ORAL ARGUMENT NOT REQUESTED

Nos. 00-3315, 00-3332

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNEST ROBINSON, et al.,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor-Appellee

v.

STATE OF KANSAS, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Hon. Monti L. Belot, United States District Judge)

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

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BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

STATEMENT OF JURISDICTION

Plaintiffs filed a complaint in the United States District Court for the District of Kansas, alleging that the State of Kansas and its officers violated, *inter alia*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Section 504 of the Rehabilitation Act of 1973, *et seq.* For the reasons discussed in this brief, the district court had jurisdiction over this action pursuant to 28 U.S.C. 1331.

This Court has jurisdiction over these appeals with regard to Eleventh Amendment immunity pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether 42 U.S.C. 2000d-7, which removes States' Eleventh Amendment immunity from discrimination suits brought under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, is a valid exercise of Congress's authority under the Spending Clause.

2. Whether 42 U.S.C. 2000d-7, which removes States' Eleventh Amendment immunity from discrimination suits brought under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any person "on the ground of race, color, or national origin." Section 504 of the Rehabilitation Act of 1973, which was modeled on Title VI, prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any "qualified individual with a disability." 29 U.S.C. 794(a). Individuals alleging violations of these prohibitions have a private right of action against persons receiving federal financial assistance and their officials. See *Pushkin* v. *Regents of the Univ. of Colo.*, 658 F.2d 1372, 1381 (10th Cir. 1981); see also *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677, 705-706 (1979).

In 1985, the Supreme Court held that the language of Section 504 was not clear enough to evidence an intent by Congress to authorize private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986). Section 2000d-7 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. According to the allegations of the complaint, defendants, the State of Kansas and various state officials, receive federal financial assistance (App. 41 ¶ 25). Plaintiffs allege that, in distributing this money, along with state funds, defendants use a formula that discriminates on the basis of race, national origin, and disability without any substantial legitimate justification (App. 41 ¶ 25, 44-45 ¶¶ 40-41, 46 ¶¶ 46-47, 47 ¶¶ 52-53).

3. Defendants moved to dismiss on the basis of Eleventh Amendment immunity, arguing that 42 U.S.C. 2000d-7 was unconstitutional. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the provision. The district court rejected defendants' motion to dismiss, holding that defendants had waived their immunity by accepting federal financial assistance (App. 18-20). This timely appeal followed.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under Title VI and Section 504 to remedy discrimination on the basis of race and disability. Section 2000d-7 contains a clear statement that States shall not have Eleventh Amendment immunity for such suits. This provision is a valid exercise of Congress's power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put States on notice that by accepting federal funds they waived their

Eleventh Amendment immunity to discrimination suits under Title VI and Section 504.

In addition, Section 2000d-7 is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. The discrimination prohibited by Title VI – discrimination on the basis of race and national origin – is clearly within Congress's power to enforce the Equal Protection Clause. Section 504's obligations can also be upheld as valid Section 5 authority, just as this Court has recently upheld the Americans with Disabilities Act in *Cisneros* v. *Wilson*, 226 F.3d 1113 (10th Cir. 2000). Under either power, Section 2000d-7's removal of defendants' Eleventh Amendment immunity for suits under Title VI and Section 504 is constitutional and the district court had jurisdiction over the action.

ARGUMENT

I

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY TO SUITS UNDER TITLE VI AND SECTION 504

Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 * * * [or] title VI of the Civil Rights Act of 1964." The Supreme Court has characterized Section 2000d-7 as meeting its requirement that Congress

unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See *Lane* v. *Peña*, 518 U.S. 187, 198 (1996). Indeed, defendants concede (Br. 18) that Congress intended to remove their Eleventh Amendment immunity. The only question is whether Section 2000d-7 is a valid exercise of any of Congress's powers.

As explained below, defendants waived their Eleventh Amendment immunity to Title VI and Section 504 suits when they elected to accept federal funds after the effective date of Section 2000d-7. Moreover, as we note in Part II, Congress properly removed Eleventh Amendment immunity from such claims pursuant to its authority under Section 5 of the Fourteenth Amendment.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under Title VI and Section 504*

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

Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI and Title IX of the Education Amendments, each of which applied to those "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

Section 2000d-7 makes unambiguously clear that Congress intended States to be amenable to suit in federal court under Title VI and Section 504 if they accepted federal funds. The Supreme Court, in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. As the Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or

sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554. Section 2000d-7 thus puts States on notice that part of the "contract" for receiving federal funds is the requirement that each agency receiving funds consent to suit in federal court for alleged violations of Title VI and Section 504. The entire package (nondiscrimination obligation and removal of Eleventh Amendment immunity) is conditioned on the agency accepting the federal financial assistance.

The Fourth Circuit, after an extensive analysis of the text and structure of the Act, held in *Litman* v. *George Mason University*, 186 F.3d 544, 554 (1999), cert. denied, 120 S. Ct. 1220 (2000), that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." Every court to address this issue has agreed with *Litman* that the Section 2000d-7 language clearly manifests an intent to condition receipt of federal financial assistance on consent to waive Eleventh Amendment immunity. See *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), cert. granted on other grounds, 121 S. Ct. 28 (2000) (No. 99-1908); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); see also *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (addressing same language in 20 U.S.C. 1403),

cert. denied, 121 S. Ct. 70 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same).

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity*

Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States which voluntarily accept federal financial assistance. As the Supreme Court recently reaffirmed, when it elects to disburse federal funds, "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." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

1. States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank*, 527 U.S. at 674. Defendants nonetheless suggest (Br. 35-36) that Congress may not require the waiver of Eleventh Amendment immunity as a condition for receiving federal funds because Congress could not directly abrogate immunity under the Spending Clause. That is simply incorrect. The Supreme Court has explained that when exercising its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). Indeed, the Court held that even "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit

the range of conditions legitimately placed on federal grants." *Ibid*. (citing *Oklahoma* v. *Civil Serv. Comm'n*, 330 U.S. 127 (1947)). That is because conditioning the receipt of federal grants does not impose a direct restriction on States' immunity; they may choose to conform to federal requirements or to forego federal funds. See *Grove City College* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1203-1204 (10th Cir.) ("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. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)), cert. denied, 121 S. Ct. 623 (2000).

There is nothing unique about the Eleventh Amendment that would bar Congress from conditioning its spending on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court specifically noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits. Cf. *South Dakota* v. *Dole*, 483 U.S. 203 * * * (1987)." Similarly, in *College Savings Bank*, the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under

the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id*. at 678-679 n.2. The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id*. at 687.

2. In *In re Innes* (*Innes* v. *Kansas State University*), 184 F.3d 1275, 1281 (10th Cir. 1999), cert. denied, 120 S. Ct. 1530 (2000), this Court concluded that "*College Savings Bank* reaffirms the proposition that a waiver may be found in a state's acceptance of federal funds with conditions attached." *Innes* held that the Kansas State University (KSU) waived its immunity to suit by participating in a federal spending program despite the fact that neither "a Kansas statute or constitutional provision governing [the] case has expressly waived Eleventh Amendment immunity." *Id.* at 1278-1279. This Court held that so long as the state agency had the authority to participate in the federal program and it was sufficiently clear (either through the text of the federal statute or its regulations) that acceptance of the funds was conditioned on the waiver of Eleventh Amendment immunity, a fund recipient waived its immunity by accepting the funds. See *id*. at 1281-1282; see also *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 935-939 (10th Cir. 2000) (applying *Innes* to hold that state waived its immunity by participating in federal regulatory program), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593).

Defendants' attempts to distinguish *Innes* from this case are not persuasive. First, they contend (Br. 37-39) that the statutory grant of authority by which they accept federal financial assistance is different than the statutory authority of the agency in *Innes*. But state law "authorize[s] and empower[s]" the Board of Education to apply for federal funds and "to do all things necessary to comply with and carry out any such federal law or the rules and regulations promulgated thereunder by the federal government or any agency thereof." K.S.A. 72-6202; see also K.S.A. 72-7518 (Board may "receive and expend, or supervise the expenditure of, any * * * grant * * * made to the state board of education for furthering any phase of education"). This is no different than the language relied on in *Innes*, which "allow[ed] state educational institutions to contract with the United States Department of Education to apply for and receive federal funds and to make the funds available under existing [federal] law, rules, or regulations." 184 F.3d at 1281 (summarizing K.S.A. 76-723).[1]

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[1] *Innes* also held that it was appropriate to look to state statutes to determine whether the state agency was affirmatively prohibited from waiving its Eleventh Amendment immunity. 184 F.3d at 1284. As in *Innes*, defendants have pointed to no such law and thus this condition has been satisfied. We note, however, that this part of *Innes* is in tension with the Court's earlier decisions holding that engaging in voluntary conduct that federal law clearly deems to constitute a waiver of immunity is sufficient in itself, even if state law purports to bar such a waiver. See *Sutton* v. *Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1235-1236 (10th Cir. 1999); see also *McLaughlin* v. *Board of Trustees of State Colleges of Colo.*, 215 F.3d 1168, 1171 (10th Cir. 2000) ("in *Sutton* we held that removing the case to federal court and litigating the merits constituted an effective waiver despite statutory language precluding the Attorney General from waiving Eleventh Amendment immunity by entering an appearance and litigating the case").

Defendants also contend (Br. 39) that they have not agreed to comply with Title VI and Section 504, but only to make "'assurances' [that defendants] believe local public schools are following the law." But that claim cannot be reconciled with the statutes themselves, which on their face make clear that agencies receiving federal financial assistance are prohibited from discriminating. See *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987). In any event, the document they cite for that proposition (App. 70) does not say anything to that effect. To the contrary, that document notes that as part of their "consolidated state plan," the defendants are also submitting "the assurances in OMB Standard Form 424B." That form, signed by the Kansas Commissioner of Education on the same date, certifies that the applicant "[w]ill comply with all Federal statutes relating to nondiscrimination. These include * * * Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; * * * [and] Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps." (We have attached this signed assurance as Addendum A to this brief.) Thus, this case is controlled by *Innes*.[2]

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[2] Defendants also assert (Br. 39-40), that the State does not use the federal funds it receives, but simply passes them on to the local school districts. But it does not deny that it is "receiving" the funds, and this is all that the statute requires. In any event, defendants' factual assertion, unsupported by any record citation, is difficult to credit. One recent study of the administration of 10 major federal education programs found that, depending on the program, the Kansas Department of Education spent between 1.5% and 23.8% of the funds itself, rather than simply

(continued...)

3. Citing *Printz* v. *United States*, 521 U.S. 898 (1997), defendants suggest (Br. 19-20, 23-25) that Title VI and Section 504 are unconstitutional because they "commandeer" States to administer a federal program. This is incorrect. These statutes do not force States to administer federal programs – they simply impose conditions on those state agencies that accept federal financial assistance. As this Court explained when it rejected similar arguments in *Kansas*, 214 F.3d at 1203, when "States are free to refuse to implement the conditions and to decline the grant money," a statute cannot be said to "directly compel or command state employees to take any action whatsoever."

Indeed, as this Court noted in *Kansas*, the Supreme Court has consistently upheld Congress's power to condition the receipt of federal funds on the recipient State taking actions that affect its sovereign interests. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York* v. *United*

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[2](...continued)
passing them on to local school districts. See General Accounting Office, *Federal Education Funding: Allocation to State and Local Agencies for 10 Programs* 23 (1999). For example, defendants receive federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1401 *et seq*. That law authorizes States to retain 25% of the federal grant money to pay for costs of state administration and to fund a variety of state-level activities. See 20 U.S.C. 1411(f). The General Accounting Office reported that the Kansas Department of Education retained 18.4% of IDEA money it received. This is consistent with Kansas' own budget reports, which show that in Fiscal Year 2000 only $9.9 million of the $19.2 million spent on the Department of Education's operations were drawn from state revenues. See 2 *The Governor's Budget Report: Fiscal Year 2002* 652 (2001) (available on the internet at http://da.state.ks.us/budget/gbr.htm).

States, 505 U.S. 144, 167 (1992). Thus, in *New York*, the Court held that a statute in which Congress conditioned grants to the States upon the States "regulating pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause. *Id*. at 169, 173; see also *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (assuming that Constitution vested authority over drinking age solely in the States, Congress could condition the receipt of federal money on States enacting legislation setting drinking age); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on State appointing non-partisan disbursement officials).

For all these reasons, Section 2000d-7 is proper Spending Clause legislation and defendants' acceptance of federal financial assistance constitutes a waiver of their sovereign immunity to private suit. "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).

II

42 U.S.C. 2000d-7 IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO REMOVE ELEVENTH AMENDMENT IMMUNITY TO SUITS UNDER TITLE VI AND SECTION 504

Section 2000d-7 can also be upheld as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity. In *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated the States' Eleventh Amendment immunity:

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

517 U.S. at 55 (citations, quotations, and brackets omitted).

A. *Section 2000d-7 Is An Exercise Of Congress's Section 5 Authority*

Defendants concede (Br. 18) that in 42 U.S.C. 2000d-7 Congress made clear that it intended to remove their Eleventh Amendment immunity to suits alleging violations of Title VI and Section 504. Defendants instead argue (Br. 16-19) that Congress must clearly state that it intended to exercise its power under Section 5 of the Fourteenth Amendment.

1. While we disagree with defendants' contention, the disagreement has no effect on this case. When Congress enacted Section 2000d-7 in 1986, it expressly invoked its power under the Fourteenth Amendment. Senator Cranston, the provision's primary sponsor, described the proposed legislation as "clearly

authorized" by both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of these constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that "to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress's intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts." 132 Cong. Rec. 28,624 (1986). As the Fifth Circuit explained while rejecting this very argument in *Lesage* v. *Texas*, 158 F.3d 213 (1998), rev'd and remanded on other grounds, 528 U.S. 18 (1999):

> Congress unquestionably enacted 42 U.S.C. § 2000d-7 with the "intent" to invoke the Fourteenth Amendment's congressional enforcement power. * * * The Congressional Record contains specific references to exercising congressional power under Section Five of the Fourteenth Amendment to accomplish this abrogation of Eleventh Amendment immunity. The state's argument thus rests on presumptions regarding subjective intent which are simply incorrect with respect to the relevant statute.

158 F.3d at 218-219 (footnote omitted).

Defendants also appear to argue that Congress was required to make a statement about the source of its authority in the text of the statute. But that is inconsistent with the approach adopted by the Supreme Court in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999). In *Fitzpatrick*, the

Court relied on the legislative history of Title VII's abrogation to determine that Congress exercised its Section 5 authority. See 427 U.S. at 453 n.9. And in *Florida Prepaid,* in examining the validity of the Patent Remedy Act, a statute enacted in 1992 specifically to abrogate immunity for violations of patent laws previously enacted under the Patent Clause, the Court pointed to the legislative history of that 1992 act in noting that Congress "justified" the abrogation under its Fourteenth Amendment power. 527 U.S. at 635, 637.

2. In any event, the validity of this legislation does not depend on whether Congress thought it was exercising its Section 5 authority. In upholding the abrogation in the Railroad Revitalization and Regulatory Reform Act as valid Section 5 legislation in *Union Pacific Railroad Co.* v. *Utah*, 198 F.3d 1201, 1209 (10th Cir. 1999), this Court made clear that "congressional action may be upheld under § 5 even when Congress does not expressly rely on that provision as the source of its power." This is consonant with the consistent holdings of the Supreme Court[3] and the ten other courts of appeals[4] to address the question. While

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[3] See *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983); *Fullilove* v. *Klutznick*, 448 U.S. 448, 473-478 (1980) (opinion of Burger, C.J.); *Griffin* v. *Breckenridge*, 403 U.S. 88, 107 (1971); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Keller* v. *United States*, 213 U.S. 138, 147 (1909); *United States* v. *Harris*, 106 U.S. 629, 636 (1883).

[4] See, *e.g.*, *Mills* v. *Maine*, 118 F.3d 37, 43-44 (1st Cir. 1997); *Kilcullen* v. *New York State Dep't of Labor*, 205 F.3d 77, 82 (2d Cir. 2000); *Wheeling & Lake Erie Ry. Co.* v. *Public Util. Comm'n*, 141 F.3d 88, 92 (3d Cir. 1998), cert. denied, 120 S. Ct. 323 (1999); *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery* v. *Louisiana*, 150 F.3d 431, 436-437 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161

(continued...)

it is clear that Congress intended to use federal spending as the trigger for coverage under Title VI and Section 504, there is no rule that Congress can only "enforce" the Fourteenth Amendment through prohibitory legislation. That Congress is using the "carrot" of federal funds to assure non-discrimination does not remove these provisions from the ambit of Fourteenth Amendment legislation.

B. *Title VI And Section 504 Are Valid Exercises Of Congress's Section 5 Authority*

Defendants also argue (Br. 19-30) that Congress exceeded its authority under Section 5 in enacting Title VI and Section 504. Section 5 of the Fourteenth Amendment is "a positive grant of legislative power," and Congress's power to enforce the Fourteenth Amendment, while not unlimited, is broad. *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997). Congress's power "to enforce" the Amendment "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000).

Therefore, the central inquiry in determining whether legislation is a valid exercise of Congress's Section 5 authority is whether the legislation is an

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[4](...continued)
(1999); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.),cert. denied, 121 S. Ct. 70 (2000); *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Oregon Short Line R.R. Co.* v. *Department of Revenue*, 139 F.3d 1259, 1265-1266 (9th Cir. 1998); *United States* v. *Moghadam*, 175 F.3d 1269, 1275 n.10 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000).

appropriate means of deterring or remedying constitutional violations or whether it is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id*. at 645 (quoting *City of Boerne*, 521 U.S. at 532). Although "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern * * * Congress must have wide latitude in determining where it lies." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 629 (1999). "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne*, 521 U.S. at 536. So long as there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," enforcement legislation is appropriate within the meaning of the Fourteenth Amendment. *Id*. at 520. We address each statute separately.

Section 504: Defendants argue that Section 504 of the Rehabilitation Act is not appropriate legislation to enforce the Equal Protection Clause because (1) discrimination against people with disabilities is subject to only "rational basis" review (Br. 20, 27-29); and (2) Section 504's requirements regarding reasonable accommodations do not enforce a non-discrimination prohibition (Br. 25, 29-30). In making these arguments, defendants ignore this Court's recent decision, issued after the Supreme Court's decision in *Kimel*, that the Americans with Disabilities

Act (ADA) is a valid exercise of Congress's Section 5 authority. See *Cisneros* v. *Wilson*, 226 F.3d 1113 (10th Cir. 2000); accord *Dixon* v. *Regents of Univ. of New Mex.*, No. 99-2245, 2000 WL 1637557, at *3 (10th Cir. Oct. 6, 2000) (reprinted in Addendum B). *Cisneros* held that the extensive history of discrimination against persons with disabilities and the tailored nature of the statutory scheme made the ADA an "appropriate" exercise of Congress's Section 5 authority. Because the ADA and Section 504 impose virtually identical substantive standards, see *Woodman* v. *Runyon*, 132 F.3d 1330, 1339 n.8 (10th Cir. 1997), the holding of *Cisneros* requires a similar result in this case. See *Kilcullen* v. *New York State Dep't of Labor*, 205 F.3d 77, 82 (2d Cir. 2000).

Title VI: While defendants on occasion mention Title VI during their discussion of Congress's Section 5 authority (Br. 19-30), they do not identify any distinct objection to Title VI as valid Section 5 legislation. Nevertheless, to provide the Court with a comprehensive analysis, we briefly address this issue as well.

There is no question that States have engaged in a widespread pattern of unconstitutional race discrimination. The Supreme Court has recognized that the "history of racial discrimination in this country is undeniable." *McKleskey* v. *Kemp*, 481 U.S. 279, 298 (1987). Thus, a statute like Title VI that prohibits race discrimination by States is quintessential legislation to enforce the Equal Protection Clause. See, *e.g., Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879) (upholding criminal statute prohibiting exclusion of blacks from juries as valid Section 5

legislation). For this reason, the only court of appeals to address the issue has upheld Section 2000d-7's removal of Eleventh Amendment immunity for Title VI claims as an appropriate exercise of Congress's Section 5 authority. See *Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998), rev'd and remanded on other grounds, 528 U.S. 18 (1999); see also *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.) (upholding abrogation for race discrimination claim under Title VII of the Civil Rights Act), cert. denied, 121 S. Ct. 657 (2000); *In re Employment Discrimination Litigation Against Alabama*, 198 F.3d 1305, 1321-1322 (11th Cir. 1999) (same). This Court should follow *Lesage* and uphold Section 2000d-7 as applied to Title VI as valid Section 5 legislation.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0, and contains 5,799 words.

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CERTIFICATE OF SERVICE

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