No. 01-1878

In the Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS

v.

BRIAN VINSON AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because they waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 288 F.3d 1145. The opinion of the district court (Pet. App. 31a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2002. The petition for a writ of certiorari was filed on June 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C.

794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that Section 504 was not clear enough to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides:

> (1) 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) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

2. Respondent Brian Vinson was injured on the job and was unable to continue performing his work with a flooring company. He received workers' compensation benefits, including vocational rehabilitation benefits from his employer's workers' compensation insurance carrier. The carrier determined that a two-year college program would be an important element of respondent's vocational rehabilitation. Respondent had dyslexia, an impairment that can limit one's ability to read and learn. The insurance carrier determined that respondent's dyslexia would not impede his success in a college program, but that it might require him to spend more than two years to complete the program. Respondent enrolled in a community college, but took a lighter-than-ordinary course load because of his learning disability. Pet. App. 3a-4a, 10a-11a.

The insurance carrier sought approval from petitioners Hawaii Department of Labor and Industrial Relations and Alice Thomas, its vocational rehabilitation supervisor, for state funding for the rehabilitation plan. Petitioners denied the request for state-funded schooling because of the reduced course load, despite respondent's assertion that the lesser course load was needed to accommodate his dyslexia. Pet. App. 4a-5a, 8a.

Respondent filed suit in district court, alleging that petitioners' conduct violated, *inter alia*, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and state law. On petitioners' motion for summary judgment, the district court entered judgment for petitioners on the federal claims on the merits, Pet. App. 44a-72a, and on the state law claim on Eleventh Amendment grounds, *id.* at 72a-74a. Although petitioners had not claimed Eleventh Amend-

ment immunity to suit from the federal claims (*id.* at 44a), the district court held in the alternative, and without discussion of Section 2000d-7, that "the Eleventh Amendment bars suit against [petitioners] to the extent Plaintiff's other claims would require money damages against the state." *Id.* at 74a n.14.[1]

3. Petitioners briefly raised the issue of Eleventh Amendment immunity to the Section 504 claim for the first time in the initial round of briefing on appeal. They addressed it briefly in their statement regarding jurisdiction, but acknowledged that the Ninth Circuit had previously rejected a claim of state immunity to a Section 504 claim. Pet. C.A. Br. 1-3. After this Court held in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate States' immunity to suits alleging disability discrimination in employment under Title I of the ADA, 42 U.S.C. 12111 *et seq.*, the court of appeals requested supplemental briefing on the Eleventh Amendment issue. The United States then intervened on appeal, pursuant to 28 U.S.C. 2403(a), solely to defend the constitutionality of the provision conditioning the States' receipt of federal funding on the waiver of Eleventh Amendment immunity. The

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[1] Respondent initially sought injunctive relief, as well as damages. Pet. App. 34a. The district court granted a preliminary injunction ordering petitioners to conduct a "self-evaluation" as required by Disabilities Act regulations, and vacated that injunction two years later after it had concluded petitioners were in compliance with the regulations. *Id.* at 35a. The district court declined to order that petitioners grant respondent the benefits he requested in light of evidence that, subsequent to the filing of the suit, petitioners had granted him those benefits. *Id.* at 8a-9a, 35a-36a, 42a-43a.

court of appeals affirmed in part and reversed in part. Pet. App. 1a-30a.

With regard to the Section 504 claim, the court followed (Pet. App. 2a, 9a) its recent decision in *Douglas* v. *California Department of Youth Authority*, 271 F.3d 812, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002). *Douglas* held that "Congress may exercise its spending power to condition the grant of federal funds upon the states' agreement to waive Eleventh Amendment immunity." *Id.* at 820 n.5. Examining the plain language of 42 U.S.C. 2000d-7, *Douglas* concluded that Congress had used "clear waiver language" that "conditions the receipt of federal funds under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense." 271 F.3d at 820-821. Because it was undisputed in this case that petitioners "accepted federal Rehabilitation Act funds," the court concluded that petitioners "waived [their] Eleventh Amendment immunity as to [respondent's] claim under section 504 of the Rehabilitation Act." Pet. App. 2a, 9a. On reaching the merits of respondent's Section 504 claim, the court found that, because there remained issues of material fact in dispute, the district court had improperly entered summary judgment. *Id.* at 9a-16a.[2]

Judge O'Scannlain concurred in part and dissented in part. Pet. App. 20a-30a. Although disagreeing with the court's determination that petitioners had waived their immunity to Section 504 claims by accepting federal financial assistance, he concurred in the opinion's holding on that point because the panel was bound by *Douglas*. *Id.* at 22a. On the merits, Judge O'Scannlain

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[2] Respondent abandoned his claim of discrimination under Title II of the ADA at oral argument. Pet. App. 2a n.1.

would have affirmed the grant of summary judgment, and he thus dissented from the court's judgment. *Id.* at 24a-30a.

ARGUMENT

The decision of the court of appeals is correct and does not raise a significant or sustained conflict with any decision of any other court of appeals. This Court recently denied a petition for a writ of certiorari in *Ohio Environmental Protection Agency* v. *Nihiser*, 122 S. Ct. 2588 (2002) (No. 01-1357), which advanced some of the same arguments regarding the same statute. Accordingly, further review is not warranted.

1. Section 2000d-7(a) 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." Petitioners do not dispute (Pet. 10) that Congress has the power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999). And petitioners acknowledge (Pet. 18) that the language of Section 2000d-7 was effective in putting them on clear notice that acceptance of federal funds would constitute a waiver of immunity to suit under Section 504.[3]

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[3] That is the consensus of the courts of appeals. See *Robinson* v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002); *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 554-555 (7th Cir. 2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591

Petitioners nonetheless contend (Pet. 11-15) that their waiver of immunity to suits under Section 504 was not "knowing" because of congressional action regarding States' immunity from suit under a different anti-discrimination statute, Title II of the ADA, 42 U.S.C. 12131 *et seq.* For that proposition, petitioners rely primarily on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001). The Second Circuit agreed with the other courts of appeals, see note 3, *supra*, that 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." *Id.* at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4. But the Court nonetheless held that the State's acceptance of clearly-conditioned funds "alone is not sufficient for us to find that New York actually waived its sovereign immunity in accepting federal funds" in that case. *Id.* at 113-114. Instead, the Second Circuit believed that courts must also consider "whether the state, in accepting the funds,

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(2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 550-551 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). See also *Lovell* v. *Chandler*, No. 98-16545, 2002 WL 2022140, at *7-*8 (9th Cir. Sept. 5, 2002).

believed it was actually relinquishing its right to sovereign immunity." *Id.* at 115 n.5. The Court held that that additional requirement was not satisfied because, at the time the State accepted funds, "Title II of the ADA was reasonably understood to abrogate's New York's sovereign immunity." *Id.* at 114. The court reasoned that, because "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.* (citation omitted).

The Second Circuit's conclusion about what constitutes a knowing waiver is incorrect, for several reasons. First, it is wrong because, since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that acceptance of federal funds constitutes a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity defense it might have to suit under Section 504, regardless of whether it retained immunity from suit under a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

More generally, the court in *Garcia* erred in concluding that acceptance of clearly-conditioned federal funds may be insufficient to find that a State has

waived its immunity. Under this Court's precedents, the existence of a waiver turns on the State's objective manifestation of assent by accepting clearly-conditioned funds.[4] See, *e.g.*, *College Sav. Bank*, 527 U.S. at 686 (holding that "acceptance of the funds entails an agreement" to funding conditions); *id.* at 678 n.2 ("[A] waiver may be found in a State's acceptance of a federal grant."). The Second Circuit's attempt to add an additional, subjective component to the analysis conflicts with this Court's recent teaching in *Lapides* v. *Board of Regents of the University System of Georgia*, 122 S. Ct. 1640, 1643 (2002). In that case, this Court held that the State of Georgia's removal of a case to federal court was "a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's" immunity, even though the State clearly had no subjective intention of "actually relinquishing its right to sovereign immunity," *Garcia*, 280 F.3d at 115 n.5, because it did not believe that removal amounted to a waiver of immunity. 122 S. Ct. at 1645-1646. In so doing, this Court specifically rejected the State's request to examine the State's subjective beliefs and reasons in determining whether the State's actions amounted to an unequivocal waiver. *Id.* at 1644-1645. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645. Moreover, the Court concluded in *Lapides* that removal waived the State's sovereign immunity, even though, before the

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[4] This is consistent with basic contract law principles which ordinarily turn on manifestation of assent. See Restatement (Second) of Contracts §§ 2, 18 (1981); cf. *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2101 (2002) (observing that the Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages").

Lapides decision, the State may have had doubts whether removal would constitute such a waiver. *Garcia* requires courts to engage in the difficult evaluation of States' subjective beliefs and motives, in conflict with the clear jurisdictional rule established in this Court's prior cases.

In any event, it is apparent that the differences between the Second Circuit's position in *Garcia* and the position of the other courts—including the court of appeals in this case—that have addressed similar claims is simply a dispute over a transitional rule that will, in short order, be of no further consequence. *Garcia* held that the waiver for Section 504 claims was effective before Title II went into effect in 1992, see 42 U.S.C. 12131 note, then lost its effectiveness when Title II took effect, and then regained its full effectiveness once again at some point in the late 1990's when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. The on-again, off-again pattern of waivers that results from *Garcia* provides a substantial basis for doubting the validity of the underlying analysis in that case. But it also, at a minimum, deprives petitioners' asserted conflict with *Garcia* of any meaningful long-term effect. Contrary to petitioners' contention (Pet. 12), the Second Circuit's opinion makes clear that at the point when there was a "'colorable basis' for the State[ ] to suspect" that it had retained its immunity to suit, the waiver for Section 504 became effective again "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity." *Garcia*, 280 F.3d at 114 n.4. That point presumably occurred, at the latest, in 1997, after this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v.

Flores, 521 U.S. 507 (1997). After *Seminole Tribe*, and even more so in response to *City of Boerne*, States around the country began challenging the validity of Title II's abrogation, and some courts were accepting those arguments. See, *e.g.*, *Brown* v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), aff'd, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002). Indeed, by March 1998, 33 States (including petitioner Hawaii) filed an amicus brief in this Court arguing that *City of Boerne* made it "doubtful" that Congress could have validly abrogated States' Eleventh Amendment immunity to suits under Title II of the ADA. Brief of Amici Curiae State of Nevada et al. at 10, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206 (1998) (No. 97-634).

Under the rationale of the Second Circuit's decision in *Garcia*, state departments or agencies that accepted funds after (at the latest) 1997 knowingly waived their immunity. Accordingly, in the Second Circuit, as in every other circuit that has addressed the issue, state departments or agencies that accepted federal funds after 1997 and state departments or agencies that accept federal funds in the future are subject to suit under Section 504. There is accordingly unanimity in the circuits regarding the validity of States' waiver of immunity to Section 504 suits for most cases currently being litigated and for all cases that will arise in the future. The dispute between the Second Circuit's view and that of the other courts of appeals affects at most the small and steadily decreasing number of pending Section 504 cases against States seeking monetary damages that arose between the effective date of Title

II of the Disabilities Act in 1992 and (at the latest) 1997. Further review is therefore not warranted.

2. Petitioners further contend (Pet. 16-20) that Section 2000d-7's waiver of immunity does not extend to *damages*. That argument appears to have been briefly brought before the panel, embedded in petitioners' now-abandoned argument that Congress lacked authority to enact Section 504 under the Spending Clause in a supplemental letter brief filed by petitioners in response to the Court's request for briefing on the effects of *Garrett* on the appeal. Perhaps because of its cursory presentation in petitioners' supplemental brief, the court of appeals did not expressly address the issue and petitioners did not seek further review through a petition for rehearing.[5] Moreover, despite their contention (Pet. 16-20) that their claim follows directly from *Lane* v. *Pena*, 518 U.S. 187 (1996), petitioners have not pointed to any decision by any court in the last six years that has adopted, or even addressed, the claim that they now press. This Court should not grant further review to address such a question of first impression, before there has developed any division of authority—or even any discussion of the issue—in the courts of appeals.

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[5] After oral argument, but before the court of appeals issued a decision, petitioners submitted a premature Petition for Rehearing En Banc in which they more clearly raised their claim that Section 2000d-7's waiver of immunity does not extend to damages. Citing Federal Rule of Appellate Procedure 35(c), concerning the timing of petitions for en banc review, the court ordered that the petition "not be filed" and provided that if petitioners "wish to file a petition for rehearing en banc after the panel decision in this case is filed, they may do so." 12/4/01 Order 1-2. After the panel decision was filed, petitioners did not seek either panel or en banc rehearing.

In any event, petitioners' contention (Pet. 18) that Section 2000d-7 "does not 'unambiguously' state that any waiver of sovereign immunity would extend to suits for money damages" is mistaken. Section 2000d-7(a)(1) provides that States "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." The Eleventh Amendment is an immunity from suit for any form of relief, equitable or legal. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996). By waiving their "Eleventh Amendment" immunity, then, petitioners waived their immunity to suit for any form of relief. No separate mention of damages is required, because the statute is clear that they have waived all their immunity derived from or reflected in the Eleventh Amendment. Just as a "sue and be sued" clause deprives a federal entity of any remnant of its sovereign immunity to damage actions, see *FDIC* v. *Meyer*, 510 U.S. 471, 480 (1994) (so holding and collecting cases), Section 2000d-7(a)(1)'s total relinquishment of sovereign immunity demands that petitioners be treated for purposes of immunity as if they were private entities.

Section 2000d-7(a)(2) does not, as petitioners assert (Pet. 18), serve as a limit on the waiver. That Section provides:

> In a suit against a State for a violation of [Section 504 and other specified civil rights statutes], remedies (including remedies both at law and in equity), are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

As the caption of Section 2000d-7 ("Civil rights remedies equalization") indicates, Section 2000d-7(a)(2) is intended to "equaliz[e]" the "remedies" available against a state defendant. Section 2000d-7(a)(2) is not a response to sovereign immunity (which is entirely removed by subsection (a)(1)), but to the myriad other rules *apart* from the Eleventh Amendment that reflect the special status of States (but not other public and private entities) in the federal system. See, *e.g*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). Congress enacted this subsection in order to eliminate any possibility that those other rules might limit the remedies available against States even when sovereign immunity was removed. Cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (common law presumption against punitive damage awards against governmental entities). Thus, in determining the meaning of Section 2000d-7(a)(2), no "clear statement" rule is required because it does not state a condition of waiver of sovereign immunity, but rather provides a rule of construction.

Moreover, even if Section 2000d-7(a)(2) were part of a waiver of sovereign immunity, this Court has held that once it is clear a waiver exists, the waiver's scope is determined by a "realistic assessment of legislative intent." *Franconia Assocs.* v. *United States*, 122 S. Ct. 1993, 2003 (2002) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)); see *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) ("[O]nce Congress has waived sovereign immunity over a certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress in-

tended.'"). Section 2000d-7(a)(2) provides that a plaintiff may recover "remedies both at law and in equity" against a State "to the same extent as such remedies are available for such a violation in the suit against *any* public or private entity other than a State" (emphasis added). Petitioners' primary assertion (Pet. 18-19) is that the term "public entity" refers to both local governments (such as cities and school districts, which are governed by Section 504, Title VI of the Civil Rights Act of 1964 (29 U.S.C. 794), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), and other federal statutes that "prohibit[] discrimination by recipients of Federal financial assistance," 42 U.S.C. 2000d-7(a)(1)) *and* the federal government (which is governed only by Section 504). As we explained in our brief in *Lane*, we do not believe that is the best reading of the statute. See 518 U.S. at 199 (describing as "plausible" the United States' argument that the term "public entity" refers to "'the non-federal public entities receiving federal financial assistance that are covered by' each of the statutes to which § [2000d-7(a)(1)] refers"). By using a disjunctive and broad reference to any public or private entity, the provision makes the remedies against the States the same as those broadly available against other private and public entities. The statute does not easily admit of a reading that focuses on a specific rule limiting remedies against a small subset of certain private or public entities.

But even assuming that the term "public entity" did include the federal government, and further accepting petitioners' contention (Pet. 19) that this provision must be read as providing that only remedies that are available from *both* public and private entities are available from States, that would not foreclose damages against a State. The statute does not use restrictive

terms to require that such damages be available from *every* public entity, but rather uses expansive terms, referring to "any" public entity. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *Webster's Third New International Dictionary* 97 (1976)). It is well-established that damages are generally available against all private entities and most public entities (such as cities and school districts). See *Barnes*, 122 S. Ct. at 2100-2101. Moreover, *Lane* itself made clear that the federal government could be sued for damages for violations of Section 504 when it was sued for its actions as a "provider" of federal funds. See 518 U.S. at 193. Therefore, damages *are* available against every public entity, both federal and local, in at least some circumstances. Suits against the States for damages thus fall plainly within the text of Section 2000d-7(a)(2), even if read as narrowly as petitioners advocate.

Petitioners' contention—that their Eleventh Amendment immunity is removed by Section 2000d-7, but no damages are available—would make the statute a practical nullity. *Ex parte Young*, 209 U.S. 123 (1908), permits suits against state officials for prospective injunctive relief, and nothing in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 235 (1985), which addressed suits for "retroactive monetary relief," drew the availability of a suit for injunctive relief against state officials into question. Cf. *Honig* v. *Students of the Cal. Sch. for the Blind*, 471 U.S. 148 (1985) (same); *Alexander* v. *Choate*, 469 U.S. 287 (1985) (suit under Section 504 against state official in official capacity for injunctive relief); *Campbell* v. *Kruse*, 434 U.S. 808 (1977) (same). In enacting Section 2000d-7 in response

to *Atascadero*, Congress was cognizant of the availability of *Ex parte Young* and knew that as a practical matter only damage remedies had been precluded by *Atascadero*. See 132 Cong. Rec. 28,623 (1986) (Sen. Cranston); S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986). Yet petitioners contend that Section 2000d-7 permits no remedies other than what was already available under *Ex parte Young*. It would be absurd to attribute such an intent to Congress. Cf. *United States* v. *Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (the clear statement "rule does not, however, require explicit waivers to be given a meaning that is implausible"). Therefore, if the scope of the waiver is judged by a "realistic assessment of legislative intent," it is clear that Congress intended to make damages available. *Franconia*, 122 S. Ct. at 2003.

3. Finally, petitioners urge (Pet. 20-23) this Court to review whether there is a private right of action against state recipients of federal financial assistance for violations of Section 504. That argument was not pressed by petitioners below nor addressed by the court of appeals.[6] This Court does not ordinarily grant review to consider claims that were neither pressed nor passed upon below. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001). Nor have peti-

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[6] Petitioners did press this argument (albeit for the first time) in their premature Petition for Rehearing En Banc. That petition was not accepted for filing, see note 5, *supra*, and petitioners did not file a petition for panel or en banc rehearing after the decision was issued. Thus, petitioners' argument was never submitted in a pleading accepted for filing by the court. Even if the petition had been accepted for filing, the argument would have come too late to preserve it for this Court's review. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

tioners pointed to any decision of any court of appeals that has addressed the issue. Petitioner's claim is therefore not ripe for review.

In any event, Congress has made plain in the text and structure of the relevant statutes its intent to provide a private right of action against recipients of federal funds, including state recipients, for violations of Section 504. Petitioners insist (Pet. 22) that Section 2000d-7 alone was not sufficient to put them on notice that Congress intended to create a cause of action against States. In essence, their contention reduces to the proposition that Congress clearly expressed its intent that Eleventh Amendment immunity be no bar to a private suit proceeding against a State under Section 504, without expressing any intent as to whether a cause of action existed in the first place. Without the cause of action, however, Section 2000d-7's reference to Section 504 would truly be a nullity. Thus, this Court has consistently held that Section 2000d-7 "ratified *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)]'s holding" that a private right of action exists for the statutes identified therein. *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001); see *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100 (2002); *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992); *id.* at 78 (Scalia, J., concurring). And since Section 2000d-7(a)(1) is directly targeted at a legal immunity enjoyed by States alone, there can be no doubt that Congress intended States to be defendants to Section 504's private right of action.

In any event, Section 2000d-7 does not stand alone. In 1978, Congress enacted Section 505(a)(2) of the Rehabilitation Act, which provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d *et seq.*] shall be available to any person aggrieved by any act or failure

to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. 794a(a)(2). It is now "beyond dispute that private individuals may sue to enforce" Title VI, *Alexander*, 532 U.S. at 280, and the same was true at the time Congress enacted Section 505, see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696, 701-703 (1979) (describing legal landscape in 1972); see also *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 419-421 (1978) (opinion of Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ.) (holding that there is a private right of action to enforce Title VI against a state agency).

By incorporating the "remedies, procedures, and rights" of Title VI, Congress plainly incorporated the existing private right of action to enforce Title VI. See *Barnes*, 122 S. Ct. at 2100 ("Both [Section 504 of the Rehabilitation Act and Title II of the Disabilities Act] are enforceable through private causes of action" as evidenced by the incorporation of "the remedies available in a private cause of action brought under Title VI."). The existence of the private cause of action to enforce Section 504 is also confirmed by the statutory provision authorizing the award of attorneys' fees to a prevailing party (other than the United States) "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter." 29 U.S.C. 794a(b); see *Cannon*, 441 U.S. at 699 (attorneys' fees provision "explicitly presumes the availability of private suits"); *Lane*, 518 U.S. at 194 (describing Section 505(b) as "clear waiver of the Federal Government's sovereign immunity").

Petitioners ignore Section 505(a), which expressly incorporates the remedies under Title VI, and Section 505(b), which expressly provides that private parties seeking "to enforce" Section 504 may recover attorneys'

fees. Those provisions, together with section 2000d-7, make clear that recipients, including state recipients, are subject to private suit under Section 504. Thus, even if petitioners are correct (Pet. 22) that implied causes of action for Spending Clause legislation are *in general* "inconsistent" with the clear statement rule of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), Congress made quite clear through the text and structure of the relevant statutes its intent that Section 504 be enforced against the States through such a cause of action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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