dramatically departs from ordinary legal usage of that term. 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).[17] 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 waiver. 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*, 479

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[17] 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.

U.S. at 574 ("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, 757 (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.").

2. Even If The State Believed That Section 2000d-7 Was A Valid Abrogation Provision, The Provision Did Not Apply Unless And Until The State Accepted The Federal Funds

The panel alternatively concluded that the State could have reasonably believed that its sovereign immunity to Section 504 claims already had been abrogated by Section 2000d-7. This conclusion is also wrong.

Unlike the abrogation provision of the ADA – which abrogates the sovereign immunity of every State, unilaterally, and for all time – Section 2000d-7 authorizes suits only against State agencies that receive federal funds,[18] only if the

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[18] The language of Section 2000d-7 may at first appear absolute, providing a blanket authorization for suits against States under Section 504. That statute, however, applies only to States that accept federal funds. See 29 U.S.C. 794a(a)(2) (authorizing suits as part of remedies to "any person aggrieved by any

(continued...)

State voluntarily chooses to accept those funds, and only for the duration of the funding period.[19] These differences are critically important. A State *could* read the ADA's abrogation provision and conclude that its sovereign immunity to ADA claims would be abrogated regardless of any decision or action by the State. But Section 2000d-7, in contrast, is clearly conditional. It takes effect if, and only if, the State voluntarily chooses to accept federal funds. If the State does not take the funds, no plausible reading of the provision would subject the State to suit under Section 504.

Thus, when it was deciding whether to accept federal funds for the coming school year, the University's sovereign immunity to Section 504 claims for the coming year was intact, and the State was faced with a clear choice. It could decline federal funds and maintain its sovereign immunity to suits under the Rehabilitation Act, or it could accept funds and be subject to private suits under

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[18](...continued)
act or failure to act by any *recipient of Federal assistance* * * * under [Section 504]") (emphasis added). Accordingly, under any reasonable interpretation of the statute as a whole, Congress limited its attempted abrogation to those state agencies that receive federal financial assistance.

[19] A state agency is not subject to liability and suit under Section 504 in perpetuity if, at any time, it accepts federal funds. Instead, the state program must be "receiving Federal financial assistance" at the time of the alleged discrimination leading to the lawsuit. See 29 U.S.C. 794(a).

Section 504. 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 waived its sovereign immunity.

CONCLUSION

For the foregoing reasons, the Eleventh Amendment does not bar Plaintiffs' Section 504 claims against the University.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Supplemental En Banc Brief for the United States as Intervenor were served by overnight mail, postage prepaid, on this October 28, 2003, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

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

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 11,044 words.
2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

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