No. 02-

IN THE

Supreme Court of the United States

STATE OF KANSAS, *et al.*

Petitioners,

v.

CHEROKEE ROBINSON, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a private action under 42 U.S.C. 1983 be brought to enforce disparate impact regulations promulgated by a federal administrative agency under Title VI of the Civil Rights Act of 1964?

2. Is 42 U.S.C. 2000d-7 a voluntarily waiver by the States of their Eleventh Amendment immunity?

PARTIES TO THE PROCEEDINGS

Lajuan Cherokee, by and through his mother and next friend Earnestine Robinson.

Mytesha Robinson, by and through her mother and next friend Earnestine Robinson.

Eric Montoy, by and through his father and next friend Reuben Montoy.

Ryan Montoy, by and through his father and next friend Reuben Montoy.

Sierra Gwin, by and through his mother and next friend Kimberly Gwin.

Seth Gwin, by and through his mother and next friend Kimberly Gwin.

Rene Bess, by and through his grandfather and next friend Earl Bess, Jr.

Keely Boyce, by and through his mother and next friend Kenna Boyce.

Cruiz Cedillo, by and through his mother and next friend Sandra Delgado.

Lynette Do, by and through his mother and next friend Lieu Do.

Ezekial Garcia, by and through his mother and next friend Evangelina Garcia.

Emerald Garcia, by and through his mother and next friend Evangelina Garcia.

Christopher Harding, by and through his mother and next friend Phyllis Harding.

Monique Harding, by and through her mother and next friend Phyllis Harding.

Joseph Hawkinson, by and through his mother and next friend Melody Hawkinson.

Lauri Maynes, by and through her father and next friend Robert Maynes.

Jennie Nguyen, by and through her father and next friend Phillip Nguyen.

Shasta Oaks, by and through her mother and next friend Mary Lu Tripplit.

Sandy Thu Pham, by and through her father and next friend Da Thu Pham.

Nicole Thu Pham, by and through her father and next friend Da Thu Pham.

Bruce Thu Pham, by and through his father and next friend Da Thu Pham.

Andrea Bethke, by and through her mother and next friend Linda Bethke.

Unified School District No. 443, Dodge City, Kansas. This plaintiff voluntarily dismissed its case in the District Court.

Unified School District No. 305, Salina, Kansas. This plaintiff voluntarily dismissed its case in the District Court.

State of Kansas.

Bill Graves, in his official capacity as the Governor of the State of Kansas.

Linda Holloway, in her official capacity as the Chairperson of the State Board of Education of the State of Kansas (the Chair of the Kansas State Board of Education will change at the Board's next organizational meeting after the inauguration on January 13, 2003).

Andy Tompkins, in his official capacity as the Commissioner of the State Department of Education of the State of Kansas.

Kathleen Sebelius, in her official capacity as the Governor of the State of Kansas (after her inauguration as Governor of Kansas on January 13, 2003).

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The original decision of the United States Court of Appeals for the Tenth Circuit, dated July 9, 2002, (Pet. App. 1a-13a) is reported 295 F.3d 1183. The order denying a petition for rehearing en banc (Pet. App. 14a-15a) is dated October 24, 2002. The judgment of the United States District Court for the District of Kansas, dated September 14, 2000, (Pet. App. 16a-63a) is reported at 117 F. Supp. 2d 1124.

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit, denying the petition for rehearing en banc, was filed and entered on October 24, 2002, and is now final. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional sections are Article I, Section 8, Clause 1 of the United States Constitution (the spending clause), the Eleventh and Fourteenth Amendments to the United States Constitution. The pertinent statutory sections are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 42 U.S.C. § 2000d-7(a); Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1; and 42 U.S.C. § 1983. The pertinent Department of Education regulations are stated at 34 C.F.R. § 100.3(b)(2) (1999). The constitutional, statutory and administrative regulations at issue are reproduced at Pet. App. 64a-77a.

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[1] Given the Eleventh Amendment question presented in this petition, 28 U.S.C. § 2403(a) may apply. Copies of this petition for certiorari are therefore being served on the Solicitor General of the United States. The United States Department of Justice has entered its appearance and has appeared in both the district court and the court of appeals.

STATEMENT

1. Facts of the Case

This case is the continuing saga of school finance litigation in the State of Kansas. *See Unified Sch. Dist. No. 229 v. Kansas,* 885 P.2d 1170 (Kan. 1994) where the Kansas Supreme Court found the current school finance funding formula constitutional. On May 21, 1999 the respondents, a group of school children, their parents and their school districts, filed the present action in the United States District Court alleging violations directly under the Fourteenth Amendment to the United States Constitution; disparate impact under Section 504 of the Rehabilitation Act; disparate impact under the implementing regulations of Title VI of the Civil Rights Act of 1964; and directly under the Kansas Constitution.

The current respondents are parents and students enrolled in middle sized Kansas school districts. The gist of the plaintiffs claims are they do not receive the same funding per student from the State that students in less populated school districts receive. Further, the plaintiffs claim they do not receive the same quality of education that economies of scale provide to students who attend the largest school districts in the state.

2. United States District Court proceedings

The respondents named the State of Kansas; Bill Graves, in his official capacity as Governor of the State of Kansas, Linda Holloway, in her official capacity as Chair of the State Board of Education; and Andy Tompkins, in his official capacity as Commissioner of the State Department of Education as defendants. The respondents sought "prospective injunctive relief against these defendants requiring them to revise Kansas' school finance law to comply with all applicable state and federal law." Pet. App. 91a. The respondents' ask the federal court to allocate state school finance dollars raised

from both federal and state sources according to federal, not state, priorities.

The petitioners moved to dismiss on various grounds including sovereign immunity. In response, the local school districts voluntarily dismissed themselves from the case as parties. The respondents also dismissed all claims in the United States District Court arising under the Constitution and laws of the State of Kansas. *See* Pet. App. 16a-17a. The District Court denied the States' Motion. *Id.* The State appealed.

3. Kansas State Court proceedings

The respondents refiled the state constitutional claims in the Shawnee County, Kansas District Court. Unified School District Numbers 305 and 443 were also parties to this lawsuit. After two years of discovery, the Shawnee County District Court dismissed the state constitutional claims stating "after careful review, this Court finds and concludes that the issues presented fail to suggest that the school finance formula is unconstitutional under currently prevailing rules established by the Kansas Supreme Court." Pet. App. 100a. The Shawnee County District Court denied the respondents petition for reconsideration. *Id.* at 101a-104a. The respondents have appealed these decisions to the Kansas Supreme Court. The Kansas Supreme Court has yet to render an opinion on the appeal.

4. United States Court of Appeals proceedings

The United States Court of Appeals for the Tenth Circuit affirmed the United States District Court decision. In its decision the Court of Appeals assumed for the purposes of the appeal that the respondents would amend the pleadings to state a claim. The respondent's allege in their complaint the State of Kansas violates the implementing regulations of the United States Department of Education when it disperses state and federal funds to local school districts used to educate Kansas

youth. This Court in *Alexander v. Sandoval,* 532 U.S. 275 (2001) determined that the regulations created under Section 602 of the Civil Rights Act of 1964 do not create an individually enforceable federal right for disparate impact claims. Following the dissent in *Alexander v. Sandoval*, the Court of Appeals then ruled "[d]isparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations." Pet. App. 4a.

The respondent's alleged the State violated the Rehabilitation Act in its dispersal of state and federal funds to local school districts. The Court of Appeals determined that "waiver may also result from a state's actions, specifically its participation in a particular federal program." Pet. App. 7a. The Court of Appeals then found 42 U.S.C. § 2000d-7(a)(1) to be a clear statement of Congress' "intent to condition participation" in the Rehabilitation Act "on a State's consent to waive its constitutional immunity." *Id.* at 8a. The court then found *Lane v. Pena,* 518 U.S. 187 (1996) "to constitute 'the sort of unequivocal waiver that our precedents demand.' We therefore hold that by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit." Pet. App. 8a-9a.

The petitioners petitioned the United States Court of Appeals for the Tenth Circuit for an *en banc* hearing which was denied. The respondents' have amended their complaint in the United States District Court in response to assumptions made by the District Court and the Court of Appeals. The respondent's Amended Complaint is found at Pet. App. 105a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Review Whether the Disparate Impact Regulations Issued Under Section 602 of Title VI of the Civil Rights Act of 1964 can be enforced by 42 U.S.C. § 1983.

The Court should review this question because the circuits are split on whether 42 U.S.C. § 1983 can be used as a private right of action to enforce disparate-impact regulations under Title VI and because the Tenth Circuit's decision undermines this Court's decision in *Alexander v. Sandoval.*

A. The Circuits are Split on Whether the Disparate Impact Regulations Issued Under Section 602 can be enforced by 42 U.S.C. § 1983.

The Tenth Circuit, in finding that an administrative agency can create a regulation (specifically 34 C.F.R. § 100.3(b)(2) (1999)) without supporting Congressional authority which is enforceable against state officers in their official capacity pursuant to 42 U.S.C. § 1983, is the first Court of Appeals to reach that conclusion after this Court's decision in *Sandoval.* The Tenth Circuit, with little analysis, embraced Justice Stevens dissent in *Sandoval* and perfunctorily declared the respondents have a cause of action. The Tenth Circuit then encouraged the respondents to amend their pleadings to include a claim under 42 U.S.C. § 1983. The Tenth Circuit joins the Sixth Circuit which concluded in *Loschiavo v. City of Dearborn*, 33 F. 3d 548 (6th Cir. 1994) that a regulation, even without Congressional authorization, can establish a right which can be enforced under 42 U.S.C. § 1983.

In contrast to those circuits, the Third Circuit has held, after closely considering the *Sandoval* decision, that "disparate impact regulations cannot create a federal right enforceable through section 1983." *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.,* 274 F.3d 771, 788 (3d Cir. 2001). The Third Circuit specifically followed the approach

taken by the Fourth Circuit in *Smith v. Kirk,* 821 F.2d 980 (4th Cir. 1987) and the Eleventh Circuit in *Harris v. James,* 127 F.3d 993 (11th Cir. 1997) when it determined a regulation alone may not create a right enforceable under 42 U.S.C. § 1983.

In reaching its decision in *South Camden*, the Third Circuit extensively reviewed this Court's majority opinion in *Sandoval* which held "that a private right of action is not available to enforce disparate impact regulations promulgated under Title VI." 274 F.3d at 777. The Third Circuit then reviewed the well-known language of 42 U.S.C. § 1983 and determined that "section 1983 provides a remedy for deprivation under state law of 'any rights . . . secured by the Constitution and laws." *Id.* at 779. The court determined "plaintiffs seek to enforce a prohibition on disparate impact discrimination that does not appear explicitly in Title VI, but rather is set forth in . . . regulations." *Id.* at 780. The court then went through the *Blessing* analysis and determined by passing Title VI Congress had not intended to benefit the plaintiff through establishing a new right. The *South Camden* court held "that an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the [agency's] disparate impact discrimination regulations." *Id.* at 774.

The five circuits that have determined the issue have split with three circuits holding a regulation does not establish a right enforceable under 42 U.S.C. § 1983 without an underlying statute explicitly establishing such a right. Two circuits, including the Tenth Circuit in the case at bar, have determined otherwise.

This issue warrants plenary review. The United States Supreme Court is closely divided. The Courts of Appeals are

sharply divided with one taking the majorities position in *Sandoval* and the other following the dissent. This issue is both important and recurring.

B. The United States Court of Appeals for the Tenth Circuit Decision is Contrary to this Court's Decision in *Alexander v. Sandoval.*

The United States Court of Appeals for the Tenth Circuit's decision contravenes this Court's precedents, especially *Alexander v. Sandoval.* This Court has held there is no private right of action to enforce disparate-impact regulations under section 602 of Title VI, 42 U.S.C. § 2000d. *See Alexander v. Sandoval*, 532 U.S. 275. However, in spite of this ruling, the Tenth Circuit found:

> "The Court's decision does not bar *all* claims to enforce such regulations, but only to disparate impact claims brought by private parties directly under Title VI. [523 U.S.] at 299-300 (Stevens, J., dissenting). Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. 1983 to enforce section 602 regulations. *Id.*"

Pet. App. 3a-4a. The respondents have brought claims to enforce disparate impact regulations under Title VI. The Tenth Circuit has allowed this claim to go forward and has "urged" the respondents to amend their complaint. Pet. App. 3a, n.2.

This Court thoroughly analyzed Section 602 in *Alexander v. Sandoval* and stated:

> "Section 602 authorizes federal agencies 'to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.' 42 U.S.C. § 2000d-1. It is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* [*v. Univ. of Chicago,* 444 U.S. 667] of § 601, *see* 441 U.S. at 690, n.13, is completely absent from § 602."

532 U.S. at 288. Section 602 does not confer rights upon students who are purportedly protected by the statute. Section 602 does not forbid the States or state school boards or local school board or even local schools from discriminating against their students. Section 602 focuses on the federal agencies "that will do the regulating." *Id.* Section 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds." *Id.* A Congressional directive to a federal agency to do its work does not create a private individual right. An agencies attempt to create a private individual right out of a Congressional directive to that agency goes beyond Congresses delegation of power.

The relevant Department of Education regulation under which the respondents claim a federal right is 34 C.F.R. § 100.3(b)(2) which states:

> "A recipient [of federal funds] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

The regulations, specifically 34 C.F.R. § 100.3(b)(2), are a prohibition to the "recipient" of federal funds. The regulations do not give a right to the respondents in this matter. Further, the regulations prohibit the utilization of "criteria or methods of administration which have the effect of subjecting individuals to discrimination." The regulations go beyond the prohibition of "intentional" discrimination stated in Title VI. Finally, the regulations prohibit actions of local schools and school officials. The respondents have sued the State and the State officials who obtain the federal funds and pass the funds directly to local school districts. The parties prohibited from discriminating against the respondents are the school officials

and school districts who have dismissed themselves from this lawsuit.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a remedy to a person for deprivation under state law of "any rights, privileges or immunities secured by the Constitution and *laws*." The issue is the purported deprivation of these students rights under the regulations grounded in Section 602. The respondents do not claim they are being denied a right secured by the United States Constitution, nor by a federal statute enacted by Congress. The respondents claim they were denied a right established by 34 C.F.R. § 100.3, a regulation promulgated by the United States Department of Education. The statute which creates the regulation, 42 U.S.C. § 2000d-1, does not support the right the respondents claim was violated.

"Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Alexander v. Sandoval*, 532 U.S. at 291. The "authorizing portion of section 602 reveals no congressional intent to create a private right of action." *Id.* at 289. By passing Title VI in the fashion it did, the Congress intended to prevent "intentional" discrimination. On the other hand, Congress did not fashion Title VI, Section 602 to prevent the "disparate impact" discrimination which is forbidden by 34 C.F.R. § 100.3.

The respondent's rights secured by the Constitution and laws of the United States do not include the regulations underpinning Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1. In other words, the regulations do not create an individually enforceable right for the respondents. Because the regulations went beyond the statute's implementing authority, no right of the respondents was violated.

II. The Court Should Review Whether a State's Acceptance of Federal Funds Amounts to a Declaration of Waiver.

The Court should review this question because the circuits are now split on whether a State's acceptance of federal funds necessarily waives the State's constitutional immunity. The Court should review this question because the Tenth Circuit's decision conflicts with the decision of other circuits and with this Court's decision in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666 (1999).

A. The Circuits are Split on Whether a Waiver Occurs When a State Agency Accepts Federal Funds in Light of Section 2000d-7.

The United States Court of Appeals for the Tenth Circuit, in finding that Section 2000d-7 leads to a waiver of Eleventh Amendment immunity, has joined the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, which have also held that States or State agencies have waived their immunity from Rehabilitation Act claims by accepting federal funds. *See Littman v. George Mason Univ.,* 186 F.3d 544 (4th Cir. 1999); *Pederson v. Louisiana State Univ.,* 213 F.3d 858 (5th Cir. 2000); *Ohio Envtl. Prot. Agency v. Nihiser,* 269 F.3d 626 (6th Cir. 2001); *Stanley v. Litscher,* 213 F.3d 340 (7th Cir. 2000); *Jim C. v. United States,* 235 F.3d 1079 (8th Cir. 2000) (en banc); *Clark v. California,* 123 F.3d 1267 (9th Cir. 1997); *Sandoval v. Hagan,* 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval,* 532 U.S. 275 (2001).

In contrast to those circuits, the United States Court of Appeals for the Second Circuit has recently held that a New York agency did not waive it's States immunity from Rehabilitation Act claims, and in reaching that conclusion, the Second Circuit identified the critical flaw in the reasoning of the other Circuits. *See Garcia v. S.U.N.Y. Health Serv. Ctr.,* 280 F.3d 98 (2d Cir. 2001). In *Garcia,* the court agreed with the other circuits that Section 2000d-7 expresses Congress's

clear intent to have the States waive immunity, but the court said that finding such clear intent is only the first step of a two-step process. After Congress invites a state to waive, the state must then express its clear intent to accept that invitation. The *Garcia* court cited this Court's teaching in *College Savings* that

> there 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.

Garcia, 280 F.3d at 114 (quoting *College Savings*, 527 U.S. at 680-81).

Having found that it must look at the State's intent as well as Congress's, the Second Circuit then examined whether the New York agency did in fact waive its states immunity by accepting federal funds, and it concluded that it did not waive. The court noted that any waiver is a relinquishment of a known right, and it reasoned that New York could not have known that it had any immunity to waive in the early 1990's, because of the interplay between the Rehabilitation Act and the ADA. "At the time New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority." Further, since "the proscriptions of Title II and 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity . . . since by all reasonable appearances state sovereign immunity had already been lost." *Id.*

The United States Court of Appeals for the Ninth Circuit is also split on the issue. In *Douglas v. California Department of Youth Authority,* 285 F.3d 1226 (9th Cir. 2002), four members of the Ninth Circuit wrote a stinging dissent in the denial of a petition for a hearing en banc where the appellate

court followed its *own* precedent in *Clark v. California,* 123 F.3d 1267, a case decided before the United States Supreme Court's recent abrogation decisions. "To establish waiver, Congress must first make it clear that amenability to suit in federal court is a condition of a State accepting federal funds, and, second, the State must make a 'clear declaration' that it intends to waive its immunity." 285 F.3d at 1227. The dissent in *Douglas* concluded that the Rehabilitation Act meets the first requirement with Congress's enactment of 42 U.S.C. § 2000d-7. In reaching their conclusion that California had not accepted Congress's overtures, the dissenters reasoned the "State's decision to waive its immunity must be 'altogether voluntary'" and the "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.' *College Savings,* 527 U.S. at 675." 285 F.3d at 1228.

> "As with the waiver of any constitutionally protected right, a State must make an 'intentional relinquishment or abandonment of a known right or privilege' [52[illegible] 682 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 4[illegible]). Finally, courts must 'indulge every reasonable presumption *against* waiver' of fundamental constitutional rights. *Id.* (quoting *Aetna Ins. v. Kennedy ex rel. Bogash,* 301 U.S. 389, 393 (1937))."

Id. at 1229. The dissenters conclude:

> "at the time California allegedly engaged in discriminatory hiring practices and also accepted Rehabilitation Act funds, it did *not know* it possessed the right to resist federal court jurisdiction. Without this knowledge, gleaned *only after* the Supreme Court decided *Garrett,* California's acceptance of funds simply could *not* constitute an unequivocal or intentional abandonment of its Eleventh Amendment rights."

285 F. at 1229.

All Courts of Appeals agree that through 42 U.S.C. § 2000d-7 Congress intended to invite the States to waive their Constitutional immunity through the acceptance of federal funds. The Courts of Appeals depart in their analysis on the intent of the States by accepting federal funds. The majority assumes the acceptance of federal funds is a waiver by a State of its sovereign immunity. The minority opinion focuses on the state's intent to waive its fundamental right to immunity. The minority holds the federal government cannot assume a state waives its sovereign immunity simply by accepting federal largesse. The Second Circuit and the dissenters in the Ninth Circuit believe that Congress cannot make a state's decision for it. The minority follows rulings of this Court that a state must knowingly waive it's sovereign immunity.

The split here warrants review because the majority of the circuits have conflicted with this Court's decisions in the same way that the Tenth Circuit did. That is, the problem in several circuits is not just that they reached the wrong answer on whether the State waived, but that like the Tenth Circuit, those other circuits did not even ask the right question. As the Second Circuit noted, 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. None of the cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful, as the Supreme Court required in *College Savings.*"

280 F.3d at 115.

B. The United States Court of Appeals for the Tenth Circuit Decision Conflicts with the Court's Immunity Decisions.

The United States Court of Appeals for the Tenth Circuit's decision violates the Court's precedents, especially *College*

Savings, in several respects. As detailed below, the Court has explained the fundamental distinction between *abrogation,* which results from a unilateral declaration by Congress, and *waiver,* which results from a clear declaration *by the State.* The Court's decisions leave little room for finding a "Congressional waiver of State immunity," yet this is what the Tenth Circuit purported to find here. The appeals court held that it "recognized Section 2000d-7 as a valid and unambiguous waiver"–but the entire idea of "waiver" by a Congressional statute surely conflicts with *College Savings.* That is because this Court requires any "invitation to waive" to be an unambiguous statement of such an invitation, and Section 2000d-7 has always been recognized by this Court as a clear statement of abrogation.

1. *College Savings* draws a sharp line between Congressional abrogation and a State's voluntary waiver; while abrogation can be unilaterally declared by Congress, a State's waiver must be clearly declared by the State.

In *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 243 (1985), this Court explained that under the "clear statement" rule, any Congressional abrogation of State immunity would not be lightly inferred, as "Congress must express its *intention to abrogate* the Eleventh Amendment in unmistakable language in the statute itself." Notably, this language requires that Congress's intent must be a specific intent-an "intention to *abrogate*"–not merely a general intent to get the State into federal court by any of several alternative paths.

While *Atascadero* explains how Congress may unilaterally abrogate by issuing its own clear statement, *College Savings* sets an entirely different set of ground rules that apply in the very different waiver context. The Court explained that any search for a waiver begins with the fundamental principle that a waiver must ultimately come from the State itself; it must be "altogether voluntary," as shown by the State's own "clear

declaration" of waiver. *College Savings,* 527 U.S. at 675-76. These principles required the Court to reject the doctrine of implied or "constructive waiver," under which a State could *implicitly* waive its immunity by, for example, entering a field subject to Congressional regulation. *Id.* at 680, overruling *Parden v. Terminal R. Co. of Ala. Docks Dep't,* 377 U.S. 184 (1964). The "whole point of requiring a clear declaration *by the State* of its waiver is to be certain that the State in fact consents to suit." *College Savings,* 527 U.S. at 680 (emphasis is original).

A State's waiver is effected only by the *State's* declaration. Any Congressional statement on the subject can not be a unilateral statement *effecting* a waiver, but can at most be an "invitation to waiver." To be a true invitation that the State must be free to accept or decline it. If Congress presents a deal unilaterally–i.e., if it simply announces that waiver shall be constructively exacted when the State takes some act that it already has every right to take–then such a "forced waiver" is no "invitation to waive" at all, but is "little more than abrogation under another name." *Id.* at 684. As the Court noted, the equivalence of abrogation and "forced waiver," as opposed to a true "invitation to waive" was best shown in *College Savings* by the "revealing fact[]" that the "statutory provision relied upon to demonstrate that Florida constructively waived its sovereign immunity is the *very same provision* that purported to abrogate it." *Id.* (emphasis added).

2. The United States Court of Appeals for the Tenth Circuit's decision conflicts with *College Savings* by finding a "Congressional waiver" and by ignoring the need for a clear declaration by the State.

Under *College Savings,* a waiver-enticed-by-federal-funds is a bilateral process with clarity on both sides: Congress unequivocally states the invitation and condition, and the State clearly declares its assent and its waiver. But here, the Tenth

Circuit blurred the crucial distinction between unilateral abrogation and the bilateral invitation-and-waiver process, as it based its finding of waiver solely upon Congress's statement in Section 2000d-7, without even asking whether the State clearly declared its intent to waive. The Tenth Circuit stated that "[h]ere we have a federal statute under which a state unequivocally waives its immunity when it chooses to accept federal financial assistance." Pet. App. 9a. "We therefore hold that by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit. In doing so, we join our sister circuits who have uniformly so held as well." *Id.*

These statements characterizing Section 2000d-7 as "expressing waiver" makes no sense at all for the simple reason that Congress can never, under any theory, "waive" a State's immunity. As previously noted, Congress can either (1) abrogate or (2) invite a State to waive, but it cannot by itself effect a waiver.

Further, the Tenth Circuit's decision shows that its erroneous reference to Congressional "waiver" was not simply a poor choice of words, but that the court flatly ignored *College Savings's* insistence that a finding of waiver requires that the *State* "clearly declared" its intent to waive. In *College Savings,* the Court said plainly that a waiver could never be based solely on Congress's words as there 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 it shall be deemed to have waived that immunity." 527 U.S. at 680-81. This observation remains true *even if* those Congressional words are a clear invitation to waive. No matter how clearly Congress expresses its intention, a court must still find that the State declared its waiver. The Tenth Circuit, in defiance of *College Savings,* simply skipped that step entirely.

The Tenth Circuit did not look for any clear statement of waiver by Kansas *on the facts of this case.* The Tenth Circuit did not review whether the United States, through its offer of funding under the Rehabilitation Act, specifically informed Kansas that to receive such funding it was necessary for the state to waive its sovereign immunity. The Tenth Circuit simply found the money was given to the Department of Education and Kansas accepted that funding. The Tenth Circuit reasoned, by accepting the federal funding the state waived its fundamental right to sovereign immunity through its actions.

Further, the Tenth Circuit did not review whether, or not, the entity supposedly waiving Kansas' fundamental right to sovereign immunity, the Kansas Department of Education, had the authority to do so. The Kansas Supreme Court has entered into the federalism debate by holding that only the Kansas Legislature can waive Kansas' sovereign immunity. *See Schall v. Wichita State Univ.,* 7 P.3d 1154 (Kan. 2000); *Goldbarth v. Kansas State Bd. of Regents,* 9 P.3d 1251, 1260 (Kan. 2000); and *Prager v. Kansas State Dep't of Revenue,* 20 P.3d 39, 56 (Kan. 2001). The Kansas Legislature, either through legislation or a specific vote accepting an annual offer of assistance from the Congress under the Rehabilitation Act coupled with a waiver of sovereign immunity, has not waived its immunity under the Eleventh Amendment.

At the outset of the opinion the Tenth Circuit held "that Kansas *has* waived its sovereign immunity with respect to the claims against it for violation of the Rehabilitation Act, we need not reach the abrogation claim." Pet. App. 6a-7a. The Tenth Circuits scant, conclusory references to federal funds, without any link to what the State said or did here, shows that the court looked only to what Congress unilaterally decided.

The entire framework of the Tenth Circuit's opinion contradicts the waiver paradigm detailed in *College Savings,* and warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2003