No. 05-671

In the Supreme Court of the United States

TEXAS DEPARTMENT OF PUBLIC SAFETY, PETITIONER

v.

JULIE DUNLOP ESPINOZA, ET AL.

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The opinion of the district court (Pet. App. 4-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. The petition for a writ of certiorari was filed on November 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

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. 794(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damages 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, § 1003, 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (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] * * *.
>
> (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.

42 U.S.C. 2000d-7(a).

2. Respondent Julie Espinoza suffers from a disability under by the Rehabilitation Act. In September 2000, she sued the Texas Department of Public Safety, alleging that the agency discriminated against her on the

basis of her disability in violation of Section 504 and other state and federal laws when it required her to submit to a comprehensive examination in order to qualify for a driver's license. Pet. App. 5. Espinoza initially sought damages, attorneys fees, declaratory relief, and a temporary and permanent injunction. *Ibid.* The state agency moved to dismiss Espinoza's Section 504 claims as barred by its Eleventh Amendment immunity. *Id.* at 6. Subsequently, Espinoza moved to amend her complaint to remove her claims for damages against the agency and to add its director in his official capacity as a defendant, for purposes of seeking prospective injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 10-11.

The district court simultaneously ruled on both motions, granting the motion to amend the complaint and denying the State's motion to dismiss. Pet. App. 15. With respect to the latter motion, the court held that Congress validly conditioned receipt of federal funds on the agency's waiver of sovereign immunity to Section 504 claims and that, by accepting federal funds under such conditions, the agency had waived its sovereign immunity. *Id.* at 8-10. The State filed an interlocutory appeal to challenge the denial of its Eleventh Amendment immunity defense. *Id.* at 3.

3. The United States intervened on appeal pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statutory provisions conditioning the receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity. Before hearing oral argument, the Fifth Circuit held the case in abeyance pending decisions from the en banc court in *Pace* v. *Bogalusa City School Board*, No. 01-31026, and in

Miller v. *Texas Tech Health Sciences Center*, Nos. 02-10190, 02-30318, and 02-30369.

4. On March 8, 2005, the en banc court of appeals issued its decision in *Pace*, holding that the state agency defendant knowingly and voluntarily waived its Eleventh Amendment immunity to claims under Section 504 when it accepted federal funds, and that Section 504 is a valid exercise of Congress's authority under the Spending Clause. *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005), cert. denied, 126 S. Ct. 416 (2005); Pet. App. 17-76. Relying on this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the court held that "congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive." *Pace*, 403 F.3d at 279; Pet. App. 27. The court noted that the State had not disputed that the Spending Clause statute at issue in the case was "enacted in pursuit of the general welfare" and was "sufficiently related to the federal interest in the program funded." 403 F.3d at 280; Pet. App. 30. The court proceeded to consider the other requirements for a valid exercise of congressional power under the Spending Clause.

The court held that the conditions on federal spending in Section 2000d-7 are "unambiguous." 403 F.3d at 282; Pet. App. 34. The court explained that "during the relevant time period, [Section] 2000d-7 * * * put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity." 403 F.3d at 284; Pet. App. 38. The court rejected the state agencies' attempt to "engraft[] a subjective-intent element

onto the otherwise objective Spending Clause waiver inquiry," holding that the fact that a State "might not 'know' subjectively whether it had any immunity [left] to waive by agreeing to th[e] [statutory] conditions is wholly irrelevant." 403 F.3d at 284; Pet. App. 38. The court concluded that, in light of the unambiguous statutory condition, the State's "waiver of Eleventh Amendment immunity to actions under § 504 * * * was knowing." 403 F.3d at 285; Pet. App. 39.

The court also held that Section 2000d-7 does not violate any independent constitutional prohibition. The court concluded that the statute does not violate the "unconstitutional-conditions" doctrine, because States as sovereigns, unlike private parties, have the resources to protect their interests and because in any event the need to protect a State from "coercion or compulsion * * * is subsumed in the non-coercion prong of the *Dole* test." 403 F.3d at 286-287; Pet. App. 41-43. The court also concluded that the conditions in Section 2000d-7 are not unduly coercive. The court noted that, to avoid suit under Section 504, a "state would not have to refuse all federal assistance." 403 F.3d at 287; Pet. App. 43. Instead, "[a] state can prevent suits against a particular agency under § 504 by declining federal funds for that agency." 430 F.3d at 287; Pet. App. 43. The court accordingly "refuse[d] to invalidate Louisiana's waiver on coercion grounds." 430 F.3d at 287; Pet. App. 43.

Judge Jones, joined by five other judges, concurred in part and dissented in part. 403 F.3d at 297-303; Pet. App. 65-76. She agreed with the majority that the Spending Clause statutes at issue in this case are "not unconstitutionally coercive." 403 F.3d at 299 n.2; Pet. App. 68 n.113. But in her view, a State may not be found to have waived its right to sovereign immunity unless it

"possess[ed] actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver*." 403 F.3d at 300 (internal quotation marks and citation omitted); Pet. App. 70 (same). Adopting the reasoning of the panel decision that she had authored, Judge Jones stated her view that a State could reasonably have believed "between 1996 and 1998 that it had no sovereign immunity to waive" because the Americans with Disabilities Act (ADA), had purported to abrogate its immunity to claims under that statute. 403 F.3d at 301; Pet. App. 71. In her view, although "[t]he State voluntarily accepted federal funds" during that period, the purported abrogation of its immunity to ADA claims meant that "its acceptance [of federal funds] was not a 'knowing' waiver of immunity" to claims under Section 504. 403 F.3d at 301; Pet. App. 71.

This Court recently denied a petition for certiorari filed by Louisiana in *Pace*. See *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005).

5. The en banc court subsequently issued its decision in *Miller* (which consisted of three consolidated cases—two from Louisiana and one from Texas) on August 15, 2005, addressing three remaining challenges to the validity of conditioning the receipt of federal funds on a state agency's waiver of immunity to claims under Section 504. *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342 (5th Cir. 2005), cert. denied, No. 05-617 (Feb. 21, 2006).

First, the court of appeals rejected the States' contention that they did not waive their immunity to suits under Section 504 because the agencies that accepted the clearly conditioned federal funds were not autho-

rized to waive the States' immunity, though they were authorized to apply for and accept the conditioned funds. 421 F.3d at 347-348; Pet. App. 84-86. The court held that, by authorizing the state agencies to "accept the benefits of substantial sums of federal Spending Clause money burdened with the clearly stated condition under § 2000d-7 that acceptance waives immunity from suit in federal court" for suits under Section 504, the States effectively authorized the agencies to waive their Eleventh Amendment immunity. 421 F.3d at 348; Pet. App. 85.

Second, the court of appeals rejected Texas's challenge to Sections 504 and 2000d-7 on "relatedness" grounds. 421 F.3d at 348-349; Pet. App. 86-89. Texas argued that, because the federal funds its agency received were not funds provided directly under the Rehabilitation Act itself, the conditions in Sections 504 and 2000d-7 are not "reasonably related to the purpose of the expenditure to which they are attached" as required by the *Dole* test. See 421 F.3d at 348 & n.15; Pet. App. 86 & n.15. The court rejected that contention, holding that Congress's expressed interest in "eliminating disability-based discrimination" in federally-funded programs "flows with every dollar spent by a department or agency receiving federal funds." 421 F.3d at 349; Pet. App. 88-89 (quoting *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003)).

Finally, the court of appeals rejected Louisiana's argument that it did not "knowingly" waive its immunity by accepting federal funds because it might have thought at the time it took the funds that it did not have any immunity to waive. 421 F.3d at 350-352; Pet. App. 89-93. Although the State acknowledged that the same

argument had been rejected by the en banc court of appeals in *Pace*, it argued that this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), required the court to reconsider *Pace* because this Court in *Jackson* "repudiated th[e] 'clear statement rule' and replaced it with a 'notice' rule." 421 F.3d at 350-351; Pet. App. 90-91. The court of appeals refused to "read such a sweeping change into th[is] [C]ourt's opinion in *Jackson*," holding instead that the "clear and unambiguous" waiver condition in Sections 504 and 2000d-7 was sufficient to render a State's acceptance of federal funds a knowing waiver of immunity. 421 F.3d at 351; Pet. App. 92.

Judge Jones, joined by five other judges, concurred in part and dissented in part. Although all the judges agreed with the three holdings of the majority opinion, they filed a separate opinion to reiterate their disagreement with the majority opinion in *Pace*. 421 F.3d at 352; Pet. App. 94.

Although the Texas state defendants in *Miller* did not file a petition for certiorari, the Louisiana state defendants in *Miller* did. *Louisiana Dep't of Educ.* v. *Johnson*, No. 05-617. This Court denied the petition on February 21, 2006.

6. On August 25, 2005, a panel of the Fifth Circuit issued an unpublished opinion in the instant case affirming the district court's holding that the state agency defendant is not immune to plaintiff's claims under Section 504. Pet. App. 1-3. The court of appeals stated that all of the challenges to Sections 504 and 2000d-7 had been disposed of by the court's en banc decisions in *Pace* and *Miller*. *Id.* at 3.

ARGUMENT

This Court has repeatedly denied petitions for certiorari raising arguments challenging the constitutionality of Section 504 of the Rehabilitation Act and of 42 U.S.C. 2000d-7 that are indistinguishable from those advanced by petitioner here. See *Louisiana Dep't of Educ.* v. *Johnson*, cert. denied, No. 05-617 (Feb. 21, 2006); *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005) (No. 04-1655); *WMATA* v. *Barbour*, 125 S. Ct. 1591 (2005) (No. 04-748); *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Pennsylvania Dep't of Corr.* v. *Koslow*, 537 U.S. 1232 (2003) (No. 02-801); *Hawaii* v. *Vinson,* 537 U.S. 1104 (2003) (No. 01-1878); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). Just as in those cases, further review is not warranted, and the petition should be denied.

Petitioner does not challenge Congress's authority to condition the receipt of federal funds on a state agency's waiver of its Eleventh Amendment immunity. Nor does petitioner argue that conditioning the receipt of federal funds on a state agency's waiver of its immunity to private claims under Section 504 is somehow unconstitutionally coercive. Rather, petitioner contends that its waiver was invalid because (a) Section 2000d-7(a) does not make it sufficiently clear that Congress intended to make waiver a condition of accepting federal funds, and (b) the condition Congress has placed on the receipt of federal funds is not "related" to the funds, as required under *South Dakota* v. *Dole*, 483 U.S. 203 (1987), to the extent that the condition attaches to funds not distrib-

uted under the Rehabilitation Act itself. Those contentions are incorrect and, just as in the cases cited above in which this Court denied certiorari, do not warrant further review here.

1. *Knowledge*. Petitioner argues (Pet. 14) that it could not have "knowingly" waived its immunity to Section 504 claims, because "[a]lthough Section 2000d-7(a) demonstrates Congress's unmistakable desire that States be subject to suit in federal court, it is less than clear that Congress intended to accomplish that objective indirectly by conditioning waiver on the receipt of federal funds instead of directly by abrogation." Because Congress's intent is clear, that argument was correctly rejected by the court of appeals.

a. Petitioner concedes that Section 2000d-7 makes clear Congress's intent that state agencies accepting federal funds be subject to private suits to enforce Section 504. A State that has chosen to take federal funds under that provision therefore has knowingly waived its immunity. There is no separate requirement that Congress use any particular form of words when it is clear that Congress intended that, if a State takes federal funds, it will be foreclosed from asserting immunity. Every court of appeals to have considered the question has concluded that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005); *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113-115 (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); *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005), cert. denied, 126 S. Ct. 416 (2005); *Nihiser* v. *Ohio EPA*, 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. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

Petitioner contends (Pet. 18) that "[t]he court of appeals's decision in *Pace* widens an existing split between the Second Circuit and every other circuit to consider whether Section 2000d-7(a) can form the basis of a knowing waiver." Petitioner's contention is mistaken. The Second Circuit in the case on which petitioner relies, *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98 (2001), stated unequivocally that "we agree with [the plaintiff] that [Section 2000d-7(a)] 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. Accordingly, all of the regional courts of appeals—including the Second Circuit—have agreed that Section 2000d-7(a) puts States on clear notice that agencies that accept federal funds will be subject to suit under Section 504.[1]

[1] The Second Circuit in *Garcia* did disagree with the other circuits on a different point, resulting in the conclusion that the States retained immunity from suit under Section 504 for a period in the 1990s. The court in *Garcia* reasoned that, because a State may have believed that its immunity from suits for violation of Title II of the ADA was

b. Unlike statutes such as the ADA, which authorizes suits against States by abrogating state sovereign immunity defenses, Section 504 authorizes suits only against state agencies that receive federal funds,[2] only if the State voluntarily chooses to accept those funds, and only for the duration of the funding period.[3] Those

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abrogated by Section 2000d-7(a), and because the "proscriptions of Title II [of the ADA] 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 [under Section 504], since by all reasonable appearances state sovereign immunity had already been lost [to claims under Title II]." 280 F.3d at 114 (citation omitted). The petition for certiorari does not advance the *Garcia* rationale or argue that certiorari should be granted to consider whether that rationale is correct. In any event, as the United States explained in its brief in opposition to certiorari in *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005) (No. 04-1655), *Garcia* was wrong when it was decided, see U.S. Br. in Opp. at 17-21, *Pace*, *supra* (No. 04-1655); *Garcia* has in any event been overtaken by subsequent decisions of this Court in *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613 (2002), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004), see U.S. Br. in Opp. at 21, *Pace*, *supra* (No. 04-1655); and even aside from *Lapides* and *Lane*, the *Garcia* rule was a transitional rule and the Second Circuit would now recognize that a State's waiver of immunity from Section 504 suits would be valid for most or all cases currently being litigated and all cases that will arise in the future, see *id.* at 22-23.

[2] Section 504 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 statutes as a whole, Congress limited its attempted abrogation to those state agencies that receive federal financial assistance.

[3] A state agency is not subject to liability and suit under Section 504 in perpetuity if, at any time, it accepted federal funds. Instead, the state program must be "receiving Federal financial assistance" at the

differences are critically important. A state agency could read the ADA and conclude that Congress intended to abrogate its sovereign immunity to ADA claims regardless of any decision or action by the State. But Sections 504 and 2000d-7 are clearly conditional. They have 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 those provisions would subject the agency to suit under Section 504.

Thus, when it was deciding whether to accept federal funds for the relevant funding year, petitioner'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, petitioner knowingly waived its sovereign immunity.

2. *Relatedness.* Petitioner contends (Pet. 24-30) that Section 504 and Section 2000d-7 are improper exercises of Congress's Spending Clause authority, because the conditions those statutes place on recipients of federal funds are unrelated to the federal interest in the funds insofar as they apply to funds that are not distributed directly under the Rehabilitation Act itself. That contention is incorrect.

a. This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four requirements for valid enactments

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time of the alleged discrimination leading to the lawsuit. See 29 U.S.C. 794(a).

in exercise of the Spending power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id.* 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 consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this 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.'" *Id.* at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978)). Fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id.* at 208.

b. Petitioner claims (Pet. 24-30) that Section 504 and Section 2000d-7 fail to meet the third, "relatedness" requirement. Petitioner concedes that the courts of appeals have uniformly concluded that Section 504 and Section 2000d-7 satisfy *Dole*'s relatedness requirement. See Pet. 29 ("There is no circuit split on the question of Section 2000d-7(a) and *Dole*'s relatedness requirement."). Those statutes further the federal interest in ensuring 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. Cf. *Sabri* v. *United States*, 541 U.S. 600, 606 (2004) ("Money is fungible," and it "can be drained off here because a federal grant is pouring in there.").

Section 504's nondiscrimination requirement is patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education

Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd.* v. *Arline*, 480 U.S. 273, 278 n.2 (1987). Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court held that Title VI 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).[4] The Court reached a similar conclusion 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 the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575.

Lau and *Grove City* 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 and citation omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the re-

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

ceipt of public services, such as race, gender and disability. Because that interest extends to all federal funds, Congress validly drafted Title VI, Title IX, and Section 504 to apply across the board to all federal financial assistance.[5]

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 the same 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 enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept federal funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipients' failure to follow the law.

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[5] This Court has repeatedly upheld conditions not tied to particular spending programs as valid exercise of Congress's Spending Clause powers. See *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); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 144 (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") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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