No.01-3540

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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ELBERTA BERNICE LIEBERMAN,
Plaintiff-Appellee

v.

STATE OF DELAWARE, FAMILY COURT OF DELAWARE,
Defendants-Appellants

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

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# BRIEF FOR THE UNITED STATES AS INTERVENOR

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THE UNITED STATES COURT OF APPEALS
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## STATEMENT OF SUBJECT MATTER JURISDICTION

For the reasons discussed in this brief, the district court had jurisdiction over this action pursuant to 28 U.S.C. 1331.[1]

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[1] The defendants' claim (Def. Br. 12-14) that the Supreme Court has exclusive jurisdiction to hear cases in which a State is a party is without support. The very first Congress of the United States made clear that the Supreme Court does not have exclusive jurisdiction to hear suits between a State and private citizens. See *Ames* v. *Kansas*, 111 U.S. 449, 463 (1884) (discussing the Judiciary Act of 1789, 1 Stat. 73, which states that the Supreme Court "shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens: and except also between a state and citizens of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction"). In enacting Section 1331, a later Congress gave district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or

(continued...)

## STATEMENT OF APPELLATE JURISDICTION

The defendants filed a motion to dismiss the underlying action on the grounds that, *inter alia*, they enjoy Eleventh Amendment immunity to the plaintiff's claims (see A6[2]). The district court entered an order granting the defendants' motion to dismiss some of the plaintiff's claims and denying the defendants' motion to dismiss other of the plaintiff's claims on August 30, 2001 (A21-A32). The defendants filed a timely notice of appeal on September 11, 2001 (A33). This Court has jurisdiction pursuant to 28 U.S.C. 1291 over the defendants' appeal from the district court's ruling that they do not enjoy Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993).

## STATEMENT OF THE ISSUE

The United States will address the following question:

Whether conditioning the receipt of federal financial assistance on the waiver of a State's Eleventh Amendment immunity for suits under Section 504 of

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[1](...continued)
treaties of the United States." 28 U.S.C. 1331. There is no dispute that this is such a case.

[2] References to "A__" are to pages in the Defendants-Appellants' Appendix; references to "Def. Br. __" are to pages in the Defendants-Appellants' opening brief.

the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

## STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is, those persons who can meet the "essential" eligibility requirements of the

relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 536 U.S. 181 (2002). Congress expressly conditioned receipt of federal funds on a waiver of the States' Eleventh Amendment immunity to private suits in federal court. See 42 U.S.C. 2000d-7; *Koslow* v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), petition for cert. pending, No. 02-801.

2. As alleged in the complaint, plaintiff Elberta Bernice Lieberman is a person with mental and physical disabilities (A13). Starting in 1974, she was employed in various capacities by the defendant Family Court of the State of Delaware (A12). She alleges that the defendant failed to provide reasonable accommodations for her disabilities and discriminated against her based on her disabilities and perceived disabilities in violation of Section 504 (A13-A16). The complaint also alleges that employees who did not have disabilities were treated more favorably than she was (A14). She alleges that she was reprimanded, received negative evaluations, and was suspended from work, and that the defendant retaliated against her for filing charges of discrimination (A14-A16). Lieberman filed suit against the State of Delaware and the Family Court of the State of Delaware, seeking compensatory damages, as well as costs and attorneys'

fees, under Section 504 (A10-A19).[3] The defendants moved to dismiss the suit, arguing, *inter alia*, that they enjoy Eleventh Amendment immunity from suits for damages under Section 504. The district court denied the motion to dismiss, holding that the State had waived its immunity under Section 504 by accepting federal financial assistance (A21-A32). This timely appeal followed (A33).

## SUMMARY OF ARGUMENT

As this Court held in *Koslow* v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), petition for cert. pending, No. 02-801, the Eleventh Amendment is no bar to this private action to enforce the nondiscrimination provisions of Section 504 of the Rehabilitation Act. Congress validly conditioned receipt of federal financial assistance on a State's waiver of its immunity to private suits brought to enforce Section 504. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. The defendants' application for and acceptance of federal funds is an objective manifestation of their assent to the conditions Congress placed upon those funds. There is no reason for this Court to reconsider the holding in *Koslow*, which does not conflict with any decisions of this Court or the Supreme Court.

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[3] Lieberman also sued under Titles I and II of the Americans with Disabilities Act. The district court dismissed those claims as barred under the Eleventh Amendment (A23-A30) and the plaintiff did not appeal that ruling.

ARGUMENT

**As This Court Has Held, Congress Validly Conditioned A State's Receipt Of Federal Funding On A Waiver Of Eleventh Amendment Immunity For Private Claims Under Section 504**

The Eleventh Amendment bars suits by private parties against a State, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). The state defendants argue that the plaintiff's claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794(a), are barred by the Eleventh Amendment. In fact, the State has waived its Eleventh Amendment immunity to suits under Section 504.

Section 504 prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." 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 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964." Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily apply for and accept federal financial assistance. States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). And "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. Thus, Congress may, and has, conditioned the receipt of federal financial assistance on the defendants' waiver of Eleventh Amendment immunity to Section 504 claims.

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 receipt of federal financial assistance on 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. 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.

Section 2000d-7 makes unambiguously clear that Congress intended to condition federal funding on a State's waiver of Eleventh Amendment immunity to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance).[4] Any state agency reading the U.S.

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[4] Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep.

(continued...)

Code would have known that after the effective date of Section 2000d-7 it would waive its Eleventh Amendment immunity to suit in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the contract for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received financial assistance.[5]

Thus, 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

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[4](...continued)
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.").

[5] 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. 1420 (Oct. 21, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

immunity" in Section 2000d-7. The text and structure of the statutes make clear that federal financial assistance is conditioned on both the nondiscrimination obligation and waiver of Eleventh Amendment immunity.

Indeed, this Court recently held that 42 U.S.C. 2000d-7 clearly puts States on notice that federal financial assistance is conditioned on a waiver of a State's Eleventh Amendment immunity when it accepts federal financial assistance. In *Koslow* v. *Pennsylvania*, 302 F.3d 161, 170-172 (3d Cir. 2002), petition for cert. pending, No. 02-801, this Court explicitly found:

> Section 2000d-7 of the Rehabilitation Act, as amended, represents a "clear intention," as mandated by *Atascadero State Hospital*. Enacting the amendment to § 2000d-7, Congress put states on notice that by accepting federal funds under the Rehabilitation Act, they would waive their Eleventh Amendment immunity to Rehabilitation Act claims.

302 F.3d at 170 (footnote omitted). The *Koslow* panel further concluded that, "if a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency." *Id.* at 171. The Court acknowledged that "[m]ere participation in a federal program is not sufficient to waive immunity," and held that, "where 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." *Id.* at 172. Nine other courts of appeals agree that the language in Section 2000d-7 clearly manifests an intent to condition receipt of federal financial assistance on a State's consent to

waive its Eleventh Amendment immunity. See *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002) (Section 504); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001) (Section 504), cert. denied, 122 S. Ct. 2591 (2002); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 533 U.S. 949 (2001); *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), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); see also *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001).

The defendants urge this Court to rehear this issue en banc,[6] but there is no reason to do so.[7] The only argument proffered by the defendants[8] in support of their request for rehearing (Def. Br. 10-11) is that this Court's decision in *Koslow* conflicts with the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). The defendants claim that the *Koslow* panel's holding that a State waives its immunity

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[6] The defendants did not move for an initial hearing en banc in this appeal.

[7] The defendants do not contest – nor could they – that this panel is bound by the holding in *Koslow*. See 3d Circuit Internal Operating Procedure 9.1 (July 2002) ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so."); see also *Reich* v. *D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996).

[8] The defendants also note in a footnote that, under the Delaware Constitution, only the Delaware General Assembly has authority to waive the State's immunity. Because the defendants merely mention this defense without offering argument in support thereof, they have waived their right to rely on this ground. *John Wyeth & Brother Ltd.* v. *CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived."). In any case, the Supreme Court held in *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), that questions about who may waive a State's Eleventh Amendment immunity and in what manner they may do so are questions of federal law rather than state law. *Id.* at 1645 (holding that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law"). For the reasons stated in this brief, the defendants have, as a matter of federal law, waived their Eleventh Amendment immunity to claims under Section 504.

under the Eleventh Amendment when it applies for and accepts federal financial assistance conflicts with the holding in *College Savings Bank* that, as the defendants put it, "there are no constructive waivers" (Def. Br. 10). The waiver here is not a constructive waiver. This Court found a valid waiver in *Koslow* not because the State accepted federal financial assistance, but because it accepted the federal financial assistance knowing that the assistance was conditioned on a waiver of immunity. The defendants' knowing application for and acceptance of federal funds is an objective manifestation of their assent to the clear conditions Congress placed upon those funds. This Court should adhere to the holding of *Koslow* that Section 2000d-7 validly conditions a State's acceptance of federal funds on its waiver of Eleventh Amendment immunity. There is no reason to grant en banc review.[9]

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[9] This Court also held in *Koslow* that Section 504 is valid Spending Clause legislation. 302 F.3d at 175-176. The defendants do not challenge that holding. The United States believes that Section 504 can also be upheld as valid legislation under Section 5 of the Fourteenth Amendment. Because this Court held in *Koslow* that the statute is valid legislation under the Spending Clause, however, the United States believes that there is no need for this Court to address the validity of Section 504 under the Fourteenth Amendment.

## CONCLUSION

The order of the district court denying defendants' motion to dismiss the plaintiff's Section 504 claims on the grounds of Eleventh Amendment immunity should be affirmed.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is also being challenged in *Bowers* v. *NCAA*, Nos. 01-4226, 01-4492, 02-1789, 02-3236, and *A.W.* v. *Jersey City Public Schools*, No. 02-2056.

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 3,029 words.

February 27, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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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