No. 01-31026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS PACE,

Plaintiff-Appellant,

v.

BOGALUSA CITY SCHOOL BOARD*, et al.*,

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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REGULATIONS:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31026

TRAVIS PACE,

Plaintiff-Appellant

v.

BOGALUSA CITY SCHOOL BOARD, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF THE ISSUES

1. Whether Congress may condition receipt of federal financial assistance on a knowing and voluntary waiver of a State's Eleventh Amendment immunity.

2. 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, 29 U.S.C. 794 (Section 504).

3. Whether Congress clearly conditioned the receipt of federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*., on a State agency's knowing and voluntary waiver of Eleventh Amendment immunity to private actions under the IDEA.

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

5. Whether the State's waiver of sovereign immunity in this case was voluntary.

STATEMENT OF THE CASE

This suit was brought by a disabled student against state and local educational agencies under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. The United States has sought rehearing en banc with respect to Plaintiff's claims under the IDEA and Section 504.

1. Section 504 of the Rehabilitation Act 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). The provision 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). 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 for private damage actions against state entities and reaffirmed that mere receipt of federal funds was insufficient to constitute a waiver. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7(a)(1) provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.],

> title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. The Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq*., created a federal grant program that provides billions of dollars to States to educate children with disabilities. In order to qualify for IDEA funding a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a), (a)(1)(A). The statute also requires States accepting IDEA funds to provide an administrative process for resolving IDEA disputes and authorizes civil suits in federal court by any party aggrieved by the outcome of the administrative hearing. See 20 U.S.C. 1415(f), (i). In 1990, Congress enacted a provision, now codified at 20 U.S.C 1403(a), which states in pertinent part that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the IDEA.

3. The district court dismissed Plaintiff's claims against the State defendants, holding that Plaintiff failed to prove a violation of the IDEA, Section 504, or the ADA. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 99-806, 2001 WL 969103 (E.D. La. Aug. 23, 2001). Plaintiff appealed and the United States filed an amicus brief on the merits. On October 10, 2002, the panel *sua sponte* ordered the

parties to address whether the Eleventh Amendment barred Plaintiff's claims against the State defendants. The United States intervened to defend the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity.

On March 24, 2003, the panel issued its opinion holding that the Eleventh Amendment precluded Plaintiff's claims against the State defendants. *Pace* v. *Bogalusa City Sch. Bd.*, 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 Title II of the ADA or Section 504. See 325 F.3d at 613. The panel extended that ruling to the IDEA as well. See *id*. at 614. The panel next considered whether the State had nonetheless waived its sovereign immunity by accepting IDEA funding. 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. The panel also held that Section 1403 of the IDEA "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity." *Id.* at

617. 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 because "[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 * * *, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." *Id.* at 616. The panel extended this reasoning to the IDEA, concluding that, until the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a state agency could reasonably have believed that the IDEA validly abrogated its immunity and, therefore, could not knowingly have waived its immunity to claims under the IDEA. *Id.* at 617.

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 sovereign immunity to Section 504 and IDEA claims by accepting federal funds.[1]

The Supreme Court has repeatedly affirmed Congress's authority to condition participation in federal spending programs on a knowing and voluntary waiver of sovereign immunity. The panel rightly rejected the State's arguments to the contrary. Such waiver conditions, however, must be clearly and unambiguously expressed in order to ensure that States have a fair chance to decide whether the benefits of federal funding are worth the required waiver of sovereign immunity. The panel properly concluded that Congress provided this clear notice when it enacted 42 U.S.C. 2000d-7 and 20 U.S.C. 1403.

The panel erred, however, in concluding that the State in this case could have read these clear conditions, and accepted federal funds, yet not understood that doing so would constitute a waiver of its right to assert sovereign immunity

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[1] More precisely, the State waived its sovereign immunity to IDEA claims by accepting IDEA funds, and its sovereign immunity to Section 504 claims by accepting federal funds generally. Further references in this brief to the State's acceptance of "federal funds" assume this distinction.

against private IDEA and Section 504 claims. 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 knowing and voluntary waiver of sovereign immunity to the claims identified in that provision. See *Pederson* v. *Louisiana State University*, 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 might have reasonably believed that Congress had the power to abrogate its sovereign immunity to Section 504 and IDEA claims whether the State accepted federal funds or not, the State could *not* reasonably believe that Section 2000d-7 or Section 1403 would abrogate its sovereign immunity even if it declined federal funds. Instead, Congress made clear that Section 2000d-7 and Section 1403 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 and very real choice. Having made that choice in favor of accepting IDEA assistance, the State cannot now avoid the conditions it agreed to in accepting those funds.

The State was not unconstitutionally coerced into waiving its sovereign immunity. Although the Supreme Court has said that an offer of financial

assistance may, under some circumstances, cross the line from inducement to coercion, that line was not crossed here. The offer of assistance here is indistinguishable from those made under countless other exercises of Congress's Spending Clause authority. The State can identify no court that has ever held such an offer unconstitutionally coercive, and this Court has rejected similar arguments in the past. Finding unconstitutional coercion based simply on the size of the agency's federal funding in this case, and the State's decision to rely heavily upon it, would "plunge the law in endless difficulties." *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (citation omitted).[2]

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[2]Accordingly, this Court need not address whether Congress validly abrogated the State's sovereign immunity to Plaintiff's Section 504 or IDEA claims. Nor does the United States ask this Court to reconsider its holding in *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), that Congress did not validly abrogate a State's sovereign immunity to claims under Title II of the ADA. That question will be decided by the Supreme Court next term in *Tennessee* v. *Lane*, No. 02-1667. However, regardless of the resolution of the Eleventh Amendment issues, this Court *will* be required to address the merits of Plaintiff's IDEA, Section 504 and ADA claims against the local defendants. The United States' position on those issues was set forth in the amicus brief filed with the panel. We do not repeat them here.

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, 123 S. Ct. 73 (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 *id.* 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 Dept. 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) pursuant to a valid exercise of its Spending Clause authority, (2) 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, and (3) the State voluntarily applies for and receives 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 State's sovereign immunity to private claims under Section 504 and the IDEA was validly waived.

I. CONDITIONING FEDERAL FUNDS ON A KNOWING AND VOLUNTARY WAIVER OF A STATE'S ELEVENTH AMENDMENT IMMUNITY IS A VALID EXERCISE OF CONGRESS'S SPENDING CLAUSE AUTHORITY

The State first argues (Resp. 8-12)[3] that conditioning federal financial assistance on the waiver of Eleventh Amendment immunity is an invalid exercise of Congress's Spending Clause authority. The panel correctly rejected this assertion. See 325 F.3d at 615. Indeed, within the last five years, ten courts of appeals, including this one, have held that Congress may condition federal funds on a knowing and voluntary waiver of sovereign immunity.[4] None has held to the contrary. There is no basis for this Court to change course or create a split of authority among the courts of appeals on this question.

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[3] "Resp." refers to the State Defendants' Response to Petitions for Rehearing En Banc.

[4] See *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 24-25 (1st Cir. 2001), cert. denied, 123 S. Ct. 73 (2002); *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) , cert. denied, 123 S. Ct. 1353 (2003); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) ; *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001) , cert. denied, 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); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 819, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *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 in part on other grounds, 532 U.S. 275 (2001).

A. The Supreme Court Has Clearly Instructed That Congress May Condition Federal Funds On A Waiver Of Sovereign Immunity

The State's Spending Clause argument is contrary to Supreme Court cases holding that Congress may use its Spending Clause authority to condition federal funds on a State's knowing and voluntary waiver of Eleventh Amendment immunity.

In *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), the Court considered whether, prior to the passage of Section 2000d-7, Section 504 validly conditioned receipt of federal funds on a waiver of sovereign immunity. Although the Court held that it did not, it made clear that a State may waive its sovereign immunity "in the context of a particular federal program," 473 U.S. at 238 n.1, if Congress "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id*. at 247.

This view was reaffirmed in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999). In that case, the Court re-examined the holding of *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), which had found a waiver of sovereign immunity in a State's participation in interstate commercial activity that was subject to congressional regulation, on

the theory that Congress could validly condition such participation on a waiver of sovereign immunity. The Court in *College Savings Bank* overruled *Parden*, concluding that prohibiting a State from engaging in "otherwise lawful activity" unless it waived its sovereign immunity amounted to unconstitutional coercion of the State's consent to suit. 527 U.S. at 686-687. "Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin," the Court explained. *Id.* at 683.

The State seizes upon this portion of the decision, asserting (Resp. 12) that conditioning federal funds on a waiver of sovereign immunity constitutes a "forced waiver" no less than the condition held unconstitutional in *College Savings Bank*.[5] The dissent in *College Savings Bank* agreed, arguing that the condition permitted by *Parden* was indistinguishable from the Spending Clause waiver permitted by *Atascadero*. See 527 U.S. at 696-697 (Breyer, J., dissenting). However, the majority rejected that view:

> These cases seem to us fundamentally different from the present one. * * * Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity.

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[5] The State also makes a case-specific coercion argument, which is addressed at pp. 44-55, *infra*.

527 U.S. at 686-687. Accordingly, the Court found no conflict between overruling *Parden* and the suggestion in *Atascadero* "that a waiver may be found in a State's acceptance of a federal grant." *Id*. at 678 n.2. "[W]e make the same suggestion today, while utterly rejecting *Parden*. * * * [C]onditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." *Ibid.*

This Court has since interpreted *College Savings Bank* as reaffirming Congress's authority to condition federal "gifts," including federal funding, on a knowing and voluntary waiver of sovereign immunity. See, *e.g.*, *AT&T Communications* v. *Bellsouth Telecomm., Inc.*, 238 F.3d 636, 644-645 (5th Cir. 2001) ("*College Savings* made clear that when Congress bestows a gift or gratuity, it may attach the condition of a waiver of Eleventh Amendment immunity to a state's acceptance."); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876-876 (5th Cir. 2000) (adopting reasoning of *Litman* v. *George Mason Univ.*, 186 F.3d 544, 552 (4th Cir. 1999) (discussing *College Savings Bank*), cert. denied, 528 U.S. 1181 (2000)). There is no basis for reaching a different conclusion now.

B. Permitting Spending Clause Waivers Does Not Conflict With Seminole Tribe *Or Principles Of Federalism*

The State nonetheless argues that allowing Congress to condition federal funds on a waiver of sovereign immunity, when it could not unilaterally abrogate the State's immunity, conflicts with the Supreme Court's decision in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), and principles of federalism by allowing Congress to use an Article I power to achieve indirectly through funding conditions what it is prohibited from doing directly through abrogation. This Court properly rejected the same argument when Louisiana raised it in *Pederson.* See 213 F.3d at 876 (concluding that prohibiting Spending Clause waivers "would affront the Court's acknowledgment in *Seminole Tribe* of the 'unremarkable . . . proposition that States may waive their sovereign immunity.'") (citation omitted). See also, *e.g.*, *Sandoval* v. *Hagan*, 197 F.3d 484, 494 (11th Cir. 1999), rev'd in part on other grounds, 532 U.S. 275 (2001).

The State's renewed argument fails first because the Supreme Court has specifically rejected the assertion that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly." *South Dakota* v. *Dole*, 483 U.S. 203, 209 (1987). In *Dole*, the Court held that Congress constitutionally conditioned federal highway funds on a State's raising its

minimum drinking age. South Dakota argued that Congress could not enact such conditions because the Twenty-First Amendment gave States the sole right to regulate drinking ages. *Id*. at 206. For the purposes of deciding the case, the Supreme Court assumed that this was a proper understanding of the Constitution. *Ibid*.[6] The Court nonetheless held that Congress had the authority under the Spending Clause to condition federal funds on a State's waiver of that constitutional right. "[O]bjectives not thought to be within" Congress's power to regulate directly "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id*. at 207.

The Supreme Court applied this principle to Spending Clause waivers of sovereign immunity in *College Savings Bank*, holding 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." 527 U.S. at 686 (citing *Dole*). See also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (citing *Dole* for proposition that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). This holding was entirely consistent with the

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[6] The State thus mischaracterizes *Dole* when it says (Resp. 11) the case "did not implicate a constitutional right."

holding of *Seminole Tribe*, which did not establish an absolute prohibition against private suits against States, but rather an immunity from "suits by private parties against *unconsenting* States." 517 U.S. at 72 (emphasis added). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

C. Conditioning Federal Funds On A Knowing And Voluntary Waiver Of Eleventh Amendment Immunity Does Not Violate The "Unconstitutional Conditions" Doctrine

The State argues that Spending Clause waivers nonetheless violate the Constitution because they are inconsistent with the "unconstitutional conditions" doctrine. Under that doctrine, the State asserts (Resp. 10), "Congress cannot condition the receipt of a benefit upon an infringement of [a] constitutional right." This argument fails for several reasons.

First, the Supreme Court has repeatedly held that Congress *can* constitutionally condition receipt of federal funds on knowing and voluntary waivers of sovereign immunity. Indeed, accepting the State's construction of the "unconstitutional conditions" doctrine would require not only disregarding the clear instruction given in *Atascadero* and *College Savings Bank*, but overturning the holdings of cases like *Dole*, which affirmed Congress's power to condition

highway funds on a waiver of the State's presumed Twenty-First amendment right to regulate alcohol, and *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), which held that Congress may condition approval of an interstate compact on a State's waiver of its Eleventh Amendment immunity. See also *College Savings Bank*, 527 U.S. at 686-687 (reaffirming both *Petty* and *Dole*).

Second, the State's "unconstitutional conditions" argument is based on an oversimplied description of the doctrine. That doctrine "for over a hundred years has bedeviled courts and commentators alike." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6 (1988). The doctrine does *not* prohibit the government from offering inducements in exchange for the waiver of constitutional rights in all cases. See *Adolph* v. *FEMA*, 854 F.2d 732, 735-736 (5th Cir. 1988). Indeed, in addition to the Spending Clause waiver cases, the Supreme Court has authorized the government to offer inducements in exchange for the waiver of constitutional rights in other settings.[7]

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[7] See, *e.g.*, *United States* v. *American Library Ass'n, Inc.*, 123 S. Ct. 2297, 2307-2309 (2003) (plurality) (rejecting First Amendment "unconstitutional conditions" challenge to requirement that libraries receiving certain federal aid must install internet filters on their computers); *Dolan* v. *City of Tigard*, 512 U.S. 374, 386, 390-391 (1994) (doctrine permits government to require the relinquishment of property without just compensation in exchange for a zoning variance, so long as

(continued...)

Instead of forming a simple, universal proscription, the principles behind the doctrine of unconstitutional conditions have generated different limitations on conditional offers of government assistance depending on the constitutional rights involved and the factual context of the offer. See *supra* n.7. The State has pointed to no case finding the doctrine violated in the context of Spending Clause waivers of Eleventh Amendment immunity. In fact, in rejecting such a challenge, the Third Circuit recently observed that the "unconstitutional conditions" doctrine has never been applied to the relations between co-sovereigns. See *Koslow*, 302 F.3d at 174. Instead, the Third Circuit stated that the doctrine was developed in light of the potentially coercive relationship between a government and individual citizens dependent on certain government "privileges" for daily living. See *ibid.* (citing *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926)). The

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[7](...continued)
there is an "essential nexus" between a "'legitimate state interest' and the permit condition exacted by the city," and a "rough proportionality" between the permit condition and the impact of the proposed development.); *Rust* v. *Sullivan*, 500 U.S. 173 (1991) (federal government may condition federal family planning funds on program participants' waiver of First Amendment right to discuss abortion with program clients); *Connick* v. *Myers*, 461 U.S. 138 (1983) (government may condition employment on limitation of employees' free speech rights); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited amounts on campaign); *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's consent to inspection of home without probable cause).

relationship between sovereigns is of a different nature, and States are protected against federal coercion by other doctrines, see, *e.g.*, *New York* v. *United States*, 505 U.S. 144 (1992) (discussing Tenth Amendment protections), including a series of limitations imposed on Congress's Spending Clause authority. See *Dole*, 483 U.S. at 207.[8] Subject to these limitations, however, the Supreme Court has recognized that Congress is not prohibited from requiring a State to waive immunity in order to receive federal funds. See *Atascadero*, 473 U.S. at 247; *College Savings Bank*, 527 U.S. at 686-687; *Alden*, 527 U.S. at 755.

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[8] As amicus, Texas argued below (Texas Amicus Br. 18-22) that Section 504 violates one such limitation by applying to all federal fund recipients, rather than only those that receive federal funds directly under the Rehabilitation Act itself. See *Dole*, 483 U.S. at 207-208 ("[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interests in particular national projects or programs.") (internal quotation marks and citation omitted); see also *Koslow*, 302 F.3d at 175-176 (rejecting relatedness challenge to Section 504); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002) (same), cert. denied, 123 S.Ct. 871 (2003). The issue is not properly before this Court. Louisiana made no "relatedness" challenge to Section 504 either to the panel, or in its response to the petition for rehearing. Nor is there any evidence in the record to show whether the Louisiana Department of Education accepts funds disbursed directly under the Rehabilitation Act. Accordingly, this Court should not address the argument. See *Christopher M.* v. *Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292-1293 (5th Cir. 1991) ("Absent exceptional circumstances, an issue waived by appellant cannot be raised by amicus curiae.").

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

Although Congress may use its Spending Clause authority 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 panel correctly held that Congress met this standard when it enacted the waiver provisions for Section 504 and the IDEA. See 325 F.3d at 615, 617; see also *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000).

As the panel observed, Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), 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.[9] In *Lane* v. *Pena*, 518 U.S. 187 (1996), the Supreme Court noted "the care with which

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[9] Similarly, Congress enacted Section 1403 in response to the Court's decision in *Dellmuth* v. *Muth*, 491 U.S. 223 (1989), which found a similar lack of clarity in the predecessor to the IDEA. See, *e.g.*, H. R. Rep. No. 544, 101st Cong., 2d Sess. 12 (1990).

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.

Section 2000d-7 and Section 1403 provide the unequivocal notice demanded by the Supreme Court's precedents because they are 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). Both make clear to States that the "consequences of their participation" in the relevant federal spending program is the obligation to submit to private suit in federal court to enforce the IDEA and/or Section 504. See *Pederson*, 213 F.3d at 876. The State has argued that the condition is not clear because Congress did not use the words "waiver" or "condition," and Texas has pointed (Texas Amicus Br. 17-18)[10] to other statutes that have used such terms. 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

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[10] "Texas Amicus Br." refers to the amicus brief filed by Texas before the panel.

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*, 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 238 F.3d 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 and Section 1403, the Telecommunications Act provision simply stated that States participating in the federal program would be subject to private suit in federal court. *Ibid.*

The State also suggests (Resp. 12) that Section 2000d-7 and Section 1403 cannot constitute a clear waiver condition because they represent 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 and Section 1403 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. 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, because it applies only to those agencies that accept federal financial assistance. See *Lesage*, 158 F.3d 217-218; *Pederson*, 213 F.3d at 876. 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 the State shall be subject to suit only if the State 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").[11] The consequences of accepting federal funds under Section 2000d-7 and Section 1403 are unambiguously clear.

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

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.[12] The panel in this case seemed to agree that this is the rule, at least in

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[11] Accordingly, as the panel explained, it makes no constitutional difference that Section 1403 is entitled "Abrogation of state sovereign immunity." See 325 F.3d at 617 n.12. See also *Marie O.* v. *Edgar*, 131 F.3d 610, 618 n.15 (7th Cir. 1997).

[12] Six Circuits have so held in Section 504 cases. See *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (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), petition for cert. pending, No. 02-1314; *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 (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). Two Circuits have reached the same conclusion about the IDEA. See *Oak Park Bd. of Educ.* v. *Kelly E.*, 207 F.3d 931 (7th Cir.), cert. denied, 531 U.S. 824

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ordinary cases. See 325 F.3d at 618 n.15; see also *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 and IDEA claims. See 325 F.3d at 616-617. Following, and expanding upon, the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the panel noted that Section 2000d-7 and Section 1403, along with the abrogation provision of the ADA, could each 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 panel concluded, 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

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[12](...continued)
(2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999).

and the IDEA 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.[13]

The panel opinion is wrong in two respects. First, it fails to apply the proper test for a knowing waiver of sovereign immunity. Second, it wrongly

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[13] This rationale could have been applied in *Pederson* to invalidate the State's waiver of sovereign immunity to claims under Title IX, since the State could have reasonably believed that Section 2000d-7 abrogated its immunity to Title IX claims as well as to claims under Section 504. See *Pederson* v. *Louisiana State Univ.*, 201 F.3d 388, 404-407 (5th Cir. 2000) (original panel opinion holding Section 2000d-7 validly abrogated State's sovereign immunity to Title IX claims). The same argument could be made with respect to the other statutes identified in Section 2000d-7, including Title VI and the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, and other federal statutes "prohibiting discrimination by recipients of Federal financial assistance," such as the IDEA and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq*. The practical effect of extending the panel's rationale to such cases would, however, depend on whether the courts concluded that Section 2000d-7 could operate to constitutionally abrogate the fund-recipient's sovereign immunity. For example, finding that a State did not knowingly waive its sovereign immunity to a Title VI claim would have little practical impact in this Circuit, because this Court has already held that Section 2000d-7 validly abrogates the State's sovereign immunity to such claims. See *Lesage* v. *Texas*, 158 F.3d 213, 217-218 (5th Cir. 1998), overruled on other grounds, 528 U.S. 18 (1999). Accordingly, it is difficult to approximate how many cases might be affected by adoption of the panel's rationale. The United States is aware of at least five Section 504 cases pending in this Court that could be affected. See *Miller* v. *Texas Tech. Univ.* (No. 02-10190); *Johnson* v. *Louisiana Dep't of Educ.* (No. 02-30318); *August* v. *Mitchell* (No. 02-30369); *Thomas* v. *University of Houston* (No. 02-20988); *Randolph* v. *Texas Rehab. Comm'n* (No. 03-50538).

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.

A. Acceptance Of Federal Funds In The Face Of The Clear Conditions Of 42 U.S.C. 2000d-7 And Section 1403 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 panel in this case, 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.[14]

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[14] 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 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. 12, *supra*.

This test was derived from the Supreme Court's decision in *Atascadero*. 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." 473 U.S. 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 immunity," *ibid*., *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.[15] In *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

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

established if "the state elects to engage in the conduct or transaction after such legal notice has been given." *Id*. at 644.

The 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. The Court began by acknowledging that it has "required a 'clear' indication of the State's intent to waive its 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 would constitute a valid waiver of the State's sovereign immunity. See 535 U.S. at 621-622.[16] Therefore, the State argued, the Attorney General's removal of the case to federal court should not be found to constitute a "clear declaration" of the State's intent to waive its sovereign immunity.

The panel's rationale in this case 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,

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

rejected the argument and held that the State had validly waived its sovereign immunity. See *id*. 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." 535 U.S. 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 Or IDEA Claims Was Already Abrogated Even Before The State Accepted Federal Funds

The panel departed from the standard test for a knowing Spending Clause waiver because it 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 panel's view, prior to *Garrett* the State could have reasonably believed that Congress had already taken away its sovereign immunity to Section 504 and IDEA claims long before the State had a chance to waive it through acceptance of the clearly conditioned federal funds. See 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, Section 1403 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 and IDEA claims even if the State declined federal funding.

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

The State could not reasonably believe that anything in the ADA would abrogate its sovereign immunity to claims under Section 504 or the IDEA, 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 or the IDEA could count as a "violation of this chapter."

The 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 or the IDEA. Indeed, the State has never argued that it had such a belief (see *Johnson* Br. 36-38 (alleging solely that State believed its sovereign immunity had been abrogated by Section 2000d-7)). However, the Second Circuit's decision in *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. 280 F.3d at 114.[17] But such a belief would not make the waiver unknowing. What must be

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[17] 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 *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.

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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 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

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[17](...continued)
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).

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).[18] 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* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not

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[18] 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.

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.").

In any case, even if the substantive overlap of Title II and Section 504 could justify a State's confusion about the status of its sovereign immunity to Section 504 claims, this rationale could not possibly be extended to the IDEA. As discussed in our amicus brief to the panel (U.S. Amicus Br. 13-18), while overlapping in some respects, the ADA and the IDEA also impose different obligations in many applications. For example, the IDEA requires schools to prepare an "individualized education program" for disabled students, see 20 U.S.C. 1414(d), while the ADA does not. Conversely, a school may be required under the ADA to install wheelchair ramps, accessible bathrooms and curb ramps at the school, even if failing to provide these measures would not deprive disabled students of a "free appropriate education" in violation of the IDEA. Compare *Board of Education* v. *Rowley*, 458 U.S. 176, 188-189 (1982) with 20 C.F.R. 31.150(a), (d)(2) and 20 C.F.R. 35.151(a), (e).

2. Even If The State Believed That Section 2000d-7 And Section 1403 Were Valid Abrogation Provisions, The Provisions 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 and IDEA claims had already been abrogated by Section 2000d-7 and Section 1403. 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 and Section 1403 authorize suits only against State agencies that receive the relevant federal funds,[19] only if the State voluntarily chooses to accept those funds, and only for the duration of the funding period.[20] These differences are critically

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[19] The language of Section 2000d-7 and Section 1403 may at first appear absolute, providing a blanket authorization for suits against States under Section 504 and the IDEA. These two statutes, however, apply 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 act or failure to act by any *recipient of Federal assistance* * * * under [Section 504]") (emphasis added); 20 U.S.C 1415(a), (i)(2) (authorizing IDEA suits as part of procedural safeguards that apply to "[a]ny State educational agency, State agency, or local educational agency *that receives assistance under this subchapter*") (emphasis added). Accordingly, under any reasonable interpretation of the statutes as a whole, Congress limited its attempted abrogation to those States that receive the relevant federal financial assistance.

[20] A state agency is not subject to liability and suit under Section 504 in perpetuity (continued...)

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 the provisions for Section 504 and the IDEA, in contrast, are clearly conditional. They take effect if, and only if, the State voluntarily chooses to accept the relevant federal funds. If the State does not take the funds, no plausible reading of either provision would subject the State to suit under either Section 504 or the IDEA.

Thus, when it was deciding whether to accept federal funds for the coming school year, the Louisiana Department of Education's sovereign immunity to IDEA and 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 submit to private suits under Section 504. In choosing to accept federal funds that were

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[20](...continued)
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). Likewise, IDEA funds and their concomitant obligations are extended for a single fiscal year at a time. See 20 U.S.C. 1412(a).

clearly available only to those States willing to submit to enforcement proceedings in federal court, the State knowingly waived its sovereign immunity.[21]

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

An effective waiver of sovereign immunity must be both knowing and *voluntary*. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). In describing the requirements for valid Spending Clause legislation, the Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), observed that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id*. at 211 (citation omitted). The State argues that such circumstances have arisen in this case, pointing to the size of the federal grants offered in exchange for the State's promised compliance with the attached conditions, and the State's decision to rely substantially on federal (rather than state, local or private) funds for its education programs.[22] The State has not

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[21] Even if this Court adopted the panel's reasoning, this would not preclude Plaintiff's request for injunctive relief to end what he alleged was an on-going violation of his federal rights.

[22] This argument turns on the State's factual assertion (Resp. 13) that federal funds constitute approximately $804 million, or about 75% of the state Department of Education's budget, and its factual claim that "the Louisiana

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identified any case from the Supreme Court or any court of appeals that has ever accepted such a constitutional argument.[23] This Court should not accept it either.

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[22](...continued)
Department of Education simply has no choice but to submit to the terms of the Rehabilitation Act." These facts are not in the record, undoubtedly because the State never asserted that it was unconstitutionally coerced until the panel ordered supplemental briefing on the sovereign immunity issues. As the D.C. Circuit has observed, "[e]ven a rough assessment of the degree of temptation would require extensive and complex factual inquiries," *Oklahoma* v. *Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981), particularly regarding the State's assertion that it has no alternatives to accepting federal funding. The United States certainly does not concede that the State has no choice but to accept federal funds, and has not undertaken to evaluate the accuracy of the State's financial assertions. However, because this Court may properly hold that the State fails to state a valid coercion claim, even assuming the truth of its financial assertions, the United States will address the argument in this brief.

[23] The State has suggested (Resp. 14) that the Fourth Circuit accepted a coercion argument against the IDEA in *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc). That suggestion is inaccurate. *Riley* involved an attempt by the United States Department of Education to withhold Virginia's IDEA allotment for non-compliance with regulatory requirements regarding expulsion of disabled students. The en banc court resolved the case by adopting the portion of the dissenting panel opinion that held the relevant regulations invalid. See *id*. at 561. A minority of the full court also joined a separate portion of the panel dissent that suggested in dicta that even if the regulation had been valid, enforcing the regulation by withholding the State's entire IDEA allotment would raise serious Tenth Amendment questions. See *id*. at 570. The Fourth Circuit subsequently held, in *West Virginia* v. *United States Department of Health & Human Services*, 289 F.3d 281 (4th Cir. 2002), that such concerns were not raised by requiring a State to agree to a funding condition in order to be eligible for Medicaid assistance, since the statute permitted a sanction for non-compliance of less than full withholding of the entirety of the State's Medicaid allotment. The same is true in this case. While the IDEA does not foreclose the United States

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The exact nature of the choice made by the State should be made clear at the outset. A State that wishes to avoid suit under the IDEA need only abstain from accepting IDEA funds. See 20 U.S.C. 1403(a), 1412(a). Thus, the State may accept other forms of federal financial assistance, even educational assistance, without waiving its sovereign immunity to private IDEA actions. The obligations of Section 504 are also limited, applying on an agency-by-agency basis. See, *e.g.*, *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). Accordingly, a State may preserve an agency's sovereign immunity to Section 504 claims without having to decline federal funding for all state programs. *Ibid.*

While the Supreme Court in *Dole* recognized that an offer of financial assistance might result in unconstitutional coercion under "some circumstances," it also cautioned that every congressional spending statute "is in some measure a temptation." 483 U.S. at 211. "[T]o hold that motive or temptation is equivalent to coercion," the Court warned, "is to plunge the law in endless difficulties." *Ibid.* The Court in *Dole* thus reaffirmed the default assumption, founded on "a robust

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[23](...continued)
from cutting off all federal funds to a state agency that fails to comply with the statute, nothing in the IDEA compels the federal government to impose that remedy. See 20 U.S.C. 1416(a)(2) (authorizing partial withholding of IDEA funds in response to violations).

common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid.* (citation omitted).

Accordingly, the Ninth Circuit has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997). See also *Nevada* v. *Skinner*, 884 F.2d 445, 448 (1989); *Oklahoma* v. *Schweiker*, 655 F.2d 401, 413-414 (D.C. Cir. 1981).

Three courts of appeals have recently rejected coercion challenges to Section 504. The Eighth Circuit, sitting en banc, explained its conclusion as follows:

> To avoid the effect of Section 504 on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities. See, *e.g.*, *Lau* v. *Nichols*, 414 U.S. 563 (1974) (upholding Congress's power to condition federal education funds on non-discrimination in the funded programs). In these cases, the Court has found no coercive interference with state sovereignty because the State could follow the "'simple expedient' of not yielding...." *State of Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127, 143-44 (1947). Likewise here, the Arkansas Department of Education can avoid the requirements of Section 504 simply by declining

> federal education funds. The sacrifice of all federal education funds, approximately $250 million or 12 per cent. of the annual state education budget according to the 1999-2001 Biennial Budget, 28-29, would be politically painful, but we cannot say that it compels Arkansas's choice.

Jim C., 235 F.3d at 1081-1082 (parallel citations omitted). The Third Circuit similarly rejected a State's coercion challenge to Section 504, concluding that while "declining all federal funds" for a particular agency "would doubtless result in some fiscal hardship – and possibly political consequences – it is a free and deliberate choice." *Koslow* v. *Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003). The Ninth Circuit reached the same conclusion in *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003).

While this Court has not yet considered a coercion challenge to Section 504 or the IDEA, it has rejected similar claims against other federal spending programs. In *Adolph* v. *FEMA*, 854 F.2d 732 (5th Cir. 1988), this Court rejected the argument that Congress had unconstitutionally coerced local governments into enacting flood-plain management ordinances in exchange for federal flood insurance. "Congress traditionally has been sustained in enacting such programs to encourage state and local participation in the achievement of federal legislative goals," this Court observed. *Id*. at 735-736. "[T]o comply with a condition

attached to a federal benefit is not to be equated with federal coercion." *Id*. at 736 n.3 (characterizing *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589-90 (1937)).

Similarly, in *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997), this Court rejected the claim that Congress unconstitutionally coerced the State of Texas into providing emergency medical care to undocumented aliens by conditioning receipt of Medicaid funding on that requirement:

> We agree with our colleagues in the Second, Third, Ninth, and Eleventh Circuits that state expenditures on medical and correctional services for undocumented immigrants are not the result of federal coercion. * * * The Supreme Court has recognized that the tenth amendment permits Congress to attach conditions to the receipt by the states of federal funds that have the effect of influencing state legislative choices. "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties." This we will not do.

Id. at 666 (quoting *Dole*, 483 U.S. at 211) (footnotes and other citations omitted). This Court reached that conclusion even though the challenged conditions were attached to very large grants of federal aid upon which States heavily rely in order to provide important medical services to indigent state residents. See also *Florida* v. *Mathews*, 526 F.2d 319, 326 (5th Cir. 1976) (offer of Medicaid funds is an "inducement [that] does not infringe upon any power reserved to the state under the Tenth Amendment").

This Court applied the same approach to a constitutional challenge to the Education of Handicapped Children Act, the predecessor to the IDEA, in *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983). This Court acknowledged that some have argued that "the notion that state participation in national spending programs is voluntary is nothing more than a legal fiction." *Id*. at 1037 n.36 (citation omitted). This Court, however, did not accept that view and held, instead, that the State's voluntary decision to accept the federal funds and the attached conditions precluded a Tenth Amendment challenge. See *id*. at 1036-1037.

Other courts of appeals have also rejected coercion challenges to conditions attached to large federal grant programs upon which States were heavily dependent. See, *e.g.*, *West Virginia* v. *United States Dep't of Health & Human Servs.*, 289 F.3d 281, 284 & n.2 (4th Cir. 2002) (enforcing Medicaid requirement where State received more than $1 billion in federal funds, representing approximately 75% of the State's Medicaid budget); *California* v. *United States*, 104 F.3d at 1092 (Medicaid conditions not coercive); *Padavan* v. *United States*, 82 F.3d 23, 29 (2d Cir. 1996) (same); *Chiles* v. *United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) (same), cert. denied, 517 U.S. 1188 (1996); *Schweiker*, 655 F.2d at 413-414 (same); see also *Kansas* v. *United States*, 214 F.3d 1196, 1198, 1201-

1202 (10th Cir.) (enforcing condition in federal welfare program that provided $130 million, constituting 66% of state funds for child support enforcement program), cert. denied, 531 U.S. 1035 (2000); *United States* v. *Regents of Univ. of Minn.*, 154 F.3d 870, 873 (8th Cir. 1998) (False Claims Act, 31 U.S.C. 3729-3733); *City of Sacramento* v. *California*, 156 Cal. App. 3d. 182, 195-196 (3d Dist. Ct. App. 1984) (federal unemployment compensation program); *New Hampshire Dep't of Employment Sec.*, 616 F.2d at 246 (same); *County of Los Angeles* v. *Marshall*, 631 F.2d 767, 769 (D.C. Cir.) (same), cert. denied, 449 U.S. 1026 (1980).

These cases are consistent with Supreme Court precedent. The case cited by the Supreme Court in *Dole* for the proposition that a financial inducement might, in some circumstance, become unconstitutionally coercive was *Steward Machine Company* v. *Davis*, 301 U.S. 548 (1937). See *Dole*, 483 U.S. at 211. In *Steward*, the Court acknowledged the possibility of coercion while rejecting a coercion challenge against the portion of the Social Security Act which created the national unemployment compensation system:

> Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between State and nation. * * * We cannot say that [the State] was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence * * * .

Id. at 590. The Court similarly concluded that a State was acting of its own will in accepting conditions attached to federal funds in *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127 (1947). In that case, the Court rejected the claim that the "coercive effect" of conditioning receipt of federal financial assistance on compliance with the requirements of the Hatch Act, violated the Tenth Amendment. *Id*. at 143-44. The Court reached this conclusion even though compliance with the Hatch Act is a condition of receiving any federal financial assistance at all. See 5 U.S.C. 1501. The same is true of Title VI, which was the model for Section 504. See 42 U.S.C. 2000d *et seq*. Nonetheless, in *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court rejected the claim that Title VI was beyond Congress's power under the Spending Clause. "Whatever may be the limits of [the Spending Clause] power, they have not been reached here." *Id*. at 569 (citing *Steward Machine Company*, 301 U.S. at 590 (discussing possibility of unconstitutional coercion)).

Other Supreme Court decisions further demonstrate that States may be put to difficult or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned

the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id.* at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id.* at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[24]

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[24] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "[w]hether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's

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Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, * * * [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[25]

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[24](...continued)
judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976).

[25] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman*, 400 U.S. at 317-318 ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, Congress may constitutionally condition federal funding to a

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Thus, the Supreme Court has held that the federal government can place conditions on federal funding that require state agencies to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d at 1202 ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)).[26]

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[25](...continued)
recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); see also *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

[26] Counsel for the State informs us that the State may also argue that its waiver of sovereign immunity was ineffective because the state officials who solicited the federal funding lack state law authority to waive the State's sovereign immunity.
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CONCLUSION

For the foregoing reasons, the Eleventh Amendment does not bar Plaintiff's Section 504 and IDEA claims against the state defendants.

Respectfully submitted,

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[26](...continued)
This Court should not address that argument en banc. The panel did not address the question and the State did not make this argument in either of its briefs before the panel – except through a reference to the brief in *Johnson* v. *Louisiana Department of Education*, No. 02-30318, which briefly raised the issue – or in its response to the petitions for rehearing. Moreover, the State of Texas has raised a similar argument in *Frew* v. *Hawkins*, No. 02-628, which will be decided next Term in the Supreme Court. The United States has fully briefed the issue in a number of cases currently pending before this Court. See, *e.g.*, *Espinoza* v. *Texas Dep't Pub. Safety*, No. 02-11168; *Thomas* v. *Univ. Houston*, No. 02-20988; *Danny R.* v. *Spring Branch Indep. Sch. Dist.*, No. 02-20816. If necessary, this Court may remand this case to the panel to consider the argument, if necessary, at the conclusion of its en banc proceedings.

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 12th day of August, 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 13,713 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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