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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF SUBJECT MATTER JURISDICTION

The district court had jurisdiction over the claim on appeal pursuant to 28 U.S.C. 1331.

STATEMENT OF APPELLATE JURISDICTION

The United States concurs with defendant's statement of appellate jurisdiction.

STATEMENT OF THE ISSUE

Whether Congress clearly conditioned the receipt of federal financial assistance on a waiver of States' Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Section 504 contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

Section 504 applies to a "program or activity," a term defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C.

794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Congress instructed that in Section 504 cases involving employment discrimination, "the standards applied under title I of the Americans with Disabilities Act" shall apply. 29 U.S.C. 794(d). Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Carter* v. *Orleans Parish Pub. Schs.*, 725 F.2d 261, 262 n.2 (5th Cir. 1984).

2. In 1985, the Supreme Court held that Section 504 was not clear enough to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. 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.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Section 504 of the Rehabilitation Act to remedy discrimination on the basis of disability. Congress validly conditioned federal funding on a state agency's waiver of sovereign immunity. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. By accepting the funds, a state agency agreed to the terms of the statute. Any misapprehension by the recipient about the method by which Congress intended to provide individuals with an action against state recipient does not affect the effectiveness of the waiver.

ARGUMENT

CONGRESS CONDITIONED RECEIPT OF FEDERAL FUNDS ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964."

The Eleventh Amendment bars private suits against a State sued in its own name, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999).[1] In *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), this Court held that Congress did not have the power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity to suits under Section 504. While the United States disagrees with that decision, we recognize that it binds this panel.

Reickenbacker reserved the question, at issue in this appeal, whether Congress conditioned the receipt of federal financial assistance on a recipient's waiver of its Eleventh Amendment immunity to Section 504 claims. See 274 F.3d at 984. Defendant properly concedes (Def. Br. 5) that Congress has the power under the Spending Clause, Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden*, 527 U.S. at 755; *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). And defendant admits (Def. Br. 4, 22 n.5) that it accepted federal financial assistance at the time plaintiff alleges it began discriminating against her in the Spring of 1999 (R. Vol. 1 at 220-

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[1] The Eleventh Amendment does not bar private suits brought against state officials seeking prospective injunctive relief. See *id.* at 755-757; *University of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001). Plaintiff's complaint did not name a state official, and thus the *Ex parte Young* doctrine has no application to this case.

222: Amended Complaint), and continued receiving federal funds until at least 2001.

Defendant contends, nonetheless, that it has not waived its immunity because Section 2000d-7 does not clearly condition the receipt of federal financial assistance on a waiver of immunity and, even if it did, defendant's receipt of federal financial assistance during the relevant period was not an effective waiver. Neither of these contentions is correct.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Constitutes A Waiver To Private Suits Brought Under Section 504*

Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to condition the receipt of federal financial assistance on a waiver of States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. *Id*. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247.

1. Section 2000d-7 makes unambiguously clear that Congress intended to condition federal funding on States' waiver of Eleventh Amendment immunity to suit in federal court under Section 504 (and the other non-discrimination statutes

tied to federal financial assistance).[2] Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it would not have immunity to suit in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.

This Court reached this very conclusion in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (2000), which involved the application of Section 2000d-7 to Title IX of the Education Amendments (a statute prohibiting sex discrimination by educational programs that receive federal financial assistance). Defendant in that case argued that "§ 2000d-7(a)(1) does not contain the word 'waiver,' and that the state may have logically disregarded the language of this statute as an attempt to abrogate its sovereign immunity." *Id*. at 876. This Court rejected that argument, holding that "in 42 U.S.C. § 2000d-7(a)(1) Congress has successfully codified a statute which clearly, unambiguously, and unequivocally

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[2] Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986).

conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment Immunity." *Ibid.* Relying on the Fourth Circuit's "careful analysis" in *Litman* v. *George Mason University*, 186 F.3d 544 (1999), cert. denied, 528 U.S. 1181 (2000), this Court explained:

> First, we will consider whether 42 U.S.C. § 2000d-7(a)(1), although it does not use the words "waiver" or "condition," unambiguously provides that a State by agreeing to receive federal educational funds under Title IX has waived sovereign immunity. 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.'" *Litman*, 186 F.3d at 550 (quoting *Atascadero State Hosp.*, 473 U.S. at 247). Title IX as a federal spending program "operates much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id*. at 551. The Supreme Court has noted that Congress in enacting Title IX "condition[ed] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998); *Litman*, 186 F.3d at 551-552.

Pederson, 213 F.3d at 876 (some citations omitted).

2. Defendant concedes that the holding of *Pederson* applies with equal force to this case, but argues (Def. Br. 9-10) that the Supreme Court "implicitly overruled" this holding in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), when it described a similarly worded provision in the Americans with Disabilities Act as an "abrogation." But defendant's reliance on this description of the provision in the Americans with Disabilities Act misses the mark. The language of Section 2000d-7 serves a different function from similar language in the Disabilities Act because the statutes operate in a markedly different manner. The Americans with Disabilities Act acts as a unilateral regulation of employers and

public entities. Thus, the provision removing Eleventh Amendment immunity for such acts can only be viewed as a unilateral abrogation by Congress. Sections 504 and 2000d-7, by contrast, condition the receipt of federal funds on a State's waiver of its Eleventh Amendment immunity.

The obligations of Sections 504 and 2000d-7 are incurred only when a recipient elects to accept federal financial assistance. If a state agency does not wish to accept the conditions attached to the funds (non-discrimination and suits in federal court), it is free to decline the assistance. But if it does accept federal money, then it is clear that it has agreed to the conditions as well. Thus, by voluntary acceptance of funding, the state agency waives its right to assert immunity. "[A]cceptance of the funds entails an agreement to the actions." *College Sav. Bank*, 527 U.S. at 686; cf. *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision"). Whether called abrogation or waiver,[3] Section 2000d-7 applies only if a state agency agrees to forfeit its immunity by accepting federal financial assistance.

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[3] Defendant itself acknowledges (Def. Br. 14-15) that the Supreme Court has sometimes used the terms "abrogation" and "waiver" interchangeably. See also *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) ("The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.").

Each of the six courts of appeals to address the issue has reached the same conclusion that this Court did in *Pederson*, 213 F.3d at 876: Section 2000d-7 "clearly, unambiguously, and unequivocally conditions receipt of federal funds * * * on the State's waiver of Eleventh Amendment immunity." See *Garcia* v. *SUNY Health Sci. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, 265 F.3d 541, 554-555 (7th Cir. 2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), petition for cert. pending, No. 01-1357; *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). Nothing warrants this Court overruling *Pederson* and creating a split in the circuits.

B. *Defendant's Case-Specific Contentions Do Not Negate Its Waiver of Immunity*

Defendant further contends (Def. Br. 16-23) that even if Section 2000d-7 clearly conditions the receipt of federal funding on a recipient's waiver of Eleventh Amendment immunity, the waiver was ineffective in this case. These contentions are also erroneous.

1. Relying on *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), and its progeny, defendant argues (Def. Br. 17-21) that the voluntary acceptance of federal financial assistance did not constitute an effective waiver because defendant was not authorized under state law to waive Eleventh Amendment immunity. Since the filing of defendant's brief, however, the Supreme Court has overruled the relevant part of *Ford Motor* in *Lapides* v. *Board of Regents*, 122 S. Ct. 1640 (2002).

In *Lapides*, Georgia had removed a case from state to federal court and then moved to dismiss on the grounds of Eleventh Amendment immunity. The Supreme Court, resolving a split in the circuits, held that removal of a case from state to federal court constituted a waiver of the State's immunity. *Id*. at 1643-1644. Georgia argued that even if removing a case to federal court constituted a waiver, and even though the state attorney general was authorized under state law to conduct litigation, the state attorney general was not authorized under state law to waive the State's Eleventh Amendment immunity and thus there was no effective waiver. *Id.* at 1644. Georgia relied on *Ford Motor*, in which the Court had held that a state attorney general's litigation conduct was not sufficient to waive immunity when he did not have the authority under state law to waive it. The Supreme Court rejected that argument and overruled *Ford Motor* "insofar as it would otherwise apply." *Id*. at 1646.

The Court held that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a

question of federal law." *Id.* at 1645. The Court then established "[a] rule of federal law" designed to "avoid[] inconsistency and unfairness." *Ibid.* The Court held that so long as state law authorized the state attorney general to engage in the relevant litigation conduct, such conduct would constitute an effective waiver regardless of whether the official had state law authority to waive immunity. *Ibid.*

In this case, defendant concedes (Def. Br. 20) that it is authorized under state law to accept federal funds. Under *Lapides*, no further state law inquiry is required. Instead, whether the state activity of accepting federal funds constitutes a waiver is a question of federal law, one that Congress itself answered in the affirmative by the plain language and structure of Section 2000d-7. It would certainly be unfair to permit the States to benefit from the federal financial assistance, but then disclaim the authority to comply with the conditions imposed by federal law.

2. Defendant also contends (Def. Br. 21-23) that it did not waive its immunity to suit in this case because "it reasonably believed" that Section 2000d-7 functioned as an abrogation at the time it took the federal funds and thus did not "know" that it had any immunity to waive. But it does not matter whether defendant thought that Section 2000d-7 was a valid abrogation or simply a clear notice that acceptance of funds would constitute waiver. Either way, the obligation was incurred only when defendant elected to accept federal financial assistance. Defendant was faced with the same clear choice then as it is now: if defendant did not wish to accept the conditions attached to the funds (non-

discrimination and suits in federal court), it was free to decline the assistance. But by taking the assistance, it knew that it would not be entitled to raise its Eleventh Amendment immunity as a defense to private suits under Section 504.

In *Lapides*, the Supreme Court held that a State waived its Eleventh Amendment immunity through voluntary litigation in federal court done at a time when the State had much more reason to think that its conduct would not constitute a waiver. *Lapides* resolved a split in the circuits by holding, for the first time, that a state waived its immunity from suit when it removed a case from state to federal court and by overruling, at least in part, a prior precedent that the State was relying on to argue that it did not waive its immunity. Yet the Court applied the holding of the case to Georgia because of its voluntary invocation of federal jurisdiction, concluding that "the State's action joining the removing of *this case* to federal court waived its Eleventh Amendment immunity." 122 S. Ct. at 1646 (emphasis added). This is consistent with the general rule that a waiver can be knowing and voluntary even if it was based on an incorrect understanding of the law. See *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); cf. *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987) (plaintiff may waive the right to bring a 42 U.S.C. 1983 action for unknown constitutional violations).

Even if defendant's knowledge of the state of the law were relevant, it could not succeed in negating the waiver. By the time defendant accepted federal funds in 1999 (when the alleged disability discrimination began), a number of courts had held that Section 2000d-7 validly conditioned the receipt of federal funds on the state agency's waiver of immunity. See, *e.g.*, *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Sandoval* v. *Hagan*, 7 F. Supp. 2d 1234, 1269, 1271-1272 (M.D. Ala. 1998); *Litman* v. *George Mason Univ.*, 5 F. Supp. 2d 366, 375-376 (E.D. Va. 1998); *Beasley* v. *Alabama State Univ.*, 3 F. Supp. 2d 1304, 1311-1312 (M.D. Ala. 1998). Indeed, defendant acknowledged in the district court that "at the time the funds were accepted, it was reasonably understood that acceptance of such funds was conditioned on the waiver of eleventh amendment immunity (as expressed in the statute [Section 2000d-7] cited by Plaintiffs)." R. Vol. 3 at 706: Defendant's Reply to Plaintiff's Response. Defendant has no colorable basis for now arguing that its waiver of immunity was unknowing because of its alleged misapprehension about the function of Section 2000d-7.

Finally, it is useful to note what defendant is *not* arguing in this case. Although defendant cites to *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), it does not urge this Court to adopt the holding of *Garcia*. *Garcia* agreed with the other courts of appeals that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. And it further

agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id*. at 114 n.4. However, *Garcia* also held that Title II of the ADA did not validly abrogate the States' immunity and that the Section 504 waiver was not knowing because the state agency did not "know" in 1995 (the latest point the alleged discrimination in *Garcia* had occurred) that the abrogation in Title II of the ADA was not effective and thus would have thought (wrongly, in the view of the Second Circuit) that Title II's abrogation for Title II claims made the waiver for Section 504 redundant. *Id*. at 114. According to the court, since "by all reasonable appearances state sovereign immunity [to claims of disability discrimination under the ADA] had already been lost" by virtue of the Title II abrogation, the State "could not have understood that in [accepting federal funds] it was actually abandoning its sovereign immunity from private damages suits" for the same disability discrimination under Section 504. *Ibid*.

Defendant does not argue that the validity of the ADA's abrogation for suits under Title II is relevant to whether Section 2000d-7 put it on notice that it had waived its immunity to suits under Section 504 by accepting federal funds. Nonetheless, in order to provide a complete legal analysis, it is appropriate to explain why *Garcia*'s reasoning on this point was clearly incorrect. It is wrong because every state agency did know from the plain text of Section 2000d-7 from the time it was enacted in 1986 that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Section 504 was not

amended or altered by the enactment of Title II of the ADA in 1990, and it was clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). It is thus untenable to suggest that abrogation for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute. *Garcia*'s holding -- that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's, when a "colorable basis for the state to suspect" that the abrogation was unconstitutional developed, see 280 F.3d at 114 n.4, and has now regained its full effectiveness -- creates an unworkable and unprecedented patchwork of coverage.

As this Court held in *Pederson* v. *Louisiana State University*, 213 F.3d 858, 876 (2000), Section 2000d-7 "clearly, unambiguously, and unequivocally conditions receipt of federal funds * * * on the State's waiver of Eleventh Amendment Immunity." This clear statement in the text of the statute about the Eleventh Amendment assured that defendant knew as a matter of law that it was waiving its immunity for Section 504 claims when it applied for and took federal financial assistance. Defendant's attempts to create ambiguity where none exists should be rejected.

CONCLUSION

The judgment of the district court denying defendant's motion to dismiss the Section 504 claim should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is being challenged in *Johnson* v. *Louisiana Department of Education*, No. 02-30318 (5th Cir.), and *August* v. *Mitchell*, No. 02-30369 (5th Cir.).

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2002, two copies of the Brief for the United States as Intervenor was served by first-class mail, postage prepaid, on the following counsel:

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