Scheduled for oral argument on February 10, 2004

No. 03-7044

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADAM BARBOUR,

Plaintiff-Appellee

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties And Amici*

Except for the following, all parties, intervenors, and amici appearing in the district court and in this court are listed in the Brief for Appellant. The United States hereby appears as intervenor, but did not appear in this case in the district court.

B. *Ruling Under Review*

Reference to the ruling at issue appears in the Brief for the Appellant.

C. *Related Cases*

The United States is not aware of any prior appeal in this case or of any related cases pending in this Court. In addition to the cases noted in the Appellant's brief, the following cases pending in other federal courts of appeals involve the question whether a state agency waives its Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act by accepting federal financial assistance:

Nieves-Marquez v. *Commonwealth of Puerto Rico*, No. 02-2721 (1st Cir.) (argued Nov. 3, 2002)

Crosby v. *Department of Labor*, No. 02-9490, 75 Fed. Appx. 865 (2d Cir. Oct. 3, 2003) (time for filing petition for certiorari has not expired)

M.A. v. *State-Operated Sch. Dist.*, 344 F.3d 335 (3d Cir. Sept. 16, 2003) (time for filing petition for certiorari has not expired)

Shepard v. *Irving*, 77 Fed. Appx. 615 (4th Cir. Aug. 20, 2003) (petition for rehearing en banc pending)

August v. *Mitchell*, No. 02-30369 (5th Cir.) (currently awaiting en banc argument)

Danny R. v. *Spring Branch Indep. Sch. Dist.*, No. 02-20816 (5th Cir.) (under submission and stayed pending en banc decision in *Pace* v. *Bogalusa City Sch. Bd.*)

Espinoza v. *Texas Dep't of Pub. Safety*, No. 02-11168, 5th Cir. (under submission and stayed pending en banc decision in *Pace* v. *Bogalusa City Sch. Bd.*)

Johnson v. *Louisiana Dep't of Educ.*, 330 F.3d 362, vacated and rehearing en banc granted, 343 F.3d 732 (5th Cir. 2003) (currently awaiting en banc argument)

Miller v. *Texas Tech Univ. Health Scis. Ctr.*, 330 F.3d 691, vacated and rehearing en banc granted, 342 F.3d 563 (5th Cir. 2003) (currently awaiting en banc argument)

Pace v. *Bogalusa City Sch. Bd.*, 325 F.3d 609, panel opinion vacated and rehearing en banc granted, 339 F.3d 348 (5th Cir. 2003) (argued en banc September 26, 2003)

Thomas v. *University of Houston*, No. 02-20988 (5th Cir.) (under submission and stayed pending en banc decision in *Pace* v. *Bogalusa City Sch. Bd.*)

Randolph v. *Texas Rehab. Comm'n*, No. 03-50538 (5th Cir.) (under submission and stayed pending en banc decision in *Pace* v. *Bogalusa City Sch. Bd.*)

Parr v. *Middle Tenn. State Univ.*, 63 Fed. Appx. 874 (6th Cir. 2003), petition for certiorari pending, No. 03-533

Doe v. *Nebraska*, 345 F.3d 593 (8th Cir. 2003) (time for filing petition for certiorari has not expired)

Pugliese v. *Dillenberg*, 346 F.3d 937 (9th Cir. 2003) (time for filing petition for certiorari has not expired)

Phiffer v. *Columbia River Corr. Inst.*, 63 Fed. Appx. 335 (9th Cir. 2003), petition for certiorari pending, No. 03-279

Garrett v. *University of Alabama*, 344 F.3d 1288 (11th Cir. 2003) (time for filing petition for certiorari has not expired)

November 26, 2003

SARAH E. HARRINGTON

Attorney

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GLOSSARY OF ABBREVIATIONS

ADA . . . . . Americans with Disabilities Act

WMATA . . . . . Washington Metropolitan Area Transportation Authority

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291, as interpreted by the Supreme Court in *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993).

STATEMENT OF THE ISSUES

1. 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 of 1973, 29 U.S.C. 794.

2. Whether Section 504's waiver provision is a valid exercise of Congress's Spending Clause authority.

STATUTES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

42 U.S.C. 2000d-7 provides:

> 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.A. §§ 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. §§ 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. §§ 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

1. The plaintiff, Adam Barbour, filed suit against the Washington Metropolitan Area Transportation Authority (WMATA) under, *inter alia*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. That provision states 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, State, 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 the language of Section 504 did not, with sufficient clarity, demonstrate Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity 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. On March 27, 2003, the district court denied the State's motion to dismiss the plaintiff's Section 504 claims as barred by the Eleventh Amendment. App. 32-36. The court held that WMATA had waived its sovereign immunity to Section 504 claims by accepting federal financial assistance that was clearly conditioned on such a waiver. WMATA filed an interlocutory appeal to challenge the denial of its claim of sovereign immunity and the United States hereby intervenes in the

appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the Section 504 waiver provision.

SUMMARY OF ARGUMENT

WMATA waived its Eleventh Amendment immunity to Section 504 claims by applying for and accepting federal funds that were clearly conditioned on a waiver of the agency's sovereign immunity. Congress clearly and unambiguously conditioned receipt of federal financial assistance on a State's waiver of its immunity to private suits brought to enforce Section 504. As every court of appeals that has considered the question has held, 42 U.S.C. 2000d-7 makes clear that Congress intended to condition the receipt of federal funding on a state agency's waiver of its Eleventh Amendment immunity to suit in federal court under Section 504. That is all the clear statement rule requires.

The defendant's contention that it thought Section 2000d-7 was intended to be an abrogation of its sovereign immunity by Congress is contrary to the text and structure of the statute and irrelevant to the effectiveness of its waiver of immunity upon acceptance of the federal funds. WMATA's application for and acceptance of clearly conditioned federal funds is an objective manifestation of its assent to the conditions Congress placed upon those funds. WMATA's contention that it reasonably believed that Section 2000d-7 abrogated its sovereign immunity even if

it declined federal funds is similarly unavailing. Congress made clear that Section 2000d-7 would subject a state agency to suit if, but only if, it accepted the funds. Accordingly, at the time it was deciding whether to accept federal funding, WMATA's sovereign immunity was intact and the agency faced a clear choice. Having made that choice in favor of accepting federal assistance, WMATA cannot now avoid the conditions to which it agreed.

Moreover, Section 504 is a valid exercise of the Spending Clause. Congress has a significant interest in ensuring that the benefits secured through federal funding are available to all of a State's citizens without regard to disability, and in ensuring that federal taxpayers do not subsidize agencies that engage in discrimination. The nondiscrimination requirement of Section 504, therefore, is directly related to the purposes of *all* federal funding programs, not just those funded under the Rehabilitation Act itself.

ARGUMENT

Congress Clearly Conditioned Receipt Of Federal Funds On A Waiver Of Eleventh Amendment Immunity For Private Claims Under Section 504 Of The Rehabilitation Act

The Eleventh Amendment bars suits by private parties against a state agency, absent a valid abrogation by Congress or waiver by the State or state agency. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). By applying for and

accepting federal financial assistance, WMATA[1] knowingly and voluntarily waived its Eleventh Amendment immunity to suits under Section 504 of the Rehabilitation Act.

When Congress intends 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 district court correctly held that, in enacting 42 U.S.C. 2000d-7, Congress clearly conditioned a state agency's acceptance of federal funds on waiver of its Eleventh Amendment immunity. In fact, every court of appeals that has considered the question – ten in all – has held that Section 2000d-7 constitutes a clear and unambiguous waiver condition.[2] WMATA's argument to the contrary is meritless.

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[1] This Court has repeatedly held that WMATA is protected by Eleventh Amendment immunity. See, *e.g.*, *Watters* v. *WMATA*, 295 F.3d 36, 39 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1574 (2003).

[2] See *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858 (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); *Lovell* v. *Chandler*, 303 F.3d 1039,

(continued...)

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

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

Section 2000d-7 provides the unequivocal notice demanded by the Supreme Court's precedents because it is 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

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[2](...continued)
1051-1052 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003); *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 on other grounds, 532 U.S. 275 (2001).

U.S. 1, 17 (1981). The provision makes clear to States that the "consequences of their participation" in the relevant federal spending program is that the State or state agency that receives the federal funds will be subject to private suit in federal court under Section 504. See *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); see also *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) ("[W]here a state participates in a federal financial assistance program 'in light of the existing state of the law,' the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity."), cert. denied, 537 U.S. 1232 (2003).

WMATA nonetheless argues (Br. 15-19) that Section 2000d-7 cannot constitute a clear waiver condition because it represents an attempt to abrogate the agency's sovereign immunity. That argument is unavailing. The obligations of Sections 504 and 2000d-7 are incurred only when a recipient elects to accept federal financial assistance. If a state agency does not wish to accept the conditions attached to the funds (nondiscrimination and suit in federal court), it is free to decline the assistance. But if it does accept federal money, then it is clear that it has agreed to the conditions as well. Thus, by voluntarily accepting federal funding, the state agency waives its right to assert immunity. "[A]cceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid*

Postsec. Educ. Expense Bd., 527 U.S. 666, 686 (1999); cf. *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision"). Because Section 2000d-7 makes clear that Congress intends to subject recipient agencies to suit *only* if the state agency 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" or as an "abrogation."[3] But that does not violate any clear statement rule. What must be clear are the consequences of accepting federal funds, not the legal description for those consequences. See *Pennhurst*, 451 U.S. at 17. The consequences of accepting federal funds under Section 2000d-7 are unambiguously clear.

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[3] The Supreme Court has sometimes used the terms "abrogation" and "waiver" loosely and interchangeably. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) ("The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."); *Supreme Court of Va.* v. *Consumers Union, Inc.*, 446 U.S. 719, 738 (1980) ("We held * * * that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity.").

B. *By Accepting Clearly Conditioned Federal Funds, WMATA Knowingly Waived Its Eleventh Amendment Immunity*

WMATA urges this Court to adopt the reasoning of the Second Circuit in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98, 113 (2001), which held that, although Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity," the waiver was not effective because the state agency did not "know" in 1995 (the latest point the alleged discrimination had occurred) that the abrogation in Title II of the Americans with Disabilities Act (ADA) was not effective and thus would have thought that its sovereign immunity was already lost, even before it accepted federal funds. 280 F.3d at 114. The reasoning of *Garcia* is incorrect and has not been adopted by any other court of appeals.[4] See, *e.g.*, *Garrett* v. *University of Ala.*, 344 F.3d 1288, 1293 (11th Cir. 2003); *Doe* v.

[4] Although a panel of the Fifth Circuit adopted the reasoning of *Garcia* in *Pace* v. *Bogalusa City School Board*, 325 F.3d 609 (2003), that opinion was vacated when the full Fifth Circuit voted to rehear the case en banc, 339 F.3d 348 (2003). In addition, the decisions of two other panels of the Fifth Circuit that had followed the holding in *Pace* were also vacated when the full court voted to rehear those cases en banc as well. See *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 330 F.3d 691, vacated and reh'g en banc granted, 342 F.3d 563 (2003); *Johnson* v. *Louisiana Dep't of Educ.*, 330 F.3d 362, vacated and reh'g en banc granted, 343 F.3d 732 (2003).

Nebraska, 345 F.3d 593, 601-602 (8th Cir. 2003); *M.A.* v. *State-Operated Sch. Dist.*, 344 F.3d 335, 349-351 (3d Cir. 2003).

The Second Circuit's decision in *Garcia* is flawed both because (1) the decision fails to apply the proper test for a knowing waiver of sovereign immunity, and because (2) it wrongly concludes that, in the circumstances of this case, a state agency could reasonably believe that it had no sovereign immunity to waive by accepting federal funds.

1. 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, 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.

This test was derived from the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). 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." *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 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.*

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. The purpose of the Court's clear statement rule is to ensure that, if a state agency voluntarily applies for and accepts federal funds that are conditioned on a valid waiver of sovereign immunity, the courts may fairly conclude that the agency 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 agency's acceptance of funds in the face of clearly stated funding conditions constitutes a "clear declaration," *id*. at 676, that the agency has agreed to the condition, and the agency cannot later be heard to complain that it did not know that its actions would waive its sovereign immunity.[5]

The Supreme Court endorsed such reasoning in *Lapides* v. *Board of Regents*, 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. As noted above, the Court began by recognizing that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court went on to rule that the "clear" indication requirement may be found when a State engages in conduct that federal law declares will constitute a waiver of

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[5] 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).

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 in litigation would constitute a valid waiver of the State's sovereign immunity. See *Lapides*, 535 U.S. at 621-622.[6] 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.

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[6] In fact, this portion of the Court's holding in *Ford* was good law until the Supreme Court overruled it in *Lapides* itself. See *Lapides*, 535 U.S. at 622-623.

The rationale in *Garcia* cannot be squared with *Lapides*. In *Lapides*, the Court rejected Georgia's argument that it did not knowingly waive its sovereign immunity because it reasonably believed that removing the case to federal court would not constitute a valid waiver. The Supreme Court, however, held that the State had validly waived its sovereign immunity. See *Lapides*, 535 U.S. at 622-624. 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." *Id*. at 624 (emphasis added) (internal 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.

2. The *Garcia* 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 claims long before the State had a chance to waive it through acceptance of the clearly conditioned federal funds. See 280 F.3d at 114-115. This reasoning is flawed. A state agency could only reasonably believe that its "sovereign immunity had already been lost" *id.* at 114, if it reasonably believed that its sovereign immunity was abrogated whether it accepted federal funds or not. Otherwise, if the agency

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 would retain its immunity into the future if it turned down the federal funding. The question, then, is not simply whether the state agency 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 agency 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 a state agency could not reasonably believe that Congress had attempted to abrogate its sovereign immunity to Section 504 claims even if the agency declined federal funding.

a. A state agency could not reasonably believe that anything in the ADA would abrogate its sovereign immunity to claims under Section 504, even if it assumed that the ADA abrogation provision was within Congress's constitutional power.[7] By its terms, the ADA provision abrogates a State's sovereign immunity

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[7] Although the United States believes that Title II of the ADA validly abrogates States' Eleventh Amendment immunity to suit, resolution of that issue is not necessary to resolve the question whether WMATA waived its sovereign immunity when it applied for and accepted federal funds. The Supreme Court will

(continued...)

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 could count as a "violation of this chapter."

The Second Circuit's decision in *Garcia* concluded that a state agency could believe, at the time it accepted the relevant federal funds, that the ADA abrogation provision had abrogated its sovereign immunity to Section 504 claims. See 280 F.3d at 114. 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*

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[7](...continued)
decide this term whether Title II of the ADA validly abrogates States' Eleventh Amendment immunity. *Tennessee* v. *Lane*, No. 02-1667. This Court has not had occasion to determine the validity of the abrogation provision in Title II.

matter, from maintaining its sovereign immunity to Section 504 claims. *Ibid*.[8] But such a belief would not make the waiver unknowing. What must be 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 the 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

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[8] The Second Circuit may have also 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.* v. *Halderman*, 465 U.S. 89, 103 n.12, 124-125 (1984).

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 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).[9] 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") (internal quotation marks omitted); *Colorado*, 479 U.S. at 574 ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment

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[9] 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. WMATA has not relied on the contract law principle of mistake of law, however, perhaps because that doctrine ordinarily would require the agency to show that the mistake would have made a difference to its decision to accept federal funds, see *ibid*., and because the agency normally would be required to return the funds in order to avoid its obligations under the contract, see *id*. at §§ 158, 376, 384.

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 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.").

2. WMATA also argues (Br. 26) that it could have reasonably believed that its sovereign immunity to Section 504 claims already had been abrogated by Section 2000d-7. 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 authorizes suits only against state agencies that receive federal funds,[10] only if the State voluntarily chooses to accept those funds, and only for the duration of the funding period.[11] These differences are critically

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[10] The language of Section 2000d-7 may at first appear absolute, providing a blanket authorization for suits against States under Section 504. That statute, however, applies 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). Accordingly, under any reasonable interpretation of the statute as a whole, Congress limited its attempted abrogation to those state agencies that receive federal financial assistance.

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

important. A state agency *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 Section 2000d-7, in contrast, is clearly conditional. It takes effect if, and only if, the agency voluntarily chooses to accept federal funds. If the state agency does not take the funds, no plausible reading of the provision would subject the agency to suit under Section 504.

Thus, when it was deciding whether to accept federal funds for the relevant funding year, WMATA's sovereign immunity to Section 504 claims for the coming year was intact, and the agency 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 be subject to private suits under Section 504. In choosing to accept federal funds that were clearly available only to those state agencies willing to submit to enforcement proceedings in federal court, WMATA knowingly waived its sovereign immunity.

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[11](...continued)
if, at any time, it accepted 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).

C. *Section 504 Is A Valid Exercise Of The Spending Power*

The Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four requirements for valid enactments in exercise of the Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress places conditions on the States' receipt of federal funds, it "must do so unambiguously * * *, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequence of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid.* (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978)). And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id.* at 208. Section 504 satisfies each of these criteria. In its opening brief, WMATA did not claim that Section 504 fails to meet the first, second, or fourth prongs of the *Dole* analysis. It has therefore waived its right to assert those arguments. See *World Wide Minerals, Ltd.* v. *Republic of Kazakhstan*, 296 F.3d 1154, 1168 (D.C. Cir. 2002), cert. denied, 537 U.S. 1187 (2003).

1. First, the general welfare is served by prohibiting discrimination against persons with disabilities. See *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval). Indeed, *Dole* noted that there should be substantial judicial deference to Congress's determination that legislation serves the general welfare. 483 U.S. at 207 n.2.

2. The language of Section 504 alone makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance. Thus, the second *Dole* requirement is met. See *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst*). Moreover, Department of Justice implementing regulations require that each application for financial assistance include an "assurance that the program or activity will be conducted in compliance with the requirements of section 504 and this subpart." 28 C.F.R. 42.504(a).

3. Contrary to WMATA's argument (Br. 28-30), Section 504 meets the third *Dole* requirement as well. Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons.

Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *Arline*, 480 U.S. at 278 n.2. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students, was a valid exercise of the spending power. "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." *Id.* at 569 (citations omitted).[12] The Court made a similar holding in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free

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[12] 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." The Court did not cast doubt on the Spending Clause holding in *Lau*.

to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575.

These cases stand for the proposition that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. See *United States* v. *Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of the main purposes for which public education funds are expended: equal education opportunities to all citizens." (footnote omitted)). Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance. The purposes articulated by Congress in enacting Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to

place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); *id.* at 7061-7062 (Sen. Pastore); *id.* at 2468 (Rep. Celler); *id.* at 2465 (Rep. Powell). Certainly, there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.[13] Thus, a challenge to such a cross-cutting nondiscrimination statute should fail.

The requirement in Section 2000d-7 that a state funding recipient waive its Eleventh Amendment immunity as a condition of accepting federal financial assistance is also related to these important federal interests. The United States relies on private litigants to assist in enforcing federal programs and, in particular, in enforcing federal nondiscrimination mandates. The requirement that state funding recipients waive their sovereign immunity to suits under Section 504 as a condition of accepting federal financial assistance both (1) provides a viable

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[13] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending programs, see *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (upholding 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).

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 recipient's failure to follow the law.

4. Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. Neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates anyone's constitutional rights. "[T]he powers of the state are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

5. In addition to the four established limits on the Spending Power, the Court has suggested that recipients may be able to raise a coercion argument. While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Charles C. Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)), it saw no reason generally to inquire into

whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the state agencies voluntarily exercise their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Charles C. Steward Mach. Co.*, 301 U.S. at 590). WMATA has waived the right to raise a coercion argument by failing to raise such argument in its opening brief. See *World Wide Minerals, Ltd.*, 296 F.3d at 1168. For all these reasons, Section 504 and Section 2000d-7 should be upheld under the Spending Clause.[14]

[14] The United States believes that Section 504 can also be upheld as valid legislation under Section 5 of the Fourteenth Amendment. Because the statute is clearly valid legislation under the Spending Clause, however, the United States believes that there is no need for this Court to address this issue.

CONCLUSION

For the foregoing reasons, the Eleventh Amendment does not bar the plaintiff's Section 504 claims against the defendant.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 7,058 words.

November 26, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2003, two copies of the foregoing Brief for the United States as Intervenor were served by overnight mail, postage prepaid, on the following counsel:

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