UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 03-7044

ADAM BARBOUR

Appellee,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appellant.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

The Metropolitan Washington Employment Lawyers Association (MWELA) is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys, predominantly plaintiffs' counsel, who specialize in employment law. MWELA conducts continuing legal education programs for its 200 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the three

jurisdictions in which its members mostly practice – the District of Columbia, Maryland and Virginia.[1]

Appellant Washington Metropolitan Area Transit Authority (WMATA) is a major player in the national capital area. The Authority operates the principal transit system in the region, serving an area of 1500 square miles in the District of Columbia, Maryland and Virginia. In FY 2002 WMATA carried passengers on some 330 million round trips, including over 180 million by rail.[2] The Authority employs some 9,000 workers in this area, and members of MWELA regularly represent employees with claims against WMATA. Indeed, MWELA members represent plaintiffs in the three related cases involving WMATA that are set forth in the certificate at the front of this brief.

WMATA has successfully argued that the Supreme Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), which held that the Eleventh Amendment bars private suit by state employees under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*., insulates the Authority from ADEA actions by its employees. *See Jones v. WMATA*, 205 F.3d 428, 432 (D.C. Cir. 2000). And WMATA has persuaded district court judges, including the judge below, that *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), which extended *Kimel*'s holding to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq*., likewise precludes ADA actions by its workers.

In both *Kimel* and *Garrett*, the Supreme Court noted that state employees retained protection from age and disability discrimination because virtually all states have their own

[1] The parties, including intervenor United States, have consented to the filing of this brief, and on December 2, 2003 the Court granted leave to file.

[2] *See* www.wmata.com/about/metrofacts.

statutes forbidding such bias. *See Kimel*, 528 U.S. at 91 ("[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union"); *Garrett*, 531 U.S. at 374 n.9 ("state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress"). WMATA, however, has contended successfully that the Authority is not subject to local anti-discrimination measures such as the District of Columbia Human Rights Act. *See, e.g.*, *Lucero-Nelson v. WMATA*, 1 F.Supp.2d 1, 7 (D.D.C. 1998).

The upshot is that WMATA today has more freedom to discriminate than any other public employer in America. Unless this Court affirms the court below and rules that WMATA is subject to suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Authority's disabled employees will have no remedy for even the most flagrant biased treatment. In that event, and assuming that the Supreme Court rules in *Tennessee v. Lane*, No. 02-1667, that private parties cannot sue states under Title II of the ADA, WMATA's disabled passengers will have no rights, either.

MWELA has an abiding interest in seeing that WMATA is held to the same employment standards as other employers. That can happen only if the decision below is affirmed, and MWELA submits this brief urging affirmance.

JURISDICTION

MWELA agrees with the statement of jurisdiction in the Brief for Appellant.

ISSUE PRESENTED FOR REVIEW

The sole issue on this appeal is whether the Eleventh Amendment bars suit against WMATA under the Rehabilitation Act.

CONSTITUTIONAL PROVISIONS AND STATUTES

Except for Art. I, Sec. 10, cl. 3 of the Constitution, all applicable constitutional provisions and statutes are set forth in the Brief for Appellant. The omitted clause provides:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

STATEMENT

Adam Barbour briefly worked for WMATA in 1998, during a time (like all others) when the Authority was receiving Federal funds. After being fired, Barbour sued WMATA, among other things alleging violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act (ADA). The district court granted WMATA's motion to dismiss the ADA allegation on Eleventh Amendment immunity grounds [App. 13] but denied the Authority's attempt to invoke immunity on the Rehabilitation Act claim [App. 59]. This interlocutory appeal followed. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993).[3]

ARGUMENT

SUMMARY

1. Ten circuits agree that Congress intended to condition a state's receipt of Federal funds on the waiver of its Eleventh Amendment immunity for purposes of claims brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* 42 U.S.C. § 2000d-7(a)(1).

[3] This Court summarily dismissed Barbour's cross-appeal of the district court's ADA ruling, holding that "[t]he exercise of pendent appellate jurisdiction over the cross-appeal is unwarranted." 2003 WL 22095655 (D.C. Cir. 2003).

Eight of these courts believe that Congress succeeded in this effort, which was legitimate under the Spending Clause. There is no dispute that WMATA received Federal funds throughout the short period in dispute, so – if these courts are right – the Authority waived whatever immunity it possessed, and Adam Barbour's claim can proceed to trial.

The Second Circuit is the principal dissenter, holding that New York's acceptance of Federal money in the 1993-95 time frame could not have been a knowing waiver of its Eleventh Amendment immunity, because the state at that time would have reasonably believed that Congress had abrogated that immunity anyway. *Garcia v. SUNY Health Services Center*, 280 F.3d 98, 113 (2d Cir. 2001).[4] *Garcia* is flawed legally, but WMATA's reliance on it also founders on the awkward fact that the Authority knew – a year before firing Barbour – that it had grounds to argue that Congress had *not* validly abrogated its immunity. In fact, WMATA had already made precisely that argument in a case that ultimately reached this Court, *Jones v. WMATA*, 205 F.3d at 432. So even if *Garcia* was correctly decided on its own facts – and it was not – the decision does not help the Authority.

There are no loopholes here. A valid congressional enactment conditioned Federal funds on waiver of immunity. WMATA accepted Federal money. That should be the end of this appeal.

2. If the Court believes that WMATA has not waived whatever immunity it has, then it must address a larger question: whether the Authority has immunity in the first instance. At least with respect to the Rehabilitation Act, it does not.

[4] A panel of the Fifth Circuit agreed with the approach taken in *Garcia*, but that decision was vacated when the court granted rehearing *en banc*. *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003), *rehearing en banc granted*, 339 F.3d 348 (5th Cir. 2003).

WMATA's immunity appears in Section 80 of the WMATA Compact, an agreement among the states of Maryland and Virginia and the District of Columbia. Section 80 focuses on actions in contract and tort. *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986), this Court's seminal case on WMATA's immunity, held that the immunity reflected in Section 80 for governmental-function torts represents a valid conferral of the immunity possessed by each of the three contracting parties – the sovereign immunity of the United States and the Eleventh Amendment immunity of Maryland and Virginia. The Court's more recent decisions have also recognized the hybrid nature of WMATA's immunity. *E.g.*, *Watters v. WMATA*, 295 F.3d 36, 39 (D.C. Cir. 2002).

Typically, the immunities of the three parties to the Compact are in confluence, as they were in *Morris*. But in the present case, they are not, since Congress has revoked the immunity of the United States – and the District of Columbia in particular – from suit by disabled employees under the Rehabilitation Act. In such cases, the issue is whether the revocation reaches WMATA.

The Authority is not a state. Rather, it is a Federal entity that came into existence only because Congress consented, *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1980), and whose immunity exists only because Congress has sanctioned it. "[T]he Framers sought to ensure that Congress would maintain ultimate supervisory power" over Compact Clause agencies, *id.*, and this power entails the authority to revoke immunity.

Section 80 of the Compact retains immunity only for specified tort actions. A suit under the Rehabilitation Act does not arise in tort, so it would appear that WMATA simply lacks any immunity to assert against suits under the Act. In some circumstances, though, the Court has recognized immunity for WMATA against actions that are not tort-based -- but only where the

law of all three signatories provided for such immunity. *See Watters*, 295 F.3d at 39 n.6. Again, that is not the case for Rehabilitation Act claims, since Congress has revoked immunity for the District of Columbia.

If this Court reaches the issue, the answer is clear: even in the absence of a waiver of immunity, WMATA is subject to claims under the Rehabilitation Act.

I. WMATA KNOWINGLY WAIVED ELEVENTH AMENDMENT IMMUNITY BY ACCEPTING FEDERAL FUNDS CONDITIONED ON SUCH A WAIVER

Congress has provided that states "shall not be immune under the eleventh amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). The focus is on "recipients of Federal financial assistance," and ten courts of appeals have agreed that – in the words of the case most heavily relied on by WMATA – "this provision constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Garcia v. SUNY Health Services Center*, 280 F.3d at 113.[5]

The appellee and the United States have shown that (1) the courts of appeals are correct in their reading of the statute in question, 42 U.S.C. § 2000d-7(a)(1); (2) the statute is a legitimate exercise of congressional authority under the Spending Clause; and (3) in light of the statute, WMATA knowingly waived its immunity by accepting Federal funds, *Garcia* notwithstanding. We will not repeat those arguments and will add only that the Authority's reliance on *Garcia* is misguided for historical as well as legal reasons.

[5] The cases are collected in the Brief for United States at 7 n.2.

The Second Circuit in *Garcia* emphasized that waiver requires the "intentional relinquishment or abandonment of a *known* right or privilege," 280 F.3d at 114, *quoting College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (emphasis in *Garcia*). Reasoning that "the proscriptions of Title II [of the ADA] and § 504 [of the Rehabilitation Act] are virtually identical," 280 F.3d at 114, and that "the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority," *id.*, without regard to Federal funding, the court concluded that New York would have reasonably thought that it had nothing meaningful left to lose by accepting funds conditioned on a waiver of immunity under the Rehabilitation Act: "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits . . . since by all reasonable appearances state sovereign immunity had already been lost." *Id.*

Garcia recognized, however, "that an argument could be made that if there is a colorable basis for the state to suspect that an express congressional abrogation is invalid, then the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." 280 F.3d at 114 n.4. But the court said that could not have been true of New York, "because throughout the entire period involved in this dispute during which SUNY was accepting federal funds -- September 1993 until August 1995 -- even the most studied scholar of constitutional law would have had little reason to doubt the validity of Congress's asserted abrogation of New York's sovereign immunity as to private damage suits under Title II." *Id.*

WMATA says it is saved by *Garcia*. But the present case arose in 1998, so the Authority is reduced to pleading that, "[w]hen Barbour was terminated in 1998, before *Kimel* and *Garrett*

were decided, WMATA had no reason to believe that it had any immunity to waive." Brief for Appellant at 26.[6] This is simply not true, as WMATA's own actions show.

The tectonic shift in Eleventh Amendment jurisprudence occurred in 1996, with the Supreme Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), that Congress lacked authority under the Commerce Clause to abrogate Eleventh Amendment immunity and instead was remitted only to Section 5 of the Fourteenth Amendment. At that time, it was apparent that all Federal legislation banning discrimination by states was in jeopardy, save for statutes aimed at bias based on race or sex. This became clearer a year later, when the Court constrained Congress' ability to act under Section 5. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

WMATA was fully aware of these developments. On January 14, 1997, even before *Boerne v. Flores* – and well before *Kimel* -- the Authority filed a motion to dismiss the ADEA claims in *Jones v. WMATA*, No. 89-552 (D.D.C.), citing *Seminole Tribe* and arguing that WMATA possessed Eleventh Amendment immunity that had not been abrogated.[7] This Court adopted this position three years later, following *Kimel*. *Jones v. WMATA*, 205 F.3d at 432 (2000).

In short, WMATA knew early on of the sea change in Eleventh Amendment law heralded by *Seminole Tribe*. And by early 1997 -- a full year before Adam Barbour was fired -- the

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[6] *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), decided that the Eleventh Amendment barred private actions by state employees under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), extended this holding to Title I of the ADA. Hence WMATA is saying that it had "no reason to believe that it had any immunity to waive" until 2000.

[7] Excerpts from the district court's docket sheets in *Jones* are bound with this brief. The pertinent entry appears on the fourth page, No. 167.

Authority developed a strategy to exploit that change. In light of this history, WMATA cannot seriously claim that in 1998 it had "no reason to believe that it had any immunity to waive," and the Authority's attempt to clamber aboard *Garcia*'s lifeboat is unseemly.

The United States has shown why WMATA's *Garcia*-based argument fails as a legal matter. Brief for United States at 11-24. But the argument also fails on practical grounds, in a manner recognized by *Garcia* itself, because the Authority at a bare minimum had "a colorable basis . . . to suspect that an express congressional abrogation is invalid," thereby revealing "a knowing relinquishment of sovereign immunity." 280 F.3d at 114 n.4.

Here the governing statute, which represents a legitimate exercise of Spending Clause authority, conditions a state's receipt of Federal funds on its waiver of Eleventh Amendment immunity for purposes of the Rehabilitation Act. 42 U.S.C. § 2000d-7(a)(1). At all relevant times, WMATA has received Federal funding, even as it was trumpeting its immunity under other statutes. In these circumstances, it is clear that WMATA has waived its immunity from Rehabilitation Act claims and is subject to suit in Federal court under the Act.

II. WMATA'S IMMUNITY IS A HYBRID OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES AND THE ELEVENTH AMENDMENT IMMUNITY OF MARYLAND AND VIRGINIA. THIS HYBRID IMMUNITY IS SUBJECT TO ABROGATION BY CONGRESS, AND IT HAS BEEN ABROGATED FOR PURPOSES OF THE REHABILITATION ACT

The foregoing discussion assumes that WMATA, as an entity, is imbued with Eleventh Amendment immunity. But WMATA is not a state; nor is it an agency or instrumentality of any particular state. Rather, the Authority is an interstate agency created under the Compact Clause of the Constitution. Art. I, Sec. 10, cl. 3. The WMATA Compact is a three-party agreement entered into by the states of Maryland and Virginia and the District of Columbia, a Federal enclave for which Congress is exclusively responsible under Art. 1, Sec. 8, cl. 17. Congress both

entered into the Compact on behalf of the District of Columbia, and consented to the resulting agreement as required by the Compact Clause. *See* 80 Stat. 1350.

A compelling case can be made that the Eleventh Amendment does not shelter the Authority, at least not where Congress has undertaken to abrogate that immunity. This matter need not be addressed if the Court rules that WMATA waived whatever immunity it may have. But if for any reason the Court decides that the Authority's acceptance of Federal funding did not constitute a waiver for Rehabilitation Act purposes, then it must also decide the antecedent question: whether WMATA has any immunity to waive.[8]

A. *Morris v. WMATA*

The WMATA Compact provides for what this Court described, in its original and still leading decision on the Authority's immune status, as "limited sovereign immunity." *Morris v. WMATA*, 781 F.2d at 219. In particular, Section 80 of the Compact provides that "[t]he Authority shall be liable for its contracts and for its torts . . . committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory . . . but shall not be liable for any torts committed in the performance of a governmental function." 80 Stat. 1350.

The plaintiff in *Morris* was a former Transit Police officer who alleged that he was fired in retaliation for his complaints of discrimination, in violation of 42 U.S.C. § 1983 and the First and Fourteenth Amendments; he sought compensatory and punitive damages. *Id.* at 219. The Court saw this tort action as exactly the type barred by Section 80, since "the operation of a police force is a governmental rather than a proprietary function." *Id.* at 220. This point was not controversial, and the bulk of the opinion in *Morris* is devoted to explaining why Section 80

[8] This is the dispositive issue in Barbour's appeal of the dismissal of his ADA claim, since the Supreme Court decided in *Garrett* that Congress lacked authority to abrogate Eleventh Amendment immunity under that statute. *See* n.3 *above*.

itself – which purports to waive immunity for suits on contract and for certain tort actions, while retaining it for "torts committed in the performance of a governmental function" – is valid.

The Court first said that

> WMATA's sovereign immunity exists because the signatories have successfully conferred their respective sovereign immunities upon it. Congress has power to legislate for the District of Columbia and to create an instrumentality that is immune from suit. Maryland and Virginia have immunity under the eleventh amendment and each can confer that immunity upon instrumentalities of the state. It is clear that each of the three signatories attempted to confer its sovereign immunity upon WMATA. We think they succeeded. . . .

781 F.2d at 219-20.

The Court then analyzed how Congress, on the one hand, and Maryland and Virginia, on the other, had "conferred their respective sovereign immunities upon" WMATA. After observing that, "[b]y virtue of its sovereignty, the United States enjoys immunity from suit without its consent," *id.* at 222, the Court observed that

> Congress played a particularly active role in creating WMATA. Notably, Congress, not the states, initiated the WMATA Compact. * * * The Constitution grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]." U.S. Const. art. I, § 8, cl. 17. Pursuant to this power, Congress "adopt[ed] and enact[ed]" the WMATA Compact for the District of Columbia. * * * Congress also gave its consent to Maryland and Virginia to enter into the WMATA Compact, as required by U.S. Const. art. I, § 10, cl. 3.

Id.

The Court concluded that "[t]here seems no question that the United States could validly confer its immunity upon WMATA," and the Court likewise held that "the other signatories, Maryland and Virginia, validly conferred the constitutional immunities they possess." *Id.* In this connection, the Court said that "it is absolutely clear that Maryland, Virginia, and the Congress of the United States intended that WMATA should receive the eleventh amendment immunity of the states for torts of the sort alleged here." *Id.* at 225.

Finally, the Court considered the argument that "the District of Columbia's participation in creating WMATA destroys WMATA's immunity from suit." *Id.* 228. This contention was rejected: "We cannot accept the notion that the sum is less than any of its parts so that when three immunities are added together, all immunities disappear." *Id.*

Two points emerge from *Morris*. First, WMATA's immunity, as reflected in Section 80 of the Compact, is a hybrid, partaking of both the sovereign immunity of the United States and the Eleventh Amendment immunity of Maryland and Virginia. Second, the immunities in *Morris* itself were in confluence; that is, there is no suggestion that either the United States, or the states of Maryland and Virginia, had waived their respective immunities from suit for the type of conduct alleged by the plaintiff.

B. *Hybrid Immunity*

WMATA as an entity does not possess Eleventh Amendment immunity. Rather its immunity is an admixture of the potent sovereign immunity of the United States and the Eleventh Amendment immunity of Maryland and Virginia. Much of the time, the characterization of the nature of WMATA's immunity is a moot point, since the three parties to the Compact share a common interest in immunizing certain conduct. But that is not true concerning claims under the Rehabilitation Act of 1973, under which Adam Barbour seeks to sue.

In 1978, Congress amended the Rehabilitation Act and waived the sovereign immunity of the United States to permit suits by Federal employees alleging disability discrimination. 29 U.S.C. § 794a(a)(1). *See Barth v. Gelb*, 2 F.3d 1180, 1183 (D.C. Cir. 1993). Congress also sought to subject state agencies to the Act, *see* 29 U.S.C. 794(b), but the Supreme Court held in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), that the original enactment was

wanting. That decision led to the passage of the principal statute at issue here, 42 U.S.C. § 2000d-7(a).

Assuming that, in the absence of waiver, Maryland and Virginia have immunity from Rehabilitation Act claims, the District of Columbia – a Federal entity – does not. *See, e.g., Does I-IV v. District of Columbia,* 962 F.Supp. 202 (D.D.C. 1997). If the District's non-immunity were poured into the same vat with the immunities of the two states, the resulting blend would certainly not be pure. Indeed, the presence of the District would appear to "taint" the mixture so as to deprive the other immunities of their force. In these circumstances, the argument rejected in *Morris* -- "that the District of Columbia's participation in creating WMATA destroys WMATA's immunity from suit," 781 F.2d at 228 -- carries the day. No abrogation by Congress, or waiver of immunity by WMATA, is needed, because the Authority lacks the requisite immunity in the first instance.

More fundamental, agencies created by interstate compact are not states. They are Federal entities so that, for example, construction of a compact poses "a question of federal law since 'congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States.' " *Morris v. WMATA*, 781 F.2d at 220, *quoting Cuyler v. Adams*, 449 U.S. 433, 438 (1980). *See New York v. Hill*, 528 U.S. 110, 116 (2000) ("[a]s 'a congressionally sanctioned interstate compact' within the Compact Clause . . . the [Interstate Agreement on Detainers] is a federal law subject to federal construction").

As the Supreme Court held in *Cuyler,* interstate agencies are creatures of Congress that come into existence only if Congress consents:

> The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative

> state action that might otherwise interfere with the full and free exercise of federal authority.

449 U.S. at 439-40.

There is no question that Congress could condition its consent on a requirement that the contracting parties disavow immunity and subject the new agency to suit. And if Congress could do this at the outset, it can also "maintain ultimate supervisory power" over its offspring by revoking immunity at a later date. This is especially true here, since "Congress played a particularly active role in creating WMATA." *Morris*, 781 F.2d at 222. In the same way that 29 U.S.C. § 794a(a)(1) revoked the immunity of the United States from suit by its disabled employees, 29 U.S.C. § 794(b)(4) abrogated (for Rehabilitation Act purposes) the immunity conferred by Section 80 of the WMATA Compact.[9]

C. *This Court's Recent Decisions on WMATA's Immunity*

1. In *Jones v. WMATA*, 205 F.3d at 432, the Court noted that "WMATA was created by a compact enacted by the Congress and to which the Commonwealth of Virginia, the State of Maryland and the District of Columbia are signatories." And it said that "[w]e have consistently recognized that in signing the WMATA Compact, Virginia and Maryland each conferred its immunity upon WMATA, which therefore enjoys, to the same extent as each state, immunity from suit in federal court based on its performance of governmental functions." *Id.*

Since WMATA's immunity is hybrid, it would have been more accurate to say that the Court's decisions, beginning with *Morris*, hold that WMATA enjoys immunity to the same extent as each of the *three* contracting parties. *See Watters v. WMATA*, 295 F.3d at 39, where the Court said that it had "repeatedly held" that "the three signatories conferred each of their

[9] The cited provision, 29 U.S.C. § 794(b)(4), defines "program or activity" as "any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3)," and paragraph 1 includes states. This definition encompasses WMATA.

respective sovereign immunities, including the Eleventh Amendment immunity of the two states, upon the Authority." The Court later noted that "WMATA's immunity does not arise solely from the Eleventh Amendment," *id.* at 42 n.13, a reference to the sovereign immunity of the United States. And in the present situation, the United States has disclaimed immunity for suit under the Rehabilitation Act.

More to the point, even assuming that WMATA as an entity was given the Eleventh Amendment immunity of Maryland and Virginia in Section 80 of the Compact, the question is whether the Authority should be treated as if it were a state for purposes of abrogating that immunity. Under *Cuyler* – and the Compact Clause – it should not. WMATA's immunity exists only upon the sufferance of Congress, and Congress can revoke it.

2. In *Watters*, a lawyer sought to enforce an attorney's lien against WMATA. The Court first observed that each of the three parties to the Compact possessed sovereign immunity against the enforcement of equitable liens, 295 F.3d at 39 n.6, then considered whether Section 80 waived that immunity. Here the Court applied District of Columbia law, "because the District is where the obligation . . . arose, and section 80 of the Compact provides that WMATA is liable 'in accordance with the law of the applicable signatory.' " *Id.* at 40 n.7. And in the District, an attorney's lien against funds held by a party is "not a contract with, or tort of," the party. *Id.* at 40. Hence such liens were not affected by Section 80's waiver of immunity for all contract and certain tort actions but were instead governed by the law of the signatories prohibiting enforcement of liens against the sovereign. *Id.* at 41. Concluding that "[a] lien of the kind Watters seeks to enforce would have the same impact on the public fisc" as that decried by the

District of Columbia Court of Appeals in a 1997 decision,[10] this Court held that the lawyer's action was "barred by WMATA's sovereign immunity." *Id.* at 41-42.

D. *Immunity Where Actions Do Not Arise in Tort*

Watters recognized that not all legal claims can be characterized as contract disputes or tort actions. In the present case, a suit under the Rehabilitation Act is neither. Instead, it is a statutory claim unlike those known at common law.

Morris v. WMATA suggested that the Authority's immunity is confined to that set forth in Section 80: "it is absolutely clear that Maryland, Virginia, and the Congress of the United States intended that WMATA should receive the eleventh amendment immunity of the states *for torts of the sort alleged here*." 781 F.2d at 225 (emphasis added). If the Authority's immunity is limited to "torts committed in the performance of a governmental function," consistent with Section 80, there is simply no immunity to assert concerning a claim under the Rehabilitation Act, which does not arise in tort.[11] Indeed, this approach easily reconciles Section 80 and Section 81, which provides that "[t]he United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority." 80 Stat. 1350. That is, any number of actions may be brought in Federal court against WMATA under Section 81, and the only claims barred by immunity are those

[10] *Grunley Construction Co. v. District of Columbia*, 704 A.2d 288 (D.C. 1997).

[11] In *Jones v. WMATA*, 205 F.3d at 432, the Court appeared to assume that the Age Discrimination in Employment Act is a tort statute, so that claims under the ADEA are subject to Section 80's retention of immunity for governmental-function torts. In fact, ADEA claims do not arise in tort. *See Commissioner of IRS v. Schleier*, 515 U.S. 323, 334 (1995) ("a recovery under the ADEA is not one that is 'based upon tort or tort type rights' ").

involving "torts committed in the performance of a governmental function" under Section 80.[12]

In *Watters*, though, the Court indicated that WMATA's immunity may be broader than that set forth in Section 80, and it accorded immunity from a claim based on an attorney's lien, which under the law of the District of Columbia – where the claim arose – is neither contract nor tort. But the Court emphasized that all three parties to the Compact enjoyed immunity from such claims under state (or D.C.) law. *See* 295 F.3d at 39 n.6. That is not true here, because the District is *not* immune from claims under the Rehabilitation Act. WMATA has no immunity here, either.

E. *The Possibility that the Court Need Not Decide these Issues*

As noted above, the Court will not have to address the issues discussed in this section if it affirms the district court and holds that WMATA's acceptance of Federal funds waived, for purposes of the Rehabilitation Act, whatever immunity it may possess. But if the Court finds that no waiver occurred, then it must decide whether Eleventh Amendment immunity protects the Authority in the first instance. It does not.

CONCLUSION

WMATA accepted Federal funds whose receipt was validly conditioned on its waiver of immunity for Rehabilitation Act purposes. That alone is sufficient to decide this case. In any event, the Authority is a Federal entity – not a state – whose immunity exists only at the pleasure of Congress, which has revoked it.

[12] This view is reinforced by the Supreme Court's decision last term in *Lapides v. Board of Regents*, 535 U.S. 613 (2002), which held that a state waives its Eleventh Amendment immunity by removing claims to Federal court. In Section 81 of the Compact, Maryland and Virginia agreed that any claims against WMATA could be brought in Federal court as an original matter. *Lapides* suggests that this agreement constituted a waiver of Eleventh Amendment immunity as to all such claims, except for those tort actions specifically sheltered by Section 80.

This Court should affirm the district court's refusal to accord WMATA immunity from Rehabilitation Act claims, and this case should be remanded for trial.

Respectfully submitted,

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