No. 01-31026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS PACE,

Plaintiff-Appellant,

v.

BOGALUSA CITY SCHOOL BOARD*, et al.*,

Defendant-Appellant.

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

PETITION FOR REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

College Sav. Bank v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666 (1999);

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

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

I further express a belief, based on a reasoned and studied professional judgment, that these appeals involve a question of exceptional importance concerning the validity of 42 U.S.C. 2000d-7 as a valid condition on the receipt of federal financial assistance and that the panel opinion conflicts with the authoritative decisions of eight other United States Courts of Appeals:

Koslow v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003);

Robinson v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002), petition for cert. pending, No. 02-1314;

Douglas v. *California Dep't of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001), opinion amended, 271 F.3d 910, cert. denied, 536 U.S. 924 (2002);

Nihiser v. *Ohio E.P.A.,* 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002);

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

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

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

Litman v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000).

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-31026

TRAVIS PACE,

Plaintiff-Appellant

v.

BOGALUSA CITY SCHOOL BOARD, *et al.*,

Defendants-Appellees

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

PETITION FOR REHEARING EN BANC
FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

1. Whether a state agency's application for and acceptance of federal financial assistance constituted an effective waiver of its sovereign immunity to suits under Section 504 of the Rehabilitation Act of 1973.

2. Whether a state agency's application for and acceptance of funds under the Individuals with Disabilities Education Act (IDEA) constituted an effective waiver of its sovereign immunity to suits under that statute.

STATEMENT OF THE CASE

This suit was brought by a disabled student against state and local educational agencies under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.* This petition for rehearing en banc concerns only Plaintiff's claims under the IDEA and Section 504.

1. Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). As part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845, Congress enacted 42 U.S.C. 2000d-7, which provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq*.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq*.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq*.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

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

2. The IDEA created a federal grant program that provides billions of dollars to States to educate children with disabilities. In order to qualify for IDEA financial assistance, a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a), (a)(1)(A). In 1990, Congress enacted what is now codified at 20 U.S.C 1403(a), which provides 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.

3. The district court dismissed Plaintiff's claims against the State defendants, holding that Plaintiff failed to state a claim under the IDEA, Section 504, or the ADA. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 99-806, 2001 WL 969103 (E.D. La. 2001). Plaintiff appealed and the United States filed an amicus brief on the merits. On October 10, 2002, the panel *sua sponte* ordered the parties to address whether the Eleventh Amendment barred Plaintiff's claims against the State defendants. The United States intervened to defend the constitutionality of the statutory provisions subjecting the State defendants to suit under each statute.

On March 24, 2003, the panel issued its opinion holding that the Eleventh Amendment precluded Plaintiff's claims against the State defendants. *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, 2003 WL 1455194 (5th Cir. 2003).

Applying the Circuit's prior decision in *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000), the panel held that 42 U.S.C. 2000d-7 "clearly, unambiguously, and unequivocally conditions a state's receipt of federal * * * funds on its waiver of sovereign immunity." *Pace*, 2003 WL 1455194 at *3. The court also held that Section 1403 of the IDEA "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity." *Id.* at *5. Nonetheless, the panel held that the State did not knowingly waive its sovereign immunity by applying for and accepting federal funds and IDEA funds. Expanding upon the reasoning of *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the panel held that, because "[p]rior to *Reickenbacker*, the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA * * *, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." *Id.* at *4-*5. The panel extended this reasoning to the IDEA, concluding that, until the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a state agency could reasonably have believed that the IDEA validly abrogated its immunity and,

therefore, could not knowingly have waived its immunity to claims under the IDEA. *Id.* at *5-*6.

ARGUMENT AND AUTHORITIES

Rehearing en banc is warranted because the panel's decision conflicts with this Court's prior decision in *Pederson* v. *Louisiana State University.*, 213 F.3d 858 (5th Cir. 2000), the holdings of six other courts of appeals, and the decisions of the Supreme Court. Cf. *Johnson* v. *Louisiana Dep't of Educ.*, No. 02-30318 (5th Cir. May 5, 2003) (Wiener, J., dissenting). In wrongly holding two important statutes partially unconstitutional, the panel deprived individuals with disabilities of remedies Congress intended to afford them against unlawful disability discrimination.

1. Like the panel in this case, the Court in *Pederson* was faced with a challenge to the constitutionality of 42 U.S.C. 2000d-7. The Court initially held it was "beyond peradventure" that Section 2000d-7 validly abrogated a State's sovereign immunity to claims under Title IX. See *Pederson*, 201 F.3d at 404-407. However, upon a petition for rehearing, the Court amended the opinion and held, instead, that the State "waived its Eleventh Amendment sovereign immunity by accepting federal funds under Title IX." 213 F.3d at 875 (adopting holding of

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

The revised opinion held that, as a general matter, a "state may waive its immunity by voluntarily participating in federal spending programs when Congress expresses a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity." *Id*. at 875 (citation and quotation marks omitted). This Court then held that "in enacting § 2000d-7, Congress permissibly conditioned a state university's receipt of [federal funds] on an unambiguous waiver of the university's Eleventh Amendment immunity, and that in accepting such funding, the university has consented to litigate private suits in federal court." *Ibid*. (internal punctuation and citation omitted). The Court reaffirmed its holding, clearly stating that "in accepting federal funds under Title IX LSU waived its Eleventh Amendment sovereign immunity." *Id*. at 876.

The panel's decision in this case directly conflicts with the holding in *Pederson*. The *Pace* panel faithfully applied the first part of *Pederson*, agreeing that "42 U.S.C. 2000d-7 clearly, unambiguously, and unequivocally conditions a state's receipt of federal educational funds on its waiver of sovereign immunity." 2003 WL 1455194 at *3. But the panel specifically rejected the second portion of *Pederson*'s holding that under Section 2000d-7, "in accepting [federal] funding,

the [State] has consented to litigate private suits in federal court." 213 F.3d at 875. Instead, the panel agreed with the Second Circuit that cases such as *Pederson* "are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds." 2003 WL 1455194 at *6 (quoting *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 115 n.5 (2d Cir. 2001)). Based on this disagreement, the *Pace* panel adopted a different legal standard than was set forth and applied in *Pederson*, concluding that even though the State accepted clearly-conditioned federal funds, it did not effectively waive its sovereign immunity to the claims identified under 42 U.S.C. 2000d-7. *Id*. at *5-*6.

2. The panel's Section 504 holding also conflicts with the view of a majority of other circuits, as the panel forthrightly acknowledged. *Pace*, 2003 WL 1455194, at *5 nn.13 & 14.[1] In addition, the two other courts of appeals to have

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[1] Six Circuits have held that acceptance of federal funds in the face of Section 2000d-7 constitutes a knowing and voluntary waiver of a State's sovereign immunity to Section 504 claims. See *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353; *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), petition for cert. pending, No. 02-1314; *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). Other courts of appeals have held the

(continued...)

addressed the validity of the IDEA's waiver provision have found that a State's acceptance of IDEA funds constitutes a knowing and valid waiver of immunity.[2]

3. The panel's decision is also wrongly decided and conflicts with the Supreme Court's decisions in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) and *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). Those decisions establish that a State's voluntary application for and acceptance of federal funds under a statute that clearly conditions receipt of such funds on a valid waiver of immunity, shall constitute a waiver of a State's sovereign immunity.

a. The Supreme Court held in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), that Congress had not made clear its intent that state agencies receiving federal financial assistance be amenable to private suit for violations of Section 504. The Court noted, however, that if a statute "manifest[ed] a clear

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[1](...continued)
same with respect to the other statutes identified in Section 2000d-7. See, *e.g.*, *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553-555 (7th Cir. 2001) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI), rev'd in part on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000).

[2] See *Oak Park Bd. of Educ.* v. *Kelly E.*, 207 F.3d 931 (7th Cir. 2000), cert. denied, 531 U.S. 824 (2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999), .

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. Congress responded to *Atascadero* in 1986 by enacting 42 U.S.C. 2000d-7, which, the panel acknowledged, "clearly, unambiguously, and unequivocally conditions a state's receipt of federal * * * funds on its waiver of sovereign immunity." 2003 WL 1455194 at *3.[3] Under *Atascadero*, then, the State's acceptance of federal funds constituted a knowing and voluntary waiver of its Eleventh Amendment immunity.

Contrary to the panel's conclusion, *College Savings Bank* does not support a different result. While the Court found in that case "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 it shall be deemed to have waived that immunity," 527 U.S. at 680-681, it also explained that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that

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[3] Similarly, in 1989, the Supreme Court held that the language of the predecessor to the IDEA did not clearly evidence Congress's intent to authorize private actions against state entities. See *Dellmuth* v. *Muth*, 491 U.S. 223, 232 (1989). In response, Congress enacted 42 U.S.C. 1403, which the panel in this case also held "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity." 2003 WL 1455194 at *5.

Congress could not require them to take, and [] acceptance of the funds entails an agreement to the actions." *Id*. at 686. The Court recognized that the same analysis applies to a waiver of sovereign immunity as a condition for federal funding. See *id*. at 678 n.2. A waiver may be found in a State's "acceptance" of a federal grant because a State's acceptance of funds in the face of clearly stated funding conditions necessarily constitutes a "clear declaration," *id*. at 676, that the State has agreed to the condition. Cf. *AT&T Communications* v. *Bellsouth Telecommunications, Inc.*, 238 F.3d 636, 645 (5th Cir. 2001). The very purpose of the Court's clear statement rule is to ensure that a State's decision to accept clearly conditioned funds is "exercise[d] * * * knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981).

The Court's recent decision in *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), further undermines the panel's holding. In *Lapides*, the Court acknowledged that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court found such a "clear indication" in a State's removal of state law claims to federal court. "[W]hether a particular set of state * * * activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law," the Court explained. *Id*. at

623. And federal law made clear that "voluntary appearance in federal court" would constitute a waiver of sovereign immunity. *Id*. at 619. Removing state law claims to federal court in the face of this principle, the Court held, waived the State's sovereign immunity. *Id*. at 620.

Importantly, it was undisputed that the State in *Lapides* did not "believe[] it was actually relinquishing its right to sovereign immunity." *Garcia*, 280 F.3d at 115 n.5. See *Lapides*, 535 U.S. at 622-623. Under state law, the State argued, the Attorney General lacked authority to waive the State's sovereign immunity, and under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State could reasonably believe that absent that state law authority, no action by the Attorney General would constitute a valid waiver of the State's sovereign immunity. See 535 U.S. at 621-622. Indeed, it was not until its decision in *Lapides* that the Court overruled this aspect of *Ford Motor Co.* See 535 U.S. at 623. Importantly, however, the Court did *not* hold that a State removing claims to federal court prior to *Lapides* would fail to "knowingly" waive its sovereign immunity. Instead, the Court applied a simple, objective rule and concluded that the removal constituted a valid waiver of a State's sovereign immunity. *Id*. at 623.

So, too, in this case, federal law has long made clear that a State's acceptance of clearly conditioned federal funds shall constitute a knowing and

voluntary waiver of sovereign immunity. See, *e.g.*, *Atascadero*, 473 U.S. at 247. The clarity of this rule, and of the funding condition, is sufficient as a matter of federal law to ensure that the State's waiver of its sovereign immunity is knowing.

b. The panel further erred in concluding that, in the circumstances of this case, a State *could* accept clearly conditioned federal funds yet *not* knowingly waive its immunity because the State could have reasonably believed that its immunity had already been abrogated by the ADA, Section 2000d-7 and Section 1403. That conclusion is simply wrong.

First, the panel erred in adopting the Second Circuit's reasoning in *Garcia* to find that the existence of an abrogation provision for Title II of the ADA could prevent a State from knowing that acceptance of federal funds would constitute a knowing and voluntary waiver of sovereign immunity to claims under Section 504, an entirely separate statute. No State could reasonably believe that anything in the ADA abrogated its immunity to claims under Section 504.[4] A State's immunity is claim-specific. Cf. *Pennhurst*, 465 U.S. at 103 n.12, 124-125. Thus,

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[4] Believing that the ADA abrogated a State's sovereign immunity to claims under the IDEA would be even more unreasonable. The court in *Garcia* placed much weight on the fact that the substantive requirements of the ADA and Section 504 are "virtually identical." 280 F.3d at 114. As the panel in *Pace* recognized, however, this is not true of the ADA and the IDEA. See 2003 WL 1455194 at *6-*7, *9 & n. 20; compare also 42 U.S.C. 12132 with, *e.g.*, 20 U.S.C. 1414.

whether the State was immune to suits under the ADA is a distinct question from whether it was immune to claims for similar conduct under Section 504. The ADA abrogation provision clearly applies *only* to claims brought under the ADA and has no effect on a State's immunity to claims under any other statute. See 42 U.S.C. 12101(b), 12202. Accordingly, the validity of the ADA abrogation provision could have no effect on a State's ability to understand that acceptance of federal funds was conditioned on a valid waiver of sovereign immunity to claims under Section 504.

In *Garcia*, the Second Circuit suggested that the ADA could nonetheless render a waiver of sovereign immunity to Section 504 claims unknowing because, as a practical matter, a State already subject to suit under the ADA would have little to gain from abstaining from federal funds in order to maintain its immunity to Section 504 claims. 280 F.3d at 114.[5] But this conception of "knowingness" is completely foreign to the law. As a matter of contract law, an agreement is not rendered unenforceable simply because one of the parties wrongly believes that he is not giving up much in exchange for the benefit he is receiving. See Restatement

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[5] This conclusion is entirely implausible with respect to the IDEA, which imposes very different obligations that extend well beyond those already created under the ADA. See n.5, *supra*.

(Second) of Contracts § 151, illust. 1 (1981).[6] Similarly, as a matter of constitutional law, a waiver of a constitutional right is not rendered unknowing simply because a party miscalculates the practical implications of the waiver. See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986); *Brady* v. *United States*, 397 U.S. 742, 757 (1970).

Second, the panel erred in extending *Garcia* to find that Section 2000d-7 *itself* rendered the State's waiver of its sovereign immunity unknowing. The panel concluded that because "[p]rior to *Reickenbacker*, the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act * * *, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." *Id.* at *5. This is incorrect because at the time the State was deciding whether or not to accept federal funds, Section 2000d-7 had *not* abrogated the State's immunity to Section 504 claims. Whether Section 2000d-7 is called a "waiver" or an "abrogation" provision, Congress made

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[6] While the doctrine of "mistake of law" may provide relief in some contract cases, the doctrine generally requires that the mistaken party show that the mistake had a material effect on its decision to accept the bargain, see *ibid*., and would require that party to return the benefit it received under the contract (in this case, the federal funding), in order to avoid its obligations under the contract, see *id*. at § 7, cmt. c, d; *id*. at § 158.

plain, on the face of the statute, that unless and until a State accepts federal funds, it retains its sovereign immunity to claims under Section 504. A State that has not yet accepted federal funds for the relevant time period is not subject to the requirements of Section 504 or to suit under Section 2000d-7. Even if the State thought that Section 2000d-7 was an "abrogation" provision, it was clear that the provision would be invoked only if the State voluntarily accepted federal funding, since Section 504, by its terms, applies only to programs "receiving Federal financial assistance." 29 U.S.C. 794(a).[7]

CONCLUSION

This Court should grant rehearing or rehearing en banc to address this important issue.

Respectfully submitted,

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[7] The same is true with respect to the IDEA. The statute makes clear that a State is subject to the requirements of the IDEA and to enforcement proceedings in federal court if, and only if, the State accepted IDEA funds. See 20 U.S.C 1403(a), 1415(a), (i)(2).

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Petition for Rehearing En Banc for the United States as Intervenor were served by overnight mail, postage prepaid, on this 7th day of May, 2003, to the following counsel of record:

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