

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THEODORE JOHNSON,

Plaintiff - Appellee

v.

LOUISIANA DEPARTMENT OF EDUCATION; STATE OF LOUISIANA;
PRESIDENT OF LOUISIANA STATE UNIVERSITY SYSTEM;
BOARD OF REGENTS,

Defendants - Appellants

LYNN AUGUST,

Plaintiff - Appellee

v.

SUZANNE MITCHELL; MAE NELSON; ED BARRAS;
DEPARTMENT OF SOCIAL SERVICES, for the State of Louisiana,

Defendants - Appellants

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

**CONSOLIDATED SUPPLEMENTAL EN BANC BRIEF FOR
THE UNITED STATES AS INTERVENOR**

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue - PHB 5010
Washington, DC 20530
(202) 305-4584

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Nos. 02-30318, 02-30369

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This case presents the question of whether the Eleventh Amendment bars
Plaintiffs' suits against the State for alleged violations of Section 504 of the

Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794. The Eleventh Amendment bars private suits against a state agency, absent a valid abrogation by Congress or waiver by the State. See *Alden v. Maine*, 527 U.S. 706, 755-756 (1999). In this case, the State waived its sovereign immunity to Section 504 claims by accepting federal funds that were clearly conditioned on a knowing and voluntary waiver of sovereign immunity. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1, 246-247 (1985); cf. *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000).

The State disagrees, for reasons it set forth in its en banc brief in *Pace v. Bogalusa City School Board*, No. 01-31026 (argued en banc Sep. 26, 2003), which it has incorporated by reference in its short supplemental filing in this case. The United States has addressed the State's arguments at length in our brief in *Pace*. Accordingly, we likewise incorporate our en banc brief in *Pace* by reference and attached a copy as Exhibit 1, with one addition.

Since we filed our brief in *Pace*, the Eighth Circuit decided *Doe v. Nebraska*, No. 02-2014 (8th Cir. Oct. 7, 2003) (attached as Exhibit 2), holding that the state agency in that case waived its Eleventh Amendment immunity to Section 504 claims by accepting federal funds that were clearly conditioned on a knowing and voluntary waiver of its immunity. The Court stated that although the amount

of funding the state received was significant,¹ “we cannot conclude that Nebraska’s decision to accept the money was impermissibly coerced.” Slip op. 9.

The Court also declined to follow the Second Circuit’s decision in *Garcia v. SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001) and the panel’s decision in *Pace*. See slip op. 10-17. The Court began by noting that in light of Supreme Court precedent, “the validity of the ADA as a § 5 enactment was far from clear when Nebraska accepted Rehabilitation Act funds in 1996.” *Id.* at 14. “We are not holding that Nebraska should have known that the abrogation clause in the ADA was invalid, but only that there was reason to question it and to consider the possibility that the abrogation clause would ultimately prove ineffective.” *Id.* at 15. “Even if one accepts the assumption that Nebraska was actively considering the existence of the abrogation clause in the ADA, Nebraska’s acceptance of the funds is best understood as something like an insurance policy that the federal government was buying – it was getting Nebraska to waive its immunity just in case the congressional abrogation in the ADA was invalid.” *Ibid.* Finally, the Court noted that it was incongruent with general contract principles for the State to assert that its mistaken beliefs about the status

¹ The state agency received \$557 million in federal funding in 1995, which constituted 60% of the agency’s budget, and more than 18% of the State’s overall spending. Slip op. 7.

of its immunity would entitle it to avoid its waiver agreement but yet retain the federal funds it received. *Id.* at 16-17.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue - PHB 5010
Washington, DC 20530
(202) 305-4584

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Consolidated Supplemental En Banc Brief for the United States as Intervenor, along with a computer disk containing an electronic version of the brief, were served by overnight mail, postage prepaid, on October 20, 2003, on the following parties:

Theodore Johnson
516 Superior
Bogalusa, LA 70427

J. Stuart Buck
Hughes & Luce, LLP
1717 Main Street, Suite 2800
Dallas, TX 75201

Sanford A. Kutner
6 Tara Place
Metairie, LA 70002

Richard A. Curry
M. Brent Hicks
McGlinchey Stafford
1 American Place, 9th Floor
Baton Rouge, LA 70825

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

KEVIN RUSSELL
Attorney