No. 07-7258

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WESLEY CHASE,

Plaintiff-Appellee

UNITED STATES OF AMERICA,

Intervenor-Appellee

v.

ALTON BASKERVILLE, Warden of the Powhatan Correctional Center, in his personal and official capacities; MS. PARKER, Principal of the Powhatan Correctional Center, in her personal and official capacities; P. M. HENICK, Regional Ombudman, Virginia Department of Corrections, in his or her personal and official capacities; S. TRIMMER, Special Education, director for the Virginia Department of Education, in her personal and official capacities,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

INFORMAL BRIEF FOR THE UNITED STATES AS APPELLEE

GRACE CHUNG BECKER
Acting Assistant Attorney General

DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7999

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. 1331. The district court entered an order denying the state defendants' motion to dismiss the plaintiff's claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, on the basis of Eleventh Amendment immunity on August 2, 2007. The defendants filed a timely notice of appeal on August 17, 2007. This

Court has jurisdiction over interlocutory orders denying Eleventh Amendment immunity pursuant to 28 U.S.C. 1291 and the collateral-order doctrine. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993).

STATEMENT OF THE ISSUE

Whether, as this Court has already held, a state agency that accepts federal funds waives its Eleventh Amendment immunity to a private plaintiff's claims under Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Pro se plaintiff Wesley Chase is a deaf inmate who was incarcerated in a Virginia Department of Corrections facility at the commencement of this action. Plaintiff filed a complaint on October 14, 2004, alleging that various state prison officials discriminated against him on the basis of his disabilities in violation of, *inter alia*, Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act, by denying his requests for a qualified interpreter to enable him to understand and participate in the prison's educational and other programming. This appeal involves only Chase's claims under Section 504.

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, the Supreme 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 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).

The defendants filed a motion to dismiss in the district court, asserting that they have sovereign immunity to the plaintiff's claims under Section 504 and Title II. After the district court certified the constitutional questions, the United States intervened pursuant to 28 U.S.C. 2403 in order to defend the constitutionality of Title II of the ADA, as applied in the prison context, of Section 504, and of the

statutory provisions removing States' Eleventh Amendment immunity to suits under Title II and Section 504.

On August 2, 2007, the district court issued an order and opinion granting in part and denying in part the defendants' motion to dismiss the plaintiff's claims. The court dismissed the plaintiff's Title II claims after holding that the State is immune to those claims. The court also refused to dismiss the plaintiff's claims under Section 504, finding that this Court's binding precedents clearly hold that the State waived its Eleventh Amendment immunity to claims under Section 504 when it accepted federal financial assistance. The defendants filed a timely notice of appeal.

SUMMARY OF ARGUMENT

All of the arguments put forth by the defendants in their opening brief were considered and rejected by this Court only months ago. They were rejected, moreover, because they are squarely foreclosed by binding precedent of this Court and the Supreme Court. This Court held in 2005 in *Constantine* v. *Rectors & Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005), that a State validly and voluntarily waives its Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act when it accepts federal financial assistance. That decision has not been overruled and continues to be binding.

The defendants argue that Congress may not condition the receipt of federal funds on a State's waiving its Eleventh Amendment immunity to claims under Section 504 in situations where Congress could not unilaterally abrogate States'

immunity. But that argument is directly contrary to the decisions of the Supreme Court and this Court. This Court must therefore affirm the district court's refusal to dismiss the plaintiff's claims under Section 504 on the basis of sovereign immunity.

ARGUMENT

AS THIS COURT HAS ALREADY HELD, A STATE AGENCY THAT ACCEPTS FEDERAL FINANCIAL ASSISTANCE VOLUNTARILY WAIVES ITS ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT

This Court should affirm the district court's refusal to dismiss the plaintiff's claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because all of the defendants' arguments are squarely foreclosed by binding precedent of this Court and the Supreme Court. Indeed, Virginia presented identical arguments to a panel of this Court only a few months ago, and the Court rejected them in full. *Spencer* v. *Earley*, Nos. 07-6248, 07-6418, 07-6460, 2008 WL 2076429, at *3 n.3 (4th Cir. May 16, 2008) ("Although Virginia argues vigorously on appeal that * * * [the plaintiff's] claims under § 504 of the Rehabilitation Act * * * [are] barred by state sovereign immunity, its contentions in this regard are foreclosed by circuit precedent. This court has previously held that state agencies that knowingly and willingly accept clearly conditioned federal funding validly waive their Eleventh Amendment immunity with respect to claims for damages under § 504 of the Rehabilitation Act.").

This case presents a sovereign immunity question that has already been answered – in its entirety – by this Court's decision in *Constantine* v. *Rectors & Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005). That case unambiguously held that Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause, and that a state agency that accepts federal funds waives its Eleventh Amendment immunity to claims under Section 504. *Constantine*, 411 F.3d at 491-496. Virginia attempts in the instant case to circumvent this controlling precedent by misconstruing case law from this Court and the Supreme Court. This Court must reject those attempts and, consistent with the holding in *Constantine*, hold that the state defendants have waived their Eleventh Amendment immunity to the plaintiff's claims under Section 504.

Throughout their brief, the state defendants argue that Congress's authority under the Spending Clause to condition the receipt of federal funds on a State's voluntary waiver of its immunity is coextensive with Congress's authority under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity.[1] The defendants are simply incorrect. Binding precedent from the Supreme Court and this Court establish beyond doubt that limitations on

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[1] The United States continues to believe that Congress has the authority under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity to claims of disability discrimination arising in the prison context. But that issue is not presented in this appeal, and there is no need for this Court to consider it.

Congress's authority under Section 5 to abrogate States' immunity do not apply to Congress's authority under the Spending Clause to condition the receipt of federal funds on a State's waiver of its immunity. Congress's authority under the Spending Clause – and any limitations thereon – is governed by a separate body of law. There is no longer room to doubt that the state defendants waived their Eleventh Amendment immunity to claims under Section 504 when they accepted federal financial assistance.

A. Whether Congress May Abrogate States' Eleventh Amendment Immunity Pursuant To Its Authority Under Section 5 Of The Fourteenth Amendment Has No Bearing On Whether A State Validly Waives Its Immunity In Exchange For Federal Funds

1. Virginia's primary argument is that Congress may not use its authority under the Spending Clause to invite a state agency to waive its sovereign immunity in an area where Congress could not unilaterally abrogate States' immunity. That argument has been rejected by the Supreme Court and by the Fourth Circuit. In support of its claim, the State relies primarily on the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), which was decided prior to this Court's decision in *Constantine*, and on which the *Constantine* court relied. The State erroneously claims (VA Br. 15)[2] that the Court in *College Savings Bank* "indicated that the congressional power to abrogate sovereign immunity was constitutionally indistinguishable from the power to exact a waiver of sovereign

[2] Citations to "VA Br. __" are to pages in the Appellant's opening brief.

immunity." But Virginia misconstrues the Court's holding in that case by selectively quoting from passages of the decision that have nothing to do with Congress's authority under the Spending Clause and essentially ignoring the passages that do discuss that authority.

The State relies heavily on the following statement:

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Florida* v. *Florida*, 517 U.S. 44 (1996)]. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin.

College Sav. Bank, 527 U.S. at 683 (VA Br. 15). From this statement, the State argues (VA Br. 16), it follows that, "[i]f the power to abrogate sovereign immunity and the power to exact a waiver are the 'same side of the same coin,' then it follows logically that the limitations on the abrogation power also apply to the waiver power." Virginia apparently would have this Court believe that the type of waiver exacted through a Spending Clause statute such as Section 504 is the type of "constructive" waiver that the Supreme Court equated with abrogation in *College Savings Bank*. But Virginia ignores the explicit analysis of the Supreme Court in that case, which, in fact, precludes Virginia's argument.

The alleged "waiver" at issue in *College Savings Bank* involved a provision in the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992), which amended the Lanham Act by subjecting States to private suits for false and misleading advertising. *College Sav. Bank*, 527 U.S. at 668-670. The

plaintiff and the United States in that case first argued that the statute validly abrogated States' Eleventh Amendment immunity to Lanham Act suits, and the Court rejected that argument. *Id.* at 672-675. The parties then argued that the State of Florida had "'impliedly' or 'constructively' waived its immunity from Lanham Act suit," *id.* at 676, by advertising an investment program "after being put on notice by the clear language of the [Act] that it would be subject to Lanham Act liability for doing so," *id.* at 680. The Court rejected that argument as well, reasoning that the State's "mere presence in a field subject to congressional regulation" was insufficient to qualify as express consent by the State to waive its sovereign immunity. *Ibid.*

Far from equating the alleged "constructive waiver" at issue in that case with the type of waiver effected through use of the Spending Clause, however, the Court *explicitly held* that Spending Clause waivers are "fundamentally different" from the constructive waivers invalidated in that case. *College Sav. Bank*, 527 U.S. at 686. The parties in *College Savings Bank* did not even attempt to argue that the constructive waiver at issue there amounted to the State's "express[] consent[] to being sued in federal court." *Id.* at 676. The Court contrasted that situation with Spending Clause waivers, reaffirming that, when States accept federal funds that are clearly conditioned "upon their taking certain actions that Congress could not require them to take" – such as waiving Eleventh Amendment immunity – "acceptance of the funds entails an agreement to the actions." *Id.* at 686. Thus, Virginia's claim (VA Br. 14) that "*College Savings Bank* suggests that

the limits on the power to abrogate are equally applicable to the power to exact a waiver of sovereign immunity," is contrary to the plain language of the decision itself. Rather, the Court's decision in *College Savings Bank* unambiguously supports Congress's authority to grant federal funds to state agencies in exchange for their waiver of sovereign immunity to certain types of suit, regardless of whether Congress could simultaneously abrogate States' immunity to those suits. Cf. *Constantine*, 411 F.3d at 491 (relying on *College Savings Bank* for the proposition that "[a] State may waive its Eleventh Amendment immunity and consent to suit in federal court"); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 555 (4th Cir. 1999) ("[W]hen a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it."), cert. denied, 528 U.S. 1181 (2000).

Virginia's argument (VA Br. 17-18) that the waiver at issue in this case is "analogous" to the invalidated waiver in *College Savings Bank* is, therefore, unavailing. Indeed, that argument was explicitly rejected by the Court in *College Savings Bank* itself. The Court stated, in reference to waivers granted in exchange for federal funds:

> These cases seem to us fundamentally different from the present one. * * * Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity.

527 U.S. at 686-687. Whether or not Virginia finds this distinction satisfying, this Court has no authority to disregard it.

Observing that distinction, and allowing States to waive their immunity in exchange for federal funding, does not permit Congress to use its Spending Clause power "to circumvent the limitations" on its authority to abrogate States' immunity, as Virginia suggests (VA Br. 16, 19-24). Limits on Congress's ability to abrogate States' sovereignty are not violated by enforcing a State's decision to waive its immunity, either in an individual case or in a class of cases. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *College Sav. Bank*, 527 U.S. at 675-676. The holding of such cases is respected, not overturned, when a State's amenability to suit is determined by the State's own choices rather than through the unilateral action of Congress. And when States choose to waive their immunity in exchange for federal financial assistance, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). See also *Bell Atl. Md., Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 289 (4th Cir. 2001) ("[N]othing in the federal structure prohibits a State from voluntarily waiving its sovereign immunity from suit by private individuals either by explicitly consenting to such suits, or by accepting from Congress a gift or gratuity that is conditioned on such a waiver.") (citations omitted), vacated on other grounds, 535 U.S. 635 (2002).

2. It goes without saying that the Constitution contains a number of sources of congressional authority. Each source of authority, in turn, is governed by its own body of case law and is constrained by its own set of limitations. Although some limitations on congressional authority apply to more than one enumerated power, it is simply not the case that limitations placed on one power automatically apply to a different power. Congress's authority to enact legislation under Section 5 of the Fourteenth Amendment is limited to enacting legislation that "enforce[s]" the protections provided in Section 1 of the Fourteenth Amendment. U.S. Const. Amend. XIV, § 5. In establishing the congruence and proportionality test in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), and refining that test in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *United States* v. *Georgia*, 546 U.S. 151 (2006), the Supreme Court has attempted to ensure that Congress does not exceed this grant of authority by providing statutory protections that are not congruent and proportional to the object of enforcing the constitutional protections provided in Section 1 of the Fourteenth Amendment. See *Boerne*, 521 U.S. at 516-520; *Lane*, 541 U.S. at 520-522; *Georgia*, 546 U.S. at 157-159. Indeed, it was the concept of congruence and proportionality that motivated the *Georgia* Court to bifurcate the plaintiff's statutory claims sounding in constitutional violations from the plaintiff's non-constitutional statutory claims: the Court held that statutory enforcement of the former claims is by definition congruent and proportional to enforcement of constitutional protections, and declined to consider the congruence and proportionality of statutory enforcement of the latter claims. Concerns about

congruence and proportionality are unique to the Section 5 context and have no place in the consideration of whether Section 504 is a valid exercise of Congress's Spending Clause authority. This Court in *Constantine* understood that determining whether a State was immune to a private plaintiff's claims under Title II of the Americans with Disabilities Act (Title II) and under Section 504 required distinct analyses. The Court held first that Title II is a valid exercise of Congress's Section 5 authority as applied in the education context, *Constantine*, 411 F.3d at 484-490, and separately held that Section 504 is a valid exercise of Congress's Spending Clause authority across the board, *id.* at 490-496.

B. This Court Has Already Held That A State Agency, Such As The Virginia Department Of Corrections, That Accepts Federal Financial Assistance Voluntarily Waives Its Eleventh Amendment Immunity To Claims Under Section 504

As noted above, this Court held in *Constantine*, 411 F.3d at 491-498, that a state agency that accepts federal financial assistance waives its immunity to private suits to enforce Section 504. That decision has not been overruled. The state defendants attempt to circumvent this Court's binding decision by grafting limitations on Congress's Section 5 authority onto Congress's Spending Clause authority. As discussed, pp. 7-13 *supra*, the question whether Congress may condition the receipt of federal funds upon a State's waiver of immunity to statutory claims is entirely distinct from the question whether Congress may abrogate States' immunity to such claims because in each situation Congress relies

upon a different enumerated power. Virginia's arguments must therefore be rejected, and the plaintiff permitted to proceed with his claims under Section 504.

1. This Court's Decisions Holding That A State Agency That Accepts Federal Funds Waives Its Immunity To Private Section 504 Claims Are Not Limited To Cases In Which Congress Could Have Abrogated States' Immunity

Virginia attempts to circumvent several binding decisions of this Court by erroneously asserting (VA Br. 38) that "[t]his Court's recent decisions invalidating or upholding Congress' attempts to diminish the States' sovereign immunity * * * are as-applied holdings." The State's assertion is based on a misunderstanding of the difference between a facial challenge and an as-applied challenge to a federal statute. When an entity challenges the constitutionality of a federal statute on the ground that the enactment of such statute was outside the scope of Congress's enumerated powers – as Virginia has done here – courts must examine the validity of such statute on its face. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); *United States* v. *Morrison*, 529 U.S. 598 (2000); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); *United States* v. *Lopez*, 514 U.S. 549 (1995). It is only where a statute is alleged to infringe on the individual rights of a person or entity that courts examine the legitimacy of a particular application of such statute. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973).[3]

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[3] The Supreme Court's decisions in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *United States* v. *Georgia*, 546 U.S. 151 (2006), are not to the contrary. Although neither of those cases considered the validity of Title II of the ADA in its entirety, both were facial challenges, upholding Congress's authority to apply

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Virginia argues (VA Br. 43-44) that this Court's binding decision in *Constantine*[4] does not control this case because the holding in that case was limited to situations in which Congress could unilaterally abrogate States' immunity. Virginia's position not only fails to find any support in the cases of the Supreme Court and this Court, but has been rejected by this Court in *Madison* v. *Virginia*, 474 F.3d 118, 127 (4th Cir. 2006). The Court in *Constantine* held that a state agency that accepts federal financial assistance voluntarily waives its Eleventh Amendment immunity to claims under Section 504. 411 F.3d at 491-496.[5] The State cannot point to anything in that decision that limits its holding to

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[3](...continued)
the statute to States in an entire category of cases, rather than merely to the facts of the cases before the Court. See *Lane*, 541 U.S. at 533-534 ("Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."); *Georgia*, 546 U.S. at 158 ("[N]o one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.").

[4] Virginia was also the defendant in *Constantine*, but did not petition for rehearing in that case and did not file a petition for certiorari.

[5] Every regional court of appeals in the nation has held that Section 504, along with 42 U.S.C. 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, 544 U.S. 904 (2005); *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir.) (en banc), cert. denied, 546 U.S. 933 (2005); *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir.), amended by 271 F.3d 910 (9th Cir. 2001), cert. denied,
(continued...)

instances in which Congress could have abrogated States' immunity. Rather, this Court's holding that States knowingly and voluntarily consent to waive their immunity when they accept federal funds means that a waiver under Section 504 is *not* the type of "constructive" waiver that the Supreme Court condemned in *College Savings Bank*. The validity of the waiver does not, therefore, depend on whether Congress could have abrogated States' immunity to Section 504 claims.[6]

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[5](...continued)
536 U.S. 924 (2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Even the Second Circuit, which has concluded that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, has not disputed that Section 504 may generally be applied to the States now and in the future, as those concerns have dissipated. See *Garcia* v. *S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113-115 (2d Cir. 2001).

[6] Also unavailing is Virginia's claim (VA Br. 38) that the holding in *Constantine* is limited to Section 504 claims brought in the context of higher education. Although the holding in *Constantine* that Congress validly abrogated States' immunity to claims under Title II of the ADA was limited to the context of public higher education, that limitation does not extend to its holding with respect to Section 504. As discussed, pp. 4-8 *supra*, the question whether Congress may condition the receipt of federal funds upon a State's waiver of immunity to statutory claims is entirely distinct from the question whether Congress may abrogate States' immunity to such claims. In assessing whether legislation enacted under Congress's Section 5 authority is congruent and proportional, courts examine the constitutional rights at stake in a particular context, as well as the history of deprivations of those rights. When a court inquires whether conditions imposed on a grant of federal funds are valid under the Spending Clause, however, it focuses on the text of the statute itself rather than the historical and social context in which it was enacted. See *Constantine*, 411 F.3d at 492-496. The text of the statute does not vary from context to context. Therefore, the Fourth

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In the same vein, Virginia claims (VA Br. 41-43) that this Court's holding in *Litman* v. *George Mason University* that a state agency that accepts federal funds waives its Eleventh Amendment immunity to claims under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, is limited to circumstances in which Congress could have unilaterally abrogated those agencies' immunity. But, again, nothing in that case limits its holding in that way. Indeed, the *Litman* Court held that "when a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it." 186 F.3d at 555.

Just last year, moreover, in *Madison* v. *Virginia*, 474 F.3d 118, 127 (4th Cir. 2006), this Court explicitly rejected Virginia's argument that Congress may not attach conditions to federal funds that it could not impose on States unilaterally. The Court in *Madison* upheld the institutionalization provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.,* as valid Spending Clause legislation while acknowledging the Supreme Court's holding in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), that Congress could not enact substantively identical statutory requirements pursuant to its authority under Section 5 of the Fourteenth Amendment. *Madison*, 474 F.3d at 123-124. In so

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[6](...continued)
Circuit's conclusion in *Constantine* that the State's waiver of immunity was valid applies with equal force to the instant case.

doing, the Fourth Circuit reaffirmed that Congress's authority under the Spending Clause is "'arguably greater' than Congress's power to achieve its goals directly." *Id.* at 127.

Virginia attempts to distinguish *Madison* by pointing out (VA Br. 45-47) that the decision also held that, while States consented to private suit in federal court under RLUIPA by accepting federal funds, they did not consent to private damages claims. But this Court in *Madison* did not hold that Congress lacked the authority to condition the receipt of funds on a State's consent to private damages claims. Rather, the Court held that, as a statutory matter, RLUIPA did not condition a State's acceptance of federal funds on its consent to suit for money damages. *Madison*, 474 F.3d at 130-133. The same cannot be said of Section 504. See *Barnes* v. *Gorman*, 536 U.S. 181, 185-187 (2002).

Virginia is also wrong that the decision in *Madison* merely upheld the State's waiver of immunity in a situation in which Congress could have abrogated it because the plaintiffs sought only injunctive relief. To be sure, the Eleventh Amendment is no bar to a private person's enforcement of a federal statute against a state official, acting in his or her official capacity, where that person seeks only prospective injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908). One need only read the caption of *Madison* v. *Virginia* to see, however, that the plaintiff in that case sued the State directly. The Eleventh Amendment bars private suits for injunctive relief against a State to the same extent that it bars private damages suits against a State. *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 58 (1996)

("[T]he relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."). Congress, therefore, could not have unilaterally subjected States to private suits for injunctive relief under RLUIPA's institutionalization provisions to any greater extent than it could have subjected States to private suits for damages under such provisions. Indeed, this Court explicitly held – because it had to in order to allow that suit to go forward – that the State of Virginia voluntarily waived its Eleventh Amendment immunity to private claims for injunctive relief under RLUIPA when it accepted federal funds. *Madison*, 474 F.3d at 130-131, 133.

Virginia's reliance on the Supreme Court's decision in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), is just as unavailing. In fact, this Court rejected essentially the same argument in *Madison*. Virginia claims (VA Br. 22-24) that the Supreme Court's decision in *Rumsfeld* overruled the settled understanding of Congress's authority under the Spending Clause, as articulated in *Constantine*, by holding that Congress may not use its authority under the Spending Clause to impose conditions that it could not impose unilaterally. But defendants misread *Rumsfeld*. The Supreme Court in *Rumsfeld* held that a condition imposed through Congress's spending authority could not be unconstitutional where Congress had the authority to impose that condition directly. 547 U.S. at 59-60. Contrary to the defendants' theory, however, the Supreme Court did *not* hold the inverse, *i.e.*, that Congress may not use its spending authority to impose a condition that it could not impose unilaterally.

Again, this Court rejected exactly that argument – asserted by Virginia in that case as well – and held that "*Rumsfeld* v. *FAIR* cannot be read to work such a sea change in existing law." *Madison*, 474 F.3d at 127. This Court found that, "far from limiting Congress' spending authority," the Supreme Court's decision in *Rumsfeld* "confirmed the * * * view that th[e Spending] power is 'arguably greater' than Congress' power to achieve its goals directly." *Ibid.* (quoting *Rumsfeld*, 547 U.S. at 59).

2. Conditioning The Receipt Of Federal Funds On A State Agency's Waiver Of Its Eleventh Amendment Immunity Does Not Violate Any "Independent Constitutional Bar"

Virginia also seeks to circumvent this Court's holding in *Constantine* by arguing (VA Br. 19-34) that conditioning the receipt of federal funds on a State's waiver of immunity runs afoul of the Supreme Court's admonition that Congress's authority under the Spending Clause is limited by any "independent constitutional bar" that might apply. See *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). To a large extent, this is merely a new gloss on the State's argument that Congress may not use its authority under the Spending Clause to extract a waiver of immunity where it cannot abrogate immunity. See, *e.g.*, VA Br. 22 ("Where an independent constitutional bar is present, the validity of a Spending Clause statute turns on whether Congress could impose the funding condition directly."). For the reasons already discussed herein – as well as by the Supreme Court in *College Savings Bank* and by this Court in *Constantine* and *Madison* – that argument is incorrect. To the extent the Eleventh Amendment imposes a bar on Congress's unilaterally

abrogating States' immunity to private suit in federal court, that "enumerated limitation" (see VA Br. 25) is not implicated where, as here, a State voluntarily waives its immunity.

An additional flaw in this argument, however, stems from Virginia's misunderstanding of the term "independent constitutional bar." In *South Dakota* v. *Dole*, the Supreme Court made clear that this rule prevents Congress from using the fisc "to induce the States to engage in activities that would themselves be unconstitutional." 483 U.S. at 210. But a State's voluntary waiver of its own immunity is not an unconstitutional activity. Regardless of whether Congress may abrogate States' immunity in a particular area, a State clearly is free to waive its own immunity whenever and wherever it chooses without running afoul of the Constitution. As a Supreme Court has held, "a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank*, 527 U.S. at 675. Virginia relies (VA Br. 22-24) on the Supreme Court's recent decision in *Rumsfeld* in support of its position. But *Rumsfeld* stands for the unremarkable proposition that Congress may not use its authority under the Spending Clause to place unconstitutional restrictions on the speech and association rights guaranteed to citizens in the First Amendment. See 547 U.S. at 58-70. The instant case does not involve any First Amendment rights. *Rumsfeld* is therefore inapposite.

CONCLUSION

This Court should affirm the district court's rejection of the state defendants' assertion of Eleventh Amendment immunity to the plaintiff's claims under Section 504 of the Rehabilitation Act.

Respectfully submitted,

GRACE CHUNG BECKER
Acting Assistant Attorney General

/s/ Sarah E. Harrington
DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7999

STATEMENT REGARDING ORAL ARGUMENT

The United States does not feel that oral argument is necessary for the Court to resolve the issue presented in this case because this Court has already held that the State is not immune to the plaintiff's claims under Section 504 of the Rehabilitation Act.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 5,635 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

Date: August 11, 2008

/s/ Sarah E. Harrington
SARAH E. HARRINGTON
Attorney

CERTIFICATE OF SERVICE

This is to certify that on August 11, 2008, I electronically filed the foregoing informal BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

William Eugene Thro
Office of the Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

I further certify that I have mailed the foregoing informal BRIEF FOR THE UNITED STATES AS APPELLEE by first-class mail, postage prepaid, to the following non-CM/ECF participant:

Wesley Chase, #263444
3600 Woods Way
Powhatan Correctional Center
State Farm, VA 23160

/s/ Sarah E. Harrington
SARAH E. HARRINGTON
Attorney