No. 02-1730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EDWARD BOUDREAU, by and through his parents, Edwin and Ann Boudreau, BRIAN BRUGGEMAN, by and through his parents, Kenneth and Carol Bruggeman, FRANCES CORSELLO, by and through his parents, Vincent and Agnes Corsello, et al.,

Plaintiffs - Appellants

v.

GEORGE H. RYAN, in his official capacity as Governor of the State of Illinois, ANN PATLA, in her official capacity as Director of the Illinois Department of Public Aid, LINDA BAKER, in her official capacity as Secretary of the Illinois Department of Human Services, MELISSA WRIGHT, in her official capacity as Associate Director of the Office of Developmental Disabilities,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Honorable John F. Grady

BRIEF FOR THE UNITED STATES AS INTERVENOR

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JURISDICTIONAL STATEMENT

The plaintiffs-appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

The United States will address the following question:

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.

STATEMENT OF THE CASE

1. 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). Section 504 contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's effort 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 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against recipients of federal funds. See *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *Carter* v. *Orleans Parish Pub. Schs.*, 725 F.2d 261, 262 n.2 (5th Cir. 1984).

2. In 1985, the Supreme Court held that the language of Section 504 was not clear enough to evidence Congress's intent to condition the acceptance of federal funding on a waiver of Eleventh Amendment immunity for private damages 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.

3. In this case, individuals with disabilities brought suit against state officials, sued in their official capacities, alleging that their practices violated, *inter alia*, the Medicaid Act (through 42 U.S.C. 1983), Title II of the Americans with Disabilities Act, and Section 504, and seeking "purely" prospective relief. Short App. C at 7. The state officials moved to dismiss the action on the ground that the Eleventh Amendment barred the suit. *Id.* at 6. The district court denied the motion as to the Medicaid claims, holding that, under the *Ex parte Young* doctrine, state officials sued in their official capacities for prospective injunctive relief are not entitled to Eleventh Amendment immunity. *Id.* at 6-9. The district court also denied the motion to dismiss the Section 504 claim on Eleventh Amendment grounds, relying on this Court's holding in *Stanley* v. *Litscher*, 213 F.3d 340, 344 (2000), that Congress validly conditioned the receipt of federal financial assistance on the waiver of a state agency's Eleventh Amendment immunity to Section 504

claims. *Id.* at 6. The district court granted the defendants' motion to dismiss the Title II claims, relying on this Court's holding in *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied, 531 U.S. 1190 (2001), that Congress did not validly abrogate States' Eleventh Amendment immunity to Title II claims. *Id.* at 9. The district court also held that the *Ex parte Young* doctrine was "inapplicable to Title II cases." *Ibid.* After an evidentiary hearing, the court dismissed the Medicaid claims. Short App. B. Without referring to the remaining claim under Section 504, the district court entered a final judgment dismissing the action. Short App. A. This timely appeal followed.

The United States filed a brief on appeal as *amicus curiae* in support of the plaintiffs-appellants, arguing that this Court should overturn the holding in *Walker* that *Ex parte Young* suits are not available to enforce Title II claims. In its brief as appellee, the state defendant asserted (Def. Br. 61-64) that it enjoys Eleventh Amendment immunity to suits brought under Section 504 because it did not waive its immunity by accepting federal financial assistance. The United States now intervenes in this action pursuant to 28 U.S.C. 2403(a)[1] in order to defend the

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[1] 28 U.S.C. 2403(a) provides that, "[i]n any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court * * * shall permit the United States to intervene * * * for

(continued...)

constitutionality of 42 U.S.C. 2000d-7, which conditions the state defendant's receipt of federal financial assistance on its agreement to waive its Eleventh Amendment immunity to private suits under Section 504.

SUMMARY OF ARGUMENT

As this Court has held, 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. Congress validly conditioned receipt of federal financial assistance on waiver of a State's immunity to private suits brought to enforce Section 504 of the Rehabilitation Act. Any state agency or department is subject to the requirements of Section 504 if it accepts federal financial assistance conditioned upon a waiver of sovereign immunity. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of any federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. Congress validly conditioned federal funding on a state agency's waiver of sovereign immunity. Thus, by accepting Medicaid funds, the state defendant waived its immunity to claims under Section 504. There is no reason for this Court to reconsider its

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[1](...continued)
argument on the question of constitutionality."

holding in *Stanley* v. *Litscher*, 213 F.3d 340 (7th Cir. 2000), that States waive their immunity to claims under Section 504 when they accept federal financial assistance.

ARGUMENT

Congress Validly Conditioned Receipt Of Federal Funds On A Waiver Of Eleventh Amendment Immunity For Private Claims Under Section 504 Of The Rehabilitation Act Of 1973

The Eleventh Amendment bars private suits against a State, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). In *Stanley* v. *Litscher*, 213 F.3d 340 (7th Cir. 2000), this Court held that Section 2000d-7 of Title 42 validly conditions the receipt of federal financial assistance on a State's waiver of Eleventh Amendment immunity to private suits under Section 504. See *id.* at 344 (holding that Section 2000d-7 "is a condition on the receipt of federal funds," and is "enforceable in federal court against recipients of federal largess").[2] For the reasons stated in this brief, there is

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[2] Although the defendants claim (Def. Br. 62) that "[r]esearch has disclosed no case from this Court addressing the issue" of whether a State waives its Eleventh Amendment immunity when it accepts federal funds, in fact the district court in this very case cited this Court's decision in *Stanley* when it rejected these very defendants' assertion that they are immune from suit on the plaintiffs' Section 504 claims. See *Boudreau* v. *Ryan*, 2001 WL 840583, at *2 (N.D. Ill. May 2, 2001) ("As an initial matter, we note that the Eleventh Amendment does not bar the plaintiffs' Rehabilitation Act claim. *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th

(continued...)

no reason for this Court to reconsider its correct conclusion that Congress validly conditioned the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity from suit under Section 504.

Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to condition receipt of federal financial assistance on waiver of sovereign immunity.[3] States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (1999); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 64 (1996); *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, 265 F.3d 541, 554 (7th Cir. 2001). And both this Court and the Supreme Court have held that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * acceptance of the funds entails an agreement to the actions." *College Sav. Bank*, 527 U.S. at 686; see also *Cherry*, 265 F.3d at 554 (finding that, because "federal funds under Title IX are 'gifts' to the States, * * * Congress may, in its exercise of its spending power, condition its grant of funds to the States on

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[2](...continued)
Cir. 2000).").

[3] Because the defendants admit that they have applied for and accepted Medicaid funds, there is no dispute about whether they receive federal financial assistance.

their consent to waive their immunity from suit" (quoting *College Sav. Bank*, 527 U.S. at 687)). Thus, Congress may, and has, conditioned the receipt of federal funds on the defendants' waiver of Eleventh Amendment immunity to Section 504 claims. The defendants contend, nonetheless, that they have not waived their immunity because Section 2000d-7 does not clearly condition the receipt of federal financial assistance such as Medicaid funding on a waiver of immunity. This contention is without merit.

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

Section 2000d-7 makes clear that Congress intended to condition federal funding on a State's waiver of Eleventh Amendment immunity to suit in federal court under Section 504 (and other non-discrimination statutes tied to federal

financial assistance). Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it would not have immunity to private suits in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting a State on express notice that part of the "contract" for receiving federal funds was the requirement that it consent to suit in federal court for alleged violations of Section 504 for those agencies that received financial assistance.

The Supreme Court, in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7.[4] The Fourth Circuit, after an extensive analysis of the text and structure of the Act, held in *Litman* v. *George Mason University*, 186

[4] The Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

F.3d 544, 554 (1999), cert. denied, 528 U.S. 1181 (2000), that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." Seven other courts of appeals have agreed with this Court's holding in *Stanley* that the language in Section 2000d-7 clearly manifests an intent to condition receipt of federal financial assistance on waiver of Eleventh Amendment immunity, and there is no reason to reconsider that holding. See *Koslow* v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002) (Section 504); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002); *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001) (Section 504); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 533 U.S. 949 (2001); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 532 U.S. 275 (2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998).

The defendants appear to be arguing (Def. Br. 62) that they have not waived their immunity because they have not received any funds under the Rehabilitation Act itself. But this argument is contrary to the unambiguous language of both

Section 504 and Section 2000d-7. The obligations in Section 504 apply to any program or activity receiving federal financial assistance. The waiver of immunity in Section 2000d-7 similarly applies to "recipients of Federal financial assistance."

It is well-settled that Congress can impose in a single statute a condition that applies to all federal financial assistance. Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.2 (1987). Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citations omitted).[5] The Court made a similar finding in *Grove City College* v.

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[5] 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*.

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

The obligation to answer to private suits filed under Section 504 is incurred only when a recipient elects to accept federal financial assistance conditioned on a waiver of sovereign immunity. If a state agency does not wish to accept these conditions, it is free to decline the assistance. But if it does accept federal money, then it is clear that it is bound by the conditions.

Because Congress has made it entirely clear that a State's decision to accept federal funds subjects it to suit under Section 504, there is no requirement – contrary to the defendants' suggestion (Def. Br. 63-64) – that a state agency's assent to the waiver be manifested in a manner apart from its voluntary action in accepting the federal funds. The same is true in other settings in which a waiver of Eleventh Amendment immunity is triggered by an action completely within the control of a state agency. For example, in the bankruptcy context, the courts of appeals are in agreement that, after Congress made clear in 11 U.S.C. 106(b) that

the effect of filing a proof of claim in bankruptcy court would be a waiver of immunity from claims arising out of the same transaction or occurrence, state agencies waive their Eleventh Amendment immunity by filing a proof of claim. See, *e.g.*, *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 27-28 (1st Cir. 2001) (so holding and collecting cases), cert. denied, 123 S. Ct. 73 (2002); see also *Lapides* v. *Board of Regents*, 122 S. Ct. 1640, 1643-1645 (2002) (discussing ability of the States to waive Eleventh Amendment immunity through litigation conduct).

2. The defendants rely on the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2001), to support their claim that the waiver condition in Section 2000d-7 is invalid. The *Garcia* court agreed with every other court of appeals (including this one) that has considered the question whether Section 2000d-7 unambiguously conditions the acceptance of federal financial assistance on a State's waiver of Eleventh Amendment immunity. The court held that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. The court went on to hold that the waiver was not effective in that case because the state agency did not "know" in 1995 (the latest point the alleged discrimination had occurred) that the abrogation in Title II

of the ADA was not effective and thus would have thought (wrongly, in the view of the Second Circuit) that the abrogation for Title II claims made the waiver for Section 504 redundant, *id.* at 114.

This Court should not follow that reasoning because it is incorrect. The *Garcia* panel recognized that Congress could condition the receipt of funds on a waiver of immunity, so long as the waiver was "knowing," but it misconstrued what that term means in the context of a Spending Clause statute. The reason the Supreme Court, in *Atascadero*, required that Congress make its intention clear is so that, when a State applies for and receives federal financial assistance, there can be no question that it made the decision with knowledge that it could be subjected to private suits. The clarity required by *Atascadero* and provided by Section 2000d-7 exists to ensure, as a matter of law, that recipients "exercise their choice knowingly, cognizant of the consequence of their participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). A State could not have thought that it was *not* waiving immunity to suit under Section 504. The language of Section 2000d-7 is absolute. Congress did not repeal Section 504 or Section 2000d-7 when it enacted the Americans with Disabilities Act of 1990. Although Title II must be interpreted to be at least as protective as Section 504, see 42 U.S.C. 12201(a), Congress did not abolish the Section 504 cause of action. To the

contrary, Congress preserved it. See 42 U.S.C. 12201(b). Thus, whatever functional equivalence the two causes of action have, they remain formally distinct causes of action and require separate provisions removing immunity. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (Eleventh Amendment immunity must be assessed claim by claim).

The *Garcia* panel's theory produces anomalous results. A state agency that accepted funds after Congress enacted Section 2000d-7 in 1986 did waive its immunity to suit. This waiver was effective at least until 1990 – when Title II was enacted – and possibly until 1992 – when Title II became effective. But at that time, according to the *Garcia* panel, although Section 504 and Section 2000d-7 remained the same, the State's knowing waiver became unknowing. Indeed, the panel would have a State's Section 504 waiver depend upon the current state of the case law adjudicating the abrogation provision of the ADA.

In any event, the panel was incorrect in holding that a party who may have relied on the current state of the law in making a choice to waive constitutional rights cannot be said to have made an effective waiver simply because of subsequent changes of law. Thus, the panel opinion in *Garcia* is not persuasive and should not be followed. This Court should instead continue to align itself with the five other courts of appeals to address the issue in holding that Section 2000d-7

put state agencies on notice that acceptance of federal financial assistance constituted a waiver of Eleventh Amendment immunity to Section 504 suits. See *Koslow* v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002); *Robinson* v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

3. The defendants do not dispute that Congress has the power under the Spending Clause, Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank*, 527 U.S. at 686; *Alden*, 527 U.S. at 755. Nor do they dispute, except with respect to the clear statement issue addressed *supra*, that Sections 504 and 2000d-7 meet the four primary limitations on Congress's Spending Power identified in *South Dakota* v. *Dole*, 483 U.S. 203 (1987): (1) the general welfare is served by prohibiting discrimination against persons with disabilities, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval); *Dole*, 483 U.S. at 207 n.2 (noting substantial judicial deference to Congress on this issue); (2) the language of Section

504 makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance, see *Arline*, 480 U.S. at 286 n.15 (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)); (3) the condition is related to the federal government's overarching interest in not supporting or subsidizing discrimination, cf. *Lau*, 414 U.S. at 569 (Title VI is valid Spending Clause legislation); *Grove City Coll.*, 465 U.S. at 575(same for Title IX); and (4) neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates any constitutional rights.[6]

[6] The plaintiffs may also proceed with their Section 504 claims against the named state officials in their official capacities for prospective injunctive relief under the doctrine of *Ex parte Young*.

CONCLUSION

This Court should affirm the district court's finding that Section 504 and Section 2000d-7 validly condition the receipt of federal financial assistance on a State's waiver of Eleventh Amendment immunity and that the state defendant in this case has waived its immunity to claims under Section 504.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points and contains 4,130 words.

November 25, 2002

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