No. 01-16544

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA A. PUGLIESE,

Plaintiff - Appellant

v.

JACK DILLENBERG, in his individual capacity and official capacity as Director of the Arizona Department of Health Services, WAYNE LEBLANCE, in his individual capacity and official capacity as Assistant Chief of the Arizona Department of Health Services, Office of Human Rights, STATE OF ARIZONA,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

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ARGUMENT

In its Answering Brief, the State does not defend the district court's holding that the Constitution prohibits Congress from conditioning receipt of federal financial assistance on a knowing and voluntary waiver of its sovereign immunity to claims under Section 504. See *Pugliese* v. *Dep't of Health & Human Servs.*, 147 F. Supp. 2d. 985, 989-991 (D. Ariz. 2001). Instead, the State argues (Br. 6-18) that its acceptance of federal funds was not "knowing," that (Br. 18-19) its consent to suit was unconstitutionally coerced, and that (Br. 20-22) enforcing its waiver of sovereign immunity would violate "community standards of fairness."

The United States fully addressed the State's coercion argument in the government's opening brief (see U.S. Br. 11-17). We respond further to the State's other arguments below.

I. BY ACCEPTING FEDERAL FUNDS CLEARLY CONDITIONED ON A WAIVER OF ITS SOVEREIGN IMMUNITY UNDER SECTION 2000d-7, THE STATE KNOWINGLY WAIVED ITS SOVEREIGN IMMUNITY TO PLAINTIFFS' SECTION 504 CLAIMS

The State first argues (Br. 9-14) that Section 2000d-7 fails the constitutional requirement that "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (citation and quotation marks omitted). During the relevant time period when the State accepted federal funds, its asserts (Br. 11), "neither § 2000d-7 itself nor the cases interpreting it clearly required states to waive their sovereign immunity" in exchange for federal funding. Instead, the State argues (*ibid.*), "the clearly established law at the time was that § 2000d-7 had *abrogated* the states' immunity, regardless of their agreement or disagreement." For this reason, the State asserts that Section 2000d-7 failed (at least in 1994-1995) to clearly condition the acceptance of federal funds on a knowing and voluntary waiver of sovereign immunity. Relying on the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), and the Fifth Circuit's decision in *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194 (5th Cir. 2003), the State contends (Br. 14-18), that its acceptance of federal funds under these circumstances could not constitute a knowing waiver of sovereign

immunity. These arguments are barred by the law of the circuit and meritless as well.

A. The State's "Clear Statement" And "Knowingness" Arguments Are Precluded By Circuit Precedent

As the State appears to recognize (Br. 13) this Court has already held that Section 2000d-7 "manifests a clear intent to condition a state's participation [in a federal funding program] on its consent to waive its Eleventh Amendment immunity." *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997); see also *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3284 (U.S. Jan 13, 2003); *Vinson* v. *Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3021 (U.S. Jan 13, 2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir. 2001), opinion amended, 271 F.3d 910, cert. denied, 122 S. Ct. 2591 (2002); *Armstrong* v. *Davis*, 275 F.3d 849, 878-879 (9th Cir. 2001). The State attempts to avoid the binding effect of this precedent by arguing that even if Section 2000d-7 is clear *now*, it was not clear when the State accepted the funds relevant to this case. That is, when it "accepted funds in 1994 and 1995," the State says (Br. 11), "it was not clear that 42 U.S.C. § 2000d-7 expressed Congress's intent to require a waiver of immunity in exchange for federal funds." In the State's view (Br. 13-14), it was only after this Court's decision in *Clark*, construing Section 2000d-7 as a valid waiver provision, that a State would be on notice that federal funds were conditioned on a knowing and voluntary waiver of sovereign immunity. This

claim is meritless. The decision in *Clark* examined the language of Section 2000d-7 and concluded that the language of that provision, *by itself*, manifested "a clear intent to condition" federal funds on a State's "consent to waive its Eleventh Amendment immunity." 123 F.3d at 1271.[1] Nothing in the statutory language of Section 2000d-7 changed between 1994 and this Court's decision in *Clark* in 1997. The State clearly thinks that *Clark* was wrong in finding this language unambiguous, but this panel is bound by *Clark*.

The State's reliance on *Pace* and *Garcia* is also precluded by law of the circuit. Those cases hold that in certain circumstances, a State might accept clearly conditioned federal funds *without* knowingly waiving sovereign immunity. See *Pace*, 2003 WL 1455194 at *5-*6; *Garcia*, 280 F.3d at 115 & n.5. In contrast, this Court has held that any State that applies for and accepts federal funds in the face of Section 2000d-7 *necessarily* effectuates a knowing and voluntary waiver of its Eleventh Amendment immunity to Section 504 claims. See, *e.g.*, *Vinson*, 288 F.3d at 1151 ("States are subject to suit in federal court under section 504 of the Rehabilitation Act if they accept [federal] funds."); *Clark*, 123 F.3d at 1271 ("Because California accepted federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment."); *Douglas*,

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[1] The Court in *Clark* could not have relied on anything other than the language of the statute since the Supreme Court had made perfectly clear that the requisite clarity of a waiver provision must be found in the statutory language itself. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243, 247 (1985).

271 F.3d at 821 ("[W]e hold that by accepting federal Rehabilitation Act funds, California has waived its sovereign immunity under the Rehabilitation Act."); see also *Lovell*, 303 F.3d at 1051-1052. Thus, the courts in both *Pace* and *Garcia* specifically noted that their holdings conflicted with the law of the Ninth Circuit. See *Pace*, 2003 WL 1455194 at *5 n.13; *Garcia*, 280 F.3d at 115 n.5. Similarly, in *Douglas*, Judge O'Scannlain recognized that adopting the *Garcia* approach would require overruling circuit precedent, and he urged the Court to grant rehearing en banc. See *Doulgas* v. *California Dep't of Youth Auth.*, 285 F.3d 1226 (9th Cir. 2002). En banc review was not granted, see *ibid.*, and Judge O'Scannlain subsequently recognized that the correctness of the *Garcia* decision was no longer an open question in this Circuit. *Vinson*, 288 F.3d 1157 (O'Scannlain, J., dissenting) (noting dissent in *Douglas* but recognizing, "however, that we have recently reaffirmed that by accepting federal funds under the Rehabilitation Act, a State waives its sovereign immunity from suits by individuals in federal court.") (citation omitted).

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

Even if circuit precedent did not bar adoption of *Pace* and *Garcia*, those decisions are founded on a series of mistakes that should not be repeated.

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

As an initial matter, both cases fail to recognize that the Supreme Court has already established that a State's application for and acceptance of clearly

conditioned federal funds constitutes a knowing and voluntary waiver of sovereign immunity. In *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), the district court "properly recognized that the mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Id*. at 246-247. "The court erred, however, in concluding that because various provisions of the Rehabilitation Act are addressed to the States, a State necessarily consents to suit in federal court by participating in programs funded under the statute." *Id*. at 247. The problem with this reasoning, the Supreme Court explained, was that the Rehabilitation Act, as it was written at the time, "falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Ibid*. "Thus," the Court explained, "there was no indication that the State of California consented to federal jurisdiction." *Ibid*.

As this and other courts have recognized, the clear implication of the Court's teaching in *Atascadero* was that acceptance of federal funds in the face of a statute that *succeeded* in "manifesting a clear intent to condition participation * * * on a State's consent to waive its constitutional immunity," *would* constitute a State's knowing waiver of that immunity. *Ibid*. The purpose of the Court's clear statement rule is to ensure that if a State voluntarily applies for and accepts federal funds that are conditioned on a waiver of sovereign immunity, the courts may fairly conclude that the State has "excercise[d] [its] choice knowingly, cognizant of the consequences of [its] participation." *Pennhurst State Sch. & Hosp.* v.

Halderman, 451 U.S. 1, 17 (1981). When a funding statute meets the clear statement standard, therefore, a State cannot plausibly claim that its acceptance of the funding conditions was unknowing.

Accordingly in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), 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. The Court recognized that the same analysis applies to a waiver of sovereign immunity as a condition for federal funding. See *id*. at 678 n.2. A waiver may be found in a State's "acceptance" of a federal grant because a State's acceptance of funds in the face of clearly stated funding conditions necessarily constitutes a "clear declaration," *id*. at 676, that the State has agreed to the condition.

The Court's recent decision in *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), further supports this view. In *Lapides*, the Court acknowledged that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court found such a "clear indication" in a State's removal of state law claims to federal court. "[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 state 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 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. Indeed, it was not until its decision in *Lapides* that the Court overruled this aspect of *Ford Motor Co.* See 535 U.S. at 623. Importantly, however, the Court did *not* hold that a State removing claims to federal court prior to *Lapides* would fail to "knowingly" waive its sovereign immunity. Instead, the Court applied a simple, objective rule and concluded that the removal constituted a valid waiver of a State's sovereign immunity. *Id*. at 623.

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 voluntary 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 as a matter of federal law to ensure that the State's waiver of its sovereign immunity is knowing.

2. No State Could Reasonably Believe That Section 2000d-7 Abrogated Its Sovereign Immunity Even If The State Refused To Accept Federal Funds

Both *Garcia* and *Pace* are also premised on the erroneous assumption that a State could have reasonably believed that its sovereign immunity to claims under Section 504 was already abrogated at the time the State was deciding whether or not to accept federal funds. The State makes the same argument in this case, asserting (Br. 11) that in 1994, "the clearly established law at the time was that § 2000d-7 had *abrogated* the states' immunity, regardless of their agreement or disagreement." This is simply not correct. Even if Section 2000d–7 is seen as an abrogation provision, it is an abrogation provision that only applies if the State voluntarily accepts federal funds, since Section 504, by its terms, applies only to programs "receiving Federal financial assistance." 29 U.S.C. 794(a). A State that has not yet accepted federal funds for the relevant time period is not subject to the requirements of Section 504 or to suit under Section 2000d-7.

Accordingly, the State is wrong in asserting (Br. 11) that it "had no immunity to waive in exchange for federal funds." In 1994, when it was deciding whether to accept federal funds, its sovereign immunity was intact and it 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

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

II. THE "COMMUNITY STANDARDS OF FAIRNESS" TEST DISCUSSED IN *BARNES* V. *GORMAN* HAS NO APPLICATION TO THIS CASE

The State further argues that the Supreme Court's decision in *Barnes* v. *Gorman*, 536 U.S. 181 (2002), precludes finding a waiver of sovereign immunity in this case, for two reasons, neither of which has any merit.

First, the State observes (Br. 20-21) that the Court in *Barnes* required that Congress make clear the conditions attached to spending programs, and claims that Section 2000d-7 did not provide the State adequate notice that acceptance of federal funds would subject the State to private suits. This argument simply restates the State's prior, inaccurate, assertion that Section 2000d-7 failed to inform States that a knowing and voluntary waiver of the State's sovereign immunity to Section 504 claims was a condition for receipt of federal funds.

Second, the State argues (Br. 21) that holding the State to its waiver of sovereign immunity would violate "community standards of fairness" and, therefore, would be unconstitutional under *Barnes*. As discussed above, the State was on notice that it could not both accept federal funds and maintain its sovereign immunity to suits under Section 504. There is nothing unfair in enforcing that bargain. In any case, the State's argument misinterprets the constitutional relevance of "community standards of fairness" under *Barnes*.

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

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

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

Id. at 2102 (citations and internal punctuation omitted). The Court concluded that it need not choose between these theories, or even decide whether the doctrine of

implied contract terms was relevant, because under any version of the theory, punitive damages would not be authorized. *Ibid*.

As is clear from the above description, *Barnes* had nothing to do with the Eleventh Amendment[2] or any constitutional limitation on Congress's Spending Clause authority. The Court's reference to "community standards of fairness" was simply a potential device for filling a void in the statute,[3] not an invitation to lower courts to strike down any federal funding condition the court deems unfair. When the question has been squarely before it, the Supreme Court has set forth the constitutional limitations on Congress's power to condition federal funds. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Complying with "community standards of fairness" is not among them. See *ibid*. The Supreme Court has never held that complying with community standards of fairness is a such a conduction but has, instead, explained the question of what conditions are

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

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

fair and appropriate is one for Congress, subject to little, if any, second-guessing by the courts. See *id*. at 207 n. 2.

CONCLUSION

The Eleventh Amendment is no bar to Plaintiff's Section 504 claim. The district court's judgment should be reversed.

Respectfully submitted,

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RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is also at issue in *Miranda B.* v. *Kitzhaber*, No. 01-35950 (oral argument heard Mar. 6, 2003).

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a reply brief of no more than 15 pages.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Notice of Intervention Pursuant to 28 U.S.C. 2403(a) were sent by first-class mail postage pre-paid this __ day of May, 2003 to the following counsel of record:

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