No. 02-2721

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOSHUA NIEVES-MARQUEZ, minor; JESUS NIEVES; LEONOR MARQUEZ,

Plaintiffs-Appellees,

v.

THE COMMONWEALTH OF PUERTO RICO; DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF PUERTO RICO, through its Secretary, Hon. César Rey Hernández; ELSIE TRINIDAD; ENDA ROSA-COLON

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS INTERVENOR

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INTEREST OF THE UNITED STATES

The Commonwealth has challenged the constitutionality of provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, that subject state agencies to private suit. The United States has a statutory right to intervene to defend the constitutionality of federal statutes. See 28 U.S.C. 2403(a).

JURISDICTIONAL STATEMENT

Plaintiffs filed this case alleging violations of, among other statutes, Section 504 and Title II of the ADA. The district court had jurisdiction pursuant to 28 U.S.C. 1331. On November 1, 2002, the district court denied the Commonwealth's motion to dismiss Plaintiffs' Section 504 claims as barred by the Eleventh Amendment and granted Plaintiffs' request for a preliminary injunction. On November 27, 2002, the Commonwealth filed a timely notice of appeal. This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. 1291, 1292(a).

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether Congress validly abrogated the Commonwealth's Eleventh Amendment immunity to suits under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*.

2. Whether Congress validly conditioned the receipt of federal financial assistance on a waiver of Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794.

3. Whether the Commonwealth knowingly waived its sovereign immunity to claims under Section 504 by applying for and receiving federal funds.

STATEMENT OF THE CASE

This case involves attempts by Jesus Nieves and Leonor Marquez to secure a sign language interpreter to assist their son, Joshua, in a public school in Puerto Rico. Plaintiffs brought claims under three statutes: the Individuals with Disabilities Education Act (IDEA), 29 U.S.C. 1400 *et seq.*, the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et* seq., and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794.

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, *education*, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3) (emphasis added). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and *communication barriers*, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5) (emphasis added).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4). The Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case involves a suit filed under Title II. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or

local government" and its components. 42 U.S.C. 12131(1)(A) and (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

Under the regulations issued pursuant to the statute, a public entity must provide "appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity conducted by a public entity." 28 C.F.R. 35.160(b)(1). While this does not include providing "services of a personal nature including assistance in eating, toileting, or dressing," 28 C.F.R. 35.135, it can require providing "[q]ualified interpreters * * * or other effective methods of making aurally delivered materials available to individuals with hearing impairments," 28 C.F.R. 35.104(1). However, a public entity need not provide

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[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

communications assistance if doing so would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial or administrative burdens." 28 C.F.R. 35.164.

Congress intended to authorize private suits against public entities, see 42 U.S.C. 12133, and the statute contains a provision expressly abrogating States' Eleventh Amendment immunity to private suits in federal court, see 42 U.S.C. 12202.

2. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). This requirement applies to any "program or activity" that receives federal financial assistance, a phrase defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is, those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *School Bd. of Nassau County* v.

Arline, 480 U.S. 273, 287 n.17 (1987). An accommodation is not reasonable if it imposes "undue financial" or "administrative burdens" on the grantee, or requires "a fundamental alteration in the nature of [the] program." *Ibid*. Section 504 may be enforced through private suits against States or state agencies providing programs or activities that receive federal funds. See *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

In 1985, the Supreme Court held that Section 504 did not, with sufficient clarity, demonstrate Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities and reaffirmed that mere receipt of federal funds was insufficient to constitute a waiver. 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, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7(a)(1) provides in pertinent part:

> 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], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], 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.

3. Joshua Nieves-Marquez has moderate to severe bilateral hearing loss (see Order dated Nov. 1, 2002, at 2). Joshua's parents sued the Commonwealth of Puerto Rico, the Puerto Rico Department of Education (Department), and Department officials, alleging that education officials' failure to provide Joshua with a sign language interpreter to assist him at school violated Title II of the ADA, Section 504 and the IDEA. Plaintiffs asked for damages as well as injunctive relief. The Commonwealth moved to dismiss Plaintiffs' damages claims as barred by the Eleventh Amendment. The district court denied the motion, holding (*id*. at 6-10) that Congress validly abrogated the Commonwealth's sovereign immunity to Title II and Section 504 claims. The Court did not decide whether the Eleventh Amendment barred Plaintiff's IDEA claims because it held (*id*. at 11-12) that Plaintiffs had no cause of action under the IDEA. The Commonwealth then took this interlocutory appeal.

SUMMARY OF ARGUMENT

The scope of this appeal is necessarily limited by its interlocutory posture. In particular, the only questions within this Court's jurisdiction are whether the Commonwealth is immune to suit under the Eleventh Amendment and whether the district court abused its discretion in entering a preliminary injunction. Accordingly, this Court should not decide whether Plaintiffs have stated a viable claim for damages under the ADA or Section 504.

Congress validly abrogated the Commonwealth's Eleventh Amendment immunity to claims under Title II of the ADA, as the United States argued to this Court en banc in *Kiman* v. *New Hampshire Dep't of Corr.*, 332 F.3d 29 (1st Cir. 2003). Although this Court did not resolve the issue in *Kiman*, the Supreme Court will address that question next Term in *Lane* v. *Tennessee*, No. 02-1667. This Court should, therefore, hold this case pending the Supreme Court's decision in *Lane*. With respect to Plaintiff's Section 504 claims, Congress clearly and unambiguously conditioned the Commonwealth's receipt of federal financial assistance on a knowing and voluntary waiver of its sovereign immunity to private suits to enforce Section 504. By accepting federal funds in the face of this clear condition, the Commonwealth knowingly and voluntarily waived its sovereign immunity to Plaintiffs' Section 504 claims.

ARGUMENT

PLAINTIFFS' CLAIMS UNDER TITLE II OF THE ADA AND SECTION 504 ARE NOT BARRED BY THE ELEVENTH AMENDMENT

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)[2]. In this case, the district court properly denied the Commonwealth's Eleventh Amendment defense against Plaintiffs' ADA and Section 504 claims because Congress validly abrogated the Commonwealth's sovereign immunity to claims under Title II of the ADA and because the Commonwealth knowingly and voluntarily waived its sovereign immunity to Section 504 claims by applying for and receiving federal funds that were clearly conditioned on such a waiver of sovereign immunity.

A. Whether Plaintiffs Have A Viable Claim For Damages On The Merits Is Not Properly Before This Court On An Interlocutory Appeal

As an initial matter, the Commonwealth asserts (Br. 46) that before reviewing the district court's Eleventh Amendment ruling, this Court should

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[2] The Eleventh Amendment does not bar private suits brought against state officials in their official capacity seeking prospective injunctive relief to end an ongoing violation of federal law. See *id*. at 755-757; *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001). The Commonwealth does not, therefore, raise an Eleventh Amendment objection to Plaintiffs' claims for injunctive relief against the Secretary of the Department of Education in his official capacity (see Br. 43).

decide whether Plaintiffs have stated a claim for damages under Title II and Section 504. While this Court might have discretion to decide the questions in that order in an appeal from a final judgment, see *Parella* v. *Retirement Bd. of the R.I. Employees' Ret. Sys.,* 173 F.3d 46, 53-57 (1st Cir. 1999), the Commonwealth's suggestion should not be accepted in an interlocutory appeal.

Ordinarily, of course, this Court would lack jurisdiction to review the district court's rulings until final judgment has been entered. See 28 U.S.C. 1291; *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 41 (1995). The collateral order doctrine nonetheless permits interlocutory appeals in a "small category" of cases that "includes only decisions that are conclusive, that resolve important questions *separate from the merits*, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Id*. at 42 (emphasis added). An order denying a claim of sovereign immunity falls within this exception. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993).

However, there is no basis for using an Eleventh Amendment interlocutory appeal as an opportunity to rule on merits issues that are otherwise outside this Court's jurisdiction. In *Swint*, the Supreme Court rejected the approach of some courts of appeals that permitted discretionary "pendent appellate jurisdiction" over issues outside the scope of the collateral order doctrine when at least one issue

within the doctrine was properly before the court. See 514 U.S. at 43-51. That practice, the Court concluded, was inconsistent with the structure of the statutory provisions governing appeals – which require certification from the district court for interlocutory appeals on issues falling outside the collateral order doctrine, see 28 U.S.C. 1292(b) – and with a provision of the Rules Enabling Act, 28 U.S.C. 2072(c), that permits the Supreme Court to create further exceptions to the final judgment rule, but only through a rulemaking process. See 514 U.S. at 47-48.

Even before *Swint*, this Court had rejected the "pendant jurisdiction" doctrine in a similar context. See, *e.g.*, *Roque-Rodriguez* v. *Moya*, 926 F.2d 103, 105 & n.2 (1st Cir. 1991). For example, this Court has explained that "[n]otwithstanding that we have jurisdiction to review the denial of qualified immunity midstream, any additional claim presented to and rejected by the district court must independently satisfy the collateral-order exception to the final-judgment rule in order for us to address it on an interlocutory appeal." *Id*. at 105 (citations and internal punctuation omitted)[3]. There is no basis for applying a

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[3] This Court has applied the same restraint to interlocutory review of preliminary injunctions:

> [W]hile we doubtless could now proceed to decide the case on its merits, on the theory that we should confront the merits in order to consider the propriety of the premise upon which the injunction issued, we decline to do

(continued...)

different rule for claims of Eleventh Amendment immunity. See *Bell Atlantic-Pennsylvania, Inc.* v. *Pennsylvania Pub. Util. Comm'n*, 273 F.3d 337, 343-344 (3d Cir. 2001).[4]

B. This Court Should Await A Decision From The Supreme Court In Lane *v.* Tennessee *Before Addressing The Validity Of The ADA's Abrogation Provision*

The Commonwealth argues (Br. 53-59) that Congress did not validly abrogate its sovereign immunity to claims under Title II of the ADA. This Court

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[3](...continued)

> so. Rather we think it more suitable to regard the injunction as a purely interlocutory matter, and since viewed in that light it was not an abuse of discretion, see *infra*, to affirm it, and await the appeal, if any, from the final judgment, before dealing with the difficult constitutional issues underlying this case.

Garzaro v. *University of Puerto Rico*, 575 F.2d 335, 338 (1st Cir. 1978). See also *ibid*. ("[T]o use our limited appellate jurisdiction over this rather innocuous interlocutory injunction as the basis for full-dress consideration is to encourage piecemeal appellate review contrary to deeply-rooted policies.").

[4] Nor are the merits of Plaintiffs' claims "inextricably intertwined" with the Eleventh Amendment immunity question. See *Swint*, 514 U.S. at 50-51 (not deciding whether review might be available for rulings that are "inextricably intertwined" with orders falling within the collateral order doctrine). Whether Plaintiffs have stated a claim has no bearing on whether the Eleventh Amendment bars this action. See, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 145 ("[A] motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, whose resolution generally will have no bearing on the merits of the underlying action.") (citation omitted).

recently sat en banc to address that question, but did not resolve it. See *Kiman* v. *New Hampshire Dep't of Corr.*, 332 F.3d 29 (1st Cir. 2003) (en banc) (affirming district court decision by an equally divided Court).[5] The Supreme Court has since granted certiorari in a case raising the same question and will presumably resolve the issue in the coming Term. See *Lane* v. *Tennessee*, 123 S. Ct. 2622 (2003) (granting petition for certiorari). Accordingly, this Court should delay decision on the Title II abrogation question pending the Supreme Court's decision in *Lane*.

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[5] This case presents the question in a somewhat different posture. Regardless of the validity of Title II's abrogation provision as legislation to enforce the Fourteenth Amendment, Congress could abrogate Puerto Rico's sovereign immunity pursuant to its Article IV authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. Art. IV, § 3; see *First Nat'l Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1879) (Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments"). We recognize, however, that this Court has adopted a presumption that Congress would not have intended to abrogate Puerto Rico's immunity to suit if Congress did not have the power to abrogate States' Eleventh Amendment immunity, at least so long as a statute (like the ADA, see 42 U.S.C. 12102(3)) defines Puerto Rico as a State. See *Jusino Mercado* v. *Puerto Rico*, 214 F.3d 34, 40-44 (1st Cir. 2000); see also *Acevedo Lopez* v. *Police Dep't of Puerto Rico*, 247 F.3d 26 (1st Cir. 2001). While we disagree with that presumption, we acknowledge that this panel is bound to apply it in this case.

C. By Applying For And Receiving Federal Funds, The Commonwealth's Department Of Education Has Knowingly And Voluntarily Waived Its Eleventh Amendment Immunity To Section 504 Claims

This Court need not, however, await a decision in *Lane* before determining that the Commonwealth waived its sovereign immunity to claims under Section 504. "[A] state may * * * explicitly waive the protections of the Eleventh Amendment by choosing to participate in a federal program for which waiver of immunity is a stated condition," so long as the condition is made through "'express language or . . . such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 24-25 (1st Cir. 2001), cert. denied, 537 U.S. 813 (2002) (quoting *Florida Dep't of Health & Rehab. Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981)).[6] See also, *e.g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 678 n.2, 687 (1999). Congress created such a clear and unambiguous condition on federal

[6] The United States agrees with the district court that Congress could also abrogate the Commonwealth's sovereign immunity to private suits under Section 504 pursuant to a valid exercise of its power to enforce the Fourteenth Amendment. However, because the Commonwealth knowingly and voluntarily waived its sovereign immunity to Plaintiffs' Section 504 claims, there is no need for this Court to address Congress's power to abrogate that sovereign immunity pursuant to its Fourteenth Amendment authority.

funds when it enacted 42 U.S.C. 2000d-7, and the Commonwealth waived its sovereign immunity to Plaintiffs' Section 504 claims when it accepted federal funds in the face of that condition.[7]

1. Congress Clearly Conditioned Receipt of Federal Funds on a Waiver of Eleventh Amendment Immunity for Private Suits Under Section 504

Although it raised a number of other constitutional challenges to Section 2000d-7 in the district court, on appeal the Commonwealth argues only that the provision is too ambiguous to constitute a valid waiver condition.[8] Ten courts of appeals – all of those to have considered that argument – have rejected it.[9] As

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[7] For the same reason, the Commonwealth waived its sovereign immunity to claims under the IDEA. See 20 U.S.C. 1403; *A.W.* v. *Jersey City Pub. Sch.*, No. 02-2056, 2003 WL 21962952 (3d. Cir. Aug. 19, 2003); *Oak Park Bd. of Educ.* v. *Kelly E.*, 207 F.3d 931 (7th Cir. 2000), cert. denied, 531 U.S. 824 (2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999). However, no Eleventh Amendment challenge to the IDEA is properly before this Court. The district court did not reach the Commonwealth's Eleventh Amendment objection to Plaintiffs' IDEA claims for damages, holding instead that Plaintiffs could not sue directly under the IDEA. Because the district court did not deny the Commonwealth's assertion of Eleventh Amendment immunity, there is no basis for an interlocutory appeal to decide any sovereign immunity challenge to the IDEA. See, *e.g.*, *Clemens* v. *Kansas*, 951 F.2d 287, 288 (10th Cir. 1991).

[8] By failing to raise those other arguments in its opening brief, the Commonwealth has waived them for purposes of this appeal. See *United States* v. *Sacko*, 247 F.3d 21, 24 (1st Cir. 2001).

[9] See *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Koslow*
(continued...)

noted above, Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to condition the receipt of federal financial assistance on a waiver of States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. *Id*. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247. In *Lane* v. *Pena*, 518 U.S. 187 (1996), the Supreme Court noted "the care with which Congress responded to our decision in *Atascadero,*" *id*. at 200, and concluded that in

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[9](...continued)
v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio E.P.A.,* 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. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003)*; Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

enacting Section 2000d-7 "Congress sought to provide the sort of unequivocal waiver that our precedents demand," *id*. at 198.

The Commonwealth disagrees. It argues (Br. 50) that the waiver provision for Section 504 is ambiguous because there is "simply no way to infer from Section 504's statutory language that Congress intended to give a choice to the States." Instead, the Commonwealth asserts (Br. 51) that Section 2000d-7 "suggests that Congress sought to *expressly* abrogate the States' immunity, and not to present a choice under its Spending Clause power." This argument is meritless. Congress made clear in the text of the statute that a State is subject to the substantive non-discrimination requirements of Section 504 and the private suit requirement of Section 2000d-7 *only if* it elects to apply for and receive federal financial assistance.[10] No State could read these provisions and reasonably believe that it would be subject to suit under Section 504 even if it declined federal funds. At the same time, no State could reasonably believe that it would be entitled to

[10] The language of Section 2000d-7 may at first appear absolute, providing a blanket authorization for suits against States under Section 504. But Section 504 only applies 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 statute, Congress made clear that a state agency that declines federal funding maintains its sovereign immunity to claims under Section 504.

assert Eleventh Amendment immunity to Section 504 claims if it chose to apply for and accept federal funding. The Commonwealth, therefore, was given a clear choice with unambiguous consequences.

The Commonwealth may be suggesting that although the consequence of accepting federal funds is clear, whether this consequence should be described as an "abrogation" or as a "waiver" is uncertain. But the legal terminology for this clear and unambiguous consequence is of no constitutional significance. Even if Section 2000d-7 were properly considered an "abrogation" provision, it is an abrogation provision that applies only to States that chose to receive federal funding. Cf., *e.g.*, *Pederson*, 213 F.3d at 876 (Congress need not use the word "waiver" or "condition"); *Litman*, 186 F.3d at 554 (same). The purpose of requiring Congress to make its condition clear and unambiguous is to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Section 504 and Section 2000d-7 amply satisfy this standard, enabling States to make a knowing and voluntary choice between acceptance of federal funds and maintaining Eleventh Amendment immunity to Section 504 claims.

2. *The Commonwealth's Waiver Of Its Eleventh Amendment Immunity Was Knowing*

In a footnote, the Commonwealth states (Br. 51 n.8) that "it should not be readily assumed that the Commonwealth would have accepted the funding absent the abrogation language present in the IDEA, ADA and Section 504 of the Rehabilitation Act, had it previously known of the abrogation test developed in the *Seminole-Kimel-Garrett* line of cases. See *Pace v. Bogalusa City Sch. Bd.* 325 F3d 609, (5th Cir. 2003) * * * ." This statement is not clear but seemingly refers to a very different constitutional challenge that was accepted by the Fifth Circuit in *Pace*,[11] until the full Court vacated the panel decision and granted a petition for rehearing en banc. See No. 01-31026, 2003 WL 21692677 (5th Cir. July 17, 2003). The panel in *Pace* held that even though Section 2000d-7 clearly conditioned receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity, a State accepting federal funds prior to the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), would not have "knowingly" waived its sovereign

[11] The Commonwealth also cites *Johnson* v. *Louisiana Department of Education*, 330 F.3d 362 (5th Cir. 2003), vacated and rehearing en banc granted, No. 02-30318, 02-30369, 2003 WL 21983251 (5th Cir. Aug. 14, 2003). That case simply followed the precedent set in *Pace* prior to rehearing en banc being granted. See *id*. at 363.

immunity to Section 504 claims because it could have reasonably believed that Congress had abrogated that immunity whether the State accepted federal funds or not. See 325 F.3d at 615-618 (following and expanding upon rationale in *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001)). The Commonwealth's vague reference to this case, without any additional briefing or argument, is insufficient to preserve the issue on appeal. See *United States* v. *Sacko*, 247 F.3d 21, 24 (1st Cir. 2001) ("It is well-settled that arguments not raised in an appellant's initial brief are waived."); *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 352 (1st Cir. 1989) ("[The] court will not consider issue presented in 'perfunctory and underdeveloped a manner in [appellant's] brief.') (quoting *Hershinow* v. *Bonamarte*, 735 F.2d 264, 266 (7th Cir.1984)), cert. denied, 496 U.S. 937 (1990).

Even if this Court concluded that the issue was preserved, it should reject the Commonwealth's suggestion that its waiver was somehow "unknowing." Even under *Pace*, a State's acceptance of federal funds after the Supreme Court's decision in *Garrett* would constitute a knowing waiver of sovereign immunity. See 325 F.3d at 618 n.15. The events giving rise to Plaintiffs' claims in this case occurred after *Garrett* was decided. Compare *Garrett*, 531 U.S. at 356 (decided in February 2001) with Order at 2-3 (parents first asked for interpreter on August 14,

2001). Accordingly, the Commonwealth was well aware of "the abrogation test developed in the *Seminole-Kimel-Garrett* line of cases" (Br. 51 n.8) and chose, nonetheless, to accept federal IDEA funds.[12]

Moreover, the vacated panel decision in *Pace* is fundamentally flawed. See *Shepard* v. *Irving*, No. 02-1712, slip op. 7 n.2 (4th Cir. August 20, 2003) (unpublished and attached as Addendum)[13] (declining to follow *Pace*); *A.W.* v. *Jersey City Pub. Sch.*, No. 02-2056, 2003 WL 21962952, slip op. 26-32 (3d. Cir. Aug. 19, 2003) (rejecting *Pace*/*Garcia*); *Douglas* v. *California Dep't of Youth Auth.*, 285 F.3d 1226 (9th Cir.) (denying rehearing en banc over dissent urging adoption of *Garcia*), cert. denied, 536 U.S. 924 (2002). First, the panel erred in concluding that a State's acceptance of clearly conditioned federal funds may be insufficient to constitute a knowing waiver of Eleventh Amendment immunity.

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[12] Moreover, Plaintiffs' claim for prospective injunctive relief is necessarily predicated on the claim that the Commonwealth is engaging in a current and ongoing violation of Section 504. See *Dudley* v. *Hannaford Bros. Co.*, 333 F.3d 299, 304 (1st Cir. 2003) (entitlement to prospective injunctive relief must be premised on "some *ongoing* harm (or, at least, a colorable threat of *future* harm)") (emphasis added). The Commonwealth does not claim that its present waiver of sovereign immunity through acceptance of federal funds is, in any way, unknowing.

[13] Citation of this case is permitted by Local Rule 32.3(b) of this Court and Local Rule 36(c) of the Fourth Circuit because the decision specifically rejected the panel decision in *Pace* as a matter of first impression in that circuit. The United States has moved for publication of the opinion in *Shepard*.

With the exception of the Second Circuit and the *Pace* panel, the courts of appeals have uniformly applied a simple, straight-forward test to determine whether a State has knowingly waived its sovereign immunity in this context: if Congress clearly conditions federal funds on a waiver of sovereign immunity, and a State nonetheless accepts federal financial assistance, a knowing waiver of sovereign immunity is conclusively established. See *Arecibo Cmty. Health Care,* 270 F.3d at 24.[14] The Supreme Court used the same formulation in *College Savings Bank*, when it reaffirmed that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * *acceptance of the funds entails an agreement to the actions*." 527 U.S. at 686 (emphasis added). Requiring Congress to make its waiver condition clear is sufficient to ensure that the State

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[14] See also *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) , cert. denied, 123 S. Ct. 1353 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 123 S. Ct. 2574 (2003); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553-555 (7th Cir. 2001); *Jim C.* v. *Arkansas Dep't of Educ.*, 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 (11th Cir. 1999), rev'd in part on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Cf. *Oak Park Bd. of Educ.* v. *Kelly E.*, 207 F.3d 931 (7th Cir.), cert. denied, 531 U.S. 824 (2000) (IDEA); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999) (same).

has "excercise[d] [its] choice knowingly, cognizant of the consequences of [its] participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981).

The Supreme Court endorsed a similar straight-forward, objective waiver test in *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), where it found that a State had knowingly and voluntarily waived its sovereign immunity by removing state law claims to federal court. The Court began by acknowledging that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court concluded that such a "clear" indication may be found when a State engages in conduct that federal law declares will constitute a waiver of sovereign immunity. "[W]hether a particular set of state * * * activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law," the Court explained. *Id*. at 623. And federal law makes clear that "voluntary appearance in federal court" would constitute a waiver of sovereign immunity. *Id*. at 619. Removing state law claims to federal court in the face of this principle, the Court held, waived the State's sovereign immunity. *Id*. at 620.

Importantly, it was undisputed that the State in *Lapides* did not "believe[] it was actually relinquishing its right to sovereign immunity." *Garcia*, 280 F.3d at

115 n.5. See *Lapides*, 535 U.S. at 622-623. Under Georgia law, the State argued, the Attorney General lacked authority to waive the State's sovereign immunity. And under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State asserted, it could reasonably believe that absent that state law authority, no action by the Attorney General would constitute a valid waiver of the State's sovereign immunity. See 535 U.S. at 621-622.[15] Therefore, the State argued, the Attorney General's removal of the case to federal court should not be found to constitute a "clear declaration" of the State's intent to waive its sovereign immunity.

The *Pace* panel's rationale would have required the Supreme Court to accept Georgia's argument and hold that the State did not knowingly waive its sovereign immunity, since the State reasonably believed that removing the case to federal court would not constitute a valid waiver. The Supreme Court, however, rejected the argument and held that the State had validly waived its sovereign immunity. See *id*. at 622-623. The waiver rule it was applying, the Court explained, was necessary to accommodate not only the State's interest in not being subject to suit without its consent, but also the broader interest in creating a waiver

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[15] In fact, this portion of the Court's holding in *Ford* was good law until the Supreme Court overruled it in *Lapides* itself. See *id*. at 622-623.

rule that can be "easily applied by both federal courts and the States themselves" and that "avoids inconsistency and unfairness." *Id.* at 623- 624. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621. Finding that removal of state law claims represents a knowing waiver of sovereign immunity as a matter of law properly accommodated the competing interests. "[O]nce the States know or have reason to expect that removal will constitute a waiver," the Court explained, "then *it is easy enough to presume* that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal." 535 U.S. at 624 (emphasis added) (citation and quotation marks omitted).

So, too, in this case, federal law has long made clear that a State's acceptance of clearly conditioned federal funds shall constitute a knowing and effective waiver of sovereign immunity. See, *e.g.*, *Atascadero*, 473 U.S. at 247. The clarity of this rule, and of the funding condition, is sufficient to ensure that the State's waiver of its sovereign immunity is knowing. At the same time, ensuring that States accepting federal assistance are bound by the funds' valid conditions is necessary to vindicate Congress's constitutional authority to enact such conditions.

The *Pace* panel's second fundamental error was concluding that "the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds" because they could have believed that Congress had already abrogated the State's immunity to Section 504 claims through the ADA abrogation provision or Section 2000d-7. 325 F.3d at 616. Congress made plain that nothing in the ADA abrogated a State's sovereign immunity to claims under Section 504.[16] Nor could the Commonwealth reasonably believe that Section 2000d-7 would abrogate its sovereign immunity even if it declined federal funding, since that provision clearly subjects to suit only those state agencies that receive federal financial assistance. See 42 U.S.C. 2000d-7 (authorizing suit under Section 504); 29 U.S.C. 794(a) (Section 504 only applies to a "program or activity receiving Federal financial assistance"). Thus, when it was deciding whether to accept federal funds for the coming school year, the Puerto Rico Department of Education's sovereign immunity to Section 504 claims for the coming year was intact, and the Commonwealth was faced with a clear choice. It could decline federal funds and maintain its sovereign immunity to

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[16] See 42 U.S.C. 12202 (ADA abrogation provision, providing that a "State shall not be immune * * * from an action in Federal or State court of competent jurisdiction for a violation of *this* chapter") (emphasis added). Indeed, Congress explicitly provided the ADA did not alter the pre-existing Section 504 scheme in any respect. See 42 U.S.C. 12201(b).

Section 504 suits, or it could accept funds and submit to private suits under the Rehabilitation Act.

It may be that the Commonwealth could have thought that there was little practical value in maintaining its sovereign immunity to Section 504 claims (in light of its potential liability for the similar conduct under the ADA even if it declined federal funds). But that would not make its waiver unknowing.[17] What must be known for a waiver to be valid is the existence of the legal right to be waived and the legal consequence of the waiver, not the practical implications of

[17] As a matter of contract law, for example, an agreement is not rendered unenforceable simply because one of the parties wrongly believes that he is not giving up much in exchange for the benefit he is receiving. Thus, the purchaser of a business cannot claim that her agreement to the sale was unknowing simply because she grossly overestimated the future earnings (and, therefore, present value) of the company. See Restatement (Second) of Contracts § 151, illust. 2 (1981). Under limited circumstances, contract law provides relief when a party has made a mistake with respect to a "basic assumption on which he made the contract" if the mistake "has a material effect on the agreed exchange of performances that is adverse to him" and enforcement of the contract would be unconscionable or the other party had reason to know of the mistake. See *id*. at § 153. The Commonwealth has not relied on the contract law principle of mistake of law, however, perhaps because that doctrine ordinarily would require the Commonwealth to show that the mistake would have made a difference to its decision to accept federal funds, see *ibid*., and because the Commonwealth normally would be required to return the funds in order to avoid its obligations under the contract, see *id*. at §§ 158, 376, 384.

waiving the right. See, *e.g.*, *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986).[18]

Here, the Commonwealth understood that it had an Eleventh Amendment immunity to Section 504 claims of private plaintiffs and that if it accepted federal funding it would no longer be able to assert that right to avoid private suits under the Rehabilitation Act. Nothing in Section 504 or the ADA obscured either of these basic facts. Consequently, as the Third Circuit recently explained:

> By accepting such funds, the state knowingly gives up any possible right to immunity even if the abrogation is subsequently ruled invalid. Particularly given the rapidly developing nature of Eleventh Amendment law, the state is actually surrendering something of particular value. It gives up a significant measure of insurance against alterations in the law of sovereign immunity.

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[18] See also, *e.g.*, *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (citation and quotation marks omitted); *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Moran*, 475 U.S. at 422 ("No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self- interest in deciding whether to speak or stand by his rights."); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.")

See *A.W.*, 2003 WL 21962952, slip op. at 31 (citations and internal quotation marks omitted). Having made its decision in favor of accepting federal funding with the knowledge that doing so would waive its sovereign immunity to Section 504 claims, the Commonwealth knowingly waived its Eleventh Amendment immunity.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the Commonwealth's motion to dismiss Plaintiffs' Section 504 and ADA claims on Eleventh Amendment grounds.

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