No. 98-1111

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF TEXAS, ET AL., PETITIONERS

v.

FRANCOIS DANIEL LESAGE

AND

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States intervened in this litigation, pursuant to 28 U.S.C. 2403(a), solely for the purpose of defending the constitutionality of the abrogation of Eleventh Amendment immunity contained in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Accordingly, the United States addresses only the following question:

Whether Congress's abrogation of the States' Eleventh Amendment immunity in Title VI of the Civil Rights Act of 1964 is constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 158 F.3d 213. The opinions of the district court denying petitioners' motion to dismiss (Dist. Ct. Rec. 106-110)[1] and granting petitioners'

[1] Petitioners did not reproduce in the petition appendix the district court's ruling on the motion to dismiss. The district court docket sheet indicates, however, that it may be found on the designated pages of the district court record, which was before the court of appeals. In addition, we have lodged a copy of the district court's decision with the Clerk of the Court.

motion for summary judgment (Pet. App. A20-A28) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 13, 1998. The petition for a writ of certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States" shall "be subjected to discrimination" on the grounds of race, color, or national origin "under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. Congress further directed 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 * * * 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.

42 U.S.C. 2000d-7(a)(1). Congress added this abrogation language to Title VI in 1986, following this Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), which held that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246 (addressing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794); see also Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845; *Lane* v. *Peña*, 518 U.S. 187, 198 (1996) (chronicling the amendment

history). The effective date of the abrogation provision was October 21, 1986. 42 U.S.C. 2000d-7(b).

2. Respondent Francois Daniel Lesage, a white male, filed suit against petitioners the State of Texas, the University of Texas, and various university officials under 42 U.S.C. 1981, 1983, and Title VI. Pet. App. A2. Respondent alleged that he was denied admission to the University's doctoral program in counseling psychology because of the University's consideration of race as one factor in admission decisions. *Id.* at A2, A22.

Petitioners moved to dismiss the Title VI claim on the ground of Eleventh Amendment immunity. Pet. App. A2. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in Title VI. The district court denied petitioners' motion to dismiss on Eleventh Amendment grounds. See Pet. App. A4.[2] The district court held that the abrogation provision fell within Congress's power under Section 5 of the Fourteenth Amendment. Dist. Ct. Rec. 106-110. The district court subsequently granted petitioners' motion for summary judgment on the grounds that petitioners' decision not to admit respondent was unaffected by considerations of race and that respondent would have been denied admission regardless of the use of racial preferences. Pet. App. A22-A27.

3. The court of appeals affirmed the denial of petitioners' motion to dismiss on Eleventh Amendment grounds (Pet. App. A2-A10), but reversed the district

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[2] The district court did, however, grant petitioners' motion to dismiss respondent's monetary claims under 42 U.S.C. 1981 and 1983. Pet. App. A2.

court's grant of summary judgment to petitioners and remanded for further proceedings (*Id.* at A10-A19).

With respect to petitioners' Eleventh Amendment claim, the court of appeals ruled that the abrogation of the States' Eleventh Amendment immunity in 42 U.S.C. 2000d-7 was a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment. Pet. App. A4-A10. The court first concluded that Congress "unequivocally expresse[d] its intent to abrogate the immunity" in Section 2000d-7. *Id.* at A4.

The court then determined that Title VI constituted proper enforcement legislation under Section 5 of the Fourteenth Amendment, because the Act "prohibits precisely that which the Constitution prohibits in virtually all possible applications." Pet. App. A6. The court of appeals rejected petitioners' assertion that the abrogation was ineffective because Congress had intended only to exercise its powers under the Spending Clause when it enacted Title VI. *Id.* at A7-A10. The court explained that the question of Congress's authority to abrogate the States' immunity "is an entirely objective inquiry," and does not depend upon Congress's "recital[] of the power which it undertakes to exercise." *Id.* at A7 (internal quotation marks omitted). Furthermore, the court concluded, whatever Congress's intent was when it originally enacted Title VI in 1964, Congress "unquestionably enacted 42 U.S.C. § 2000d-7 with the 'intent' to invoke the Fourteenth Amendment's congressional enforcement power." Pet. App. A7-A9 & n.6 (citing legislative history references to exercise of the Section 5 power).

ARGUMENT

The court of appeals' ruling that Congress validly abrogated the States' Eleventh Amendment immunity through the enactment of 42 U.S.C. 2000d-7 is correct and consistent with the decisions of this Court and every other court of appeals to address the question. Accordingly, further review is unwarranted.[3]

In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)).

1. Petitioners do not dispute that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity in Title VI. Pet. 15. Nor could they. See *Lane* v. *Peña*, 518 U.S. 187, 200 (1996) (noting "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in [42 U.S.C. 2000d-7(a)(1)]"); see also *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1996 (1998) (noting "Congress' abrogation of the States' Eleventh Amendment immunity under * * * 42 U.S.C. § 2000d-7").

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[3] Indeed, this Court has already denied another petition for a writ of certiorari that raised the identical question. See *Texas* v. *Hopwood*, No. 95-1773, Pet. at I, Question 4, cert. denied, 518 U.S. 1033 (1996). Petitioner identifies no changed circumstances that would warrant a different disposition of the present petition.

2. Petitioners argue instead (Pet. 14-17) that Congress lacked the legislative authority to effect the abrogation because Title VI is not an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim does not merit this Court's review for three reasons.

First, every court of appeals to address the question since *Seminole Tribe* has ruled that the Eleventh Amendment abrogation contained in 42 U.S.C. 2000d-7 is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Doe* v. *University of Ill.*, 138 F.3d 653, 657-660 (7th Cir. 1998) (as applied to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*), petition for cert. pending, No. 98-126; *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) (same); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 362-363 (6th Cir. 1998) (same); *Clark* v. *California*, 123 F.3d 1267, 1269-1271 (9th Cir. 1997) (as applied to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794), cert. denied, 118 S. Ct. 2340 (1998). Petitioners make no argument that Title VI is different in any relevant respect from those other statutory prohibitions of discrimination that are governed by the same abrogation provision. Moreover, the fact that the court of appeals' ruling reflects the first and only appellate court decision that we are aware of addressing Eleventh Amendment abrogation under Title VI after *Seminole Tribe* counsels strongly against this Court's review.

Second, the court of appeals' decision is correct and consistent with this Court's precedents. Title VI's

prohibition on race-based discrimination by state actors falls squarely within Congress's powers under Section 5 of the Fourteenth Amendment. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 518, 525-527 (1997); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 487-491 (1989) (opinion of O'Connor, J.); *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-480 (1980) (opinion of Burger, C.J.).

Petitioners argue (Pet. 14-15) that, because Title VI's substantive provisions were enacted pursuant to the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, the abrogation provision cannot be considered an exercise of the Section 5 power. That claim is meritless. This Court has long recognized that

> [i]t is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," * * * for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

EEOC v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983) (citing *Fullilove*, 448 U.S. at 476-478 (opinion of Burger, C.J.), and quoting *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

Moreover, statutes can be enacted under "an amalgam of [Congress's] specifically delegated powers." *Fullilove*, 448 U.S. at 473. In *Fullilove*, the Court explained that the Public Works Employment Act of 1977 "by its very nature, is primarily an exercise of the Spending Power." *Ibid.* The Court nevertheless pro-

ceeded to analyze under Section 5 of the Fourteenth Amendment the Act's applicability to state and local grantees of federal funds. *Id.* at 476. Likewise, although Title VII of the Civil Rights Act of 1964 did not originally apply to the States and thus its substantive provisions reflected an exercise of Congress's Commerce Clause powers, this Court analyzed the scope of congressional power to enact the 1972 amendments, which extended Title VII's applicability to the States, under Section 5 of the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 452-456 & n.9. The court of appeals thus properly analyzed Title VI's abrogation provision as Section 5 legislation.[4]

Petitioners' argument (Pet. 16-17) that Section 5 legislation must be coercive rather than "[p]ermissive" and thus must not permit States to opt out of the prohibitions is clearly wrong. "*[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Croson*, 488 U.S. at 488 (quoting *Fullilove*, 448 U.S. at 483). Accordingly, Congress, under Section 5, "may *induce voluntary action* to assure compliance with existing federal statutory or constitutional antidiscrimination provisions." *Ibid.* (emphasis added); *Fullilove*, 448 U.S. at 483- 484 (same); see also *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582,

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[4] In any event, as the court of appeals recognized (Pet. App. A8-A9 & n.6), the legislative history of Section 2000d-7 documents Congress's reliance on its Fourteenth Amendment powers. See also *Fitzpatrick*, 427 U.S. at 453 n.9 (citing legislative history illustrating that "Congress exercised its power under § 5 of the Fourteenth Amendment").

603 (1949) (opinion of Jackson, J.) ("In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."); *Doe*, 138 F.3d at 659-660 (Congress's extension of an "already existing federal funds framework" to the States does not undercut its "inten[t] to act pursuant to its acknowledged powers over State actors granted by Section 5 of the Fourteenth Amendment").[5]

Third, even were petitioners' abrogation arguments correct, petitioners waived any existing Eleventh Amendment immunity when they voluntarily accepted federal funds subject to Title VI's terms and conditions subsequent to the effective date of Section 2000d-7. This Court has repeatedly recognized that, "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985). When Congress legislates pursuant to its powers under the Spending Clause, it may condition the acceptance and receipt of federal funds on a State's compliance with conditions that Congress could not impose unilaterally. *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (even "a perceived [federalism] limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants"); see also *New York* v. *United States*, 505 U.S. 144, 167, 171-172 (1992). One such

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[5] Contrary to petitioners' suggestion (Pet. 16), moreover, Congress's decision to use a "carrot" (*ibid.*) rather than a stick to enforce the Fourteenth Amendment prohibition against race discrimination through Title VI has proven to be an extremely effective enforcement device: the Department of Education advises that all fifty States accept federal education funds that subject them to Title VI's requirements.

condition may be a waiver of sovereign immunity. See *Clark*, 123 F.3d at 1271 ("One way for a state to waive its immunity is to accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'") (quoting *Atascadero*, 473 U.S. at 247); see also *Atascadero*, 473 U.S. at 238 n.1 ("A State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program."); *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) (a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity"). Indeed, in both *Atascadero* and *Edelman*, this Court's analyses turned, not upon the lack of congressional power to impose such a condition, but on the insufficient clarity of Congress's expression of its intent to do so. See *Atascadero*, 473 U.S. at 247; *Edelman*, 415 U.S. at 672-674; compare *Lane*, 518 U.S. at 198 (explaining that Congress enacted 42 U.S.C. 2000d-7 in response to *Atascadero* in order "to provide the sort of unequivocal waiver that [the Court's] precedents demand"). In short, requiring petitioners "to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on [state] sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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