



**U.S. Department of Justice**

Civil Rights Division

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*Department of Justice  
Civil Rights Division - Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403*

April 22, 2005

**BY OVERNIGHT MAIL**

Charles R. Fulbruge, III, Clerk  
United States Court of Appeals for the Fifth Circuit  
U.S. Courthouse, Room 102  
600 Camp Street  
New Orleans, LA 70130

Re: *Thomas v. University of Houston*, No. 02-20988

Dear Mr. Fulbruge:

The United States submits this supplemental letter brief in response to the Court's order, dated March 21, 2005, requesting the views of the parties on the application to this case of the Court's recent en banc decision in *Pace v. Bogalusa City School Board*, No. 01-31026, 2005 WL 546507 (5th Cir. Mar. 8, 2005). As detailed below, we believe that the decision in *Pace* resolves three of the issues raised by Texas in the instant case. The two issues remaining to be decided in this case are presented in *Miller v. Texas Tech University Health Sciences Center*, No. 02-10190, which is currently pending before this en banc Court. Thus, the United States recommends that the Court hold the instant case in abeyance pending a decision by the en banc Court in *Miller*.

In its brief before the Court in the instant case, Texas challenged the validity of its waiver of Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, on five distinct fronts, three of which were disposed of by this Court in *Pace*, and two of which will be decided by the en banc Court in *Miller*.

First, Texas claims (TX Br. 11-24; TX Reply Br. 2-13) that Section 504 and 42 U.S.C. 2000d-7 fail the Supreme Court's "clear statement rule" because they indicate Congress's intent to abrogate States' immunity to Section 504 claims rather than to condition a State's acceptance of federal funds on the State's waiver of its immunity to claims under Section 504. That argument was considered and specifically rejected by this Court in *Pace*. See *Pace*, 2005 WL 546507, at \*6 ("Just because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear-statement rule. \* \* \* For the purpose of the clear-statement rule, § 2000d-7 – janus-faced as it may be – poses no constitutional impediment to our finding valid waiver by consent.").

Second, Texas claims (TX Br. 35-37) that, even if federal funds were clearly conditioned on a State's waiver of its Eleventh Amendment immunity to claims under Section 504, Texas could not have knowingly waived its immunity because

it did not really know that it had any immunity to waive. This argument, too, was considered and specifically rejected by this Court in *Pace*. See *Pace*, 2005 WL 546507, at \*6-\*9.

Third, Texas argues (TX Br. 29-31) that conditioning receipt of federal funds on a state agency's waiver of its immunity to Section 504 claims is unconstitutionally coercive. Again, this Court in *Pace* specifically considered and rejected this argument. See *Pace*, 2005 WL 546507, at \*10.

Fourth, Texas argues (TX Br. 24-29; TX Reply Br. 24-29) that Sections 504 and 2000d-7 fail the "relatedness" prong of the test for valid Spending Clause legislation set out by the Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987). The en banc Court in *Pace* specifically declined to address that argument because the state defendant in that case had not raised it. See *Pace*, 2005 WL 546507, at \*5 (declining to address the relatedness prong of the *Dole* analysis). For the reasons stated at pages 18-26 of our brief in this case, the United States believes that Congress's conditioning a State's acceptance of federal funds on compliance with the requirements of Section 504 and on waiver of immunity to Section 504 claims satisfies *Dole*'s relatedness test. However, because this issue is before the en banc Court in *Miller*, this Court may wish to wait for a decision in *Miller*.

Finally, Texas argues (TX Br. 31-35; TX Reply Br. 14-24) that the state defendant in this case could not have waived its Eleventh Amendment immunity to Section 504 claims because the Texas Department of Public Safety did not have state law authority to waive its immunity. Although Louisiana raised this argument in its brief before the en banc Court in *Pace*, the United States urged the Court not to consider the argument because Louisiana failed to raise it before the panel. In its opinion in *Pace*, the Court did not mention this argument. Thus, it remains undecided in this Circuit. For the reasons stated on pages 33-40 of our brief in the instant case, the United States believes that the University's purported lack of state law authority does not, as a matter of federal law, prevent the University from effecting a valid waiver of its sovereign immunity by accepting federal funds. However, this issue is also before the en banc Court in *Miller* and this Court may wish to wait for a decision in *Miller*.

Respectfully submitted,

R. ALEXANDER ACOSTA  
Assistant Attorney General

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JESSICA DUNSAY SILVER  
SARAH E. HARRINGTON  
Attorneys  
Department of Justice  
Civil Rights Division, Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 305-7999

## **CERTIFICATE OF SERVICE**

I certify that, on April 22, 2005, two copies of the foregoing Supplemental Letter Brief for the United States as Intervenor was sent by overnight mail to the following counsel of record:

Blewett William Thomas  
1225 31st Avenue  
Gulfport, MS 39501

Amy Warr  
Office of the Attorney General for the State of Texas  
300 W. 15th Street, 10th Floor  
Wm P. Clements Bldg  
Austin, TX 78701

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SARAH E. HARRINGTON  
Attorney