No. 02-20988

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BLEWETT WILLIAM THOMAS,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Intervenor,

v.

UNIVERSITY OF HOUSTON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the straightforward application of settled circuit precedent regarding the proper application of 42 U.S.C. 2000d-7 to a state agency. The United States does not believe oral argument is necessary in this case. If oral argument is held, however, the United States wishes to appear along with Plaintiff-Appellee to address any questions the Court may have.

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JURISDICTIONAL STATEMENT

Plaintiff filed this case alleging violations of, among other statutes, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794. The district court had jurisdiction pursuant to 28 U.S.C. 1331. On August 2, 2002, the district court denied Appellant's motion to dismiss Plaintiff's Section 504 claims as barred by the State's Eleventh Amendment immunity. On August 20, 2002, Appellant filed a timely notice of appeal. This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

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

2. Whether Section 504's waiver provision is a valid exercise of Congress's Spending Clause authority.

3. Whether the state agency's acceptance of funds was effective to waive its Eleventh Amendment immunity.

STATEMENT OF THE CASE

1. Plaintiff sued the University of Houston (University), alleging (R.E. Tab 6, at ¶ XXXIV)[1] that the University had denied him admission to its Masters of Law program on the basis of his disability in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. 794a, and other state and federal laws. The University moved to dismiss Plaintiff's Section 504 claims as barred by the University's Eleventh Amendment immunity (see R.E. Tab 3, at 4).[2] The district court denied the motion (*id*. at 5-7), concluding that Congress validly conditioned receipt of federal funds on the University's waiver of sovereign immunity to

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[1] References to "R.E. Tab __, at __" refer to Appellant's Record Excerpts at the tab and page or paragraph number indicated.

[2] It appears undisputed that the University is an arm of the State of Texas and entitled to Eleventh Amendment immunity. The United States's brief proceeds on that assumption.

Section 504 claims and that, by receiving federal funds under such conditions, the University had waived its sovereign immunity. The University took this interlocutory appeal to challenge the denial of its Eleventh Amendment immunity defense (R.E. Tab 2).

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 "antidiscrimination mandate" 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, 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, 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]." *Arline*, 480 U.S. at 278 n.2. 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 covered agencies. See *Carter* v. *Orleans Parish Pub. Schs.*, 725 F.2d 261, 262 n.2 (5th Cir. 1984).

3. 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. 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.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Section 504 of the Rehabilitation Act to remedy discrimination on the basis of disability. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that eligibility for federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under the statutes identified in that provision, including Section 504. This Court so held in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (2000), when it concluded that Section 2000d-7 validly conditions acceptance of federal funds on a waiver of sovereign immunity to claims under Title IX. There is no basis for reaching a different conclusion when the same provision applies the same unambiguous language to claims under Section 504.

Putting state agencies to this choice was within Congress's Spending Clause authority. Congress has a significant interest in ensuring that the benefits secured through federal funding are available to all of a State's citizens without regard to disability, and in ensuring that federal taxpayers do not subsidize agencies that engage in discrimination. The non-discrimination requirement of Section 504, therefore, is directly related to the purposes of *all* federal funding programs, not just those funded under the Rehabilitation Act itself. Nor does Congress engage in unconstitutional coercion in requiring a state agency to forego disability discrimination to be eligible for any federal funding. That the University has chosen to take advantage of the substantial financial assistance Congress has made

available for state education programs, or that it has chosen to rely heavily on federal rather than state, local or private funding, does not render Section 504 unconstitutionally coercive. To hold otherwise would mean that state agencies that solicit substantial federal assistance could avoid all federal funding conditions while those agencies that accept less assistance remain subject to Section 504.

By accepting federal funds validly conditioned on a waiver of sovereign immunity, the University subjected itself to private litigation under Section 504. It does not matter that the state officials who solicited the federal funds may not have had specific state law authority to waive sovereign immunity; it is enough that state law authorized the University to accept federal funds that were clearly conditioned on a waiver of immunity. Moreover, nothing in this Circuit's cases concerning the abrogation provision of the Americans with Disabilities Act obscured the clear choice faced by the University when it was deciding whether or not to accept federal financial assistance. Having made that choice in favor of accepting federal funds, it may not now avoid the waiver of sovereign immunity it agreed to in exchange for that assistance.

ARGUMENT

I. CONGRESS CLEARLY 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 agency, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999).[3] 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 unilaterally abrogate a State's Eleventh Amendment immunity to suits under Section 504.[4] *Reickenbacker* reserved the question, at issue in this appeal, whether Congress validly conditioned the receipt of federal financial assistance on a recipient's waiver of its Eleventh Amendment immunity to Section 504 claims.[5] See 274 F.3d at 984.

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[3] The Eleventh Amendment does not bar private suits seeking prospective injunctive relief against state officials. See *id*. at 755-757; *University of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001). Plaintiff's complaint did not name a state official, and thus the *Ex parte Young* doctrine has no application to this case.

[4] While we disagree with that decision, we recognize that it is binding on this panel. We note, however, that the correctness of *Reickenbacker* is at issue in a case now pending before the Supreme Court. The Court granted certiorari in *California Med. Bd.* v. *Hason*, No. 02-479, to decide validity of the abrogation provision for Title II of the ADA. Oral argument is scheduled for March 25, 2003, and a decision is expected by July. Accordingly, this Court may wish to delay final decision in this case pending the resolution of *Hason* in the Supreme Court.

[5] This same issue also has been raised in six other cases currently pending before

(continued...)

The answer to that question turns on the interpretation of Section 2000d-7 of Title 42, which provides that 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 * * * [and] title VI of the Civil Rights Act of 1964." Section 504, in turn, prohibits discrimination against persons with disabilities in "any program or activity receiving Federal financial assistance." The University concedes (Br. 30) that it receives federal financial assistance. The University contends, nonetheless, that it has not waived its sovereign immunity because Section 2000d-7 does not clearly condition the receipt of federal financial assistance on a waiver of immunity. That contention is incorrect.

A. This Court Has Already Held That Section 2000d-7 Validly Conditions Receipt Of Federal Financial Assistance On A Waiver Of Sovereign Immunity

This Court has already rejected a State's argument that Section 2000d-7 fails to unambiguously condition receipt of federal funds on a waiver of sovereign immunity. In *Pederson* v. *Louisiana State University*, 213 F.3d 858 (2000), this Court held that Section 2000d-7 makes unambiguously clear that Congress

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[5](...continued)
this Court. See *Pace* v. *Bogalusa City Sch. Bd., et al.,* (No. 01-31026) (argued Nov. 5, 2002); *Miller* v. *Texas Tech. Univ.* (No. 02-10190) (argued Dec. 3, 2002); *Johnson* v. *Louisiana Dep't of Educ.* (No. 02-30318), consolidated with *August* v. *Mitchell* (No. 02-30369) (scheduled for oral argument Feb. 11, 2003); *Danny R.* v. *Spring Branch Indep. Sch. Dist.* (No. 02-20816) (awaiting oral argument); *Espinoza* v. *Texas Dep't of Pub. Safety* (No. 02-11168) (briefing ongoing).

intended to condition federal funding on a State's waiver of Eleventh Amendment immunity to suit in federal court under the non-discrimination statutes identified in that provision, which includes Section 504. *Pederson* involved the application of Section 2000d-7 to Title IX of the Education Amendments (a statute prohibiting sex discrimination in education programs that receive federal financial assistance). Defendant 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. See *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). Accordingly, this Court held 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.*

In so holding, this Court joined eight other courts of appeals that have held that Section 2000d-7 validly conditions receipt of federal funds on a waiver of sovereign immunity. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), petition for cert. pending, No. 02-801; *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S.Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 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, 71 U.S.L.W. 3284 (U.S. Jan 13, 2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 531 U.S. 1035 (2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001). Cf. *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001).

B. This Court's Decision In Pederson *Does Not Conflict With Prior Circuit, Or Subsequent Supreme Court, Precedent*

The University makes little attempt to distinguish *Pederson*,[6] but argues instead (Br. 13-16) that this panel may disregard that precedent because it purportedly conflicts with this Court's prior decision in *Lesage* v. *Texas*, 158 F.3d 213, 217-218 (5th Cir. 1998), overruled on other grounds, 528 U.S. 18 (1999), and with the Supreme Court's subsequent decision in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). These cases conflict with *Pederson*, the University asserts (Br. 14), because (1) they make clear that Section 2000d-7 can operate as an *abrogation* provision and because (2) "the same language cannot accomplish the two distinct goals of abrogation and conditional waiver." This argument is meritless.

While *Lesage* does indeed establish that Section 2000d-7 can operate as a valid abrogation provision as applied to cases under Title VI, nothing in *Lesage* or *Garrett* establishes that Section 2000d-7 cannot operate as a valid waiver provision as applied to some statutes (like Title IX and Section 504) and as a valid abrogation provision for others (like Title VI). This issue simply was not addressed, even implicitly, in either case. However, in *Pederson* this Court

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[6] The University does observe (Br. 14) that *Pederson* involved the application of Section 2000d-7 to Title IX claims, while this case applied Section 2000d-7 to claims under Section 504. But Defendant provides no basis for concluding that the statutory language of Section 2000d-7 could somehow be clear and effective as applied to Title IX, but ambiguous and invalid as applied to Section 504.

necessarily rejected the assertion that Section 2000d-7 could only operate as an abrogation provision in all applications. That is, this Court decided in *Pederson* that Section 2000d-7 could operate as a valid condition on acceptance of federal funds, knowing that it had previously held in *Lesage* that the same provision was supported by Congress's power to abrogate States' sovereign immunity to claims under Title VI. Indeed, the initial panel decision in *Pederson* discussed *Lesage* at length, holding that Section 2000d-7 was a valid abrogation provision as applied to cases under Section 504. See 201 F.3d 388, 404-407 (5th Cir. 2000). In response to a petition for rehearing, however, the *Pederson* court amended the opinion to uphold Section 2000d-7 as a valid waiver provision under the Spending Clause. See 213 F.3d at 863, 875-876.[7] Accordingly, the Court clearly considered the implications of *Lesage* and concluded that its decision was consistent with the holding in that prior case. In doing so, the Court necessarily rejected the University's present assertion that Section 2000d-7 must be viewed solely as an abrogation provision in all applications. That conclusion is law-of-the-circuit.

That conclusion was also correct. Section 2000d-7 is able to perform the unusual role as an abrogation provision when applied to Title VI, and as a conditional waiver provision when applied to Section 504, because it applies only

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[7] The panel's apparent uncertainty regarding the soundness of its abrogation holding presaged this Court's subsequent holding in *Reickenbacker* that Congress lacked the power under the Fourteenth Amendment to abrogate a State's sovereign immunity to Section 504 claims. See 274 F.3d at 983.

to those agencies that accept federal financial assistance. Because Section 2000d-7 is limited in this way, it may be justified under more than one source of congressional power depending on the statutory rights it is enforcing.[8] Thus, as this Court held in *Lesage*, when Section 2000d-7 is applied to claims under Title VI, it can be supported by Congress's power to abrogate a State's sovereign immunity because under the Fourteenth Amendment, Congress can unilaterally prohibit racial discrimination by state agencies. At the same time, as this Court held in *Pederson*, because a state agency's immunity is lost under Section 2000d-7 only if the agency accepts federal funds, that provision can also be supported by Congress's power to condition federal financial assistance under the Spending Clause when applied to claims under statutes like Title IX and Section 504.

The Supreme Court's clear statement rules do not prevent Section 2000d-7 from operating in this manner. The Court has simply required that Congress make clear that it is "condition[ing] participation in the [funding] programs * * * on a State's consent to waive its constitutional immunity." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-247 (1985). This rule "enable[s] the States to exercise

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[8] In this sense, Section 2000d-7 is critically different than the abrogation provision considered by the Supreme Court in *Garrett*. That provision abrogated State sovereign immunity to claims under the ADA whether they accepted federal funds or not. See 42 U.S.C. 12202. The ADA provision, therefore, could not function as a conditional waiver provision in any application, since it gave the States no choice in whether or not to submit to federal court jurisdiction. Accordingly, the Supreme Court's description of the ADA provision as an "abrogation" provision was entirely accurate, but of no relevance to the correctness of this Court's decision in *Pederson*.

their choice knowingly, cognizant of the consequences of their participation." *Penhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). As this Court held in *Pederson*, Section 2000d-7 satisfies this rule because it makes plain Congress's intent to subject recipient agencies to suit if, but only if, they accept federal financial assistance. It is true that, depending on the application, this consequence could be described as either a "waiver" (as in *Pederson*) or as a "conditional abrogation" triggered by the acceptance of federal funds (as in *Lesage*). But that does not violate any clear statement rule. What must be clear are the "consequences" of participation, not the legal description for those consequences. See *AT&T Communications* v. *Bellsouth Telecom., Inc.*, 238 F.3d 636, 644 (5th Cir. 2001) (constitutional question is simply whether "the state has been put on notice clearly and unambiguously * * * that the state's particular conduct or transaction will subject it to federal court suits brought by individuals").

C. Even If Pederson *Were Open To Reconsideration, Section 2000d-7 Unambiguously Conditions Receipt Of Federal Funding On A Waiver Of Sovereign Immunity*

Even if *Pederson* did not control the result in this case, this Court would still be compelled to conclude that the University waived its sovereign immunity by accepting federal funds. As 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 waiver of its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247.

As discussed above, Section 2000d-7 embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that a condition for receiving federal funds was their consent to suit in federal court for alleged violations of Section 504. Thus, in *Lane* v. *Pena*, 518 U.S. 187 (1996), the Supreme Court noted "the care with which Congress responded to our decision in *Atascadero*" and concluded that in enacting Section 2000d-7, "Congress sought to provide the sort of unequivocal waiver that our precedents demand." *Id*. at 198. If a state agency does not wish to accept the conditions attached to the funds, 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 sovereign immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("[A]cceptance of the funds entails an agreement to the actions."); *AT&T Communications*, 238 F.3d at 645-646; cf. *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605

(1986) ("the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision").

The University disagrees. It argues (Br. 17) that the waiver provision for Section 504 is ambiguous because "States reading § 2000d-7(a) could not have understood the consequences of accepting [federal] money." Yet the University acknowledges (Br. 16) that Section 2000d-7 makes unambiguously clear that when it applies, it results in the loss of a state agency's sovereign immunity to Section 504 claims. Moreover, the provision is similarly clear that it applies only to those agencies that accept federal funding. The University does not, for example, claim that Section 2000d-7 renders States subject to claims under Section 504 even if it does not accept federal funding. Accordingly, review of the statutory scheme makes unmistakably plain that a "consequence[] of accepting [federal] money," (Br. 17) is the loss of sovereign immunity. Whether that consequence is labeled a "waiver" or a "conditional abrogation" is irrelevant as a practical matter to the States and as a legal matter to the constitutionality of Section 2000d-7.

Furthermore, so long as those consequences are clear, it does not matter whether Congress does, or does not, use the word "waiver" or "condition" in the text of the statute (Br. 16-17). See *Pederson*, 213 F.3d at 876; *Litman*,186 F.3d at 551. That Congress has used those words in some statutes (see Br. 22-23 (citing former 42 U.S.C. 1396a)) is of no constitutional significance, so long as the language Congress *did* use was clear. Thus, for example, in *AT&T*

Communications, this Court held that Congress validly conditioned a State's right to regulate certain interstate telecommunications services on a waiver of sovereign immunity through statutory terms that nowhere use the words "waiver" or "condition." See 238 F.3d at 646. Instead, like Section 2000d-7, the provision in that case simply provided that States that participated in the federal program would be subject to private suit in federal court. *Ibid.* ("Section 252(e)(6) of the [Telecommunications Act of 1996, 47 U.S.C. 151, *et seq.*] plainly states that 'any party aggrieved by' a state commission's determination, which necessarily will include private individuals, may bring an action in an appropriate federal district court.").

The University further asserts (Br. 17-19) that the statutory and legislative history shows that Congress intended only to exercise its Fourteenth Amendment power to abrogate sovereign immunity to the exclusion of its Spending Clause authority to condition federal funds on a waiver of immunity. But as this Court explained in *Lesage*, the constitutional question is whether Section 2000d-7 is within Congress's constitutional power, not whether Congress correctly guessed which legal doctrine best supported its actions. See 158 F.3d at 217-218. "As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant." *Ussery* v.

Louisiana, 150 F.3d 431, 436 (5th Cir. 1998) (citation and quotation marks omitted). See also *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18.[9]

II. SECTION 504 IS VALID SPENDING CLAUSE LEGISLATION

The University next argues that even if Congress clearly conditioned receipt of federal funds on compliance with Section 504 and its waiver provision, these conditions exceeded Congress's authority under the Spending Clause. That claim is also mistaken.

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[9] In any case, even if Congress's subjective intent was relevant, the University points to nothing in the statutory or legislative history to suggest that Congress intended for Section 2000d-7 to operate only as an "abrogation" and not as a "waiver" provision for purposes of the Eleventh Amendment. *Atascadero*, which prompted Congress to enact Section 2000d-7, held that the prior version of Section 504 failed to effect *either* a valid abrogation *or* a valid waiver. See 473 U.S. at 242-245 (abrogation); *id*. at 246-247 (waiver). The University asserts (Br. 19) that Congress reacted only to "*Atascadero's* abrogation holding – not its conditional waiver holding." But the only support Defendant can muster for this assertion is the use of the word "abrogation" in one sentence of one Committee report. The University places more weight on the single use of that word than it can bear. Defendant itself asserts (Br. 20-21) that even the courts sometimes use "the terms 'abrogate' and 'waive' interchangeably." Moreover, the legislative history also demonstrates that Congress relied on an opinion from the Department of Justice, which advised Congress that Section 2000d-7 could be justified as an exercise of Congress's Spending Clause power to condition federal funds on a waiver of sovereign immunity. See 132 Cong. Rec. 28,624 (1986). And in signing the bill, President Reagan also explained that Section 2000d-7 "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation" of Section 504. 22 Weekly Comp. Pres. Doc. 1420 (Oct. 21, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

A. Section 504 Validly Applies To State Agencies Accepting Funds Under Any Federal Spending Program

The University asserts (Br. 25-26) without citation to any record evidence,[10] that it does not receive any federal funds under the Rehabilitation Act, and claims, therefore, that it cannot constitutionally be subject to the conditions of Section 504. The legal basis for this cursory assertion is unclear.[11] The University suggests (Br. 26) that this limitation is inherent in the contract nature of Spending Clause legislation. But the general discussion of Spending Clause legislation in Justice White's opinion for two Justices in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582, 596 (1983), upon which the University relies, does not purport to impose *any* constitutional limitation on Congress's exercise of its

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[10] There is no record evidence regarding the sources of the University's federal funding, and the University's effort (Br. 25 n.5) to present byzantine factual evidence of questionable admissibility to this Court for initial evaluation on an interlocutory appeal should be rejected. The University had the opportunity below to introduce evidence to support its motion to dismiss for lack of jurisdiction, see Fed. R. Civ. P. 12(b)(1), but it declined to do so. The United States has had no occasion to inquire whether the University's new factual assertions on appeal are accurate or not. However, this Court need not resolve this factual question since the University's legal theory is baseless.

[11] If the University is arguing that, as a matter of statutory interpretation, Section 504 only applies to agencies that receive funds under the Rehabilitation Act, that argument is meritless. On its face, Section 504 clearly applies to agencies that receive federal funds from any source. See 29 U.S.C. 794(a) (prohibiting discrimination "under any program or activity receiving *Federal financial assistance*") (emphasis added); see also 28 C.F.R. 41.3(e) (term "Federal financial assistance" includes "*any* grant, loan or contract" and other forms of assistance) (emphasis added).

spending powers, much less the particular restriction the University advances. Indeed, as many courts have held, Section 504 presents precisely the sort of ordinary *quid pro quo* described by the Justice White in *Guardians* and other cases: in exchange for the benefits of federal funding, States must agree to be subject to enforcement proceedings in federal court. See, *e.g.*, *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) ("This requirement is comparable to the ordinary quid pro quo that the Supreme Court has repeatedly approved."), cert. denied, 533 U.S. 949 (2001); see also *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (Title VI valid Spending Clause legislation); *South Dakota* v. *Dole*, 483 U.S. 203, 206-207 (1987) (citing *Lau* as example of Congress's exercise of its power to "attach conditions on the receipt of federal funds").

Limits on Congress's Spending Clause authority do not arise from vague notions of what constitutes a fair or appropriate bargain, but rather on specific constitutional doctrines articulated by the Supreme Court in a way that carefully balances state and federal interests. As discussed next, those limitations are not transgressed by Section 504. The University's attempt (Br. 25) to evade the limitations of those doctrines by generalized references to the contractual nature of the Spending Clause programs must be rejected.

B. Section 504's Non-Discrimination Provision Is Directly Related To Important Congressional Interests Implicated By Every Federal Spending Program

The University next argues (Br. 26-29) that Section 504 violates the constitutional requirement that conditions on federal funds bear a relationship to

the purposes of the funding program. In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the Supreme Court noted that its prior 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.'" *Id*. at 207. The Court subsequently interpreted this requirement as mandating that the funding conditions "bear some relationship to the purpose of the federal spending." *New York* v. *United States*, 505 U.S. 144, 167 (1992). See also *United States* v. *Lipscomb*, 299 F.3d 303, 322 (5th Cir. 2002) (Wiener, J.) ("The required degree of this relationship is one of reasonableness or minimum rationality.") (citation omitted). Section 504's conditions easily meet this standard.

In exercising its constitutional authority to spend funds for the "general Welfare,"[12] Congress is entitled to require that the benefits of those expenditures be enjoyed *generally*, without regard to disability. This interest flows with every federal dollar and exists regardless of the type of benefits secured with the federal funds. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), petition for cert. pending, No. 02-801.[13] Similarly, when Congress provides

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[12] See U.S. Const. Art. I, § 8.

[13] To take the University's example (Br. 28), Congress has an interest, related to the expenditure of federal highway funds, in ensuring that the benefits of such highway projects can be enjoyed by individuals with disabilities as well as other citizens. Section 504 may, therefore, require that a state agency accepting federal

(continued...)

federal funds for state education programs, as it has done here, requiring the State to provide the benefits of the federally assisted program to all students, including those with disabilities, is clearly and directly related to the purposes of federal education spending. 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 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).

Moreover, beyond its interest in determining how the benefits of federal funding are distributed, Congress has a more general interest in ensuring that

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[13](...continued)
highway funds take reasonable steps to ensure that individuals with disabilities are able to enjoy the benefits of, for example, a highway rest stop, by installing curb ramps and making restrooms accessible to wheel chair users. See, *e.g.*, 28 C.F.R. 41.58(a). Those requirements are directly related to Congress's purpose in disbursing highway funds to provide transportation benefits to all of a State's citizens. Imposing these requirements directly advances the stated purposes of Section 504, which include promoting the "inclusion, integration, and full participation" of individuals with disabilities in the social and economic activities of the nation. See 29 U.S.C. 701(c)(3). The Section 504 conditions bear at least as direct a relationship to the purposes of federal highway funding as did the Spending Clause conditions approved by the Supreme Court in two other highway funding cases. See *Dole*, 483 U.S. at 208-209 (federal highway funds conditioned on States' raising their minimum drinking ages to twenty-one); *Oklahoma* v. *U.S. Civil Service Comm'n*, 330 U.S. 127 (1947) (federal highway funds conditioned on employees of funded agency abstaining from certain political activities under the Hatch Act, 18 U.S.C. 61 *et seq.*).

federal tax dollars are not used to "encourage[], entrench[], subsidize[], or result[] in," discrimination that Congress has determined to be detrimental to the general welfare. See *Lau*, 414 U.S. at 569 (internal quotation marks omitted). This is the same interest that animates both Title VI and Title IX,[14] which prohibit race and sex discrimination by certain programs that receive federal funds. Like Section 504, Title VI prohibits discrimination by any state program that receives federal financial assistance from any source; it is not limited to prohibiting discrimination by recipients of "Title VI funds" (there are no such funds) or funds directed at addressing racial or national origin discrimination. In *Lau*, the Supreme Court held that Title VI was a valid exercise of the Spending Power insofar as it prohibited national origin discrimination by school systems that accepted federal financial assistance. "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." 414 U.S. at 569 (citations omitted).[15] See also *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) (Title IX case) ("Congress is free to attach reasonable and unambiguous conditions to

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[14] See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.2 (1987). .

[15] 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*.

federal financial assistance that educational institutions are not obligated to accept.").

Because Congress's interest in preventing discriminatory use of federal funds extends to all federal grants, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance.[16] Contrary to Defendant's suggestion (Br. 26), there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending. See *Lipscomb*, 299 F.3d at 321-322 (Wiener, J.). The Supreme Court has upheld as valid exercises of the Spending Clause, other conditions that apply across-the-board to all federally funded programs or activities. See *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding the across-the-board requirements of the Hatch Act, 18 U.S.C. 61 *et seq.*, which prohibits certain political activities by those employed in federally funded activities); *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).

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[16] 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).

Finally, that Section 504 prohibits discrimination in all aspects of a covered agency's activities if the agency receives any federal funds, does not render the provision unconstitutional under *Dole*. See *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3284 (U.S. Jan 13, 2003); *Koslow*, 302 F.3d at 175-176. As the Supreme Court observed in *Grove City*, 465 U.S. at 572, federal assistance "has economic ripple effects throughout the aided institution" that would be "difficult, if not impossible" to trace. See also *Hoxworth* v. *Blinder, Robinson & Co.,* 903 F.2d 186, 195 (3d Cir. 1990) ("Legally as well as economically, money is fungible."). Congress did not, however, go so far as to require the entire state government to comply with Section 504 if any part of the State accepts federal funds. Instead, Section 504 applies on an agency-by-agency basis, using the existing state organizational framework to limit the breadth of coverage. See *Koslow*, 302 F.3d at 175-176; *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001). State law establishes which programs are placed in which departments, and Congress could reasonably have presumed that States normally place related programs with overlapping goals, constituencies, and resources in the same department. Congress also could reasonably conclude that, as a practical matter, a federal grant to any part of such an agency confers a real benefit to all aspects of the agency's operations.

Thus, even if it were possible to track how the University spent each particular dollar of federal assistance, and distinguish it from money obtained from

other sources, the federal funds free other resources to be used by the University for other purposes. See *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998). The availability of those funds for other purposes within the same agency is a direct, tangible benefit of federal funding. Congress may reasonably require that all students, regardless of disability, enjoy this secondary benefit of the federal funding as well.

C. The University Was Not Unconstitutionally Coerced Into Accepting Federal Funds And Their Attached Conditions

The University claims (Br. 29-31) that it is excused from complying with the nondiscrimination requirements it agreed to when it solicited and accepted federal funds because it accepted those funds and conditions under duress and coercion. That alleged coercion consists solely in the size of the federal grants offered in exchange for the State's promised compliance with the attached conditions, and in the University's decision to rely substantially on federal, rather than state, local or private funds, for its education programs. No court of appeals has ever accepted such a constitutional argument. This Court should not accept it either.[17]

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[17] The University's argument (Br. 30) turns on its factual assertions that federal funds constitute approximately $150 million, or about 28%, of its more than $500 million budget, and that "University had no choice but to submit to the terms of the Rehabilitation Act." These facts are not found in the complaint or in the record on this interlocutory appeal from a denial of a motion to dismiss. Indeed, it appears that the University made no coercion argument in the district court and did not move, pursuant to Fed. R. Civ. P. 12(b)(1), to admit evidence outside the

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While the Supreme Court in *Dole* stated 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 also cautioned that every congressional spending statute "is in some measure a temptation." *Ibid.* "[T]o hold that motive or temptation is equivalent to coercion," the Court warned, "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.*

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[17](...continued)
complaint to support its present assertions. As the D.C. Circuit has observed, "[e]ven a rough assessment of the degree of temptation would require extensive and complex factual inquiries," *Oklahoma* v. *Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981), particularly regarding the University's assertion that it has no alternatives to accepting federal funding. The United States certainly does not concede that the University has no choice but to accept federal funds, and has not undertaken to evaluate the accuracy of the University's financial figures. Because this case comes to this court on an appeal from a motion to dismiss, there is no occasion for this Court to evaluate these factual claims, and the University's profer of evidence, in the first instance. Cf. *Byrd* v. *Corporacion Forestal Y Industrial De Olancho, S.A.*, 182 F.3d 380, 386-388 (5th Cir. 1999) (court of appeals lacks jurisdiction to resolve material factual disputes in interlocutory appeal of denial of motion to dismiss based on foreign sovereign immunity). However, because this Court may properly hold that the University fails to state a valid coercion claim, even assuming the truth of its financial assertions, the United States will address the argument in this brief.

(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). This Court has similarly observed that "Congress traditionally has been sustained in enacting such programs to encourage local participation in the achievement of federal legislative goals." *Adolph* v. *Federal Emergency Mgmt. Agency*, 854 F.2d 732, 735-736 (5th Cir. 1988). "[T]o comply with a condition attached to a federal benefit is not to be equated with federal coercion." *Id*. at 736 n.3.

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). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[18]

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

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[18] 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 "[w]hether use of the Congressional spending power to coerce states into enacting legislation and 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." 77-971 Jurisdictional Statement at 2-3. 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).

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).[19]

Thus, the federal government can place conditions on federal funding that require state agencies 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. Nor does the amount of funding at issue in this case, or the State's purported dependence on it, render the offer of assistance unconstitutionally coercive. For example, in *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997), this Court rejected the claim that Congress unconstitutionally coerced the State of Texas into providing emergency medical

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[19] 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 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).

care to undocumented aliens by conditioning receipt of Medicaid funding on that requirement:

> The Supreme Court has recognized that the Tenth amendment permits Congress to attach conditions to the receipt by the states of federal funds that have the effect of influencing state legislative choices. "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties." This we will not do.

Id. at 666 (quoting *Dole*, 483 U.S. at 211) (footnotes and other citations omitted). Other courts have likewise held that conditions attached to large federal grant programs, such as Medicaid, are not coercive.[20]

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 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, 1202

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[20] See, *e.g.*, *West Virginia* v. *United States Dep't of Health & Human Serv.*, 289 F.3d 281, 284 & n.2 (4th Cir. 2002) (enforcing Medicaid requirement where State received more than $1 billion in federal funds, representing approximately 75% of the State's Medicaid budget); *California* v. *United States*, 104 F.3d at 1092 (Medicaid conditions not coercive); *Padavan* v. *United States*, 82 F.3d 23, 29 (2d Cir. 1996) (same); *Schweiker*, 655 F.2d at 413-414 (same); see also *Jim C.,* 235 F.3d at 1082 (enforcing Section 504 where state Department of Education received "$250 million or 12 per cent. of the annual state education budget" in federal funds); *Kansas* v. *United States*, 214 F.3d 1196, 1198, 1201-1202 (10th Cir. 2000) (enforcing condition in federal welfare program that provided $130 million, constituting 66% of state funds for child support enforcement program), cert. denied, 531 U.S. 1035 (2000).

(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 matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000). [21]

For these reasons, several Circuits have recently rejected coercion arguments against Section 504. See *Koslow*, 302 F.3d at 174 (while "declining all federal funds" for a particular state agency "would doubtless result in some fiscal hardship – and possibly political consequences – it is a free and deliberate choice."); *Lovell*, 303 F.3d at 1051; *Jim C.*, 235 F.3d at 1081-1082 ("The sacrifice of all federal education funds * * * would be politically painful, but we cannot say that it compel's Arkansas's choice."). There is no basis for this Court to reach a contrary conclusion here.

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[21] Spending Clause statutes are often analogized to contracts. In this vein, we note that when a plaintiff is seeking to void a contract on the grounds of "economic duress," it must show "acts on the part of the defendant which produced" the financial circumstances that made it impossible to decline the offer, and that it is not enough to show that the plaintiff wants, or even needs, the money being offered. *Undersea Eng'g & Constr. Co.* v. *International Tel. & Tel. Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); accord *United States* v. *Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994).

III. THE UNIVERSITY'S WAIVER OF SOVEREIGN IMMUNITY WAS EFFECTIVE

The University's final pair of arguments attempts to show that even if Congress validly conditioned receipt of federal funds on a waiver of sovereign immunity, the University's acceptance of federal funds did not constitute an effective waiver.

A. The University's Authority to Solicit And Accept Federal Funds Conditioned On A Waiver of Sovereign Immunity Is Sufficient, As A Matter Of Federal Law, To Support A Waiver of Immunity Through Acceptance Of Federal Funds

The University first argues (Br. 32-35) that the voluntary acceptance of federal financial assistance did not constitute an effective waiver because the University was not authorized under state law to waive Eleventh Amendment immunity. This contention is meritless.

For the purposes of this argument, the University assumes (Br. 32) that Congress validly conditioned receipt of federal funds on a waiver of sovereign immunity. Under this assumption, the University was not eligible for federal financial assistance unless it was willing and able to comply with all the conditions attached to those funds, including the waiver of sovereign immunity to claims under Section 504. In fact, federal regulations require that every application for federal education funds include an "assurance" of eligibility to that effect. See 34 C.F.R. 104.5(a). Relying on such assurances, the federal government has distributed hundreds of millions of dollars to the University (see Br. 30). Yet the University now asserts to this Court that those representations

were materially false because it has never been able to comply with the requirement that it submit to suit in federal court to adjudicate its compliance with the nondiscrimination requirements of Section 504 (and, presumably, Title VI and Title IX as well). If that were true, the University's eligibility for future financial assistance from the federal government would be in grave doubt, for federal agencies do not have the authority to excuse state agencies from complying with Section 2000d-7 or other congressionally mandated funding conditions. See, *e.g.*, 34 C.F.R. 75.900, 76.900.

Fortunately for the University, its purported lack of authority under state law to waive its sovereign immunity does not, as a matter of federal law, prevent the University from effecting a valid waiver of immunity by accepting federal funding. As explained below, so long as the University has authority under state law to accept the conditioned federal funds (which it does not dispute), its acceptance constitutes an effective waiver of immunity.

The University's argument to the contrary is not based on any legal authority that directly addresses waivers of immunity occasioned by state officials' solicitation of federal funds validly conditioned on a waiver of sovereign immunity. Instead, the University relies (Br. 32-33) on general statements by this Court in *Magnolia Venture Capital Corp.* v. *Prudential Sec., Inc.*, 151 F.3d 439 (5th Cir. 1998), cert. denied, 525 U.S. 1178 (1999), and the Supreme Court in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). Neither decision is directly on point, and recent Supreme Court authority prevents

applying any broad dicta from these cases to relieve the University of its waiver in this case.

In *Ford*, the plaintiffs argued that the State Attorney General had waived the State's sovereign immunity in the course of litigation. The State conceded "that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding." *Id*. at 467. The Court then presumed, without discussion, that the "issue thus becomes one of their power under state law to do so." *Ibid*. In *Magnolia*, this Court looked to *Ford* in deciding whether a state agency had waived its sovereign immunity in a private contract with a corporation. See 151 F.3d at 444. This Court concluded that the contract did not validly waive the State's immunity because the state agency lacked legal authority to waive immunity. In so doing, this Court characterized *Ford* as standing for the general proposition that "the state's waiver must be accomplished by someone to whom that power is granted under state law." *Ibid*.

That statement was clearly dicta as applied to the very different context presented by this case. A waiver of sovereign immunity in a contract between a State and a corporation does not implicate the important interests of a co-sovereign. Thus, neither this Court's decision in *Magnolia*, nor the Supreme Court's decision in *Ford,* had occasion to consider or address the relevance of Congress's unique interest in vindicating its constitutional authority to condition federal funds on a waiver of sovereign immunity. Accordingly, even under

ordinary circumstances, *Magnolia* would not conclusively determine the outcome in this case.

In any event, *Magnolia's* broad interpretation of *Ford*, and indeed *Ford* itself, was substantially overruled last Term by the Supreme Court's decision in *Lapides* v. *Board of Regents*, 122 S. Ct. 1640, 1645 (2002). In that case, the Court held that Georgia's Attorney General waived the State's Eleventh Amendment immunity by voluntarily choosing to remove state law claims to federal court, even though the Attorney General lacked the authority under state law to waive the State's immunity. *Id*. at 1645-1646. The Court acknowledged that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 1644. The Court concluded, however, that such a clear indication may be found when a State engages in an activity that the courts have held, as a matter of federal law, will result in a waiver of sovereign immunity. See *id*. at 1644. "[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 1645. The law has long recognized, the Court observed, that one such activity is a State's voluntary submission to federal court jurisdiction by filing suit in federal court, or making a claim in a federal bankruptcy proceeding. *Id*. at 1644-1645. The Court in *Lapides* concluded that removal of state law claims to federal court should also be included among these recognized immunity-waiving activities. *Id*. at 1646.

Relying on *Ford Motor Co.*, Georgia objected that even if such an activity were recognized as a waiver of sovereign immunity as a general matter, is should not be recognized as a waiver when the state official removing the case to federal court lacks the specific authority under state law to waive the State's immunity. *Id.* at 1645. The Court rejected this limitation on the waiver rule. *Id.* at 1645-1646. The Court recognized this decision was at odds with *Ford*'s apparent assumption that a state official's actions may not waive a state's immunity absent state law authority to waive sovereign immunity. But the waiver rule it was applying, the Court explained, is premised upon "the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Id.* at 1644. "Finding *Ford* inconsistent with [that] basic rationale," the Court "overrule[d] *Ford* insofar as it would otherwise apply." *Id.* at 1646.

The University attempts to portray *Lapides* as a limited exception to a still-valid generalization from *Ford Motor Co.* that state officials cannot waive sovereign immunity without specific state-law authorization. But this attempt must fail because the Court in *Lapides* made clear that to the extent *Ford Motor Co.* was ever properly understood to announce this broad principle, such simple generalizations must now yield to a more nuanced consideration of the basis for any given waiver rule.

The University's argument is inconsistent with the basic rationale of *Lapides* and of the rule of federal law that finds a waiver of sovereign immunity in a State's acceptance of a conditioned federal grant. That rule is not based on the need to accommodate a State's decision to relinquish its immunity in particular cases. Thus, both this Court and the Supreme Court have consistently treated waivers under funding statutes as resulting from a general rule of federal law, like that created in *Lapides*, rather than from a case-specific inquiry into the intentions of the state agency accepting the funds.[22] This is so, because the rule arises from the need to enforce Congress's authority to create conditions on federal funding and to avoid the "inconsistency, anomaly, and unfairness" that would result if States could accept such funds and then later avoid their conditions. See *Lapides*, 122 S. Ct. at 1644. It would be anomalous to hold that Congress may condition federal funds on a waiver of sovereign immunity, yet allow a state agency to enjoy the benefits of those funds without being bound to that valid condition. And it would be unfair to permit a State to take financial advantage of its false

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[22] See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("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 that *acceptance of the funds entails an agreement to the actions.*") (emphasis added); *id.* at 678 n.2 (agreeing that "a waiver may be found in a State's acceptance of a federal grant."); *AT&T Communications* v. *Bellsouth Telecom., Inc.*, 238 F.3d 636, 645 (5th Cir. 2001) ("[W]aiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on a waiver of immunity.").

representations to federal funding agencies, when States that make *bona fide* applications are required to bear the full weight of the responsibilities required under Section 504, including submission to federal court adjudications.

Because the rule regarding waivers based on acceptance of federal funding is primarily based on this need for certainty, consistency, and fairness, the rationale of *Lapides* supports the conclusion that the rule must be enforced even if the agency accepting the conditioned funds does not have state law authority to waive sovereign immunity. This conclusion appropriately accommodates both Congress's interest in ensuring compliance with legitimate funding conditions attached to substantial federal outlays, and the States' ability to preserve their Eleventh Amendment immunity from suit. A State desiring to prevent its agencies from waiving immunity under this rule may simply withdraw the agencies' authority to apply for or accept federal funding. Conversely, a State that permits its agencies to apply for federal funds, knowing that this will result in a waiver of sovereign immunity as a matter of federal law, cannot complain of unfair treatment when that rule is enforced. Indeed, it is difficult to realistically conclude that a State in such circumstances has not authorized the waiver, since the waiver is a necessary consequence of the authorized acceptance of federal funds. See *Lapides*, 122 S. Ct. at 1646.

Finally, applying the rationale of *Lapides* to this case does not conflict with the holding of this Court's decision in *Magnolia*, or the holdings of the other cases upon which the University relies. *Lapides* does not disturb cases that require state

law authority to waive sovereign immunity when the waiver is recognized by federal law in order to accommodate "a State's actual preference or desire." 122 S. Ct. at 1644. This category clearly includes case-specific waivers of sovereign immunity by state officials during litigation, see *Freimanis* v. *Sea-Land Serv., Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981) (waiver through consent judgment); *Dagnall* v. *Gegenheimer*, 631 F.2d 1195, 1196 (5th Cir. 1980) (waiver through pretrial stipulation), or a waiver provided in a private contract, see *Magnolia*, 151 F.3d at 439. In such cases, courts must ensure the waiver actually reflects the State's desire to relinquish its sovereign immunity, rather than a mistaken or unauthorized undertaking by one of the State's officials. But where, as here, the basis of the waiver is a rule of federal law based on a need for fairness and certainty, *Lapides* prevents the extension of *Magnolia* to allow a State to obtain an unwarranted exception from valid conditions attached to federal funds.

B. The University's Waiver Of Sovereign Immunity Was Not Rendered Unknowing By Its Alleged Belief That Its Immunity Had Already Been Abrogated

The University's final argument (Br. 35-37) is that it did not knowingly waive its sovereign immunity because at the time it solicited federal funds, it reasonably believed that its immunity to Section 504 claims had already been abrogated. In particular, the University argues that at the time it accepted the federal funds relevant to this case, it reasonably believed that Section 2000d-7 validly abrogated its sovereign immunity because this Court had upheld a similar abrogation provision of Title II of the ADA. See *Coolbaugh* v. *Louisiana*, 136

F.3d 430 (5th Cir. 1998), cert. denied, 525 U.S. 819 (1998). This argument fails for two essential reasons.

First, as *Lapides* makes clear, the University's alleged subjective beliefs and confusion are constitutionally irrelevant. See 122 S. Ct. 1644-1645. The validity of a waiver turns on objective factors: whether the condition was clear and whether the University accepted federal funds in light of that condition. See, *e.g., Pederson* v. *Louisiana State University*, 213 F.3d 858, 876 (2000); *AT&T Communications*, 238 F.3d at 644 ("[A] state voluntarily waives its Eleventh Amendment immunity by engaging in activity subject to congressional regulation only if (1) the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction will subject it to federal court suits brought by individuals; (2) the state may refrain from engaging in the particular actions without excluding itself from activities otherwise lawfully within its powers; and (3) the state elects to engage in the conduct or transaction after such legal notice has been given.").

Second, nothing in this Court's cases regarding th ADA abrogation provision made the condition expressed by Section 2000d-7 unclear or the State's alleged confusion reasonable. Even if the University believed that Section 2000d-7 could operate as a valid abrogation provision, it was clear that the provision would apply only if the University accepted federal financial assistance. Thus, it is simply not true that at the time the University was considering whether to accept federal funds, it "reasonably believed that Texas' Eleventh Amendment immunity

had already been lost" (Br. 37). Because Section 2000d-7 made clear that the University would be subject to suit if, *and only if*, it accepted federal funds, at the time it was making its decision, its sovereign immunity was intact, its choice was clear, and its eventual decision to accept federal funds and waive sovereign immunity was clearly knowing.

CONCLUSION

The judgment of the district court denying defendant's motion to dismiss the Section 504 claim should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is being challenged in *Pace* v. *Bogalusa City School Board, et al.,* (No. 01-31026); *Miller* v. *Texas Technological University* (No. 02-10190); *Johnson* v. *Louisiana Department of Education* (No. 02-30318); *August* v. *Mitchell* (No. 02-30369); *Danny R.* v. *Spring Branch Independent School District* (No. 02-20816); and *Espinoza* v. *Texas Department of Public Safety* (No. 02-11168).

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 11,102 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 above Brief of the United States as Intervenor, along with a computer disk containing an electronic version of the brief, were served by first class mail, postage prepaid, on January 29, 2003, on the following parties:

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