No. 02-1712

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMY SHEPARD,

Plaintiff-Appellant

UNITED STATES OF AMERICA,

Intervenor

v.

KATRINA IRVING, GIRHARD MULHERIN, ALAN MERTEN, THE RECTORS AND VISITORS OF GEORGE MASON UNIVERSITY, LISA STIDHAM, LEIGH ANN MURTHA, CHRISSY FORBES, JOE BOATWRIGHT, and NIKKIA ANDERSON,

Defendants-Appellees

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

UNITED STATES' RESPONSE TO PETITION FOR REHEARING EN BANC

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Pursuant to this Court's order of October 8, 2003, the United States files this response to Appellees' petition for rehearing and rehearing en banc. For the reasons set forth below, the petition should be denied.

In an unpublished decision, the panel in this case held that the University

waived its Eleventh Amendment immunity to Plaintiff's suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, by applying for and accepting federal funds that were clearly conditioned on a waiver of the State's sovereign immunity. Slip op. 6-8. The panel's decision is consistent with the decisions of this Court, the Supreme Court, and with the decisions of every other court of appeals to have considered the question, with one limited exception, discussed below. Further review is unwarranted.

I. CONGRESS MAY CONDITION FEDERAL FUNDS ON A KNOWING AND VOLUNTARY WAIVER OF ELEVENTH AMENDMENT IMMUNITY

The University first argues (Pet. 3-8) that Congress may never condition federal financial assistance on a waiver of Eleventh Amendment immunity. The panel correctly rejected this assertion. See slip op. 6. 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.[1] None has held to the contrary.

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[1] 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); *Litman* v. *George Mason Univ*ersity, 186 F.3d 544, 554-555 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000);

(continued...)

The University argues (Pet. 4-8) that these cases were all wrongly decided because they misread the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999). In *College Savings Bank*, the Court held that Congress could not condition a State's right to engage in certain forms of interstate commerce on its waiving Eleventh Amendment immunity to suits under the Trademark Act, 15 U.S.C. 1125(a). The University argues (Pet. 7) that the "constructive waiver" prohibited by *College Savings Bank* cannot be sensibly distinguished from a waiver required in exchange for federal funds. The dissent in *College Savings Bank* agreed. 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

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[1](...continued)
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).

> condition is not the denial of a gift or a gratuity, but a sanction: exclusion of the State from otherwise permissible activity.

527 U.S. at 686-687.

Permitting Congress to condition a "gift" of federal funds on a knowing and voluntary waiver of Eleventh Amendment immunity does not permit Congress to use "the Spending Clause powers to circumvent all of the anti-abrogation decisions since *Seminole Tribe*" (Pet. 6). See *Litman*, 186 F.3d at 555-557. *Seminole Tribe* and its progeny recognize that State sovereignty is not violated by enforcing a State's decision to waive its immunity, either in an individual case or in a class of cases. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *College Sav. Bank*, 527 U.S. at 675-676. The holding of *Seminole Tribe* is respected, not circumvented, when a State's amenability to suit is determined by the State's own choices rather than through the unilateral action of Congress. See *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983); *Bell Atl. Md., Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 289 (4th Cir. 2001).

II. THE UNIVERSITY'S CONSENT TO SUIT WAS NOT UNCONSTITUTIONALLY COERCED

The University next argues (Pet. 8-11) that its consent to suit was coerced because compliance with Section 504 was a condition of the University's receipt of federal funds making up about 14% of the University's budget. Because those

funds "could not easily be replaced," declining federal funding in order to preserve sovereign immunity "would present great difficulty, rising to the level of coercion" (Pet. 10 n.6). The panel and the district court acknowledged the validity of the coercion theory in general, but both properly refused to equate the State's "great difficulty" in declining federal funds with unconstitutional coercion. See slip op. 7; 204 F. Supp. 2d at 917-919. That conclusion was consistent with every court of appeals decision to consider a coercion challenge to Section 504 or similar statutes, including this Court, and is consistent with Supreme Court precedent.[2]

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[2] See *Doe* v. *Nebraska*, No. 02-2014, 2003 WL 22288104 (8th Cir. Oct. 7, 2003) (Section 504 condition attached to $557 million in federal funding, which constituted 60% of the agency's budget, and more than 18% of the State's overall spending, not unconstitutionally coercive); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (same for $250 million or 12% of State Department of Education's budget), cert. denied, 533 U.S. 949 (2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002) (Medicaid funding), cert. denied, 123 S. Ct. 871 (2003). 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.*, *Texas* v. *United States*, 106 F.3d 661, 666 (5th Cir. 1997) (Medicaid conditions); *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.) (same), cert. denied, 522 U.S. 806 (1997); *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); *Oklahoma* v. *Schweiker*, 655 F.2d 401, 413-414 (D.C. Cir. 1981) (same); *Florida* v. *Mathews*, 526 F.2d 319, 326 (5th Cir. 1976); (same); see also *Kansas* v. *United States*, 214 F.3d 1196, 1198, 1201-1202 (10th Cir.) (enforcing

(continued...)

Contrary to the University's assertion (Pet. 11), the panel decision does not conflict with *West Virginia* v. *United States Dep't of Health & Human Serv.*, 289 F.3d 281 (4th Cir. 2002), or *Virginia Dep't of Educ.* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc). In *West Virginia*, the State argued that it was unconstitutionally coerced into agreeing to a condition attached to more than $1 billion in Medicaid funds, *id*. at 285, upon which the State was "unusually dependent" and without which "West Virginia's health care system would effectively collapse." *Id*. at 287. This Court rejected the challenge. The Court held open the possibility that "serious Tenth Amendment questions would be raised" if the federal government attempted to withhold "the entirety of a substantial federal grant because of an insubstantial failing by the state." *Id*. at 291-292. That possibility had been raised in *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), when the federal government

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[2](...continued)
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.* v. *Marshall*, 616 F.2d 240, 246 (1st Cir.) (same), appeal dismissed and cert. denied, 449 U.S. 806 (1980); *County of Los Angeles* v. *Marshall*, 631 F.2d 767, 769 (D.C. Cir.) (same), cert. denied, 449 U.S. 1026 (1980). See further *Lau* v. *Nichols*, 414 U.S. 563 (1974) and cases discussed at pp. 8-9 & n.5 *infra*.

attempted to withhold the State of Virginia's allotment of funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, for non-compliance with an IDEA regulation. Similar Tenth Amendment questions, however, were not posed by West Virginia's suit, because the State was not seeking to resist a federal attempt to withhold *all* Medicaid funds. In fact, the federal government was not attempting to withhold *any* Medicaid funds; the State simply wanted a declaration that it did not have to comply with the challenged funding condition. Nor was the complete withholding of all funds inevitable. As this Court explained, the federal government had discretion to respond to non-compliance by potentially withholding "all" or "part of" the State's funding. *West Virginia*, 289 F.3d at 291-292. This "small difference in language," the Court concluded "makes all the difference in our analysis." *Id.* at 292. To "the extent that West Virginia contends its actions were coerced by the mere possibility that it could lose all of its federal funds, that argument is unavailing." *Id*. at 294.

The University's claim of coercion in this case is no more persuasive. The University is not seeking to resist an attempt by the federal government to "withhold[] the entirety of a substantial federal grant." *Id*. at 291 (quoting *Riley*, 106 F.3d at 570 (opinion of Luttig, J.)). As was true of the Medicaid Act, while Section 504 does not foreclose the United States from cutting off all federal funds

to a university that fails to comply with the statute, nothing in Section 504 compels the federal government to impose that remedy. See 34 C.F.R. 74.61 ("Awards may be terminated in whole or in part" in response to noncompliance with funding conditions). Indeed, in this case, the federal government has not attempted to withhold any federal funding at all. Instead, Plaintiff is seeking compensatory damages to redress the harm caused by the violation of a funding condition. There can be no question that this remedy is "proportionate to the breach" or that it is a remedy within the power of Congress to authorize. *Id.* at 292. See also *ibid*. (the possibility of a sanction less than the entire withholding of federal funds "saves [the statute] from * * * Tenth Amendment challenge"); accord *Riley*, 106 F.3d at 569.[3]

The panel's rejection of the University's coercion claim is also consistent with the Supreme Court's treatment of similar requirements under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and other Spending Clause statutes. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI, which prohibits

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[3] Moreover, the University is certainly no more dependent on federal funding for its education programs than West Virginia was for its Medicaid program. Compare Pet. 10 n.6 (the University "receives approximately $44,183,959 or 13.8% of its total operating budget in federal funds") with *West Virginia*, 289 F.3d at 284 & n.2 (State received more than $1 billion in federal funds, representing approximately 75% of the State's Medicaid budget).

racial discrimination "under any program or activity receiving Federal financial assistance," and its implementing regulations, were within Congress's Spending Clause authority. The "Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citing *Steward Machine Company*, 301 U.S. at 590 (discussing possibility of unconstitutional coercion)). This was true even though Title VI's requirements are a condition of receiving any federal funding. See 42 U.S.C. 2000d.[4] Section 504 is identical to Title VI in that respect. Compare 42 U.S.C 2000d (Title VI) with 29 U.S.C. 794(a) (Section 504).[5]

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

[5] The Court has found similarly unobjectionable other Spending Clause statutes that impose conditions on the receipt of any federal funding. See *Board of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990) (noting that because the Equal Access Act, 20 U.S.C. 4071 *et seq*., "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.") (emphasis added, citation omitted); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) (Title IX's anti-discrimination conditions are not unconstitutional because "Congress is free to attach reasonable and unambiguous

(continued...)

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

The University next argues that Section 504's waiver condition violates the "relatedness" requirement of *South Dakota* v. *Dole*, 483 U.S. 203 (1987), because it does not "'bear some relationship to the purpose[s]' for which the University receives federal funds" (Pet. 12 (citation omitted)). The University does not claim that the panel's rejection of this argument conflicts with any circuit precedent or the decision of any other court of appeals. To the contrary, other circuits have rejected "relatedness" objections to Section 504. See *A.W.* v. *Jersey City Pub. Sch.*, 341 F.3d 234, 241-242 (3d Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003).

Nor does the panel decision conflict with *Dole*. The University does not dispute that a "purpose of the federal funding" it received was "providing a broad range of educational opportunities in an environment free from unlawful discrimination based on disability." Slip op. 7. It simply denies that there is a

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[5](...continued)
conditions to federal financial assistance that educational institutions are not obligated to accept"); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (compliance with Hatch Act, 5 U.S.C. 1501).

sufficient connection between that interest and Section 504's waiver provision because, it says (Pet. 12), the University "never receives federal funds for the purposes of allowing private parties to seek money damages from the Commonwealth of Virginia's treasury." This argument misconstrues the relatedness requirement. Under *Dole*, the Section 504 waiver condition is valid if it "bears some relationship" to the purposes of the federal funding. *New York* v. *United States*, 505 U.S. 144, 167 (1992). The waiver condition meets that standard because it (1) provides a viable enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept federal funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipients' failure to follow the law. Cf. *M.A.* v. *State-Operated Sch. Dist. of Newark*, 344 F.3d 335, 350-351 (3d Cir. 2003) ("[T]he condition of waiver of sovereign immunity from IDEA claims is directly related to promoting the substantive and procedural rights embodied in the IDEA."); *A.W.*, 341 F.3d at 254-255 ("[T]he requirement of waiver clearly promotes these interests * * * by ensuring full accountability in federal court for statutory violations committed by state educational authorities

who receive federal financial assistance under the IDEA.").[6]

IV. THE UNIVERSITY'S WAIVER OF SOVEREIGN IMMUNITY WAS KNOWING

Finally, the University asserts (Pet. 13-15) that it did not knowingly waive its Eleventh Amendment immunity when it accepted federal funding because it wrongly believed that its immunity was already abrogated even if it declined federal funds.[7] The University does not argue that the panel's rejection of this argument conflicts with any circuit precedent.[8] And while it is true that the panel's decision conflicts with *Garcia* v. *SUNY Health Scis. Center*, 280 F.3d 98 (2d Cir. 2001) and the panel decision in *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609, vacated on rehearing en banc, 339 F.3d 348 (5th Cir. 2003), that conflict does

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[6] In *Dole*, the State did not receive funds for the purpose of raising its drinking age. It received funds to build highways and the drinking age requirement was found sufficiently related to that purpose. See 483 U.S. at 208-209.

[7] The University raised this argument in the district court, but did not raise it in its briefs before the panel. Instead, the University raised the argument for the first time on appeal in a letter to the Court prior to oral argument.

[8] We note that in *Amos* v. *Maryland Department of Public Safety & Correctional Services*, 178 F.3d 212, 230-231(4th Cir. 1999), Judge Williams' dissent concluded that a State had not validly waived its sovereign immunity to Section 504 claims. The majority in *Amos* did not reach that question, having held that Congress validly abrogated the State's sovereign immunity. See *id*. at 223. The decision was subsequently vacated and the appeal dismissed. See 205 F.3d 687 (4th Cir. 2000). For the reasons set forth above, we believe that Judge Williams' conclusion was in error.

not warrant en banc review for several reasons.

First, the rationale of *Pace* and *Garcia* has been rejected by other courts of appeals. The Fifth Circuit has vacated the panel decision in *Pace* and is presently rehearing the case en banc. Four other courts of appeals have recently rejected *Garcia*'s reasoning. See *Garrett* v. *University of Ala.*, 344 F.3d 1288, 1292-1293 (11th Cir. 2003); *Doe* v. *Nebraska*, 345 F.3d 593, 600-604 (8th Cir. 2003); *Pugliese* v. *Dillenberg*, 346 F.3d 937, 937 (9th Cir. Oct. 7, 2003); *M.A.* v. *State-Operated Sch. Dist. of City of Newark*, 344 F.3d 335, 349-351 (3d Cir. 2003); *A.W.* v. *Jersey City Pub. Sch.*, 341 F.3d 234, 250-254 (3d Cir. 2003).

Second, *Pace* and *Garcia* were wrongly decided. Both cases apply the wrong test for a knowing waiver of sovereign immunity. In *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), the Supreme Court explained 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. *College Savings Bank* reaffirmed that when Congress "condition[s] its grant of funds to the States upon their taking certain actions * * * acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. 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. Indeed, the very purpose of the Court's clear statement rule is to ensure that if States accept funds, the courts may fairly conclude that they have "exercise[d] their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Thus, as this Court held in *Litman* v. *George Mason Univ*ersity, 186 F.3d 544, 555 (4th Cir. 1999), by applying for and receiving clearly conditioned federal funds, the University validly waived its sovereign immunity as set forth in Section 2000d-7.

In addition to applying the wrong legal test, *Pace* and *Garcia* also wrongly concluded that prior to the Supreme Court's decision in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a State could reasonably believe that its Eleventh Amendment immunity to Section 504 claims had been abrogated. Even if the University thought Congress had the constitutional authority to abrogate its sovereign immunity to Section 504 claims, it could not reasonably believe that Congress had *exercised* that authority to enact a unilateral abrogation provision for Section 504. While the ADA contains an abrogation provision, it applies only to claims under the ADA, not Section 504. See 42 U.S.C. 12202. Section 2000d-7, on the other hand, authorize suits only against State agencies that receive the

relevant federal funds. See 29 U.S.C. 794. Thus, while 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, the provisions for Section 504 in 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 Section 504. Therefore, it was clear even prior to *Garrett* that unless and until the University chose to accept federal funds, it retained its sovereign immunity to claims under Section 504.

CONCLUSION

The petition for rehearing and rehearing en banc should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2003, two copies of the foregoing the United States's Response to Petition for Rehearing En Banc were served by overnight mail, postage prepaid, on the following counsel:

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