IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal Nos. 02-30318 c/w 02-30369

THEODORE JOHNSON,
Plaintiff-Appellee,

v.

LOUISIANA DEPARTMENT OF EDUCATION, ET AL.
Defendants-Appellants.

LYNN AUGUST
Plaintiff-Appellee,

v.

SUZANNE MITCHELL, ET AL.
Defendants-Appellants,

THE UNITED STATES OF AMERICA,
Intervenor.

On Consolidated Appeals from the United States District Court for the Eastern District of Louisiana

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EN BANC BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, *ET AL.*, SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE OF DISTRICT COURTS' OPINIONS

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Appeal Nos. 02-30318 c/w 02-30369

JOHNSON v. LOUISIANA DEPT. OF ED., ET AL.

AUGUST v. MITCHELL, ET AL.

CERTIFICATE OF INTERESTED PERSONS

On this 27th day of October, the undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

AMICI CURIAE JOINING BRIEF IN SUPPORT OF AFFIRMANCE

The American Association of People with Disabilities

ADAPT

The Alexander Graham Bell Association for the Deaf and Hard of Hearing

The American Association on Mental Retardation

The American Council of the Blind

The American Occupational Therapy Association

The Arc of the United States

The Association on Higher Education and Disability

Judge David L. Bazelon Center for Mental Health Law

The Brain Injury Association of America

The Disability Rights Education and Defense Fund

The Epilepsy Foundation

The Legal Aid Society -- Employment Law Center

The National Association of Protection and Advocacy Systems

The National Association of Rights Protection and Advocacy

The National Health Law Program

The National Mental Health Consumers' Self-Help Clearinghouse

The National Spinal Cord Injury Association

The Polio Society

OTHER INTERESTED PERSONS

August, Lynn: Plaintiff-Appellee

Barbier, Carl J.: United States District Court Judge

Barras, Ed: Defendant-Appellant

Board of Regents: Defendant-Appellant

Buck, J. Stuart: Counsel for Johnson

Clausen, Rebecca L: Counsel for Defendants-Appellants

Curry, Richard A.: Counsel for Defendants-Appellants

Darmer II, Roman E.: Counsel for Amici Curiae

Hicks, Michael Brent: Counsel for Defendants-Appellants

Johnson, Theodore: Plaintiff-Appellee

Kutner, Sanford A.: Counsel for August

Livaudais, Jr., Marcel: United States District Court Judge

Louisiana Dept. of Education: Defendant-Appellant

Louisiana Dept. of Social Services: Defendant-Appellant

Mathis, Jennifer: Counsel for Amici Curiae

Mitchell, Suzanne: Defendant-Appellant

Nelson, Mae: Defendant-Appellant

Penn, Michael Leslie: Counsel for Defendants-Appellants

President of Louisiana State University System: Defendant-Appellant

Russell, Kevin K.: Counsel for Intervenor

Silver, Jessica Dunsay: Counsel for Intervenor

Stanton, John F.: Counsel for Amici Curiae

State of Louisiana: Defendant-Appellant

United States of America: Intervenor

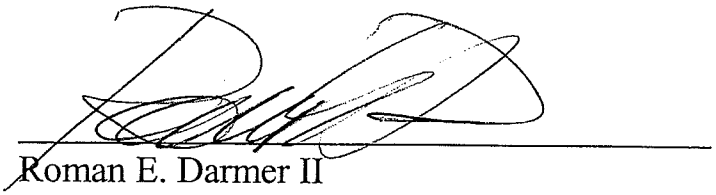

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* ("Rehab Act"), was landmark civil rights legislation enacted by Congress to foster independence, self-sufficiency and integration into the community for people with disabilities. Through affirmative litigation under the Rehab Act, people with disabilities have had an opportunity to seek equality of treatment in the employment, education and transportation contexts, among others.

Section 504 of the Rehab Act, under which plaintiffs claim damages here, prohibits disability discrimination by "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2000). Section 504 has historically provided a separate and independent basis for challenging state-sponsored discrimination against people with disabilities, in addition to suits under the Americans with Disabilities Act ("ADA"). Now that the Supreme Court has held in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), that states are immune from suit under Title I of the ADA, the independent remedies that the Rehab Act provides for state-sponsored discrimination are of even greater importance.

Amici[1] are nineteen nonprofit national law and policy organizations dedicated to advancing the civil rights of people with disabilities, including through the preservation of the protections of disability antidiscrimination statutes such as the Rehab Act. *Amici* represent people with disabilities who have first-hand knowledge of the tremendous importance of the Rehab Act in the struggle to ensure that people with disabilities are not subject to discrimination.

Pursuant to Fed. R. App. P. 29, *amici* join the briefs of plaintiffs-appellees Theodore Johnson and Lynn August (collectively, "plaintiffs"), and the United States as intervenor supporting plaintiffs' Rehab Act claims against defendants-appellants the Louisiana Department of Education, State of Louisiana, President of the Louisiana State University System, the Louisiana Board of Regents, Suzanne Mitchell, Mae Nelson, Ed Barras, and the Department of Social Services for the State of Louisiana (collectively, "defendants"). *Amici* rely on the briefs of plaintiffs and the United States for a full description of the procedural history of these cases.

The panel opinion in this case, *Johnson v. Louisiana Department of Education,* 330 F.3d 362 (5th Cir.), *vacated and pet'n for rehearing en banc granted,* 343 F.3d 732 (5th Cir. 2003) will be referred to herein as "panel

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[1] A description of the interest of each *amicus* is set forth in this Brief's Appendix.

opinion." Because defendants' brief merely adopts the arguments in their brief filed on September 8, 2003 in *Pace v. Bogalusa City School Board,* No. 01-31026 (en banc argument held 9/26/03), *amici* will refer to defendants' *Pace* brief ("Defs. Br.") in addressing their arguments here.

ISSUE PRESENTED

The issue briefed by *amici* is whether the district courts' conclusions that the defendants waived their sovereign immunity against Rehab Act claims when they accepted federal funding were correct and should be affirmed.

This issue is also pending before this en banc Court in both *Pace* and *Miller v. Texas Tech University,* No. 02-10190 (en banc argument scheduled week of 01/19/04). The arguments contained herein are fully applicable to the Eleventh Amendment issues presented in *Pace* and *Miller.* The issue is also pending before panels of this Court in *Thomas v. University of Houston*, No. 02-20988 (oral argument held 7/11/03); *Danny R. v. Spring Branch Independent School District*, No. 02-20816; and *Espinoza v. Texas Department of Public Safety*, No. 02-11168.

SUMMARY OF ARGUMENT

Relying primarily on dissenting opinions[2] and opinions that were later reversed,[3] defendants' arguments are premised upon a flawed understanding of fundamental principles of Eleventh Amendment jurisprudence. The Rehab Act was clearly a valid exercise of Congress' power to condition federal funding on a waiver of sovereign immunity.

Defendants' contention that Congress is required to employ different language in order to extract a waiver of immunity than it used in statutes attempting to abrogate immunity is entirely without basis. Every court—including the Supreme Court—has held that 42 U.S.C. § 2000d-7 (2000), which provides that states shall not be immune from suit under the Rehab Act, clearly and unambiguously informs states that acceptance of federal funds is conditioned upon a waiver of sovereign immunity.

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[2] "Although dissents may be scholarly and persuasive to some, they are not binding law to any." *Okpalobi v. Foster,* 244 F.3d 405, 415 n.15 (5th Cir. 2001) (en banc).

[3] For example, defendants repeatedly cite *Garrett v. University of Alabama,* 223 F. Supp. 2d 1244 (N.D. Ala. 2002). That decision was subsequently vacated and reversed. *See Garrett v. Univ. of Alabama,* 344 F.3d 1288 (11th Cir. 2003). Defendants also cite *Pugliese v. Arizona HHS,* 147 F. Supp. 2d 985 (D. Ariz. 2001). That opinion was likewise reversed. *See Pugliese v. Dillenberg,* 2003 U.S. App. LEXIS 20361 (9th Cir. Oct. 7, 2003).

Defendants' additional argument that any waiver was impermissibly "coercive" is unavailing. All courts to consider similar "coercion" challenges have rejected them. This Court should do likewise.

Finally, defendants' contentions that they could not fully comprehend the condition of waiving their immunity until 2001 cannot withstand scrutiny. The sole case upon which defendants base their arguments has been consistently rejected by other courts. Moreover, the case itself makes clear that its rationales are not applicable to the facts of the cases *sub judice.*

For these reasons, the district courts' grant of summary judgment to plaintiffs should be affirmed.

ARGUMENT

I. THE REHAB ACT IS LANDMARK CIVIL RIGHTS LEGISLATION THAT PROVIDES A CRITICAL REMEDY FOR ADDRESSING STATE-SPONSORED DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

Congress enacted the Rehab Act to remedy the devastating results of discrimination against people with disabilities. *See* 1973 U.S.C.C.A.N. 2125, 2143 (noting that the purpose of § 504 is to "prohibit[] discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals . . ."). The Supreme Court has recognized that the Rehab Act is "a comprehensive federal

program aimed at improving the lot of the handicapped." *CONRAIL v. Darrone*, 465 U.S. 624, 626 (1984); *accord City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) (noting that Rehab Act was a response to the needs of people with disabilities and the "corresponding need for more intrusive oversight by the judiciary"). Since its enactment, the statute has become an effective means not only of preventing disability discrimination in employment,[4] but also of ensuring equal access for people with disabilities in education,[5] public transportation,[6] and many other contexts that historically have contained barriers to people with disabilities.

Moreover, the Rehab Act is a separate statute from the ADA, with different constitutional bases affording separate rights and remedies to victims of disability discrimination. In light of the Supreme Court's decision in *Garrett* limiting

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[4] *See, e.g., Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981) (permitting employment discrimination Rehab Act suit by injured veteran). As Congress knew when it enacted the Rehab Act, only 800,000 of the 22 million adults with disabilities in the United States were employed in 1972, although an estimated 14 million would work if provided the opportunity to do so. 118 CONG. REC. 3320-21 (1972) (statement of Sen. Williams).

[5] *See, e.g., Tatro v. Texas,* 625 F.2d 557, 564-65 (5th Cir. 1980) (school's refusal to provide catheterization services to student with spina bifida violated Rehab Act), *aff'd,* 468 U.S. 883 (1984).

[6] *See, e.g., Baker v. Bell*, 630 F.2d 1046 (5th Cir. 1980) (allowing Rehab Act suit against transportation agency).

remedies under Title I of the ADA, and this Court's subsequent decision in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) finding that Title II of the ADA does not validly abrogate states' sovereign immunity the redress for state-sponsored discrimination ensured by the Rehab Act has now become even more critical to ensuring that people with disabilities have a remedy for such state-sponsored discrimination.

Recently, the National Council on Disability released a report highlighting the importance of Section 504. *See* National Council on Disability, *Rehabilitating Section 504* (Feb. 12, 2003).[7] Among other rationales, the report notes that Section 504 not only ensures that tax dollars are not spent to foster disability discrimination, but also covers entities and activities beyond the scope of the ADA. *See id.* at 13-15. Further, the report notes that private enforcement of Section 504 is essential because the federal Department of Justice will never have the resources to combat disability discrimination effectively. *See id.*

Indeed, in many instances, the only effective channel for people with disabilities to vindicate their rights has been through litigation under the Rehab Act in federal courts. State antidiscrimination laws often fail to provide protection for people with disabilities comparable to the protections of federal standards. *Cf.*

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[7] Available at http://www.ncd.gov/newsroom/publications/section504.html.

Note, *In The Wake of* Garrett: *State Law Alternatives to the Americans With Disabilities Act,* 52 CATH. U. L. REV. 837, 851-57 (2003) (comprehensive review of state employment discrimination statutes; concluding that most state schemes are an "ineffective alternative" to federal disability antidiscrimination laws).

Some states do not provide ***any*** statutory remedy for state-sponsored discrimination against people with disabilities. For example, while Mississippi proclaims that its policy is to refrain from discrimination against public employees (MISS. CODE ANN. §§ 25-9-149, 43-6-15 (2002)), it does not allow for a private right of action for disability discrimination, let alone compensatory damages for such discrimination. *See* Note, *supra,* 52 CATH. U. L. REV. at 853 n.160, 854 n.167 (citations omitted). Moreover, Mississippi's "policy" of antidiscrimination is limited to *physical* disabilities, and does not provide ***any*** protection for people with *mental* disabilities. *See* MISS. CODE ANN. § 43-6-15 (2002).

While the disability antidiscrimination laws of Louisiana and Texas appear stronger than Mississippi's, it is unclear whether either provides a jury trial. *See* Note, *supra,* 53 CATH. U. L. REV. at 863, 870.[8] If this Court rules in defendants'

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[8] Although this Court has previously expressed doubt whether Section 504 allows jury trials (*Doe v. Region 13 Mental Health-Mental Retardation Comm'n,* 704 F.2d 1402, 1407 n.3 (5th Cir. 1983)), the Civil Rights Act of 1991 explicitly provides jury trials in Rehab Act lawsuits. *See* 42 U.S.C. § 1981a(c)(1) (2000).

favor here, the right to a jury trial in Louisiana and Texas to redress disability discrimination by state entities would be in serious doubt.

For all the above reasons, the continued importance of Section 504 cannot be understated. Upholding the panel opinion could strip people with disabilities of a major means of redress for state-sponsored discrimination.

II. THE SPENDING CLAUSE VESTS CONGRESS WITH THE AUTHORITY TO CONDITION FEDERAL FINANCIAL ASSISTANCE ON A WAIVER OF SOVEREIGN IMMUNITY, AS IT HAS DONE IN SECTION 2000D-7

"Eleventh Amendment immunity from suit is not absolute." *AT&T Communs. v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 643 (5th Cir. 2001). For example, a state may "waive its sovereign immunity by consenting to suit." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

One way for a state to consent to suit is "by accepting federal funds." *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875 (5th Cir. 2000); MOORE'S FEDERAL PRACTICE § 123.41[3][a] (3d ed. 2002) ("states may waive their sovereign immunity by participating in a federal spending program"). Pursuant to its Spending Power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives

by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole,* 483 U.S. 203, 206 (1987) (citations omitted). If a state does not wish to comply with the terms imposed by federal funding (for example, by waiving its sovereign immunity), it is free to forego the federal funding. *See id.* at 211. But, "[o]nce a state chooses to participate in a federally funded program, it must comply with federal standards." *Florida v. Mathews,* 526 F.2d 319, 326 (5th Cir. 1976).

Congress has attained numerous policy ends indirectly through its Spending Power that it could not accomplish directly. For example, Congress has used its Spending Power to prohibit federal contractors from discussing abortion while working at federally-funded health clinics,[9] to ensure that federal funds are not used to support art that is deemed indecent,[10] and to achieve a national speed limit,[11] a national drinking age[12] and numerous other objectives.[13]

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[9] *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

[10] *NEA v. Finley*, 524 U.S. 569, 587-88 (1998).

[11] *Nevada v. Skinner,* 884 F.2d 445, 454 (9th Cir. 1989).

[12] *Dole*, 483 U.S. at 212.

[13] *See, e.g., Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 846 (1984) (denying federal assistance to students who had not registered for the draft); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding federal legislation prohibiting the use of medicaid funds for abortions); *Buckley v. Valeo*,

This Court has already recognized that Congress enacted Section 504 under the Spending Clause. *See Shinault v. Am. Airlines, Inc.,* 936 F.2d 796, 803 (5th Cir. 1991); *see also Johnson,* 330 F.3d at 369 (Wiener, J., dissenting). There is no reason why the federal government should not be permitted to exercise its Spending Power to combat state-based discrimination on the basis of disability, given that it uses its Spending Power to effectuate a variety of other goals.

In 1986, Congress amended the Rehab Act to provide: "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[.]" 42 U.S.C. § 2000d-7(a)(1) (2000).[14] Thus, in exercising its Spending Power, "Congress has provided state governments and their agencies with a clear choice: accept federal funds and waive sovereign immunity for individual suits brought under the Rehabilitation Act or reject federal money and maintain

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424 U.S. 1, 143 (1976) (per curiam) (upholding spending restrictions on candidates who receive federal funds).

[14] Section 2000d-7 was a direct response to the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which held that the Rehab Act as originally passed was not clear enough to evidence congressional intent to authorize suits for private damages against state entities for violations of Section 504. Section 2000d-7 also provides that acceptance of federal funds eliminates a state's immunity under Title VI, Title IX, and the Age Discrimination Act of 1975. *See* 42 U.S.C. § 2000d-7(a)(1).

immunity from suit." *Bane v. Va. Dep't of Corrections,* 267 F. Supp. 2d 514, 526 (W.D. Va. 2003).

Having made the decision to accept federal funding, defendants are thus obligated to comply with mandates of the Rehab Act. However, defendants' acceptance of federal funding does not waive sovereign immunity as to every state agency. "[When] a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency—but only against that department or agency." *Koslow v. Pennsylvania*, 302 F.3d 161, 171 (3d Cir. 2002), *cert. denied,* 123 S.Ct. 1353 (2003).

III. ACCEPTANCE OF FEDERAL FUNDS CONSTITUTES A WAIVER OF SOVEREIGN IMMUNITY AGAINST SECTION 504 CLAIMS UNDER § 2000D-7(A)(1)

A. Section 504 Is Valid Spending Clause Legislation

"[T]here is a strong presumption of constitutionality due to an Act of Congress." *Kelly v. United States*, 197 F.2d 162, 164 (5th Cir. 1952); *see also Reno v. Condon*, 528 U.S. 141, 147 (2000) (same). The challenging party bears a heavy burden of proof to demonstrate a statute's unconstitutionality. *See, e.g., McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 808-09 (1969); *Alabama State Fed. of Teachers v. James*, 656 F.2d 193, 195 (5th Cir. Unit B 1981).

1. Nine Circuits Have Upheld Section 504 Against Sovereign Immunity Challenges

"The Rehabilitation Act has a long history of scrutiny under the Eleventh Amendment." *Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied,* 536 U.S. 922 (2002); *accord* MOORE'S FEDERAL PRACTICE § 123.41[3][c] (Rehab Act is "generally held to effect waiver" of immunity). No fewer than ***nine*** circuits have held that an acceptance of federal funds constitutes a waiver of sovereign immunity against Section 504 claims.[15]

Indeed, this Court cannot rule in defendants' favor without also overruling *Pederson,* which held that Section 2000d-7 provides clear notice of Congress' intent to condition federal funds on a waiver of sovereign immunity and that the acceptance of federal funds constitutes a waiver of such immunity. 213 F.3d at 875-76. While *Pederson* involved a claim under Title IX, its holding is directly

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[15] *See, e.g., Kvorjak v. Maine,* 259 F.3d 48, 50 n.1 (1st Cir. 2001); *Koslow*, 302 F.3d at 168-76; *Shepard v. Irving,* 2003 U.S. App. LEXIS 17049, at **7-10 (4th Cir. Aug. 20, 2003); *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.,* 240 F.3d 279, 292 (4th Cir. 2001), *rev'd on other grounds sub nom. Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002); *Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002); *Nihiser,* 269 F.3d at 628; *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Doe v. Nebraska,* 2003 U.S. App. LEXIS 20408, at **8-30 (8th Cir. Oct. 7, 2003); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002), *cert. denied,* 537 U.S. 1105 (2003); *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 819 (9th Cir. 2001); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159, 1167-68 (10th Cir. 2003); *Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir. 2002), *cert. denied,* 123 S.Ct. 2574 (2003); *Garrett,* 344 F.3d 1290-93.

applicable here, because Section 2000d-7 applies to both Section 504 and Title IX. *See Shepard,* 2003 U.S. App. LEXIS 17049, at *9. Defendants' arguments are also contrary to the holdings of numerous district courts.[16]

2. Defendants Misconstrue the Relationship Between "Abrogation" and "Waiver"

Defendants' flawed analysis is a direct result of their failure to recognize the proper relationship between "abrogation" and "waiver." *See Johnson,* 330 F.3d at 367 (Wiener, J., dissenting) (noting that distinction between waiver and abrogation is "critically important"). Defendants posit that because the Supreme Court held in *Garrett* that a statutory provision similarly-worded as Section

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16 *See, e.g., Bane,* 267 F. Supp. 2d at 524-29 (rejecting virtually every argument defendants make here); *Duncan v. WMATA,* 214 F.R.D. 43, 45-50 (D. D.C. 2003); *O.F. v. Chester Upland Sch. Dist.,* 246 F. Supp. 2d 409, 425-26 (E.D. Pa. 2002); *Nelson v. Pa. Dep't of Pub. Welfare*, 244 F. Supp. 2d 382, 389 (E.D. Pa. 2002); *Martin v. Taft*, 222 F. Supp. 2d 940, 957 (S.D. Ohio 2002); *Neiberger v. Hawkins*, 208 F.R.D. 301, 312 (D. Colo. 2002); *Fedorov v. Bd. of Regents for the Univ. of Ga.*, 194 F. Supp. 2d 1378, 1387 (S.D. Ga. 2002); *A.W. v. Jersey City Pub. Schs.*, 2002 U.S. Dist. LEXIS 9369, at **18-23 (D.N.J. May 1, 2002), *aff'd,* 341 F.3d 234 (3d Cir. 2003); *Berrios-Berrios v. Puerto Rico*, 206 F.R.D. 342, 344 n.2 (D. P.R. 2002); *Doe v. Barger*, 193 F. Supp. 2d 1112, 1116 (E.D. Ark. 2002); *Nat'l Org. on Disability v. Tartaglione*, 2001 U.S. Dist. LEXIS 16731, at **23-24 (E.D. Pa. Oct. 11, 2001); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 517-21 (E.D. Pa. 2001); *Lieberman v. Delaware*, 2001 U.S. Dist. LEXIS 13624, at **18-19 (D. Del. Aug. 30, 2001), *aff'd,* 70 Fed. Appx. 630 (3d Cir. July 14, 2003); *Maull v. Div. of State Police*, 141 F. Supp. 2d 463, 472 (D. Del. 2001), *aff'd,* 39 Fed. Appx. 769 (3d Cir. July 9, 2002); *Bowers v. NCAA*, 171 F. Supp. 2d 389, 408-09 (D.N.J. 2001), *rev'd on other grounds,* 2003 U.S. App. LEXIS 17140 (3d Cir. Aug. 20, 2003).

2000d-7 could not be used to abrogate sovereign immunity for suits brought under the ADA, therefore Section 2000d-7 itself must be an invalid "abrogation provision." *See* Defs Br. at 15-22.[17] The *Pace* panel rejected this argument (*Pace v. Bogalusa City Sch. Bd.,* 325 F.3d 609, 615 (5th Cir.), *vacated and pet'n for rehearing en banc granted,* 339 F.3d 348 (5th Cir. 2003)), and this en banc Court should as well. *See, e.g., Stanley,* 213 F.3d at 344 (rejecting similar argument).

It is true that this Court applied the *Garrett* analysis to conclude that Congress exceeded its authority under section 5 of the Fourteenth Amendment to impose the Rehab Act's requirements on states. *See Reickenbacker,* 274 F.3d at 983-84. But that is not the issue before this Court.

The issue is whether Section 2000d-7 was a valid extraction of *waiver* of immunity pursuant to Congress' Spending Power. As noted *supra* at 11, Section 504 was enacted pursuant to the Spending Clause, whereas the ADA was enacted under section 5 of the Fourteenth Amendment. *See also Bane,* 267 F. Supp. 2d at 526. Thus, not only was the abrogation provision in *Garrett* separate from Section 2000d-7, but the statutes were also passed under different constitutional powers.

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[17] Defendants' argument here is facially inconsistent with their later argument that Congress' effectuation of Section 2000d-7 to extract a waiver of immunity was coercive. Section 2000d-7 was either an exercise of Congress' Spending Power to extract a waiver of immunity, or it wasn't—there is no middle ground.

Even assuming that the provisions were part of the same statutory framework (which they were not), defendants' arguments would still fail. It has long been accepted that "[w]here the subject matter to which the words refer is not the same in the several places in which they are used . . . or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *see also Calderon v. Witvoet*, 999 F.2d 1101, 1104 (7th Cir. 1993) (noting when Congress' intent is clear from the statute's context, Congress can attribute different meanings to same words in a statute); *United States v. 640,000 Acres of Land,* 756 F.2d 842, 847 (11th Cir. 1985) ("Congress employed the same language [in statute], but it is clear that a different meaning was to attach").

Thus, defendants' argument (Defs Br. at 18) that Congress was *per se* required to employ different language in Section 2000d-7 to extract a waiver of immunity is totally without foundation. Unsurprisingly, defendants cite no authority for their erroneous premise.

Defendants next contend that Congress cannot use its Spending Power to extract a waiver of immunity because that would be tantamount to abrogating immunity. Defs Br. at 19-21. Defendants are simply wrong. The Supreme Court and numerous other courts have stated that waiver and abrogation are distinct

exceptions to sovereign immunity. *See, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 787-88 (1991) (acknowledging waiver and abrogation as distinct issues); *Jim C.*, 235 F.3d at 1081 ("Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, *even though Congress could not order the waiver directly* [i.e., abrogation]") (emphasis added); *Beasley v. Ala. State Univ.*, 3 F. Supp. 2d 1304, 1310 (M.D. Ala. 1998) (holding that "abrogation" arguments are misplaced when applied to Spending Clause statutes; proper inquiry is "waiver"). Thus, even though the end result may be the same (i.e., loss of sovereign immunity), abrogation and extraction of a waiver are different mechanisms for achieving that result.

Simply put, "[n]othing in the Supreme Court's Eleventh Amendment decisions noting limitations on Congress' authority to abrogate state sovereign immunity bars Congress from conditioning federal grants [i.e., waiver] on a state's consent to suit in federal court." MOORE'S FEDERAL PRACTICE § 123.41[3][a]. Indeed, this Court has already noted that to preclude Congress from conditioning federal grants on a state's consent to be sued "would affront the Court's acknowledgment in *Seminole Tribe* of 'the unremarkable . . . proposition that

States may waive their sovereign immunity.'" *Pederson,* 213 F.3d at 876 (quotation omitted).[18]

3. The Conditions of Section 2000d-7 Are Clear And Unambiguous

As discussed *supra* at 16, even identical statutory language can have different meanings if Congress' intent is clear. Here, there cannot be any dispute that Section 2000d-7 enabled defendants to knowingly exercise their choice to waive immunity by accepting federal funds. The Supreme Court has already held that Section 2000d-7 is "an unambiguous waiver of the States' Eleventh Amendment immunity" in exchange for federal funds. *See Lane v. Pena*, 518 U.S. 187, 200 (1996).

Defendants attempt to dismiss the holding of *Lane* as "dicta." Defs. Br. at 16. Even assuming defendants are correct—and they are not—the Supreme Court has mandated that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe v. Florida,* 517 U.S. 44, 66-67 (1996). Appellate courts are not free to ignore Supreme Court pronouncements, even if arguably "dicta." *See, e.g., In re McDonald,* 205 F.3d 606, 612-13 (3d Cir. 2000) (sound judicial

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[18] Defendants' argument that the Supreme Court in *Garrett* overruled *Pederson* is also premised on the incorrect assumption that Congress was required to employ different language to effectuate a waiver of immunity under § 2000d-7.

administration dictates that appellate courts follow Supreme Court dicta); *United States v. Santana,* 6 F.3d 1, 9 (1st Cir. 1993) (same).

Defendants' additional argument that Section 2000d-7 is ambiguous because it does not specifically "use the word 'waiver' or the word 'condition'" (Defs. Br. at 19) is without merit. A statute need not "include magic words such as 'waiver' or 'immunity' or 'suit'" in order to constitute a valid waiver provision for sovereign immunity purposes. *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 513 (3d Cir. 2001), *cert. denied,* 537 U.S. 941 (2002); *accord West v. Gibson,* 527 U.S. 212, 222 (1999) (considering statute's language, purposes, history, and absence of any convincing reason to find waiver of federal sovereign immunity); MOORE'S FEDERAL PRACTICE § 123.41[3][a] ("courts do not require the use of "consent' or 'waiver' in the statute"). Indeed, defendants made an identical challenge to Section 2000d-7 in *Pederson,* and this Court properly rejected it. *See Pederson,* 213 F.3d at 876.

4. Section 504's Waiver of Sovereign Immunity Is Not Unconstitutionally Coercive

Although defendants did not present this argument below,[19] they now contend that they have become so dependent on federal funds, that they have no

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[19] *Coggin v. Longview Ind. Sch. Dist.*, 337 F.3d 459, 469 (5th Cir. 2003) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below") (citations omitted).

choice but to accept the funding. Defs. Br. at 32-39. Therefore, any waiver of immunity was invalid because it was obtained under "coercion." *Id.*

This Court should decline defendants' request to determine whether the Rehab Act imposes unconstitutional "coercion." Long ago, the Supreme Court admonished that courts refrain from determining when federal funding is deemed "coercive." *Steward Mach. Co. v. Davis,* 301 U.S. 548, 589-90 (1937) (Cardozo, J.) ("to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties"). As Professor Chemerinsky noted, "it is impossible to draw a line between inducement and compulsion. All conditions on financial aid from Congress to the states are meant to be an inducement; there is no way to define when this becomes impermissible compulsion." Erwin Chemerinsky, *Protecting the Spending Power,* 4 CHAP. L. REV. 89, 102 (Symposium 2001). This Court has already refused to perform a "coercion" analysis for the same reason. *See Texas v. United States,* 106 F.3d 661, 666 (5th Cir. 1997).

Even if this Court does engage in such analysis, there is no unconstitutional coercion here. At the time the Constitution was written, "[t]he brutal fact is that to the Founders, 'coercion' meant force, real force." Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond),* 29 HASTINGS CONST. L.Q. 439, 476 (2002). Obviously, no such "force" is present here.

Even within the context of economic coercion, "coercion" still means "[c]onduct that constitutes the *improper* use of economic power to compel another to submit to the wishes of one who wields it." BLACK'S LAW DICTIONARY 252 (7th ed. 1999) (emphasis added). By this token, "[e]xamples of coercion would thus include providing erroneous information regarding the effect of participation in the program, failing to provide relevant information regarding such participation, and directing the states to legislate, administer, or enforce federal policies." Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the* Dole *Loopholes,* 4 CHAP. L. REV. 163, 174 (Symposium 2001). None of these circumstances is present here.

Unsurprisingly, every court to consider the issue has rejected arguments that a state's waiver of immunity for Rehab Act claims is "coercive" merely because loss of federal funds would be painful or difficult.[20] As the First Circuit cogently

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[20] *See, e.g., Doe,* 2003 U.S. App. LEXIS 20408, at *16 ("Nebraska was free to 'take the money or leave it'"); *Lovell,* 303 F.3d at 1051 ("The [Rehab Act] . . . is not unduly coercive"); *Koslow,* 302 F.3d at 173-74 (state was "free to make the choice" between declining federal aid and complying with Rehab Act); *Jim C.,* 235 F.3d at 1081-82 (declining federal funds would be "politically painful, but we cannot say that it compels Arkansas's choice"); *Bane,* 267 F. Supp. 2d at 528-29 (no coercion when state could "simply decline federal assistance"); *Shepard v. Irving*, 204 F. Supp. 2d 902, 917-19 (E.D.Va. 2002) (state "could have avoided the requirements of Section 504 simply by declining federal education funds"), *aff'd in relevant part, rev'd in part on other grounds,* 2003 U.S. App. LEXIS 17049 (4th Cir. Aug. 20, 2003); *A.W.,* 2002 U.S. Dist. LEXIS 9369, at *22 ("courts have consistently found this [coercion] argument unpersuasive"); *Bowers,* 171 F. Supp.

stated, "[w]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the *size* of the stakes that controls, but the rules of the game." *N.H. Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980) (emphasis added). Indeed, other recipients of significant federal benefits have chosen to forego those benefits rather than change policies at odds with those of the federal government. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (university not entitled to the benefits of federal tax-exempt status due to policies forbidding interracial dating).

Defendants' "coercion" arguments also ignore that "[u]nlike private persons, states have the resources to serve their citizens even if the federal government, through economic incentives, encourages a particular result. . . . An individual citizen, in contrast, lacks these formidable institutional resources." *Koslow,* 302 F.3d at 174. Thus, even assuming that foregoing the federal funding would result in hardship, defendants are still free to raise revenues by taxing their citizens, implementing a state lottery, increasing tuition at state universities, or numerous other means. *Id.*; *accord California v. United States,* 104 F.3d 1086,

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2d at 408-09 (statute not coercive); *Frederick L.,* 157 F. Supp. 2d at 523 ("[T]he DPW has had the option to avoid being governed by the mandates of section 504. The DPW got what it bargained for. It cannot now avoid its obligation"); *see also Fla. Dep't of Health & Rehab. Servs. v. Califano,* 449 F. Supp. 274, 284-85 (N.D. Fla. 1978) (Rehab Act was not coercive), *aff'd,* 585 F.2d 150 (5th Cir. 1978).

1092 (9th Cir. 1997) (rejecting argument that state had "no choice" but to accept federal funds because state "[w]as always free to increase its tax revenues").

In addition, Section 504 is not an "all or nothing" statute. *See Bane,* 267 F. Supp. 2d at 568 (citing cases). A state only waives immunity against Rehab Act claims as to agencies that actually receive federal funds. *See supra* at 12. States are thus free to insulate agencies or programs against Rehab Act claims by refusing funds for those particular agencies. *See Doe,* 2003 U.S. App. LEXIS 20408, at *16; *Shepard,* 204 F. Supp. 2d at 918.[21]

B. This Court Should Reject Second Circuit's *Garcia* Decision

1. *Garcia* is "Unpersuasive" and Has Been Repeatedly Rejected by Other Courts

In reaching its erroneous conclusions, the panel opinion (as did the panel opinion in *Pace*) relied on the Second Circuit's rationale in *Garcia v. SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001). *Garcia* is not only contrary

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[21] On page 36 of their brief, defendants appear to argue that requiring a waiver of sovereign immunity is so unrelated to Congress's purpose in enacting Section 504 as to be unconstitutional. If defendants are making a "relatedness" argument, such challenges have also been repeatedly rejected by courts. *See, e.g., Koslow,* 302 F.3d at 175-76; *Duncan,* 214 F.R.D. at 49 n.7; *Frederick L.,* 157 F. Supp. 2d at 521-22; *Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1133 (D. Kan. 2000), *aff'd,* 295 F.3d 1183 (10th Cir. 2002); *see also Oklahoma v. Schweiker,* 655 F.2d 401, 406-07 (D.C. Cir. 1981) (rejecting argument that conditions "must be precisely related to the purpose of the federal funds whose receipt is conditioned").

to the decisions of ***nine*** other circuit courts, but also has been the target of judicial criticism and in any event, is factually distinguishable from the cases *sub judice.*

Garcia concluded that New York had not knowingly waived its sovereign immunity to Section 504 suits by accepting federal funds, even though it acknowledged that § 2000d-7 was a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of immunity. *Garcia,* 280 F.3d at 113-14. *Garcia* quoted from the Supreme Court's decision in *College Savings* as follows:

> [t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action [e.g., accepting federal funds] it shall be deemed to have waived that immunity.

Id. at 114 (quoting *College Savings*, 527 U.S. at 680-81).[22]

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22 By taking this quote entirely out of its context, *Garcia* ignored that in *College Savings*, the Supreme Court was concerned about the coerciveness of requiring a state to waive sovereign immunity simply by engaging in activity that Congress had chosen to regulate. In that context, the mere expression of intent on Congress's part to extract a waiver of sovereign immunity from states was insufficient to show that the state made a truly voluntary choice because the state would have to give up an otherwise lawful activity or waive its sovereign immunity. *College Savings*, 527 U.S. at 679-87. The Court specifically distinguished Congress's use of the Spending Power to condition an acceptance of federal funds on a waiver of sovereign immunity, as such federal funds constituted a gift, which a state could voluntarily choose not to take. *Id.* at 686-87.

According to *Garcia*, because Title II of the ADA was reasonably understood to abrogate sovereign immunity under the Commerce Clause at the time that New York accepted the funds in question (before the Supreme Court's holding in *Seminole Tribe* in 1996 that Congress could not abrogate immunity using its Commerce Clause power), and Title II's requirements are virtually identical to those of Section 504, a state could not have understood that taking federal funds would mean giving up immunity. Immunity, as far as the state knew, had already been lost under Title II. *Garcia,* 208 F.3d at 114.

Relying on *Garcia,* defendants argue that other courts upholding Section 504 have not considered whether there was a "knowing" acceptance of waiver by states. Defs. Br. at 19. This is patently incorrect. Both *Garcia* and defendants' position have been repeatedly considered and rejected by other courts. For example, the Third Circuit rejected *Garcia* because the ADA and the Rehab Act are separate statutes, and the ADA did not alter existing causes of action under other statutes. *See Koslow,* 302 F.3d at 172-73 n.12. Accordingly, the requisite "clear intent to condition participation in the programs funded . . . ensured the Commonwealth of Pennsylvania knew that by accepting certain funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities." *Id.* (citation omitted). Numerous other courts have also rejected the reasoning adopted by both the

Garcia court and the panel opinion in this case.[23] This Court should likewise reject *Garcia.*

The *Bane* court also soundly rejected defendants' argument that they did not understand the "bargain" of waiving their immunity:

> If the Rehabilitation Act is indeed a bargained-for exchange, then both sides accepted the risk, implicit in any deal, that one side of the bargain might come out on top due to circumstances beyond either party's control. The federal government chose to provide funds as long as states waived their sovereign immunity, regardless of whether the ADA was valid. It did so presumably because, for any number of possible reasons, the ADA's abrogation of sovereign immunity could be struck down. . . . That the states are now the losers in the bargain does not mean that the waiver of sovereign immunity under the Rehabilitation Act was an unfair or coercive exchange.

Bane, 267 F. Supp. 2d at 527 n.8; *accord Johnson,* 330 F.3d at 370-71 (Wiener, J., dissenting) (following same rationales as *Bane*).

Moreover, Louisiana has given no indication that it will return any federal funds that it now claims it mistakenly accepted. It is unconscionable to allow

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[23] *See, e.g., Doe,* 2003 U.S. App. LEXIS 20408, at **17-30 (state's *Pace* and *Garcia* arguments were "not well taken"); *M.A. v. State-Operated Sch. Dist. Of Newark,* 344 F.3d 335, 350 (3d Cir. 2003) (court was "unpersuaded" by state's *Garcia* arguments); *Garrett,* 344 F.3d at 129-93 (rejecting *Pace* and *Garcia*); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 244, 250-55 (3d Cir. 2003) (rejecting *Pace* and *Garcia*); *Bane,* 267 F. Supp. 2d at 526-28 (rejecting *Pace* and *Garcia*); *Duncan,* 214 F.R.D. at 48 ("This Court is not persuaded by the reasoning of [*Garcia*]"); *Shepard,* 2003 U.S. App. LEXIS 17049, at *10 n.2 ("We decline to follow *Pace*"); *Bowers,* 171 F. Supp. 2d at 408 ("I find this [*Garcia*] argument unpersuasive").

Louisiana to retain the benefits of the bargain while avoiding the conditions of the same bargain. *See Doe,* 2003 U.S. App. LEXIS 20408, at **29-30.

2. *Garcia* is Limited to Pre-1996 Cases

Even assuming that this Court finds *Garcia* persuasive, its logic only applies to discrimination occurring before *Seminole Tribe* (i.e., before 1996). *Garcia* acknowledged that states could reasonably be on notice that Congress' abrogation of sovereign immunity in statutes passed under the Commerce Clause was invalid after *Seminole Tribe. See Garcia,* 280 F.3d at 114 n.4. In the cases *sub judice,* Louisiana continued to accept federal funds *after* the *Seminole Tribe* decision and the Complaint was also filed after that decision.

Defendants cannot claim that they had no knowledge that immunity might have been abrogated under Title I of the ADA until the *Garrett* decision in 2001. Even *Garcia* acknowledged: "if there is a *colorable basis* for the state to suspect that an express congressional abrogation is invalid, then the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4 (emphasis added). In this situation, the court explained, a state deciding to accept federal funds "would not be ignorant of the fact that it was waiving its *possible* claim to sovereign immunity." *Id.* (emphasis added).

By contrast, after *Seminole Tribe*, states certainly had a "colorable basis" to suspect that Title I might not validly abrogate sovereign immunity. At an absolute minimum, the *Garrett* district court decision invalidating Title I abrogation was decided in 1998. Thus, states clearly had a "'colorable basis' to suspect that the Supreme Court *could* invalidate the ADA's abrogation of state sovereign immunity" after that time. *Bane,* 267 F. Supp. 2d at 527-28 (emphasis in original). As the Eighth Circuit cogently explained:

> We are, after all, dealing with a sovereign state, not an indigent uncounseled criminal defendant. The State of Nebraska, which here seeks to avoid its agreement, is well-supplied with lawyers and funds. It is not unreasonable to expect such a party to inform itself as to the state of the law.

Doe, 2003 U.S. App. LEXIS 20408, at **22-23 (also noting that "between 1993 and 1996, there was a live debate in the legal community on the question of whether Congress could abrogate a state's sovereign immunity under the Commerce Clause").

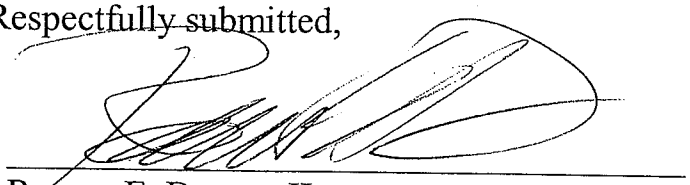
Indeed, many states had been arguing prior to 2001 that Title I did not validly abrogate sovereign immunity. Defendants here should not be permitted to maintain now that they had no reason to believe that the abrogation was invalid, when they have been vigorously contending that abrogation was invalid throughout these cases. The Third Circuit recently termed the same argument as "disingenuous." *M.A.,* 344 F.3d at 349-50.

Accordingly, even if this Court does find the *Garcia* reasoning persuasive (and it is not), it is simply inapplicable here.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment should be affirmed, and the cases remanded for trial.

Respectfully submitted,



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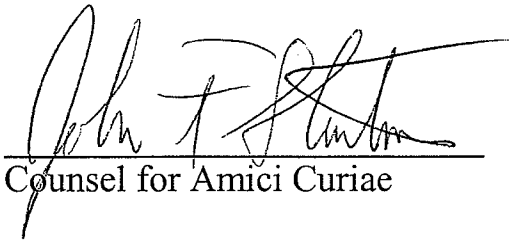
CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Times New Roman 14 point type-face. This brief also complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B). This brief contains 6,910 words.



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The undersigned hereby certifies that a copy of this Brief of Amici Curiae the American Association of People with Disabilities, Et Al. in Support of Plaintiffs-Appellants and Affirmance of District Courts' Opinions, and a computer disk containing a PDF version of same were served this 27th day of October, 2003 via Federal Express upon:

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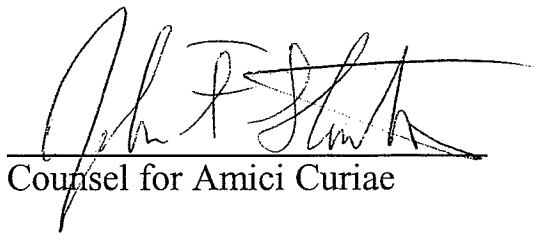

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INTEREST OF *AMICI CURIAE*

Amici Curiae include seventeen national organizations that are composed of and/or represent people with disabilities. *Amici* include:

The American Association of People with Disabilities

The American Association of People with Disabilities (AAPD) is a national, nonprofit membership organization promoting the political and economic empowerment of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the Americans with Disabilities Act (ADA), AAPD has a strong interest in promoting the implementation and enforcement of the ADA, Section 504 of the Rehabilitation Act and other federal disability rights laws.

ADAPT

ADAPT, a national grassroots, disability rights organization representing thousands of people with significant disabilities, is advocating for the delivery of home and community services in the most integrated setting and reform of the institutionally-biased long term service and support system. Continued enforcement of the Rehabilitation Act is essential to ADAPT's goals.

The Alexander Graham Bell Association for the Deaf and Hard of Hearing

The Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell) is a non-profit organization with chapters throughout the United States, and has international affiliates throughout the world. AG Bell advocates for spoken language in children and adults. AG Bell is deemed to be the preeminent

organization in deafness. AG Bell provides advocacy, resources and leadership for parents, professionals, and individuals who are deaf or hard of hearing.

The American Association On Mental Retardation

The American Association on Mental Retardation (AAMR) is the Nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has appeared as *amicus curiae* before this Court in numerous cases, including *City of Cleburne v. Cleburne Living Center*. It is the position of AAMR that disability antidiscrimination statutes such as Section 504 of the Rehabilitation Act are essential to ensure that people with mental retardation can live independent lives as valued participants in the community.

The American Council of the Blind

The American Council of the Blind (ACB) is the nation's leading membership organization of blind and visually impaired people. Founded in 1961, ACB has 51 state and regional affiliates and 20 national special interest and professional affiliates. ACB strives to improve the well-being of all blind and visually impaired people by: serving as a representative national organization of blind people; elevating the social, economic and cultural levels of blind people; improving educational and rehabilitation facilities and opportunities; cooperating with the public and private institutions and organizations concerned with blind

services; encouraging and assisting all blind persons to develop their abilities and conducting a public education program to promote greater understanding of blindness and the capabilities of blind people. The Rehabilitation Act is especially important based on ACB's role in advocating for improved education and rehabilitation services for blind children and adults.

The American Occupational Therapy Association

The American Occupational Therapy Association (AOTA) is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The AOTA mission is to support the contributions of occupational therapy to health, wellbeing, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum achievement of human potential. Occupational therapy can assist individuals with disabilities in identifying work limitations and potential. AOTA advocates on behalf of the profession and the public through support of positive public policy such as that contained in the Rehabilitation Act, the Americans with Disabilities Act, the Individuals with Disabilities Education Act and other disability programs.

The Arc of the United States

The Arc of the United States (The Arc), through its nearly 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, which have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in supporting enactment of the 1973 Amendments to the Rehabilitation Act that included Section 504.

The Association on Higher Education and Disability

The Association on Higher Education and Disability (AHEAD) is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities. Its membership includes approximately 2,000 institutions (including state colleges and universities, not-for-profit service providers and standardized testing organizations), professionals, and college and graduate students planning to enter the field of disability practice. Since its founding in 1977, AHEAD (formerly Association of Handicapped Student Service Programs in Postsecondary Education) members have been leaders in assuring Section 504 compliance and in providing reasonable

accommodations to both students and employees at institutions of higher education, especially at state college and university systems. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of Section 504 by postsecondary educational institutions.

The Bazelon Center For Mental Health Law

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA and Section 504 of the Rehabilitation Act.

The Brain Injury Association of America

The Brain Injury Association of America is the only national nonprofit organization working on behalf of the more than 1.5 million Americans who sustain a brain injury each year and the estimated 5.3 million Americans who live with permanent disabilities resulting from a brain injury and their families. With its network of more than forty Chartered State Affiliates and hundreds of local chapters and support groups across the country, the Association's mission is to

create a better future through brain injury prevention, research, education, and advocacy.

The Disability Rights Education and Defense Fund

The Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The Epilepsy Foundation

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation has worked to dispel the stigma associated with seizures and has supported the development and enforcement of laws, such as the Rehabilitation Act of 1973, that protect individuals from discrimination based on these stereotypes and fears.

The Legal Aid Society -- Employment Law Center

The Legal Aid Society -- Employment Law Center (LAS-ELC) is a public interest law firm that advocates on behalf of the workplace rights of individuals with disabilities and other under-represented communities. Since 1970, the LAS-ELC has represented clients in cases covering a broad range of employment issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The LAS-ELC represents clients faced with discrimination on the basis of their disabilities, including those with claims brought under the ADA and Section 504 of the Rehabilitation Act. The LAS-ELC also files amicus briefs in cases of importance to people with disabilities.

The National Association of Protection and Advocacy Systems

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all fifty states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular

interest to NAPAS because P&As regularly represent clients with disabilities against whom states have discriminated.

The National Association of Rights Protection and Advocacy

The National Association of Rights Protection and Advocacy (NARPA) was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates – with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40% of NARPA's members are current or former patients of the mental health system. NARPA members were key advocates for the passage of Federal legislation such as the Rehabilitation Act of 1973.

The National Health Law Program

For over thirty years, the National Health Law Program (NHeLP) has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NHeLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NHeLP has worked

with the ADA and Section 504, and the program's work and our clients will be significantly affected by the Court's decision in this case.

The National Mental Health Consumers' Self-Help Clearinghouse

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/ survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The National Spinal Cord Injury Association

Founded in 1948, the National Spinal Cord Injury Association (NSCIA) is the nation's oldest and largest civilian organization dedicated to improving the quality of life for hundreds of thousands of Americans living with the results of spinal cord injury and disease (SCI/D) and their families. This number grows by thirty newly-injured people each day. At NSCIA, we educate and empower survivors of spinal cord injury and disease to achieve and maintain the highest

levels of independence, health and personal fulfillment. Our education programs are developed to address information and issues important to our constituency, policy makers, the general public, and the media. Such issues include the enforcement and viability of Section 504's legal protections for people with disabilities. Our programs also address issues such as injury prevention, improvements in medical, rehabilitative and supportive services, research and public policy formulation.

The Polio Society

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The ADA and the Rehabilitation Act are key elements of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome.