No. 01-31026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS PACE,

Plaintiff-Appellant

v.

BOGALUSA CITY SCHOOL BOARD, *et al.*,

Defendants-Appellees

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

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TABLE OF CONTENTS

PAGE

STATEMENT OF SUBJECT MATTER JURISDICTION 2

STATEMENT OF APPELLATE JURISDICTION 2

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT

I. CONGRESS VALIDLY CONDITIONED RECEIPT OF FEDERAL FUNDS ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 9

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Constitutes A Waiver Of Immunity From Private Suits Brought Under Section 504* 11

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On A State's Waiver Of Its Eleventh Amendment Immunity* 16

C. *Section 504 Is A Valid Exercise Of The Spending Power* 19

CONTENTS (continued): **PAGE**

II. CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER THE IDEA 29

A. *Section 1403 Is A Clear Statement That Accepting IDEA Funds Constitutes A Waiver Of Immunity From Private Suits Brought Under The IDEA* 30

B. *Congress Has Authority Under The Spending Clause To Condition The Receipt Of Federal Financial Assistance On A State's Waiver Of Its Eleventh Amendment Immunity And The IDEA Is A Valid Exercise Of That Authority* 33

CONCLUSION 34

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Alden v. *Maine*, 527 U.S. 706 (1999) 9, 16, 29

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 22

AT&T Communications v. *Bell South Communications, Inc.*, 238 F.3d 636 (5th Cir. 2001) 14, 18

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) . . . . . *passim*

Barnes v. *Gorman*, 122 S. Ct. 2097 (2002) 5

Bell v. *New Jersey*, 461 U.S. 773 (1983) 29

Board of Educ. of Oak Park v. *Kelly E.*, 207 F.3d 931 (7th Cir.), cert. denied, 531 U.S. 824 (2000) 32

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 5-6

Board of Educ. v. *Mergens*, 496 U.S. 226 (1990) 27-28

Bradley v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999) 32-33

Brotherhood of R.R. Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 31-32

California v. *United States*, 104 F.3d 1086 (9th Cir.), cert. denied, 522 U.S. 806 (1997) 25

Carter v. *Orleans Parish Pub. Schs.*, 725 F.2d 261 (5th Cir. 1984) 4-5

Cherry v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001) 15-16

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 20

Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) 16

CASES (continued): **PAGE**

College Sav. Bank v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666 (1999) 10, 14, 16-17

Dellmuth v. *Muth*, 491 U.S. 223 (1989) 7, 30

Douglas v. *California Dep't of Youth Auth.*, 271 F.3d 812, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S.Ct. 2591 (2002) 16

Edelman v. *Jordan*, 415 U.S. 651 (1974) 15

Garcia v. *SUNY Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001) 15

Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) 14

Grove City College v. *Bell*, 465 U.S. 555 (1984) 22, 28

Honig v. *Doe*, 484 U.S. 305 (1988) 6

Irving Indep. Sch. Dist. v. *Tatro*, 468 U.S. 883 (1984) 6

Jim C. v. *Arkansas Dep't of Educ.*, 235 F.3d 1079 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001) 16, 28

Kansas v. *United States*, 214 F.3d 1196 (10th Cir.), cert. denied, 531 U.S. 1035 (2000) 28-29

Lau v. *Nichols*, 414 U.S. 563 (1974) 21-22

Litman v. *George Mason Univ.*, 186 F.3d 544 (1999), cert. denied, 528 U.S. 1181 (2000) 13-14, 18

Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 19-20, 24

NCAA v. *Smith*, 525 U.S. 459 (1999) 21

New York v. *United States*, 505 U.S. 144 (1992) 19, 29

Nihiser v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002) 16

CASES (continued): **PAGE**

North Carolina ex rel. Morrow v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962 (1978) 25-26, 28

Oklahoma v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) 24

Pederson v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) . . . . . *passim*

Robinson v. *Kansas,* 295 F.3d 1183 (10th Cir. 2002) 15

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 20

Petty v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) 17

Regan v. *Taxation with Representation*, 461 U.S. 540 (1983) 28

Reickenbacker v. *Foster*, 274 F.3d 974 (5th Cir. 2001) 3, 9-10

Rust v. *Sullivan*, 500 U.S. 173 (1991) 28

Salinas v. *United States*, 522 U.S. 52 (1997) 24

Sandoval v. *Hagan*, 197 F.3d 484 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001) 16

Sandoval v. *Reno*, 166 F.3d 225 (3d Cir. 1999) 32

School Bd. of Nassau County v. *Arline*, 480 U.S. 273 (1987) . . . . . *passim*

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 10, 18

South Dakota v. *Dole*, 483 U.S. 203 (1987) . . . . . *passim*

Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 24-25

Stanley v. *Litscher*, 213 F.3d 340 (7th Cir. 2000) 16

Supreme Court of Va. v. *Consumers Union, Inc.*, 446 U.S. 719 (1980) 15

Tully v. *Griffin, Inc.*, 429 U.S. 68 (1976) 27

CASES (continued): **PAGE**

United States Dep't of Transp. v. *Paralyzed Veterans of Am.*,
477 U.S. 597 (1986) 12, 14

United States v. *Louisiana*, 692 F. Supp. 642 (E.D. La. 1988) 23

Wyman v. *James*, 400 U.S. 309 (1971) 27

CONSTITUTION AND STATUTES:

United States Constitution,
Art. I, § 8, Cl. 1 (Spending Clause) . . . . . *passim*
Art. I, § 8, Cl. 3 (Commerce Clause) 17, 19
Amend. I 3, 9
Amend. XI . . . . . *passim*
Amend. XIV 27

28 U.S.C. 1291 2

28 U.S.C. 1331 2

Americans with Disabilities Act, Title II, 42 U.S.C. 12132 3

Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d *et seq.* 22
42 U.S.C. 2000d-7 . . . . . 2, 5, 8
42 U.S.C. 2000d-7(a)(1) 5, 13, 17

Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* . . . . . *passim*

Equal Access Act, 20 U.S.C. 4071 *et seq.* 27

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* . . . . . *passim*
20 U.S.C. 1400(c)(2)(C) 5
20 U.S.C. 1403, Pub. L. No. 101-476, Tit. I, § 103,
104 Stat. 1106 (1990) . . . . . *passim*
20 U.S.C. 1403(a) 7
20 U.S.C. 1412(a) 6
20 U.S.C. 1412(a)(1)(A) 6
20 U.S.C. 1412(a)(11)(A)(i) 7
20 U.S.C. 1412(a)(11)(A)(ii)(I) 7
20 U.S.C. 1413(a) 6
20 U.S.C. 1413(d)(1) 7
20 U.S.C. 1413(h)(1)(B) 7

STATUTES (continued): **PAGE**

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*:
20 U.S.C. 1415 6
20 U.S.C. 1415(i)(2) 6
20 U.S.C. 1415(i)(2)(A) 30
20 U.S.C. 1415(i)(2)(B)(iii) 30
20 U.S.C. 1415(i)(3) 6

Rehabilitation Act of 1973 . . . . . *passim*
29 U.S.C. 701(a)(2) 4
29 U.S.C. 701(a)(5) 4
29 U.S.C. 794 (Section 504) . . . . . *passim*
29 U.S.C. 794(a) 3, 9
29 U.S.C. 794(b) 4

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506,
Tit. X, § 1003, 100 Stat. 1845 5

REGULATIONS:

28 C.F.R. 42.504(a) 21

LEGISLATIVE HISTORY:

S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 12

H.R. Rep. No. 544, 101st Cong., 2d Sess. (1990) 30

110 Cong. Rec. 6544 (1964) 23

131 Cong. Rec. 22,346 (1985) 12

135 Cong. Rec. 16, 916 (1989) 30

MISCELLANEOUS:

Appellant's Jurisdictional Statement,
North Carolina ex rel. Morrow v. Califano,
435 U.S. 962 (1978) (No. 77-971) 26

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

This supplemental brief is submitted in response to the Court's order dated October 10, 2002, directing the parties to answer whether Eleventh Amendment immunity bars the plaintiff's claims against the State of Louisiana, the Louisiana State Board of Elementary and Secondary Education, and the Louisiana Department of Education under Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act, and Title II of the Americans with Disabilities Act. This brief explains that the plaintiff's Section 504 and IDEA

claims against the state defendants are not barred because the provisions of those statutes that condition the receipt of federal financial assistance on a State's waiver of Eleventh Amendment immunity are valid exercises of Congress's spending power.

STATEMENT OF SUBJECT MATTER JURISDICTION

As explained herein, the district court had jurisdiction over the claims on appeal pursuant to 28 U.S.C. 1331.

STATEMENT OF APPELLATE JURISDICTION

The district court entered final orders and judgments on March 14, 2001, and August 29, 2001. The plaintiff filed a timely notice of appeal on August 31, 2001. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether 42 U.S.C. 2000d-7, the statutory provision conditioning the receipt of federal financial assistance on a State's waiver of Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

2. Whether 20 U.S.C. 1403, the statutory provision conditioning the receipt of federal financial assistance under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* on a State's waiver of Eleventh Amendment immunity for suits under that statute, is a valid exercise of Congress's authority under the Spending Clause.

3. Whether the abrogation of Eleventh Amendment immunity for suit under Title II of the Americans with Disabilities Act, 42 U.S.C. 12132, is valid Fourteenth Amendment legislation.[1]

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973 (Section 504) 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). Section 504 contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication,

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[1] Although the United States has argued and continues to believe that the abrogation for Title II of the ADA is valid, that question was resolved by this Court's decision in *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), which held that it is not an effective abrogation of state sovereign immunity. Accordingly, this brief does not address the issue.

recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

Section 504 applies to a "program or activity," a term defined to include "all of the operations" of a state agency, such as the Louisiana State Board of Elementary and Secondary Education or the Louisiana Department of 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]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and 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 programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *Carter* v. *Orleans Parish*

Pub. Schs., 725 F.2d 261, 262 n.2 (5th Cir. 1984).

As part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845, Congress enacted 42 U.S.C. 2000d-7, which 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.

42 U.S.C. 2000d-7(a)(1).

2. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides billions of dollars to States to educate children with disabilities. The IDEA was a congressional response to the wholesale exclusion of children with disabilities from public education. See 20 U.S.C. 1400(c)(2)(C). Congress's two-fold goal in enacting the IDEA was to ensure both that children with disabilities receive a free appropriate public education, and that such an education takes place, whenever possible, in the regular classroom setting. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 192, 202-203 (1982).

In order to qualify for IDEA financial assistance, a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a), (a)(1)(A). To assure that each child receives such an appropriate education, Congress also conditioned the receipt of federal funds on detailed procedural requirements. See *Rowley*, 458 U.S.

at 182-183, 205-206; 20 U.S.C. 1415. Congress specifically authorized private plaintiffs to enforce these federal rights in federal court. *Id.* at 204-205; 20 U.S.C. 1415(i)(2), (i)(3). The IDEA requires a court "not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has" in fact complied "with the requirements of" the IDEA. *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 890 n.6 (1984) (internal quotation marks omitted); see also *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) (The IDEA "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." (citation omitted)).[2]

In 1989, the Supreme Court held that the language of the IDEA did not clearly evidence Congress's intent to authorize private actions against state entities. See *Dellmuth* v. *Muth*, 491 U.S. 223, 232 (1989). In response, Congress amended the statute to add Section 1403, making it effective for violations occurring after October

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[2] The State, in turn, may pass on the federal assistance to local school districts that agree to comply with the requirements of the IDEA. See 20 U.S.C. 1413(a). However, the local school district's special education program is "under the general supervision" of the state education agency, which is "responsible for ensuring that * * * the requirements of [the IDEA] are met," and must "provide special education and related services directly to children with disabilities" if a local school district "is unable to establish and maintain programs of free appropriate public education that meet the requirements of" the IDEA. *Id.* at 1412(a)(11)(A)(ii)(I), (a)(11)(A)(i), 1413(h)(1)(B); see also *id.* at 1413(d)(1) (State may not make payments of IDEA funds to local school districts that violate the IDEA).

30, 1990. See Pub. L. No. 101-476, Tit. I, § 103, 104 Stat. 1106 (1990). Section 1403 provides in pertinent part:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter [20 U.S.C. 1400 - 1487].

20 U.S.C. 1403(a).

SUMMARY OF ARGUMENT

The Eleventh Amendment does not bar claims brought by a private plaintiff under Section 504 of the Rehabilitation Act, to remedy discrimination against persons with disabilities; nor does it bar private claims under the Individuals with Disabilities Education Act (IDEA), to remedy alleged violations of the Act. Congress validly conditioned receipt of federal financial assistance on waiver of States' immunity to private suits brought to enforce Section 504 and the IDEA. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. Similarly, by enacting 20 U.S.C. 1403, Congress put States on clear notice that acceptance of

federal IDEA funds was conditioned on a waiver of their Eleventh Amendment immunity to suits under the IDEA. In both cases, acceptance of funds constitutes agreement to the statutes' terms.

Section 504 itself is a valid exercise of the Spending Clause because it furthers the federal government's interest in assuring that federal funds, provided by all taxpayers, do not support recipients that discriminate. The IDEA is also a valid exercise of Congress's authority under the Spending Clause because it furthers the federal government's interest in seeing that all children with disabilities receive a free appropriate public education. Nor is either statute unconstitutionally coercive. The State made voluntary choices to accept particular federal funds in particular amounts and to distribute those funds to particular state agencies.

ARGUMENT

The Eleventh Amendment bars suits by private parties against a State, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). This Court has asked whether the plaintiff's claims against the state defendants under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794(a), and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, are barred by the Eleventh Amendment. The State has waived its Eleventh Amendment immunity to suits under both Section 504 and the IDEA.

I. CONGRESS VALIDLY CONDITIONED RECEIPT OF FEDERAL FUNDS ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

The Eleventh Amendment bars private suits against a State, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). In *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), this Court held that Congress did not have the power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity to suits under Section 504. While the United States disagrees with that decision, we recognize

that it binds this panel. *Reickenbacker* reserved the question whether Congress validly conditioned the receipt of federal financial assistance on a recipient's waiver of its Eleventh Amendment immunity to Section 504 claims. See 274 F.3d at 984.

This Court should resolve that question in the affirmative. Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance.[3] States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (1999); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 64 (1996); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). And "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." *College Sav. Bank*, 527 U.S. at 686. Thus, Congress may, and has, conditioned the receipt of federal funds on defendants' waiver of Eleventh Amendment immunity to Section 504 claims.

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[3] There is no dispute that the state defendants in this case receive federal financial assistance.

As explained below, Section 2000d-7 clearly conditions the receipt of federal financial assistance on a waiver of immunity, and defendants' receipt of such assistance during the relevant period was an effective waiver. Moreover, Congress has the authority under the Spending Clause to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity, and Section 504 and Section 2000d-7 are valid exercises of that power.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Constitutes A Waiver Of Immunity From Private Suits Brought Under Section 504*

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.

1. Section 2000d-7 makes unambiguously clear that Congress intended to condition federal funding on a State's waiver of Eleventh Amendment immunity to suit in federal court under Section 504 (and the other non-discrimination statutes tied to federal financial assistance).[4] Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it would not have immunity to suit in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.

This Court reached this very conclusion in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (2000), which involved the application of Section

[4] Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986).

2000d-7 to Title IX of the Education Amendments (prohibiting sex discrimination by educational programs that receive federal financial assistance). The Louisiana defendants in that case argued that "§ 2000d-7(a)(1) does not contain the word 'waiver,' and that the state may have logically disregarded the language of this statute as an attempt to abrogate its sovereign immunity." *Id.* at 876. This Court rejected that argument, holding that "in 42 U.S.C. § 2000d-7(a)(1) Congress has successfully codified a statute which clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment Immunity." *Ibid.* Relying on the Fourth Circuit's "careful analysis" in *Litman* v. *George Mason University*, 186 F.3d 544 (1999), cert. denied, 528 U.S. 1181 (2000), this Court explained:

> First, we will consider whether 42 U.S.C. § 2000d-7(a)(1), although it does not use the words "waiver" or "condition," unambiguously provides that a State by agreeing to receive federal educational funds under Title IX has waived sovereign immunity. A state may "waive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.'" *Litman*, 186 F.3d at 550 (quoting *Atascadero State Hosp.*, 473 U.S. at 247). Title IX as a federal spending program "operates much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 551. The Supreme Court has noted that Congress in enacting Title IX "condition[ed] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Indep. School*

Dist., 524 U.S. 274, 286 (1998); *Litman*, 186 F.3d at 551-552.

Pederson, 213 F.3d at 876 (some citations omitted).

2. The obligations of Sections 504 and 2000d-7 are incurred only when a recipient elects to accept federal financial assistance. If a state agency does not wish to accept the conditions attached to the funds (non-discrimination and suit in federal court), it is free to decline the assistance. But if it does accept federal money, then it is clear that it has agreed to the conditions as well. Thus, by voluntary acceptance of funding, the state agency waives its right to assert immunity. "[A]cceptance of the funds entails an agreement to the actions." *College Sav. Bank*, 527 U.S. at 686; cf. *Paralyzed Veterans of Am.*, 477 U.S. at 605 ("the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision"); *AT&T Communications* v. *Bell South Communications, Inc.*, 238 F.3d 636, 645 (5th Cir. 2001) ("Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that [the gratuity] was

conditioned on waiver of immunity."). Whether called abrogation or waiver,[5] Section 2000d-7 applies only if a state agency chooses to accept federal financial assistance.

As this Court held in *Pederson*, Section 2000d-7 "clearly, unambiguously, and unequivocally conditions receipt of federal funds * * * on the State's waiver of Eleventh Amendment Immunity." This clear statement in the text of the statute about the Eleventh Amendment assured that defendants knew as a matter of law that they were waiving their immunity for Section 504 claims when they applied for and took federal financial assistance. Each of the seven courts of appeals to address the issue has reached the same conclusion that this Court did in *Pederson*. See *Robinson* v. *Kansas,* 295 F.3d 1183 (10th Cir. 2002); *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Cherry* v. *University of Wis. Sys. Bd. of*

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[5] The Supreme Court has sometimes used the terms "abrogation" and "waiver" loosely and interchangeably. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) ("The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."); *Supreme Court of Va.* v. *Consumers Union, Inc.*, 446 U.S. 719, 738 (1980) ("We held * * * that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity.").

Regents, 265 F.3d 541, 554-555 (7th Cir. 2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (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, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). Nothing warrants this Court overruling *Pederson* and creating a split in the circuits.

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On A State's Waiver Of Its Eleventh Amendment Immunity*

Congress has the authority under the Spending Clause to condition receipt of federal funding on a waiver of Eleventh Amendment immunity. In *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank*, the Court

reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id.* at 687.

Relying on these cases, this Court has twice upheld Congress's authority to condition the receipt of a federal gratuity authorized by an Article I power in exchange for a waiver of a State's Eleventh Amendment immunity. In *Pederson*, for example, the Louisiana defendants contended that "even if 42 U.S.C. § 2000d-7(a)(1) is intended to cause waiver of sovereign immunity, this type of 'conditional waiver' argument is at odds with the Supreme Court's decision in *Seminole Tribe*." 213 F.3d at 876. Quoting from the Fourth Circuit's decision in *Litman*, this Court rejected the defendants' argument, explaining: "We do not read *Seminole Tribe* and its progeny, including the Supreme Court's recent Eleventh

Amendment decisions, to preclude Congress from conditioning federal grants on a state's consent to be sued in federal court to enforce the substantive conditions of the federal spending program." *Ibid*. (quoting *Litman*, 186 F.3d at 556). To hold otherwise, this Court explained, "would affront the Court's acknowledgment in *Seminole Tribe* of the 'unremarkable . . . proposition that States may waive their sovereign immunity.'" *Ibid*. It thus concluded "that in accepting federal funds" the Louisiana state agency in that case "waived its Eleventh Amendment sovereign immunity." *Ibid*. This Court reaffirmed this conclusion in *AT&T Communications*: "When Congress bestows a gift or gratuity upon a state of a benefit which cannot be obtained by the state's own power, Congress may attach to the gratuity the condition of a voluntary waiver by the state of its Eleventh Amendment immunity." 238 F.3d at 639.

While there are limits on Congress's authority under the Spending Clause, see Part I.C., *infra*, the Spending Clause does not contain "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). To the contrary, it is well-settled that "objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id*. at 207; see also *New York* v.

United States, 505 U.S. 144, 167, 171-172 (1992) (relying on *Dole* for the proposition that "[w]here the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices," and holding that a federal program that paid States that met certain congressional goals was a valid exercise of the Spending Clause even though Congress could not unilaterally impose those goals on the States under the Commerce Clause).

C. *Section 504 Is A Valid Exercise Of The Spending Power*

The Supreme Court has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." *Dole*, 483 U.S. at 210. This is because the federal government has not unilaterally intruded into a recipient's operations. A recipient incurs these obligations only if it applies for and receives federal funds. "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

The Supreme Court in *Dole* identified four requirements for valid enactments in exercise of the Spending Power. First, the Spending Clause by its terms requires

that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress places conditions on the States' receipt of federal funds, it "'must do so unambiguously * * *, enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation.'" *Ibid*. (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid*. And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id*. at 208. Section 504 satisfies each of these criteria.

1. First, the general welfare is served by prohibiting discrimination against persons with disabilities. See *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval). Indeed, *Dole* noted that there should be substantial judicial deference to Congress's determination that legislation serves the general welfare. 483 U.S. at 207 n.2.

2. The language of Section 504 alone makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance. Thus, the second *Dole* requirement is met. See *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504"

with the statute in *Pennhurst*). Moreover, Department of Justice implementing regulations require that each application for financial assistance include an "assurance that the program will be conducted in compliance with the requirements of section 504 and this subpart." 28 C.F.R. 42.504(a).

3. Section 504 meets the third *Dole* requirement as well. Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons.

Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *Arline*, 480 U.S. at 278 n.2. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." *Id.* at 569 (citations

omitted).[6] The Court made a similar holding in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575.

These cases stand for the proposition that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. See *United States* v. *Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any part of the State's system of public

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

higher education, is directly related to one of the main purposes for which public education funds are expended: equal education opportunities to all citizens." (footnote omitted)). Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance. The purposes articulated by Congress in enacting Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); *id.* at 7061-7062 (Sen. Pastore); *id.* at 2468 (Rep. Celler); *id.* at 2465 (Rep. Powell). Certainly, there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.[7] Thus, a challenge to such a cross-cutting non-discrimination statute would fail.

4. Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. Neither providing meaningful access to people with disabilities nor waiving sovereign immunity

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[7] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending programs, see *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds).

violates anyone's constitutional rights. "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Mellon*, 262 U.S. at 480.

5. In addition to the four established limits on the Spending Power, the Court has suggested that recipients may be able to raise a coercion argument. While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S.

548, 590 (1937)), it saw no reason generally to inquire into whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid*. The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid*. (quoting *Steward Mach.*, 301 U.S. at 590). Accordingly, the Ninth Circuit has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997).

Any argument that Section 504 is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to difficult or even

"unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id.* at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id.* at 535-536 (footnote omitted) (emphasis added). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[8]

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[8] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[9]

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surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." Appellant's J.S. at 2-3, *North Carolina ex rel. Morrow* v. *Califano*, 435 U.S. 962 (1978) (No. 77-971). Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976).

[9] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never

These cases demonstrate that the federal government can place conditions on federal funding that require States to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. See *Jim C.*, 235 F.3d at 1081-1082 (en banc).

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1203 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no

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begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude an entity from restructuring its operations to separate its federally supported activities from other activities, Congress may constitutionally condition federal funding to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 527 U.S. at 750, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency waive its immunity to suit in federal court, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendant has accepted 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). For all these reasons, Section 504 and Section 2000d-7 should be upheld under the Spending Clause.

II. CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER THE IDEA

The IDEA is a federal grant program that offers supplemental education funds to a State conditioned on that State's agreement to provide the substantive and procedural protections necessary to assure children with disabilities a free appropriate public education and authorizes private suits for "appropriate" relief. See 20 U.S.C. 1415(i)(2)(A), (i)(2)(B)(iii). Section 1403 of Title 20 provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the IDEA. Section 1403 may also be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal IDEA assistance. As with Section 504, therefore, because States are free to waive their Eleventh Amendment immunity, Congress may, and has, conditioned the receipt of IDEA funds on defendants' waiver of Eleventh Amendment immunity to claims under the IDEA.

A. *Section 1403 Is A Clear Statement That Accepting IDEA Funds Constitutes A Waiver Of Immunity From Private Suits Brought Under The IDEA*

Section 1403 was enacted in 1990 in response to the Supreme Court's holding in *Dellmuth* v. *Muth*, 491 U.S. 223 (1989). *Dellmuth*, in turn, relied on the Court's previous opinion in *Atascadero*. Section 1403 was crafted in light of the rule

articulated in *Dellmuth* and *Atascadero*. See 135 Cong. Rec. 16,916-16,917 (1989); H.R. Rep. No. 544, 101st Cong., 2d Sess. 12 (1990).

Section 1403 uses language that is virtually identical to the language of Section 2000d-7. Just as this Court in *Pederson* v. *Louisiana State University*, 213 F.3d 858, 876 (2000), found that Section 2000d-7 constitutes a clear and unambiguous statement that States waive their immunity when they accept federal financial assistance, so should this Court hold that the language in Section 1403 unambiguously expresses Congress's intent that the acceptance of funds under the IDEA by States constitutes a waiver of their Eleventh Amendment immunity to IDEA suits. As is true with Section 2000d-7, any state agency reading the U.S. Code would have known that after the effective date of Section 1403 it would waive its immunity to suit in federal court for violations of the IDEA if it accepted federal IDEA funds. Section 1403 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving IDEA funds was the requirement that they be subject to suit in federal court for alleged violations of the IDEA.

The fact that Section 1403 is entitled "Abrogation of state sovereign immunity" is irrelevant. Whether called abrogation or waiver, the text and structure of the statute make clear that only the voluntary acceptance of federal IDEA funds

will result in a loss of immunity. It is well-settled that section titles cannot limit the plain import of the text. See *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947) ("But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. * * * Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text."); *Sandoval* v. *Reno*, 166 F.3d 225, 235 (3d Cir. 1999) ("the Supreme Court has repeatedly noted [that] a title alone is not controlling"). In any event, the Supreme Court has sometimes used the terms "abrogation" and "waiver" loosely and interchangeably. See note 5, *supra*.

The two courts of appeals to address the validity of Section 1403 have reached the same conclusion: the text and structure of the IDEA make clear that federal IDEA funds are conditioned on both the substantive and procedural obligations of the statute and the waiver of Eleventh Amendment immunity. See *Board of Educ. of Oak Park* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) ("Having enacted legislation under its spending power, Congress did not need to rely on § 5. States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant. One string attached to money under the IDEA is submitting to suit in federal

court." (citations omitted)), cert. denied, 531 U.S. 824 (2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 753 (8th Cir. 1999)

("When it enacted [20 U.S.C.] §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a State's participation in the IDEA program and its receipt of federal IDEA funds on the State's waiver of its immunity from suit in federal court on claims made under the IDEA."). This Court should reach the same conclusion.

B. *Congress Has Authority Under The Spending Clause To Condition The Receipt Of Federal Financial Assistance On A State's Waiver Of Its Eleventh Amendment Immunity And The IDEA Is A Valid Exercise Of That Authority*

For the reasons stated above, Congress has authority to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity under the Spending Clause. See Part I.B., *supra*. Moreover, the IDEA, like Section 504, is a valid exercise of that authority. See Part I.C., *supra*.

CONCLUSION

For the foregoing reasons, the Eleventh Amendment does not bar the plaintiff's Section 504 and IDEA claims against the state defendants.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 7485 words.
2. The brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief for the United States as Intervenor and a diskette containing the brief were served by first class mail, postage prepaid, on this 25th day of October, 2002, to the following counsel of record:

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