No. 04-50504

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VALERIE CROWLEY, Angel G., By Next Friend; KELLY DRABLOS, Misty M., by Next Friend; JACK PETRY, Angelica N., Elizabeth B., Nicholas L., and Alexander W., By Next Friend; ELIZABETH B. NICHOLAS,

Plaintiffs-Appellees

v.

TEXAS EDUCATION AGENCY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

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 plaintiffs-appellees to address any questions the Court may have.

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JURISDICTIONAL STATEMENT

Plaintiff filed this case alleging violations of, among other statutes, the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq*. The district court had jurisdiction pursuant to 28 U.S.C. 1331. On April 15, 2004, the district court rendered a final decision from which defendant filed a timely notice of appeal on May 17, 2004. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the Texas Education Agency (TEA) waived its Eleventh Amendment immunity by entering into a consent decree under which the district court retained jurisdiction to adjudicate disputes over the adequacy of the State's system for monitoring compliance with the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, in its residential care facilities.

2. Whether the TEA waived its Eleventh Amendment immunity in this case by accepting funds under the IDEA that were clearly conditioned on a knowing and voluntary waiver of that immunity.

STATEMENT OF THE CASE

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides grants to States to educate children with disabilities. In order to qualify for IDEA funding a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a), (a)(1)(A). The statute also requires States accepting IDEA funds to provide an administrative process for resolving IDEA disputes and authorizes civil suits in federal court by any party aggrieved by the outcome of an administrative hearing. See 20 U.S.C. 1415(f), (i). In 1990,

Congress enacted a provision, now codified at 20 U.S.C 1403(a), which states in pertinent part that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the IDEA.

2. In 1994, six students with disabilities sued the Texas Education Agency (TEA) and its officials, alleging that the TEA was failing to provide a free appropriate education to students residing in state residential care facilities (such as group foster homes and mental retardation facilities), in violation of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794.[1] See Memorandum Order 1. In 1996, the parties entered into a consent decree. As part of the settlement, plaintiffs dropped all their claims for prospective injunctive relief against the TEA's officials in their official capacity, leaving only the TEA as a defendant. One of the terms of the agreement required the TEA to hire a consultant to "identify ways of improving TEA's existing monitoring of local educational agencies serving students with disabilities living in residential care facilities." Consent Decree ¶ IV(G). The agreement further stated that "[t]he consultant is not charged with developing a new

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[1] Plaintiffs also alleged violations of the Fifth and Fourteenth Amendments.

[residential care facility] monitoring system or addressing the larger special education monitoring system." *Ibid*. Under the settlement, the consultant would make his report and if the State rejected any recommendation, plaintiffs could ask the district court to "resolve any dispute concerning a recommendation by deciding whether the disputed recommended action is legally required from TEA in order to meet its responsibility" under the IDEA. *Id*. at ¶¶ IV(I)-(J). The parties jointly moved that the district court enter the settlement and "retain jurisdiction for the sole purpose of resolving any disputes" regarding the consultant's recommendations. *Id*. at ¶ IV(K).

The consultant later issued his report, concluding that "the TEA will have to devise an additional (or a replacement system) of compliance accountability" and noting that "[b]its and pieces of such a monitoring system exist, but they must be brought together and applied specifically to the needs of the children with disabilities who live in residential-care facilities in Texas." Memorandum Order 3. The consultant requested additional time to develop more specific recommendations. The parties, however, submitted to the district court their own monitoring plans. After holding hearings, the district court held that the TEA was failing in its obligation under the IDEA to ensure that eligible students in its residential care facilities received a free appropriate public education. *Id*. at 7-9.

However, the district court concluded that plaintiff's and the consultant's recommendations went too far, effectively requiring the TEA to develop an entirely new monitoring system notwithstanding the Consent decree's proviso that the TEA need not develop a new system. *Id*. at 10. At the same time, the district court concluded that the TEA's proposed modifications would not be sufficient to bring about compliance with the IDEA. *Ibid*. The court then ordered that "TEA must elevate its monitoring," and "design a system that requires monitors to check, in a meaningful manner, on" the students. *Ibid*. Without providing any further guidance, the court then closed the case. *Ibid*. This appeal followed.

SUMMARY OF ARGUMENT

On appeal, the TEA has asserted that the district court's order is barred by the Eleventh Amendment because the TEA did not knowingly waive its immunity to plaintiff's IDEA claims. This "knowing waiver" argument is currently pending before this Court in *Pace* v. *Bogalusa City School Board*, 325 F.3d 609 (5th Cir.), vacated on rehr'g en banc, 339 F.3d 348 (5th Cir. 2003). As a result, in our view, this Court should hold this case in abeyance pending the en banc decision in *Pace*.

However, if this Court declines to hold this case in abeyance, this assertion of Eleventh Amendment immunity is wrong for two independent reasons. First, the TEA waived its immunity by entering into a consent decree that specifically

requested the district court to settle the dispute that has given rise to this appeal. In this case, the TEA requested that the district court retain jurisdiction to settle any disputes over reforms to the monitoring process and specifically represented that the district court had "jurisdiction of the subject matter of this action" and "the authority to approve and implement the relief in this agreement and any plans thereto." Consent Decree ¶¶ II, IV(J)-(K). The TEA cannot now argue that the district court lacks jurisdiction over the case on the ground that the TEA never waived its Eleventh Amendment immunity.

Second, the TEA also waived its Eleventh Amendment immunity by accepting IDEA funds that were clearly conditioned on such a waiver. As we stated in our brief in *Pace*, if Congress clearly conditions federal funds on a waiver of sovereign immunity, and a State nonetheless voluntarily accepts federal financial assistance, a knowing waiver of sovereign immunity is established.

ARGUMENT

I

THIS COURT SHOULD DELAY CONSIDERATION OF THIS CASE PENDING THIS COURT'S EN BANC DECISION IN *PACE* v. *BOGALUSA*

The Eleventh Amendment bars private suits against a state agency, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999).[2] The TEA asserts that the Eleventh Amendment bars the district court's order at issue in this case. The TEA claims that prior to this Court's decision in *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609 (5th Cir. 2003), vacated on rehr'g en banc, 339 F.3d 348 (5th Cir. 2003), the TEA could reasonably believe that Congress had unilaterally abrogated its immunity to IDEA claims, leaving it no immunity to waive. This argument is currently pending before this Court in the en banc proceedings in *Pace* itself. Accordingly, in our view, this Court should hold in abeyance this case pending the en banc decision in *Pace*.

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[2] The Eleventh Amendment does not bar private suits seeking prospective injunctive relief against state officials in their official capacities to end an ongoing violation of the IDEA. See *Ex parte Young*, 209 U.S. 123 (1908); *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609, 613 & n.4 (5th Cir.), vacated on rehr'g en banc, 339 F.3d 348 (5th Cir. 2003); cf. *University of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001). In this case, however, plaintiffs' claims against the relevant state officials were withdrawn as part of the settlement of the case.

However, if this Court declines to hold this case in abeyance, the TEA waived its Eleventh Amendment immunity to private claims under the IDEA in this case in two distinct ways.

II

A STATE THAT VOLUNTARILY SEEKS ENTRY OF A CONSENT DECREE IN FEDERAL COURT WAIVES ITS IMMUNITY FROM ACTIONS TO ENFORCE THAT DECREE

The TEA waived its immunity in this particular case by entering into a consent decree that expressly reserved to the district court jurisdiction to adjudicate the TEA's compliance with the relevant term of the decree and the IDEA.

A. A State Waives Its Immunity When It Voluntarily Submits Its Rights For Judicial Determination

The Supreme Court's precedents firmly establish that a State waives its immunity from suit when it invokes federal court jurisdiction or otherwise voluntarily submits its rights for judicial determination. *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). For example, in *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883), the Court held that a State that made a "voluntary appearance" in federal court by intervening to assert a claim to money sought by the plaintiff had waived its immunity from suit. *Id.* at 447-448. Similarly, in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), the Court held that a

State that voluntarily filed a proof of claim in bankruptcy waived its immunity respecting the adjudication of that claim.

Clark and *Gardner* involved States that entered federal court voluntarily rather than being brought in through coercive process. The waiver principle at issue here, however, also applies when a State is brought into federal court through coercive process, but then voluntarily submits its rights for judicial determination rather than asserting an immunity defense. *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906). *Gunter* involved a suit to enforce a federal court decree. In earlier litigation, a railroad had sued to enjoin the collection of taxes. The State, through the state officials who were named as defendants, did not interpose an Eleventh Amendment defense, but instead litigated the case on the merits. The district court enjoined the collection of taxes, and the Supreme Court affirmed. *Humphrey* v. *Pegues*, 83 U.S. (16 Wall.) 244 (1872). When the railroad later sought to enforce the decree in the district court, the State argued that, by virtue of the Eleventh Amendment, it was not bound by the original decree. The Court rejected that contention, explaining, *inter alia*, that "where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment." 200 U.S. at 284 (citing *Clark* v. *Barnard*,

108 U.S. at 447). The Court also concluded that the state officers' participation in the prior proceedings was on behalf of the State and therefore bound the State. *Id.* at 284-289. The Court explained that the state officers were "the agents voluntarily appointed by the state to defend its rights and submit them to judicial determination." *Id.* at 289.

The Court also rejected the State's contention that it could renew its claim of immunity as a defense to the motion to enforce the decree. The Court held that "[n]one of the prohibitions * * * of the [Eleventh] Amendment * * * relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination." *Gunter*, 200 U.S. at 292. The Court emphasized that the claim that the Eleventh Amendment "control[s] a court of the United States in administering relief, although the court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion." *Ibid.*

In *Lapides*, the Court held that *Clark*, *Gardner*, and *Gunter* establish a general principle that a State waives its immunity from suit when it voluntarily invokes a federal court's jurisdiction or otherwise submits its rights for judicial determination. 535 U.S. at 620. That principle, the Court explained, is supported

by two important considerations. First, it "would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Id*. at 619. Second, "a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results." *Ibid*.

Applying the general principle that a voluntary submission to a federal court waives immunity from suit, the *Lapides* Court held that the State of Georgia waived its immunity when it removed a case from state court to federal court. The Court recognized that the State had been sued as a defendant and thus was not a voluntary party to the litigation. 535 U.S. at 620. The Court stressed, however, that the State had voluntarily removed the case to federal court. *Ibid*. In doing so, the State had "voluntarily invoked the federal court's jurisdiction" and waived its immunity from suit. *Ibid*.

The Court rejected the State's contention that equating removal with waiver violates the principle that a waiver of immunity requires a clear intent to waive. The Court explained that waiver in the litigation context "rests upon the [Eleventh] Amendment's presumed recognition of the judicial need to avoid inconsistency,

anomaly, and unfairness, and not upon a State's actual preference or desire." 535 U.S. at 620. Accordingly, "[t]he relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act – removal – is clear." *Ibid*.

The Court also found unpersuasive the State's claim that waiver should not be found because it joined in removal for a benign reason – to afford individual state officers who were also named as defendants the generous interlocutory appeal provisions available in federal court. The Court concluded that "the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, in others." 535 U.S. at 621.

Finally, the Court rejected the State's argument, based on *Ford Motor Co*. v. *Department of Treasury*, 323 U.S. 459 (1945), that the state attorney general's absence of authority under state law to waive the State's sovereign immunity precluded a finding of waiver. The Court held that whether litigation conduct amounts to a waiver of Eleventh Amendment immunity is a question of federal law, and that, under the applicable federal rule, a state attorney general's invocation of federal court jurisdiction waives a State's immunity from suit. *Lapides*, 535 U.S. at 622. The Court overruled Ford "insofar as it would otherwise apply." *Id*. at 623.

B. A State That Consents To Entry Of A Judicial Decree Voluntarily Submits Its Rights For Judicial Determination And Waives Immunity From Actions To Enforce The Decree

Under the voluntary submission principle reaffirmed in *Lapides*, a State that urges a court to adopt a consent decree waives any Eleventh Amendment objection to the court's entry of that decree. A State's action in seeking entry of a consent decree is entirely voluntary. Indeed, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 521-522 (1986). At the same time, a consent decree is not merely a private contract. It is also a judgment of a court that finally resolves claims within the court's jurisdiction. *United States* v. *Swift & Co.*, 286 U.S. 106, 116-117 (1932). The decree may provide broader relief "than a court could have decreed after a trial," although it must "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction," come "within the general scope of the case made by the pleadings," and further "the objectives of the law upon which the complaint was based." *Firefighters*, 478 U.S. at 525 (internal quotation marks and citation omitted). Accordingly, when a State seeks to have a consent decree embodied in a federal court order, it voluntarily submits its rights for judicial determination. *Lapides*, 535 U.S. at 620. Under the Supreme Court's decisions,

such a voluntary submission waives any Eleventh Amendment objection to a court's entry of the decree.[3]

By urging a court to adopt a consent decree, a State not only waives any Eleventh Amendment objection to entry of the decree, it also waives any Eleventh Amendment objection to its judicial enforcement. By definition, a consent decree "is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). In fact, the prospect of enforcement by the court that enters the consent decree is often the reason that parties choose consent decrees over private contractual settlements. As the Supreme Court has explained, out-of-court settlements "suffer the decisive handicap of not being subject to continuing oversight and interpretation by the court," while consent decrees enable a court to draw on a "flexible repertoire of enforcement measures." *Firefighters*, 478 U.S. at

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[3] A panel of this Court reached the contrary conclusion in *Frazar* v. *Gilbert*, 300 F.3d 530 (5th Cir. 2002). The Supreme Court granted certiorari to review the panel's Eleventh Amendment ruling and reversed, holding that the consent decree could be enforced under *Ex parte Young*, 209 U.S. 123 (1908). See *Frew* v. *Hawkins*, 540 U.S. 431, 903 (2004). The panel's waiver holding, therefore, is no longer binding. See, *e.g.*, *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1332-1333 & n.7 (11th Cir. 1999). For the reasons stated above, the *Frazar* panel's waiver analysis is also unpersuasive.

523-524 n.13 (internal quotation marks and citation omitted); accord *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 380-381 (1994).

The decree in this case leaves no doubt that the parties intended for the provision at issue in this appeal to be judicially enforceable. The parties jointly requested that the district court retain jurisdiction to settle any disputes over reforms to the monitoring process, see Consent Decree ¶¶ IV(J)-(K), and specifically represented that the district court had "jurisdiction of the subject matter of this action" and "the authority to approve and implement the relief in this agreement and any plans thereto," *id.* at ¶ II.[4]

Even if the TEA had not so explicitly consented to the decree's enforcement, the court would have had authority to enforce it based on the TEA's consent to its entry. Having acquired jurisdiction over the TEA for purposes of entering the decree based on their consent, the court had ancillary authority to enforce the

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[4] In a case decided prior to the Supreme Court's decisions in *Lapides* and *Frew*, this Court held that the Eleventh Amendment barred enforcement of a provision of a consent decree that had no arguable basis in federal law, even though the State had consented to the terms of the decree. See *Saahir* v. *Estelle*, 47 F.3d 758, 760-762 (5th Cir. 1995) (declining to enforce provision of consent decree purportedly requiring prison to provide inmate with non-religious audio tapes). Even if that holding is still good law, it has no application here. The relevant provision of this consent decree is plainly grounded in federal law, requiring the district court to "resolve any dispute concerning a recommendation by deciding whether the disputed recommended action is legally required from TEA in order to meet its responsibility" under the IDEA. Consent Decree ¶¶ IV(I)-(J).

decree against them without any additional consent. *Gunter*, 200 U.S. at 292. As explained in *Gunter*, the Eleventh Amendment does not "control a court of the United States in administering relief" where the court is acting "in a matter ancillary to a decree rendered in a cause over which it had jurisdiction." *Ibid*.

Gunter involved a fully litigated judgment. But since consent decrees are "subject to the rules generally applicable to other judgments and decrees," *Rufo*, 502 U.S. at 378, the same principle applies when a court seeks to enforce a consent decree. Just as a court has inherent authority to enforce its litigated judgments, it likewise has inherent authority to enforce its consent judgments.

The Supreme Court's decision in *Kokkonen* is instructive. There, the Court held that a federal court does not have inherent authority to enforce a settlement agreement that is not embodied in a court order. The Court made clear, however, that the situation is different when an agreement is embodied in a court order. The Court specifically explained that "if the parties' obligation to comply with the terms of [a] settlement agreement" is "made part of" a court order – "either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order" – then "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." 511 U.S. at

381. Other decisions similarly recognize a court's inherent authority to enforce a consent judgment. *Spallone* v. *United States*, 493 U.S. 265, 276 (1990) ("In selecting a means to enforce the consent judgment, the District Court was entitled to rely on the axiom that 'courts have inherent power to enforce compliance with their lawful orders through civil contempt.'") (citation omitted); *Firefighters*, 478 U.S. at 518 ("noncompliance with a consent decree is enforceable by citation for contempt of court"). Because the TEA consented to entry of the decree, the court had inherent authority to enforce the decree against it.

C. The Considerations That Underlie The Voluntary Submission Doctrine Apply With Particular Force Here

The considerations that underlie the voluntary submission doctrine strongly support the conclusion that a State that seeks entry of a consent decree by a federal district court waives any Eleventh Amendment objection to enforcement of the decree. In such a case, entry of the decree is not merely the ultimate consequence of a State's litigation judgment at an earlier stage of the case. Rather, the State, by consenting to the decree, has consented to that very exercise of the core "judicial Power of the United States" (U.S. Const. Art. III) of entering a judgment in the case. In these circumstances, it truly "would seem anomalous or inconsistent" for a State both to consent to the entry of a decree, and then deny that a court has

jurisdiction to enforce the decree. *Lapides*, 535 U.S. at 619; cf. *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001).

Equally important, permitting a State to make both claims "could generate seriously unfair results." *Lapides*, 535 U.S. at 619. A consent decree ordinarily reflects a compromise: "[I]n exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). If a State could assert an immunity from enforcement of a decree to which it consented, it would allow the State to avoid its bargained-for obligations, while retaining the benefit of concessions it obtained on other issues. *Kozlowski* v. *Coughlin*, 871 F.2d 241, 245 (2d Cir. 1989). Moreover, it would mean that despite voluntarily entering into a consent decree, a State would be free at any time to disavow the judgment on Eleventh Amendment grounds. *Mitchell* v. *Commission on Adult Entm't Establishments*, 12 F.3d 406, 408-409 (3d Cir. 1993). "[T]hose who wrote the Eleventh Amendment" did not "intend to create that unfairness." *Lapides*, 535 U.S. at 622. Nor did those who wrote the Eleventh Amendment intend to allow a party to so disregard the judgment of an Article III court. See *Kokkonen*, 511 U.S. at 380-381; *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

Permitting States to engage in such tactics also would not serve the long-term interests of the States generally. As Judge Justice has observed, "principles of comity and federalism are furthered when state defendants draft their own documents setting out the means by which they will come into compliance with federal law." *Frew* v. *Gilbert*, 109 F.Supp.2d 579, 670 (E.D. Tex. 2000), rev'd in part, 300 F.3d 530 (5th Cir.), rev'd, 540 U.S. 431 (2004). "To the extent such documents are later held unenforceable by federal courts, the incentives for plaintiffs to enter into such voluntary agreements with defendants are lessened if not wholly removed." *Id*. at 670-671.

A State that has entered into a decree may have legitimate reasons for wanting to be relieved of obligations imposed by a consent decree. A State in that situation, however, is not without recourse. Federal Rule of Civil Procedure 60(b)(5) expressly permits a litigant to seek modification or vacatur of a decree when prospective enforcement is no longer equitable. In *Rufo*, the Court held that courts should apply a particularly flexible modification standard in cases where a decree constrains the authority of a public entity. 502 U.S. at 383. To warrant a modification, a public entity need only show "a significant change either in factual conditions or in law." *Id*. at 384. A court should then modify the decree in a way that is tailored to the changed circumstance. *Id*. at 391. A lesser showing is

required with respect to provisions in the decree that do not "arguably relate[] to the vindication of a [federal] right." *Id*. at 383-384 n.7. In such circumstances, a court should modify the decree if the party seeking modification has a "reasonable basis for its request." *Ibid*.

Moreover, as demonstrated by this appeal, a State that believes that a district court has wrongly interpreted or expanded the requirements of a consent decree may obtain relief through the normal channels of appellate review.

Thus, the TEA remains free to attempt to persuade the district court that the equitable standards set forth in *Rufo* warrant a modification of one or more provisions in the consent decree, and this Court should determine whether the TEA is correct in asserting that the district court erroneously expanding the scope of its obligations under the terms of the decree. The TEA is not free, however, to invoke the Eleventh Amendment as a bar to the decree's enforcement.

III

THE TEA WAIVED ITS ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER THE IDEA BY ACCEPTING IDEA FUNDING

The TEA also waived its Eleventh Amendment immunity to private IDEA enforcement actions generally, by accepting IDEA funds that were clearly conditioned on such a waiver.[5] See, *e.g.*, *A.W.* v. *Jersey City Pub. Schs.*, 341 F.3d 234, 244-255 (3d Cir. 2003); *Oak Park Bd. of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.), cert. denied, 531 U.S. 824 (2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 752-753 (8th Cir.), vacated in part on other grounds, 197 F. 3d 958 (1999); see also *Pace* v. *Bogalusa City Sch. Bd.*, 325 F.3d 609, 617 & n.12 (5th Cir.), vacated on rehr'g en banc, 339 F.3d 348 (5th Cir. 2003).

The TEA does not challenge the general principle that acceptance of IDEA funds waives sovereign immunity to IDEA claims. Instead, the TEA relies upon a portion of the panel decision in *Pace* to argue (Br. 25) that it could not have *knowingly* waived its Eleventh Amendment immunity to plaintiffs' claims when it accepted IDEA funds in 1996 due to circumstances peculiar to the time. The panel in *Pace* concluded that in 1996, prior to the Supreme Court's more recent federalism cases like *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a State

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[5] This Court need not reach this issue if it determines that the TEA waived its sovereign immunity in this particular case by entering into the consent decree.

could have reasonably believed that Congress had the power to unilaterally abrogate the State's immunity to IDEA claims. 325 F.3d at 616-617. During that time, the panel ruled, a State could not knowingly waive immunity to IDEA claims by accepting IDEA funds because "[u]nder the reasonable belief that the IDEA validly abrogated their sovereign immunity, the State defendants did not know that they retained any sovereign immunity to waive by accepting federal IDEA funds during the relevant time period." *Id*. at 617.

As we have argued in the en banc proceedings in *Pace*, the panel decision in *Pace* is wrong and has been rejected by each of the six courts of appeals to have consider the argument since *Pace* was decided. See *Barbour* v. *Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1166-1168 (D.C. Cir. 2004); *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108, 129-130 (1st Cir. 2003); *Garrett* v. *University of Ala.*, 344 F.3d 1288, 1292-1293 (11th Cir. 2003); *Doe* v. *Nebraska*, 345 F.3d 593, 600-604 (8th Cir. 2003); *Pugliese* v. *Dillenberg*, 346 F.3d 937 (9th Cir. 2003); *M.A.* v. *State-Operated Sch. Dist.*, 344 F.3d 335, 349-351 (3d Cir. 2003); *A.W.*, 341 F.3d at 250-254. Because the issue has been fully briefed in *Pace*, and will be resolved by this Court *en banc* in that appeal, we will not repeat our arguments in this brief.

CONCLUSION

The district court's order was not barred by the Eleventh Amendment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Questions regarding a State's waiver of Eleventh Amendment immunity to IDEA claims are at issue in *Pace* v. *Bogalusa City School Board*, No. 01-31026 (under submission en banc). The proper application of the *Pace* panel decision to suits for prospective relief is also at issue in *Espinoza* v. *Texas Department of Public Safety*, No. 02-11168 (stayed pending outcome of *Pace*).

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 4,961 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.

_____
KEVIN RUSSELL
Attorney

Date: November 12, 2004

CERTIFICATE OF SERVICE

I certify that two copies of the above BRIEF FOR 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 November 12, 2004, on the following parties:

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