

**In The  
Supreme Court of the United States**

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THE RECTOR AND VISITORS OF  
GEORGE MASON UNIVERSITY,

*Petitioner,*

v.

AMY SHEPARD and  
UNITED STATES OF AMERICA,

*Respondents.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

May Congress use its Article I Spending Clause power to exact a waiver of sovereign immunity?

## PARTIES TO THE PROCEEDINGS

The petitioner is the Rector and Visitors of George Mason University, which is the official corporate name of a state institution of higher education located in Fairfax, Virginia. *See Virginia Code* § 23-91.24.<sup>1</sup> For purposes of this petition, the only claim at issue is a claim for damages under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.<sup>2</sup>

There are two respondents: (1) Amy Shepard, a former student at George Mason University; and (2) the United States of America, which intervened in the court of appeals for the purpose of defending the constitutionality of a federal statute.

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<sup>1</sup> In the district court, the respondent also sued Alan Merten in his official capacity as President of George Mason University (“President Merten”), Gerhard Mulherin in his individual capacity and his official capacity as Dean of Students at George Mason University (“Dean Mulherin”), Dr. Katrina Irving in her individual capacity only (“Dr. Irving”), as well as Lisa Stidham, Leigh Ann Murtha, Chrissy Forbes, Joe Boatwright and Nikkia Anderson, all in their individual capacities only (collectively “Honor Committee Members”). The claims against President Merten and Dean Mulherin in their official capacities for injunctive relief presently are being litigated in the district court. The claims against Dean Mulherin in his personal capacity, Dr. Irving, and the Honor Committee were all dismissed by the district court. The courts of appeals either affirmed the district court’s dismissal of those claims or respondent chose not to appeal the dismissals.

<sup>2</sup> While there is an ADA Title V claim for retaliation against the University and claims for injunctive relief against President Merten and Dean Mulherin, those claims are not part of this petition.

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## PETITION FOR WRIT OF CERTIORARI

The Rector and Visitors of George Mason University (“the University”) respectfully petitions this Court for a writ of certiorari to review the judgment of the court of appeals, which held that Congress could use its Article I Spending Clause power to exact a waiver of sovereign immunity.<sup>3</sup>



## OPINIONS BELOW

The order of the court of appeals denying rehearing and rehearing *en banc* is both unpublished and unreported. It is reprinted in the Appendix at App. 63. The opinion of the court of appeals is unpublished, but is reported as *Shepard v. Irving*, 77 Fed. Appx. 615 (4th Cir. 2003) (unpublished). It is reprinted in the Appendix at App. 1. The opinion of the district court is published and is reported at 204 F. Supp. 2d 902 (E.D. Va. 2002). It is reprinted at App. 19.



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<sup>3</sup> The University, like all state-supported institutions of higher education in the Commonwealth of Virginia is an arm and instrumentality of the Commonwealth. For purposes of sovereign immunity it is the State. See *DeBauche v. Virginia Commonwealth Univ.*, 7 F. Supp. 2d 718, 722 (E.D. Va. 1998), *aff'd in part, rev'd in part, sub nom.*, *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999); *University of Virginia v. Robertson (In re Robertson)*, 243 B.R. 657, 661 (W.D. Va. 2000); *Thorpe v. Virginia State Univ.*, 6 F. Supp. 2d 507, 509 n.3 (E.D. Va. 1998).

## JURISDICTION

The court of appeals entered its judgment on August 20, 2003. The University filed a timely petition for rehearing and for rehearing *en banc*. That petition was denied on January 27, 2004. On April 20, 2004, the Chief Justice, acting as Circuit Justice for the Fourth Circuit, extended the period of time to file a petition for certiorari to May 26, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).



### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions.

1. The Spending Clause of the United States Constitution, Art. I, § 8, cl. 1, states: “The Congress shall have power . . . to pay the debts and provide for the common defense and general welfare of the United States.”
2. The Tenth Amendment to the United States Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>4</sup>

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<sup>4</sup> As this Court has observed: “The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a

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3. The Eleventh Amendment to the United States Constitution provides: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . .”<sup>5</sup>

4. The federal statute at issue in this petition, 42 U.S.C. § 2000d-7(a)(1), provides:

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, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other

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given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.” *New York v. United States*, 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

<sup>5</sup> While the Eleventh Amendment confirms the existence of the States’ sovereign immunity, it “does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.” *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 753 (2002). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) (“sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment”).

Federal statutes prohibiting discrimination by recipients of Federal financial assistance.<sup>6</sup>



### STATEMENT OF THE CASE

The sovereign immunity of the States is not absolute. Congress, under limited circumstances, may abrogate it and the States may decide to waive it. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). In recent years, this Court has provided extensive guidance regarding Congress' abrogation of sovereign immunity. *Tennessee v. Lane*, No. 02-1667 (May 17, 2004); *Hibbs*; *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (*Garrett I*); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Yet, this Court has provided scant guidance regarding Congressional efforts to exact waivers of sovereign immunity. See *College Sav. Bank*, 527 U.S. at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of

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<sup>6</sup> Although 42 U.S.C. § 2000d-7 mentions several statutes, this petition arises in the context of a claim under Section 504 of the Rehabilitation Act. However, if § 2000d-7 is unconstitutional to the extent that it exacts a waiver of sovereign immunity for § 504 claims, it logically follows that it is unconstitutional to exact waivers for claims based on the other statutes enumerated by it in its text. However, it does not necessarily follow that the attempt at abrogation of sovereign immunity for the other statutes is unconstitutional. See *Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) (suggesting that the standard for abrogation is different in the context of gender and race discrimination).

Article I powers would also, as a practical matter, permit Congress to circumvent the anti-abrogation holding of *Seminole Tribe*.”). This petition squarely presents this Court with an opportunity to decide whether Congress may use its Article I Spending Clause power to exact a waiver of sovereign immunity and thus circumvent the limitation expressed by this Court’s anti-abrogation decisions.

This question of Congress’ power to exact waivers of sovereign immunity arises in the context of a damages claim against the University for alleged violations of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“§ 504”).<sup>7</sup> Congress has attempted to exact a waiver of sovereign immunity for § 504 claims. After this Court held that sovereign immunity barred a § 504 claim against the States, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), Congress responded by enacting 42 U.S.C. § 2000d-7(a)(1) (“§ 2000d-7”). Section 2000d-7 purports both to abrogate sovereign immunity for § 504 claims and to exact a waiver of sovereign immunity.<sup>8</sup> *See Lane v. Peña*,

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<sup>7</sup> Section 504 requires that any “program or activity” receiving federal funds must refrain from discriminating against the disabled. *See* 29 U.S.C. § 794(a). The term “program or activity” is defined as “all of the operations” of “a college, university, or postsecondary institution” if “any part” are extended federal financial assistance. *See* 29 U.S.C. § 794(b)(2)(B). The University received federal funds and thus is subject to § 504.

<sup>8</sup> Since *Atascadero*, this Court has not had occasion to decide whether this attempt to abrogate sovereign immunity for § 504 claims is constitutional. At least two courts of appeal have suggested that if sovereign immunity is abrogated for Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165, then it is also abrogated for § 504 claims. *See Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 113 (2nd Cir. 2001) (“our conclusion that Title II of the ADA as a

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518 U.S. 187, 200 (1996) (Section 2000d-7 is “an unambiguous waiver of the States’ Eleventh Amendment

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whole exceeds Congress’ authority under § 5 of the Fourteenth Amendment applies with equal force to § 504 of the Rehabilitation Act.”); *Reickenbacker v. Foster*, 274 F.3d 974, 977 n.17 (5th Cir. 2001) (“Title II of the ADA and § 504 of the Rehabilitation Act should be treated identically in our sovereign immunity analysis. Since the two statutes offer virtually identical protections, the abrogation analysis is the same.”). The lower court, relying on its decision in *Wessell v. Glendening*, 306 F.3d 203 (4th Cir. 2003), held that sovereign immunity had not been abrogated for the ADA Title II claims in this case, App. 7, thus implicitly ruling that sovereign immunity was not abrogated for the § 504 claims either.

Of course, in addressing whether sovereign immunity is abrogated for ADA Title II claims, this Court has stressed that “nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole.” *Tennessee v. Lane*, No. 02-1667, slip op. at 19 (May 17, 2004). Indeed, this Court limited its holding in *Lane* to “the class of cases implicating the accessibility of judicial services.” *Id.* at 20. *See also id.* at 1 (Rehnquist, C.J., joined by Scalia, Kennedy, & Thomas, J.J., dissenting) (noting that the majority opinion is limited to cases involving access to judicial services). This case involves access to educational services in the higher education context rather than access to judicial services. Therefore, *Lane* is inapplicable. The question of whether sovereign immunity has been abrogated for ADA Title II claims related to the provision of higher education services remains open. By extension, the issue of whether sovereign immunity has been abrogated for § 504 claims related to the provision of higher educational services is equally unclear.

In the event that certiorari is granted, this Court may wish to direct the parties to address whether sovereign immunity has been abrogated for § 504 claims brought in the context of higher education services. Alternatively, this Court may wish to assume, without deciding, that sovereign immunity has not been abrogated so that it can address the waiver issue directly. *See Owasso Independent School District No. 1-011 v. Falvo*, 534 U.S. 426, 431 (2002) (assuming that provisions of the Family Educational Rights and Privacy Act could be enforced through 42 U.S.C. § 1983 so as to enable the Court to reach the issue of regulatory interpretation.).

immunity. . . .”). Quite simply, § 2000d-7 requires the University to choose between waiving its sovereign immunity for § 504 claims and forfeiting all federal funds to the University.<sup>9</sup> See *Koslow v. Pennsylvania*, 302 F.3d 161, 178 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 1353 (2003).

The factual context of this dispute concerning Congress’ power to exact waivers of sovereign immunity is relatively straightforward.<sup>10</sup> The respondent, Amy Shepard (Shepard), is a former student at the University who alleges a disability that limits her ability to concentrate and learn. During Shepard’s last semester before graduation, she took an English class taught by Dr. Katrina Irving. Shepard asked Dr. Irving for additional time to complete her assignments as an accommodation for her alleged disability; Dr. Irving refused her request. Toward the end of the semester, Dr. Irving informed Shepard that

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<sup>9</sup> This is a high price. As the district court noted, the University receives approximately \$44,183,959 or 14% of its total operating budget in federal funds. App. 45. This amount of money to support public education could not easily be replaced by the University, and the quality of public education undoubtedly would suffer if the University failed to yield to the requested waiver of its sovereign immunity. Federal taxpayers in Virginia and the students at the University would be deprived of the benefits of a return from the National Government to the Commonwealth of a significant amount of the federal tax monies collected from Virginians.

<sup>10</sup> The statement of facts presented in this petition is adapted from the district court’s summary of the allegations of the complaint. App. 21-25. This petition arises out of the district court’s ruling on a motion to dismiss. Thus, the University has not yet had the opportunity to dispute Shepard’s allegations.

she suspected her of plagiarism, and subsequently gave Shepard a failing grade in her English class.<sup>11</sup>

Dr. Irving also referred the allegation of plagiarism to the University's Honor Council, a student run organization, which adjudicates alleged violations of the school's rules. During the Honor Council proceeding, Shepard asked Dean Girhard Mulherin, the administrator responsible for overseeing the Honor Council, if she could be represented by her attorney or her mother and also have her mother serve as a witness. Pursuant to the policies and processes of the Honor Counsel, Dean Mulherin denied her request.<sup>12</sup> The Honor Council found Shepard guilty of plagiarism, issued a written reprimand, affirmed the grade of "F", and ordered her to perform community service. Shepard appealed the decision, but was unsuccessful.

Shepard then filed suit in the district court against the University, the University's president, Dean Mulherin, Dr. Irving, and all of the student members of the Honor Council, seeking damages under Title II of the Americans with Disabilities Act, § 504, and 42 U.S.C. § 1983, as well as various forms of injunctive relief. The defendants moved to dismiss on several grounds including sovereign immunity, judicial immunity, qualified immunity, and failure to state a claim. The district court dismissed all claims. App. 62. Although the district court concluded that

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<sup>11</sup> Shepard appealed her failing grade through the normal channels for a grade appeal.

<sup>12</sup> After being informed of this decision, Shepard filed a lawsuit asking the district court to enjoin the Honor Council proceeding. The district court declined because the controversy was not ripe.

sovereign immunity was waived for § 504 claims, it also found that Shepard had failed to state a claim for a violation of § 504.<sup>13</sup> App. 62.

Shepard appealed from the district court's dismissal and the court of appeals affirmed in part and reversed in part. Specifically, it affirmed the district court's dismissal of all claims against Dr. Irving and the Honor Council members and the dismissal of the ADA Title II claims on sovereign immunity grounds.<sup>14</sup> App. at 5. It reversed the district court's holding that Shepard had failed to state a § 504 claim for damages and for injunctive relief. App. 10-11. With respect to whether sovereign immunity had been waived, the court of appeals, following its previous decision in *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), held that Congress may require the University to waive sovereign immunity as a condition of receiving federal funds. App. 7. Moreover, the court of appeals rejected additional arguments, not addressed in *Litman*, concerning the constitutionality of § 2000d-7. App. 9.



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<sup>13</sup> The district court also concluded that Congress' attempt to abrogate sovereign immunity for ADA Title II claims was invalid. App. 38. Thus, the ADA Title II claims were barred by sovereign immunity.

<sup>14</sup> As explained above in footnote 13, in concluding that sovereign immunity had not been abrogated for ADA Title II claims related to the provision of higher education services, the Fourth Circuit implicitly held that sovereign immunity had not been abrogated for § 504 claims related to the provision of higher educational services.

## **REASONS FOR GRANTING THE WRIT**

The writ should be granted for two reasons. First, this Court should grant review to determine whether Congress may use the Spending Clause to diminish a fundamental aspect of the States' sovereignty. In recent years, this Court has restored federalism to the federal constitutional structure by limiting Congress' exercise of its power under the Commerce Clause and under Section 5 of the Fourteenth Amendment. Without similar limits on its exercise of Spending Clause power, Congress has effectively ignored those limits. This petition offers the Court a vehicle for addressing the issue. Section 2000d-7 employs a wide array of objectionable features, thus offering the Court considerable flexibility in crafting appropriate limits.

Second, this Court should grant review to determine whether Congress may use its Article I powers to exact waivers of sovereign immunity as a means of circumventing this Court's recent articulation of the constitutional limitations on its power to abrogate. In order to resolve this issue, this Court will have to confront a tension in its own jurisprudence. The recent sovereign immunity decisions of this Court suggest that Congress may not diminish the States' sovereign immunity except in the most extraordinary circumstances. In contrast, this Court's Spending Clause decisions support an expansion of federal power. The tension must be resolved.

**I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER CONGRESS MAY USE ITS SPENDING CLAUSE POWER TO DIMINISH A FUNDAMENTAL ASPECT OF THE STATES' SOVEREIGNTY.**

This Court should grant review to determine whether Congress may use the Spending Clause to diminish a fundamental aspect of the States' sovereignty. This issue is an important federal question that has not been, but ought to be, decided by this Court.

**A. In Order To Preserve The Sovereign Authority Of The States, This Court Must Limit Congress' Exercise Of Its Spending Clause Power.**

The division of sovereignty between the States and the National Government “is a defining feature of our Nation’s constitutional blueprint.” *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). In order to preserve the sovereign authority of the States, this Court has limited the Congress’ Commerce Clause power, *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *United States v. Lopez*, 514 U.S. 549, 563-64 (1995), as well as its power under Section 5 of the Fourteenth Amendment. *Morrison*, 529 U.S. at 627; *City of Boerne v. Flores*, 521 U.S. 507, 519-24 (1997). However, this Court has not yet articulated meaningful limits on Congress’ power under the Spending Clause.

Such limits are essential to maintaining our federal system. As this Court has recognized, the “mechanism for exercising power under the Spending Clause . . . must have limits. Otherwise, Congress ‘could render academic

the Constitution's other grants and limits of federal authority.'" *New York v. United States*, 505 U.S. 144, 167 (1992). "If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'"<sup>15</sup> *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., joined by Brennan, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)). Moreover, if "government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), then surely the National Government may not require the people at large – acting through the States – to surrender an aspect of their sovereignty in exchange for federal funds. Indeed, if government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the

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<sup>15</sup> As one commentator has noted, Congress now has "a seemingly easy end run around any restrictions the Constitution might be found to impose on its ability to regulate the states. Congress needs merely to attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states." Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 Harv. J.L. & Pub. Pol'y 95, 100-01 (1998). Indeed, "the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate." Lynn A. Baker, *Conditional Federal Spending and State's Rights*, 574 Annals 104, 105 (2002).

Constitution of the United States may be thus manipulated out of existence.” *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583, 594 (1926). If preservation of the States’ sovereignty dictates limits on all other congressional powers, then surely there must also be limits on Congress’ power to displace the States’ sovereign authority under the Spending Clause. The articulation of meaningful limits on the Spending Clause involves important federal questions that have not been, but ought to be, decided by this Court.

**B. *Dole* Provides A Basis For Articulating Limits On Congress’ Exercise Of Its Spending Clause Powers.**

An evaluation of the current state of this Court’s Spending Clause jurisprudence should be informed by both the majority and dissenting opinions in *Dole*. In that case, a majority of this Court recognized several principles that might serve as limits on the Spending Clause power:

1. “[T]he exercise of the spending power must be in pursuit of the general welfare.” *Dole*, 483 U.S. at 207 (internal quotation marks and citation omitted).
2. Any condition imposed by Congress must be unambiguous. *Id.*
3. “[C]onditions on federal grants might be illegitimate if they are unrelated ‘to the Federal interest in particular national projects or programs.’” *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

4. “[O]ther constitutional provisions may provide an independent bar to the conditional grant of federal funds.” *Id.* at 208 (citations omitted).
5. “[T]he financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Id.* at 208 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

Despite this suggestion of limiting principles in *Dole*, neither that case nor any subsequent cases decided by this Court have applied those principles to invalidate any mandate imposed by Congress as a condition of receiving federal funds.<sup>16</sup> Relevant to this case are the third and final principles – relatedness and coercion. Also important is Justice O’Connor’s dissent in *Dole*, which articulated a specific test for determining the validity of Spending Clause legislation:

The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress’ intent in making the grant will be effectuated. Congress has no power

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<sup>16</sup> Several circuits have suggested that the coercion requirement is substantively meaningless. See *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981). However, another Circuit has suggested that the coercion requirement is a meaningful restriction. *West Virginia v. United States*, 289 F.3d 281, 291 (4th Cir. 2002).

under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.

*Dole*, 483 U.S. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting). See also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1962-78 (1995) (further refining the distinction in Justice O'Connor's dissent).

### **C. This Petition Is An Ideal Vehicle To Articulate Limits On Congress' Exercise Of Its Spending Clause Power.**

This petition presents an ideal vehicle for this Court to provide substance to the limiting principles suggested by the majority in *Dole* or, alternatively, to adopt the standard suggested by Justice O'Connor's dissent, because § 2000d-7 embodies *all* of the Spending Clause problems identified by each approach.

#### **1. Coercion**

In *Dole*, the majority found that South Dakota was not coerced by the conditioned federal funds because "all South Dakota would lose if she [declines to abide by the federal condition] is 5% of the funds otherwise obtainable under *specified* highway grant programs." 483 U.S. at 211 (emphasis added) (internal quotation marks and citation omitted). By contrast, under the terms of § 2000d-7 and in this case, the federal condition is tied to *100 percent* of the funds flowing to the University. Thus, this case does not

require the Court to find the precise point at which “pressure turns into compulsion.” The Court need only recognize that it is coercive to threaten a state agency with a *complete* loss of *all* federal funds.<sup>17</sup> See *Virginia Dep’t of Educ. v. Riley*, 106 F.3d 565, 570 (4th Cir. 1997) (*en banc*) (Luttig, J., joined by Wilkinson, C.J., Russell, Widener, Wilkins, and Williams, J.J., announcing the judgment of the court).<sup>18</sup> See also *Jim C. v. Arkansas Dep’t of Educ.*, 235 F.3d 1079, 1082-83 (8th Cir. 2000) (*en banc*) (Bowman, J., joined by Beam, Loken, and Bye, J.J., dissenting) (advocating a similar analysis to that of the *Riley* plurality), *cert. denied*, 533 U.S. 949 (2001). Such a decision by this Court would establish a useful “bookend” to *Dole’s* conclusion

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<sup>17</sup> Indeed, in *College Savings Bank*, this Court suggested that, in some circumstances, asking the State to waive its sovereign immunity was per se coercive. This Court stated:

where the constitutionally guaranteed protection of the States’ sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

*College Sav. Bank*, 527 U.S. at 686-87. While this petition involves surrender of federal funds rather than the exclusion from a lawful activity, it offers an opportunity to expand or limit the coercion holding of *College Savings Bank*.

<sup>18</sup> As the *Riley* plurality explained, unconstitutional coercion occurs when the federal government:

withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact.

*Riley*, 106 F.3d at 570.

that losing a relatively small percentage of specified program funding is not coercive.

## 2. Relatedness

Conditions on the receipt of federal funds must “bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution’s other grants and limits of federal authority.” *New York*, 505 U.S. at 167. In *Dole*, the Court was divided over whether the federal condition (raising the drinking age to 21) was sufficiently related to the federal funding program at issue (highway construction). The majority found “relatedness” on the theory that a nationwide drinking age of 21 would promote safety on the highways that the federal funds helped build. *See Dole*, 483 U.S. 203, 208 (1987). Here, even such an indirect connection is absent. Indeed, there is not even a pretense of relatedness. Instead of a condition related to a specific funding program, § 2000d imposes a *blanket* condition whenever a state agency receives federal funds for *any* purpose. *See Jim C.*, 235 F.3d at 1083-84 (Bowman, J., joined by Beam, Loken, & Bye, J.J., dissenting). If “relatedness” means anything, surely this condition goes too far. For this Court to say so would, again, establish a useful “bookend” to *Dole*.

Moreover, the required waiver of sovereign immunity is not necessary to insure the University’s compliance with federal law. Section 504, like Title VI and Title IX, has an elaborate enforcement scheme whereby the National Government notifies the University of alleged violations and, if the University fails to take corrective actions, the National Government may withdraw federal funds. *See*

*Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-89 (1998). It is not necessary to permit private parties to be able to sue the University. The terms of § 504 can be and should be fully enforced by the National Government. There is simply *no* relationship between the requirement that the University waive its sovereign immunity and the variety of purposes for which the University receives federal funds.

### 3. A Test for Spending Clause Legislation

In *Dole*, Justice O'Connor said that the applicable test should be "whether the requirement specifies in some way how the money should be spent." *Dole*, 483 U.S. at 216 (O'Connor, J., joined by Brennan, J., dissenting). Such a test may best be viewed as a particularly stringent sort of relatedness. The condition imposed by § 2000d-7 – waiver of sovereign immunity – is unrelated to the purposes for which federal funds are granted. Therefore *a fortiori*, that condition does not satisfy the "spending specification" approach favored by Justice O'Connor.<sup>19</sup> Adopting the "spending specification" approach advocated by the *Dole* dissent is another option available to the Court in consideration of the question presented in this case.<sup>20</sup>

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<sup>19</sup> Under the approach favored by Justice O'Connor, one example of a permissible condition would be Medicaid, under which the federal government reimburses States for a portion of the expenditures made by them for federally-approved medical assistance purposes.

<sup>20</sup> The test articulated by Justice O'Connor could readily be expanded so as to allow Congress to impose a condition on funding *if* the condition is one that the Constitution already imposes directly on the States. For example, because the Fourteenth Amendment prohibits

(Continued on following page)

#### 4. Regulation

In *Dole*, Justice O'Connor also said that, if a requirement is not a spending specification, it is valid “only if it falls within one of Congress’ delegated regulatory powers.” *Dole*, 483 U.S. at 215-216 (O’Connor, J., joined by Brennan, J., dissenting) (emphasis added).<sup>21</sup> Such approach would mean that, if the requirement could be enacted by Congress directly, then concerns about the “coerciveness” or “relatedness” would disappear. In other words, in this case, if Congress cannot abrogate sovereign immunity for § 504 claims using its Fourteenth Amendment enforcement powers, then Congress cannot exact a waiver of sovereign immunity using its Spending Clause powers. Thus, this case presents little danger that the development of meaningful limits on Congress’ exercise of Spending Clause power would be side-tracked into a complicated debate over whether the § 2000d-7 “fall[s] within one of Congress’ delegated regulatory powers,”

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the States from engaging in many forms of discrimination, Congress could impose compliance with that constitutional standard as a condition for receiving federal funds. Thus, it would be permissible for Congress to condition the receipt of federal funds on compliance with the non-discrimination provisions of Title VI (42 U.S.C. § 2000d, prohibiting discrimination based on race) or Title IX (20 U.S.C. § 1681, prohibiting discrimination based on sex). See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411, 2431 n.23 (2003) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d is coextensive with the Equal Protection Clause).

<sup>21</sup> For example, to the extent that Congress may use its Commerce Clause powers to prohibit discrimination against the disabled, see Americans with Disabilities Act, 42 U.S.C. § 12101, Congress may also use its Spending Clause powers to prohibit such discrimination by recipients of federal funds. See Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

*Dole*, 483 U.S. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting), or what the consequence of such delegation might be. For this reason, too, this petition offers a good vehicle for articulating the limits of the Spending Clause power.

In sum, the conditions placed on federal spending by § 2000d-7 embody every potentially impermissible characteristic identified by this Court's sovereign immunity jurisprudence. By making the cost of non-compliance the loss of all funds otherwise obtainable by the University under *all* federal grant programs, § 2000d-7 is plainly coercive. Furthermore, the requirement that any State receiving federal financial assistance waive its sovereign immunity is not related to any particular federal spending program. Additionally, 2000d-7 does not specify how any federal funds are to be spent or implement any particular federal spending program. If Congress can not abrogate sovereign immunity for § 504 claims, then a requirement that a state university waive sovereign immunity for § 504 claims can not be imposed by Congress directly. This case presents an excellent opportunity to define urgently needed limits on Congress' exercise of power under the Spending Clause. Certiorari should be granted.

**II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE IF CONGRESS MAY USE ITS ARTICLE I POWERS TO EXACT WAIVERS OF SOVEREIGN IMMUNITY AND THEREBY CIRCUMVENT THE COURT'S ANTI-ABROGATION HOLDINGS.**

Additionally, this Court should grant review to determine if Congress may use its Article I powers to exact waivers of sovereign immunity and thereby circumvent

the anti-abrogation decisions of this Court. This is an important federal question that has not been, but ought to be, decided.

In order to resolve this issue, too, this Court will have to reconcile the tension within its own jurisprudence. *See infra* p. 8. As four judges of the Ninth Circuit have explained:

Courts which must decide whether a State retains its sovereign immunity after accepting conditioned federal funds are caught between two competing lines of jurisprudence. Under the Supreme Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the States. Yet, under the Supreme Court's Eleventh Amendment sovereign immunity jurisprudence, Congress' ability to place affirmative obligations on the States using its Fourteenth Amendment enforcement power is rapidly diminishing. Each doctrine pulls us in an opposite direction.

*Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226, 1226-27 (9th Cir.) (O'Scannlain J., joined by Kozinski, Kleinfeld, and Gould, J.J., dissenting from the denial of rehearing *en banc*) (citations omitted) *cert. denied*, 122 S. Ct. 2591 (2002).<sup>22</sup> This tension between this Court's

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<sup>22</sup> *See also Vinson v. Thomas*, 288 F.3d 1145, 1157 (9th Cir. 2002), *cert. denied sub nom., Hawaii v. Vinson*, 123 S. Ct. 962 (2003) (O'Scannlain, J., dissenting) ("We have seen the Supreme Court strike down statutes passed pursuant to Congress' Article I power that purported to abrogate state sovereign immunity, limit the reach of Congress' power to enforce against the States the rights guaranteed by the Fourteenth Amendment, and allow States to participate in a field

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sovereign immunity jurisprudence and its Spending Clause jurisprudence is evident in *College Savings Bank*. At one point, relying on the Court's sovereign immunity jurisprudence, the decision suggests a bright line rule against allowing Congress to exact waivers of sovereign immunity:

Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin.

*College Sav. Bank*, 527 U.S. at 683-84 (citations omitted). Yet, later relying on its Spending Clause jurisprudence, the decision suggests that Congress can require a waiver of sovereign immunity as a condition of receiving some federal benefit:

The United States points to two other contexts in which it asserts we have permitted Congress, in the exercise of its Article I powers, to extract “constructive waivers” of state sovereign immunity. In *Petty v. Tennessee-Missouri Bridge Comm’n*, we held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact. And we

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subject to Congressional regulation without waiving their constitutionally guaranteed sovereign immunity.”).

have held in such cases as *South Dakota v. Dole* that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.

*College Sav. Bank*, 527 U.S. at 686-87 (citations omitted).

The courts of appeals have universally held that Congress may require the States to waive sovereign immunity as a condition of receiving federal funds.<sup>23</sup> However, these decisions do not attempt to resolve the tension between this Court's sovereign immunity jurisprudence and its Spending Clause jurisprudence. Rather, they reflect a rigid adherence to the latter and an almost complete disregard for sovereign immunity jurisprudence. These decisions do not adequately consider the impact of this Court's sovereign immunity jurisprudence. Therefore, they "ought not to remain binding precedent." See *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

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<sup>23</sup> See, e.g., *Nieves v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003); *Koslow*, 302 F.3d at 170-171; *Vinson*, 288 F.3d at 1151; *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 819 (9th Cir.), *opinion amended*, 271 F.3d 910 (9th Cir. 2001), *rehearing en banc denied*, 285 F.3d 1226 (9th Cir.), *cert. denied*, 122 S. Ct. 2591 (2002); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628-29 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 2588 (2002); *Cherry v. University of Wisconsin*, 265 F.3d 541, 554 (7th Cir. 2001); *Jim C.*, 235 F.3d at 1081-82; *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Sandoval v. Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), *rev'd on other grounds sub nom.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Litman v. George Mason University*, 186 F.3d 544, 554 (4th Cir. 1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997).

Regardless of what other limits this Court may impose on the Spending Clause power, the tension between this Court's sovereign immunity jurisprudence and its Spending Clause jurisprudence must be resolved. Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" *Lopez*, 514 U.S. at 578 (Kennedy, J., joined by O'Connor, J., concurring), the Spending Clause cannot be used to "render academic the Constitution's . . . limits of federal authority." *New York*, 505 U.S. at 167. This Court should establish a bright line rule: Congress may never use *any* of its Article I powers to exact waivers of sovereign immunity. "Congress' powers under Article I of the Constitution do not include the power to subject States to suit in federal court at the hands of private individuals." *Kimel*, 528 U.S. at 80. If Congress cannot abrogate sovereign immunity using its powers to enforce the Fourteenth Amendment, it follows that Congress ought not be able to exact a waiver of sovereign immunity using its Article I powers. *Cf. Jim C.*, 235 F.3d at 1085 (Bowman, J., joined by Beam, Loken, and Bye, J.J., dissenting) ("Eleventh Amendment immunity trumps any exercise of the powers of Congress enumerated in the original Constitution; controlling weight must be given to the provision that became part of the Constitution later in time"). Yet, even if this Court rejects a bright line rule, or decides to adopt a bright line rule that Congress *may* use its Article I powers to exact waivers of sovereign immunity, the tension between this Court's Spending Clause jurisprudence and its sovereign immunity jurisprudence still must be resolved.

The stakes are nothing less than the continued vitality of this Court's recent sovereign immunity jurisprudence. If Congress may require the States to waive

sovereign immunity as a condition of receiving federal funds, then Congress may circumvent *Garrett*, *Kimel*, *Florida Prepaid*, and *Seminole Tribe* simply by saying that if a State or state agency accepts any federal funds, it waives sovereign immunity. All states accept federal funds. Therefore, as a practical matter, such a result would restore this Court's sovereign immunity jurisprudence to its pre-*Seminole Tribe* status. See *Pennsylvania v. Union Gas*, 491 U.S. 1, 14-23 (1989). See also *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989). Alternatively, if Congress *may not* use its Article I powers to circumvent the anti-abrogation holdings, then Article I powers are no greater than the Fourteenth Amendment enforcement power and the integrity of this Court's jurisprudence is retained. Regardless of which course is taken, it is essential that the States and the National Government know whether or not the Constitution permits Congress to use its Article I powers to circumvent sovereign immunity. Certiorari should be granted.



**CONCLUSION**

This petition for a writ of certiorari should be **GRANTED.**

Respectfully submitted,

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May 26, 2004

## **APPENDIX**

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**UNPUBLISHED**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FOURTH CIRCUIT**

AMY SHEPARD,

*Plaintiff-Appellant,*

UNITED STATES OF AMERICA,

*Intervenor,*

v.

KATRINA IRVING, Dr.,

in her individual capacity;

GIRARD MULHERIN, Dr., in his  
individual and official capacities;

ALAN MERTEN, Dr., in his official  
capacity as President of George

Mason University; THE RECTORS  
AND VISITORS OF GEORGE MASON

UNIVERSITY; LISA STIDHAM, in her  
individual capacity; LEIGH ANN

MURTHA, in her individual

capacity; CHRISSY FORBES, in her  
individual capacity; JOE BOAT-

WRIGHT, in his individual

capacity; NIKKIA ANDERSON,

in her individual capacity,

*Defendants-Appellees.*

No. 02-1712

Appeal from the United States District Court  
for the Eastern District of Virginia, at Alexandria.

Gerald Bruce Lee, District Judge.

(CA-01-1093-A)

Argued: May 7, 2003

Decided: August 20, 2003

Before KING and SHEDD, Circuit Judges, and  
Frank W. BULLOCK, Jr., United States District Judge for  
the Middle District of North Carolina, sitting by designation.

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Affirmed in part, reversed in part, and remanded by  
unpublished opinion. Judge Shedd wrote the opinion, in  
which Judge King and Judge Bullock joined.

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Unpublished opinions are not binding precedent in this  
circuit. See Local Rule 36(c).

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### **OPINION**

SHEDD, Circuit Judge:

Plaintiff Amy Shepard appeals the district court's  
grant of the defendants' motion to dismiss her complaint.

We affirm in part, reverse in part, and remand for further proceedings.

I.

In her complaint, the plaintiff alleges she has a disability that limits her ability to concentrate and learn. While a student at George Mason University (“GMU”), the plaintiff requested and received extra time to do her assignments to accommodate her disability. During the summer of 2000, she took her final course, an English class. She asked her instructor, defendant Katrina Irving, for extra time to do her work because of her disability. Irving initially agreed to accommodate the plaintiff but later refused.

The plaintiff complained to the GMU Disability Resource Center about Irving’s failure to accommodate her disability. The plaintiff asserts that Irving gave her an “F” and concocted a plagiarism charge against her in retaliation for making this complaint.

The plaintiff asked the GMU dean, defendant Girard Mulherin, if she could appeal the grade without fear of being prosecuted before the Honor Committee for plagiarism. Mulherin told the plaintiff the time for Irving to file the plagiarism charge had expired, so she could appeal her grade without fear of reprisal. The plaintiff appealed, but Irving then filed the plagiarism charge with the Honor Committee.

The plaintiff filed her first lawsuit in the district court to enjoin the Honor Committee from reviewing the plagiarism charge. The district court dismissed her case for lack of ripeness. The plaintiff did not appeal.

After the first lawsuit was dismissed, the Honor Committee heard the plagiarism charge against the plaintiff but disallowed her from having either her lawyer or her mother represent her. The Honor Committee found her guilty of plagiarism, affirmed the “F,” issued a written reprimand, and ordered her to perform community service.

The plaintiff had a job lined up contingent upon her graduation. Because of the “F,” the plaintiff did not graduate on time, and she lost the job she had lined up. She eventually completed her degree at GMU several months later in May 2001.

## II.

The plaintiff filed this second lawsuit, seeking both injunctive relief and damages against GMU; Alan Merten (GMU’s president), in his official capacity; Mulherin, in his individual and official capacities; Irving, in her individual capacity; and the student members of the Honor Committee, in their individual capacities.

The plaintiff’s complaint contains six counts. The first four allege violations of the plaintiff’s due process rights under the Fourteenth Amendment. In count V, the plaintiff alleges a violation of her First Amendment right to free speech. In VI, the plaintiff asserts various claims under Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), 29 U.S.C. § 794(a).

The defendants filed their motion to dismiss, raising such defenses as Eleventh Amendment immunity, absolute immunity, qualified immunity, and failure to state a claim. Although the district court did not rule in favor of the

defendants on all of their alternative grounds, the district court ultimately dismissed the plaintiff's complaint in its entirety.

On appeal, the plaintiff has failed to raise several of the district court's rulings against her. In particular, the plaintiff does not appeal the dismissal of the first four counts of her complaint, all of which claim a violation of her due process rights. Also, the plaintiff does not appeal the following three legal issues:

1. The Honor Committee members are entitled to absolute immunity. Thus, all five members of the Committee are immune from all claims for damages arising out of the Honor Committee proceeding.
2. All defendants in their individual capacities are not subject to suit under the ADA and the Rehabilitation Act.
3. All defendants are entitled to qualified immunity as to claims for damages arising under the First Amendment.

Because the plaintiff did not raise these matters on appeal, we deem them abandoned. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 (4th Cir. 1999). Moreover, because we remand this case for further proceedings, the district court's rulings on these unappealed matters remain the law of the case. *See United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (“[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”).

Thus, on appeal we are faced with the following issues:

1. whether GMU and Merten and Mulherin, in their official capacities, are immune under the Eleventh Amendment from suit for damages under Title II of the ADA and § 504 of the Rehabilitation Act;
2. whether the plaintiff's requests for prospective relief satisfy the requirements of the *Ex parte Young* doctrine; and
3. whether the plaintiff properly states claims upon which relief can be granted in counts V and VI.

We address each of these issues in turn.

### III.

The district court issued two rulings involving Eleventh Amendment immunity, the first as to Title II of the ADA and the second as to § 504 of the Rehabilitation Act. Because these rulings are jurisdictional, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), we review them before we reach the merits of the plaintiff's claims. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). We review the district court's Eleventh Amendment immunity determinations *de novo*. *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002).

#### A.

The district court ruled that Congress did not validly abrogate the Eleventh Amendment immunity of the States when it enacted Title II of the ADA. Therefore, the court ruled that GMU is immune from suit and Merten and Mulherin, in their official capacities, are immune from suit for damages under Title II of the ADA.

After the parties filed their initial appellate briefs, we decided *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002). We held in *Wessel* that Congress failed to validly abrogate a State's Eleventh Amendment immunity for claims brought under Title II of the ADA. *Id.* at 215. Accordingly, we affirm the district court's judgment that GMU is immune from suit and Merten and Mulherin, in their official capacities, are immune from suit for damages under Title II of the ADA.

B.

The district court also ruled that GMU waived its Eleventh Amendment immunity under § 504 of the Rehabilitation Act by accepting approximately \$44 million in federal funds in the year in question.<sup>1</sup> We agree.

A State may constructively waive its Eleventh Amendment immunity by voluntarily accepting federal funds when Congress expresses a clear intent to condition receipt of those funds on a State's consent to waive its Eleventh Amendment immunity. *Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir. 1997). Congress clearly expressed its intent to require a State to waive its Eleventh Amendment immunity for § 504 claims as a condition of receiving federal funds. Section 2000d-7(a)(1) states in relevant part:

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<sup>1</sup> The district court ruled that a private right of action exists under § 504 of the Rehabilitation Act. Although the defendants challenged this ruling at oral argument, they failed to raise this issue in their opening brief. Accordingly, this issue is not properly presented and we deem it abandoned. *See Edwards*, 178 F.3d at 241.

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 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

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

In *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), we ruled that Congress permissibly conditioned GMU's receipt of federal funds on its consent to be sued in Title IX discrimination claims. As such, we held that GMU waived its Eleventh Amendment immunity. *Id.* at 555.

Although *Litman* involved a Title IX claim rather than a § 504 claim, we nevertheless find the analysis in *Litman* persuasive. Both Title IX and § 504 of the Rehabilitation Act are specifically listed in § 2000d-7(a)(1) as statutes under which a State defendant must waive its Eleventh Amendment immunity.

In support of its position that it did not waive its immunity for § 504 claims, GMU raises three issues not addressed in *Litman*. It contends that: (1) the waiver requirement is coercive; (2) its waiver was not knowing;<sup>2</sup> and (3) there is no reasonable nexus between the required

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<sup>2</sup> The defendants would have us follow the recent Fifth Circuit case, *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003), *reh'g en banc granted*, 2003 WL 21692677 (July 17, 2003), in which the panel held that the State defendants did not knowingly waive their immunity. We decline to follow *Pace*.

waiver and the purpose of the federal funding that GMU accepted. We reject the first two arguments based on the reasoning of the district court. As for GMU's third argument, we hold that there is a sufficient relationship between the condition imposed by Congress – GMU's consent to be sued for disability discrimination claims – and the purpose of the federal funding – providing a broad range of educational opportunities in an environment free of unlawful discrimination based on disability.

We affirm the district court's ruling that GMU waived its Eleventh Amendment immunity for claims brought under § 504 of the Rehabilitation Act. Therefore, the plaintiff may seek damages and injunctive relief against GMU and Merten and Mulherin, in their official capacities,<sup>3</sup> under § 504 of the Rehabilitation Act.

#### IV.

Defendants Merten and Mulherin next argue that the plaintiff's claims for prospective relief against them in their official capacities under Title II of the ADA do not

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<sup>3</sup> The plaintiff may seek recovery against only GMU and Merten and Mulherin, in their official capacities, because § 504 prohibits discrimination by “any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a); *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999). GMU, a State institution, may be sued because the statutory definition of “program or activity” includes universities. 29 U.S.C. § 794(b)(2)(A). Merten and Mulherin may be sued in their official capacities because a suit for damages against a State official in his official capacity is treated like a suit against the State entity. *Lizzi v. Alexander*, 255 F.3d 128, 136 (4th Cir. 2001), *overruled in part on other grounds by Nevada Dep't. of Human Resources v. Hibbs*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1972 (2003).

satisfy the requirements of the *Ex parte Young* doctrine. We disagree.

We review *de novo* a district court's legal determination whether *Ex parte Young* relief is available. *CSX Transp., Inc. v. Board of Public Works*, 138 F.3d 537, 541 (4th Cir. 1998). The *Ex parte Young* doctrine

“allows private citizens, in proper cases, to petition a federal court to enjoin State officials in their official capacities from engaging in future conduct that would violate the Constitution or a federal statute.” *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002). Specifically, *Ex parte Young* authorizes “suits against state officers for prospective equitable relief from ongoing violations of federal law.” *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001). To determine whether the *Ex parte Young* doctrine is applicable, as the Supreme Court recently observed, a court “need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 122 S.Ct. 1753, 1760, 152 L.Ed.2d 871 (2002).

*Franks v. Ross*, 313 F.3d 184, 197 (4th Cir. 2002).

At oral argument, plaintiff's counsel clarified that the plaintiff is seeking only the following prospective relief: (1) expungement of the “F” she received in Irving's class; (2) expungement of the plagiarism conviction by the Honor

Committee;<sup>4</sup> and (3) in the alternative to expungement, a new Honor Committee hearing in which she is allowed representation. GMU argues that these requests do not seek relief for any ongoing violation of federal law.

Assuming the plaintiff prevails on her substantive claims, the “F” and the plagiarism conviction would constitute a continuing injury to the plaintiff. Thus, the plaintiff’s two requests for expungement would relate to an ongoing violation of federal law and the relief granted would be prospective in nature. *See Wolfel v. Morris*, 972 F.2d 712, 719 (6th Cir. 1992) (allowing expungement of records); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986).

The plaintiff’s request, in the alternative, for a new Honor Committee hearing also alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. A new hearing with representation would give the plaintiff an opportunity to be heard, under circumstances in which her disability does not disadvantage her, in hopes of obtaining a favorable ruling as to the “F” and plagiarism conviction on her record.

Therefore, the plaintiff may seek relief under Title II of the ADA against Merten and Mulherin, in their official capacities, for expungement or, in the alternative, a new Honor Committee hearing with representation under Title II of the ADA.

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<sup>4</sup> The defendants claim that the plaintiff’s plagiarism conviction does not appear on her record. In our review of a motion to dismiss, however, we must accept as true all well-pleaded allegations. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The defendants will have an opportunity to prove their assertion to the district court on remand.

V.

Last, the plaintiff argues that the district court erred in dismissing her remaining claims for failure to state a claim upon which relief can be granted.<sup>5</sup> We agree.

We review *de novo* the dismissal of a complaint for failure to state a claim upon which relief could be granted. *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). A motion to dismiss under Rule 12(b)(6) must not be granted unless it appears certain that the plaintiff can prove no set of facts which would support her claim and would entitle her to relief. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). In considering a motion to dismiss for failure to state a claim, the court accepts as true all well-pleaded allegations and views the complaint in the light most favorable to the plaintiff. *Id.*

The plaintiff attempts to allege three types of claims in counts V and VI: (1) retaliation in violation of her First Amendment right to free speech; (2) retaliation in violation of the ADA and the Rehabilitation Act; and (3) disability discrimination in violation of the ADA and the Rehabilitation Act.

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<sup>5</sup> At oral argument, counsel clarified that the plaintiff is not claiming in her complaint that she had a right to plagiarize because of her disability. Instead, she alleges that, because Irving did not give her a reasonable accommodation, she was forced to turn her assignments in before she had sufficient time to properly complete them. She asserts that what someone else might construe to be plagiarism was her best effort to finish her assignment without a reasonable accommodation.

A.

In count V, the plaintiff claims that Irving<sup>6</sup> violated her First Amendment right to free speech. The plaintiff alleges that she complained to the GMU Disability Resource Center about Irving's failure to accommodate her disability and that, in retaliation, Irving gave her an "F" and concocted a plagiarism charge. The plaintiff claims that she suffered damage to her reputation, was not able to graduate on time, and lost her job and thousands of dollars as a result.

The First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right. *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676 (4th Cir. 2000). A plaintiff seeking to recover under § 1983 for retaliation must establish three elements: (1) the plaintiff's right to speak was protected; (2) the plaintiff suffered some adverse action in response to her exercise of a protected right; and (3) a causal relationship between the plaintiff's speech and the defendant's retaliatory action. *Id.* at 685-86.

We find that the plaintiff has adequately alleged all three elements of a First Amendment retaliation cause of action. Irving does not contest the first element – that the plaintiff's complaint to the Resource Center constituted protected speech. As for the second element, the plaintiff

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<sup>6</sup> In her appellate brief, the plaintiff limits her First Amendment claim to the alleged retaliation for complaining to the Resource Center. We deem any other potential First Amendment claims in the plaintiff's complaint to be abandoned. *See Edwards*, 178 F.3d at 241.

asserts that Irving gave her an “F” and concocted a plagiarism charge against her in response to her exercising her protected right to make a complaint. As for the third element, the plaintiff sufficiently alleges that Irving retaliated against her because she engaged in protected speech. Accordingly, we reverse the district court’s dismissal of the plaintiff’s First Amendment retaliation claim.

B.

In count VI, the plaintiff again alleges that Irving retaliated against her for complaining to the GMU Disability Resource Center.<sup>7</sup> The plaintiff contends that she adequately states a claim for retaliation under both the ADA and the Rehabilitation Act.

Title V of the ADA governs claims for retaliation. Title V states in pertinent part:

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a).<sup>8</sup>

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<sup>7</sup> This allegation appears in count VI only by way of incorporation from count V.

<sup>8</sup> The plaintiff cited without discussion § 12203 in the jurisdiction section of her complaint. The plaintiff did not cite any reference to the

(Continued on following page)

The district court issued no rulings relating to the plaintiff's purported retaliation claim under Title V of the ADA. In particular, the district court did not decide whether Congress validly abrogated GMU's Eleventh Amendment immunity for Title V claims and did not address the merits of her claim. Because the district court has not yet addressed either the threshold jurisdictional issue or the merits, we remand the plaintiff's purported retaliation claim to the district court for further review as the case merits.

C.

In count VI, the plaintiff also claims that the defendants discriminated against her because of her disability. It appears that the plaintiff actually attempts to allege three discrimination claims under Title II and § 504.<sup>9</sup> First, she claims that the defendants refused to allow her to have a representative at the hearing because she is disabled. Complaint, ¶ 96. Second, she alleges that the defendants failed to reasonably accommodate her by allowing her to have a lawyer or her mother represent her at the hearing. Complaint, ¶¶ 51, 95. Third, she asserts

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Rehabilitation Act that contains an anti-retaliation provision similar to the one in § 12203.

<sup>9</sup> The plaintiff alleges her Title II and § 504 claims against all the defendants. Based on the law of the case and our prior rulings, the plaintiff may seek recovery under Title II against only Merten and Mulherin, in their official capacities, and under § 504 against only GMU and Merten and Mulherin, in their official capacities.

that the defendants failed to accommodate her by giving her additional time to complete her assignments. ¶ 97.<sup>10</sup>

1.

The plaintiff's first claim clearly states a disability discrimination claim. Pursuant to Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the *benefits of the services, programs, or activities of a public entity.*" 42 U.S.C. § 12132 (emphasis added). To establish a cause of action under Title II of the ADA and § 504 of the Rehabilitation Act, a plaintiff must show that: (1) she has a disability; (2) she is otherwise qualified for the benefit in question; and (3) her disability was a motivating factor in her exclusion from the benefit (Title II) or the sole reason for her exclusion from the benefit (§ 504). *Baird v. Rose*, 192 F.3d 462, 467, 470 (4th Cir. 1999).

In her complaint, the plaintiff sufficiently alleges that: (1) she has a disability; (2) she is otherwise qualified to have a representative at an Honor Committee hearing;<sup>11</sup>

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<sup>10</sup> The plaintiff abandoned her request for prospective relief relating to this particular claim. See *ante* at 9. However, it does not appear that the plaintiff has abandoned her claim for damages under § 504 of the Rehabilitation Act relating to this alleged discriminatory conduct.

<sup>11</sup> Title II prohibits discrimination in all "services, programs, or activities" of a public entity. 42 U.S.C. § 12132. Although Title II does not define this phrase, we have found that a middle school "show choir" qualifies as a "service, program, or activity." *Baird*, 192 F.3d at 467. We likewise find that the Honor Committee is one of the "services, programs, or activities" provided by GMU to its students.

and (3) the Honor Committee disallowed her from having a representative because she is disabled.

The district court wrongly concluded that the plaintiff failed to allege that she was denied proper representation at the Honor Committee hearing because of her disability. Thus, we reverse the district court's dismissal of the plaintiff's claims under Title II of the ADA and § 504 of the Rehabilitation Act.

2. and 3.

As for the plaintiff's two failure [sic] to accommodate claims, the plaintiff asserts that cases "interpreting the Rehabilitation Act have consistently held that disability discrimination can be demonstrated merely by showing an educational institution failed to . . . reasonably accommodate a student." Plaintiff's Brief, p. 38. The plaintiff cites no authority for this assertion.<sup>12</sup>

The district court did not address the merits of either of the plaintiff's purported failure to accommodate claims. We decline to consider the merits of these claims for the first time on appeal. Accordingly, we remand these claims to the district court for further consideration as the case merits.

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<sup>12</sup> The plaintiff cites 29 C.F.R. § 84.4, but no such regulation exists.

VI.

For the foregoing reasons, we

*AFFIRM IN PART, REVERSE IN  
PART, AND REMAND FOR FURTHER  
PROCEEDINGS CONSISTENT WITH  
THIS OPINION.*

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204 F.Supp.2d 902

United States District Court,  
E.D. Virginia.  
Alexandria Division.

Amy SHEPARD, Plaintiff,

v.

Dr. Katrina IRVING, et al. Defendants.

**No. CIV.A. 01-1093-A.**

June 5, 2002.

Michael Jackson Beattie, Esquire, Fairfax, VA, for  
Plaintiff.

Jason Paul Cooley, Office of the Virginia Attorney  
General, Richmond, VA, for Defendants.

***MEMORANDUM OPINION***

LEE, District Judge.

THIS MATTER is before the Court on Defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The plaintiff in this case is a college student with a learning disability who sought additional time on her assignments from her English professor. The professor denied her the additional time and suspected her of plagiarism. The professor later gave the plaintiff an "F" in her class and brought plagiarism charges against her with the university's student disciplinary board, the Honor Council. During the Honor Council proceeding, the plaintiff was not allowed to have an attorney represent her nor was she allowed to have her mother testify as a witness. Ultimately, the Honor Council convicted her of the charges as alleged, affirmed the "F" she received in her class, and gave her a written

reprimand. Based on these actions, the plaintiff alleges violations under the Fourteenth Amendment (Count I), First Amendment (Count II), Americans with Disabilities Act (“ADA”) and the Rehabilitation Act (Count III) against the professor, the university, the university’s president, a university dean in charge of the Honor Council, and the students on the Honor Council.

Two issues are before the Court. The first issue is whether a public university, its officials, and students who presided over the Honor Council proceeding, are immune from suit for their role in initiating disciplinary proceedings and convicting the plaintiff of plagiarizing her assignment. The second issue is whether the plaintiff states a claim for discrimination when she alleges violations based upon a professor’s failure to accommodate her disability with more time on her assignments, giving her a failing grade, and initiating disciplinary proceedings against her.

Upon review of the pleadings and arguments of the parties, this Court holds as follows. First, the Court lacks subject matter jurisdiction over all claims against the students presiding over the Honor Council proceeding because they were acting in a quasi-judicial capacity during the proceeding and thus are entitled to absolute immunity from all claims arising out of such proceeding. Moreover, the plaintiff does not have a cause of action against the remaining defendant officials in their individual capacities for violations under Title II of the Americans with Disabilities Act and the Rehabilitation Act because these statutes are not actionable against individuals and the plaintiff is barred from bringing suit under 42 U.S.C. § 1983. In addition, all defendants are immune from liability for civil damages, pursuant to the doctrine of

qualified immunity, for the plaintiff's claims arising under the Fourteenth Amendment Due Process Clause (Count I) and the First Amendment (Count II) because the plaintiff never alleges the deprivation of any clearly established constitutional right.

Nonetheless, the plaintiff may assert her Rehabilitation Act claim (Count III) against the defendant officials in their official capacities because the public university waived its sovereign immunity when it accepted federal funds. Moreover, the plaintiff may seek prospective injunctive relief for her ADA claim against the defendant officials in their official capacities pursuant to the *Ex parte Young* doctrine.

Second, the plaintiff fails to state a claim under the Fourteenth Amendment, First Amendment, Rehabilitation Act, and ADA. In particular, the plaintiff fails to state a claim for discrimination under the Fourteenth Amendment (Count I) because she does not allege the deprivation of any recognized constitutional interest. In addition, the plaintiff fails to state a claim for retaliation under the First Amendment (Count II) because she fails to allege that she suffered some adversity in response to her exercise of a protected right. Finally, the plaintiff fails to state a claim under the Rehabilitation Act and the ADA (Count III) because the allegations in the Complaint do not allege that she was excluded from any service, program, or benefit. Accordingly, Defendants' motions to dismiss are GRANTED.

## I. BACKGROUND

Plaintiff Amy Shepard ("Shepard") was a student at George Mason University ("GMU") during the summer of

2000. GMU is a state created university and is a recipient of federal education funding. During her tenor at GMU, Shepard utilized the GMU Disability Resource Center because she has a learning disability that limits her ability to concentrate and learn. Shepard requested accommodations through the Resource Center to allow her additional time to research and write her assignments. During Shepard's last semester prior to graduation, in the 2000 summer school session, Shepard took an English class taught by Professor Katrina Irving, Ph.D. Dr. Irving did not give Shepard extra time to complete her assignments. Shepard encountered difficulty properly completing her English written assignments and complained to the GMU Disability Resource Center about Dr. Irving's failure to allow Shepard the extra time. On July 21, 2000, Dr. Irving informed Shepard that she suspected Shepard of plagiarism, and subsequently gave Shepard a failing grade in her English class.

Subsequently, Shepard's mother spoke with Dean of Students Girard Mulherin, Ph.D. Dr. Mulherin told Shepard that she could file a grade appeal without fear of being prosecuted for the suspected plagiarism because GMU allows fifteen days to bring such charges before the school's Honor Council and the fifteen days had already expired. Accordingly, Shepard appealed her English grade.

On August 28, 2000, Dr. Irving filed a plagiarism charge against Shepard with the school's Honor Council. GMU's Honor Council is a student run organization, which adjudicates alleged violations of the school's rules. During the Honor Council proceeding, Shepard asked Dr. Mulherin if she could be represented by her attorney or her mother and also have her mother serve as a witness. Dr. Mulherin denied her request. It was GMU's policy not to

have attorneys or law students represent students during such proceedings.

On November 2, 2000, Shepard filed a Complaint in this Court to halt the Honor Council proceedings. On March 21, 2001, this Court dismissed Shepard's case as unripe. On March 26, 2001, the Honor Council issued its decision finding Shepard guilty of the offense as charged, issued her a written reprimand, affirmed the "F" she received in her class, and ordered her to perform community service. Shepard appealed the decision and was unsuccessful.

On July 11, 2001, Shepard filed a second Complaint in this Court against Dr. Irving, Dr. Mulherin, GMU President Alan Merten, the Rector and Visitors of GMU, and Honor Committee Members, Lisa Stidham, Leigh Ann Murtha, Chrissy Forbes, and Joe Boatwright (collectively "Defendants") arising out of her failure to receive additional time to complete her assignments and the disciplinary proceedings instituted against her.

Count I alleges that Defendants' actions deprived Shepard of her liberty interest in her reputation and future employment and a property interest in her education in violation of the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV. In particular, Shepard alleges due process violations arising from: (1) Dr. Irving failing to abide by GMU's own policy by filing honor charges more than fifteen days after Dr. Irving realized the violation; (2) GMU's policy barring attorneys and law students from representing an accused before the Honor Council; (3) Dr. Mulherin's refusal to let Shepard's mother represent Shepard during the proceedings in violation of

GMU's own policy; and (4) Dr. Mulherin's refusal to allow Shepard the right to call her mother as a witness.

Count II alleges that Defendants retaliated against Shepard for exercising her First Amendment right to redress her grievance. *See* U.S. CONST. amend. I. In particular, Shepard alleges that: (1) in retaliation for Shepard's complaint about Dr. Irving, Dr. Irving gave Shepard a failing grade; and (2) in retaliation for Shepard contesting the grade in Honor Council, Dr. Irving disparaged Shepard's reputation, and prevented her graduation and anticipated employment.

Count III alleges that Defendants breached their obligation under the Americans with Disabilities Act of 1990 ("ADA") § 309, 42 U.S.C. § 12189, and the Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a), by failing to accommodate her disability. In particular, Shepard alleges that Defendants: (1) failed to make reasonable accommodations for her learning disability by not offering Shepard additional time to complete her assignments during the summer session; and (2) failed to reasonably accommodate Shepard at the Honor Council by not allowing someone to represent her.

Defendants Dr. Irving, Dr. Mulherin, President Merten, and GMU filed a motion to dismiss for lack of subject matter jurisdiction on the basis that they are immune from suit in their official capacities and they also move to dismiss for failure to state a claim for violations of due process, retaliation, and disability discrimination. In addition, Honor Committee Members, Murtha, Anderson, Stidham, and Forbes filed a motion to dismiss for lack of subject matter jurisdiction on the basis of absolute immunity and qualified immunity, and they move to dismiss

Shepard's ADA and Rehabilitation Act claims for failure to state a claim. Honor Committee Member Boatwright also filed a motion to dismiss, which adopted the arguments of both groups of Defendants. These motions are now before the Court.

## II. DISCUSSION

Rule 12(b)(1) of the Federal Rules of Civil Procedure provide for dismissal of an action against a party where the court lacks subject matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1). When ruling on a 12(b)(1) motion to dismiss, the allegations of the complaint are accepted as true. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). The Court should not dismiss a claim for lack of subject matter jurisdiction unless it appears beyond a doubt that recovery would be impossible under any set of facts which could be proven. *See Gasner v. Board of Supervisors of County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D.Va.1995), *aff'd*, 103 F.3d 351 (4th Cir.1996).

Similarly, in considering a motion to dismiss under Rule 12(b)(6), the court should accept as true all well pled allegations of the complaint and view the complaint in the light most favorable to the plaintiff. *See Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993); FED. R. CIV. P. 12(b)(6). The court should grant a motion to dismiss for failure to state a claim only if it appears to a certainty that the plaintiff cannot prove any set of facts in support of its claim that would entitle the plaintiff to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

A court must first resolve jurisdictional issues before proceeding to the issue of whether the plaintiff has stated

a claim. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In addition, a court must resolve jurisdictional issues related to statutory construction before resolving jurisdictional issues related to sovereign immunity. See *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 778-79, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). Accordingly, the issues before the Court are addressed as follows. First, the Court addresses whether Section 504 of the Rehabilitation Act creates a private cause of action against a State entity. Second, the Court addresses absolute immunity as it relates to the Honor Committee Members. Third, the Court addresses Eleventh Amendment immunity with respect to GMU, Dr. Mulherin, and Dr. Merten in their official capacities and Congress' attempt to abrogate such immunity for claims brought against them under the ADA and the Rehabilitation Act. Fourth, the Court addresses Eleventh Amendment immunity with respect to GMU, Dr. Mulherin, and Dr. Merten in their official capacities and their waiver of such immunity for claims under the Rehabilitation Act. Fifth, the Court addresses Eleventh Amendment immunity and Dr. Mulherin and Dr. Merten's liability for prospective injunctive relief under the *Ex parte Young* doctrine. Sixth, the Court addresses immunity for Defendants in their individual capacities for ADA and Rehabilitation Act claims, and the viability of causes of action under 42 U.S.C. § 1983. Finally, the Court addresses whether Shepard has properly stated a claim for violations under the Fourteenth Amendment (Count I), violations under the First Amendment (Count II), and relief under the ADA and Rehabilitation Act (Count III).

A. *Private Right of Action under Section 504 of the Rehabilitation Act*

Defendants argue that Congress has not clearly and unambiguously created a private right of action to enforce Section 504 of the Rehabilitation Act. Specifically, Defendants argue that there is nothing in the statute that puts States on notice that upon accepting federal funds they would be subjected to a private right of action under Section 504. When determining congressional intent to create a private right of action or to otherwise make a remedy available to a special class of litigants, a court should determine: (1) whether the statute was enacted for the benefit of a special class of persons, of which the plaintiff is a member; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether the implication of such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 689-708, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (citing *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)).

The Seventh Circuit in *Lloyd v. Regional Transportation Authority* analyzed these factors in light of Section 504 and made a determination that Section 504 created a private right of action against a State entity. 548 F.2d 1277, 1285-87 (7th Cir.1977). The Fourth Circuit has acknowledged the sound reasoning of the *Lloyd* Court's holding and has held that a private right of action exists under Section 504 against a State entity. *See Davis v. Southeastern Cmty. Coll.*, 574 F.2d 1158 (4th Cir.1978), *rev'd on other grounds*, *Southeastern Cmty. Coll. v. Davis*,

442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *see also Pandazides v. Virginia Bd. of Ed.*, 13 F.3d 823, 828 (4th Cir.1994) (acknowledging Section 504 creates a private right of action). Therefore, pursuant to such authority, this Court holds that Shepard has a private right of action to sue under Section 504.

B. *Absolute Immunity for Honor Committee Members*

Defendants Stidham, Murtha, Forbes, and Boatwright (“Honor Committee Members”) are immune from personal liability pursuant to the doctrine of absolute immunity. Generally, the judicial system assumes that all individuals, whatever their position, are subject to the law. *See Austin Mun. Sec., Inc. v. Nat’l Ass’n of Sec.*, 757 F.2d 676, 687 (5th Cir.1985). However, absolute immunity exempts an official from personal liability, when they hold an official position and perform specialized duties and the alleged offense falls under the scope of such duties. *See id.* (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)). Officials protected by absolute immunity do not have to face the rigors of full discovery or trial for claims arising within their official duties. *See id.* (acknowledging that such officials are subject to discovery to determine whether their actions were taken within the scope of their authority). Ultimately, the burden is on the person claiming absolute immunity to prove that public policy requires such a broad protection of the person’s actions. *See id.*

The “functional approach” must be utilized to determine whether an official is entitled to absolute immunity. *See Butz v. Economou*, 438 U.S. 478, 514-15, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). This approach looks to the nature

of the functions performed to determine whether the officials should be immune from prosecution. *See id.* Under such approach, an official is entitled to absolute immunity if (a) the official's function shares the characteristics of the judicial process, (b) the official's activities are likely to result in recriminatory lawsuits by disappointed parties, and (c) sufficient safeguards exist in the regular process to control unconstitutional conduct. *See id.* Administrative officials, who are subject to restraints and perform adjudicatory functions within an agency similar to those of judges and prosecutors, are entitled to absolute immunity. *See id.* at 514, 98 S.Ct. 2894.

Shepard alleges damages against the Honor Committee Members in their individual capacities for presiding over a Honor Council proceeding where the Members' sole purpose was to adjudicate allegations of academic dishonesty and recommend a sanction. (Compl. ¶ 25.) The Honor Committee Members were presented with Shepard's case in an adversarial manner, they listened to the facts presented, and rendered their decision. The Honor Committee Members were essentially performing the function of judicial officers for GMU, as a state agency. Their performance of such duties makes them open to vexatious litigation and the threat of civil liability from accused students who are unhappy with the council's decision. Moreover, the Honor Council was subject to procedures and administrative processes, which shaped the quasi-judicial adjudication. (Compl. ¶¶ 38-40.) Therefore, pursuant to the reasoning in *Butz*, the Honor Committee Members are entitled to absolute immunity from damages for

any claims arising out of the Honor Council proceeding because they were acting within a quasi-judicial capacity.<sup>1</sup>

C. *Eleventh Amendment Protection of GMU, Dr. Mulherin, and Dr. Merten in their Official Capacities for Claims under the Rehabilitation Act and the ADA (Count III)*

Each state has sovereign immunity from lawsuits brought by private citizens under the Eleventh Amendment. See U.S. CONST. amend XI. The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

*Id.* Although the plain meaning of the Eleventh Amendment does not support states' sovereign immunity

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<sup>1</sup> Defendants also assert that the Honor Committee Members are entitled to qualified immunity. In light of the Court's holding that these students are entitled to absolute immunity, it is not necessary for the Court to reach this determination. Nonetheless, the Court holds that the Honor Committee Members would be entitled to qualified immunity because a reasonable official in their position would not have known it to be a violation of Shepard's constitutional rights not to allow an accused student to be represented by counsel or have her mother testify as a witness. See *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 74 (4th Cir.1983) (holding that the plaintiff student was afforded sufficient due process even though he was not permitted to have a practicing attorney represent him because he had adequate notice of the charges against him, the opportunity to be heard by disinterested parties, the right to confront his accusers, and the right to have the record reviewed by an appellate body).

directly, the Supreme Court has extended the plain meaning to lawsuits brought by private citizens against their own state. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (citing *Coll. Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-69, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999)).

Sovereign immunity extends to GMU as well as to Dr. Mulherin, and Dr. Merten in their official capacities. A state supported university enjoys the same sovereign immunity as States. See *Thorpe v. Virginia State University*, 6 F.Supp.2d 507, 509 n. 4 (E.D.Va.1998). Moreover, suits against state officials in their official capacities are considered suits against the state. See *Litman v. George Mason University*, 186 F.3d 544, 547 (4th Cir.1999). GMU is a state supported institution of higher education. See *id.* In addition, Shepard files suit against Dr. Mulherin and Dr. Merten [sic] in their official capacities as GMU officials. Accordingly, GMU, Dr. Mulherin, and Dr. Merten [sic] enjoy the same sovereign immunity as the Commonwealth of Virginia.

Sovereign immunity bars all claims against the States regardless of the type of relief. See *South Carolina State Ports Auth. v. Federal Maritime Comm'n*, 243 F.3d 165, 169-70 (4th Cir.2001). However, the immunity that States enjoy under the Eleventh Amendment is not absolute. States are not protected under the doctrine of sovereign immunity if (a) there exists a valid abrogation of that immunity by Congress, (b) a state has clearly and unequivocally waived its immunity, or (c) the prosecution of an action fits comfortably within the doctrine of *Ex parte Young*. See *Bell Atlantic Maryland v. MCI Worldcom, Inc.*, 240 F.3d 279, 288 (4th Cir.2001).

With respect to Count III of her Complaint, Shepard argues that GMU, Dr. Merten, and Dr. Mulherin are liable in their official capacities under the ADA and Rehabilitation Act because Congress validly abrogated Defendants' sovereign immunity with the enactment of these statutes prohibiting discrimination based on a disability. In addition, Shepard argues that GMU clearly waived its immunity from suit for claims under the Rehabilitation Act when Congress conditioned the receipt of federal funds in return for GMU's commitment not to discriminate on the basis of an individual's disability. Moreover, Shepard argues that the prosecution of her action fits comfortably within the doctrine of *Ex parte Young* because Defendants are committing an ongoing violation of federal law. Each argument is addressed in turn.

1. *Abrogation of Sovereign Immunity under Title II of the ADA*

In determining whether Congress has validly abrogated a state's sovereign immunity, courts generally look to the well-established two-prong test set forth in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996):(1) whether Congress intended to abrogate the state's sovereign immunity; and (2) whether Congress has acted pursuant to a valid exercise of its power. *Id.*

a. *Intent to Abrogate*

Congress clearly expressed its intent to abrogate States' sovereign immunity in passing Title II of the ADA. See 42 U.S.C. § 12101. Notwithstanding the Eleventh Amendment guarantees of immunity, the Fourteenth

Amendment guarantees equal protection to citizens of the United States. *See* U.S. CONST. amend XIV. Specifically, Section 1 of the Fourteenth Amendment provides, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.* Section 5 of the Fourteenth Amendment empowers Congress “to enforce the substantive guarantees contained in § 1 by enacting ‘appropriate legislation.’” *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). Pursuant to Section 5, Congress enacted the ADA, which requires that a qualified individual with a disability not be subjected to discrimination or otherwise be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, on the basis of such disability. *See* 42 U.S.C. § 12132. In addition, with respect to the ADA, Congress set forth that:

A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. . . .

*Id.* at § 12202. The unambiguous language of this statute demonstrates Congress’ clear intention that states not be shielded by immunity from suit for ADA cases. *See Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir.2001); *Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 110 (2d Cir.2001); *Reickenbacker v. Foster*,

274 F.3d 974, 983 (5th Cir.2001). Thus, such provision is an attempt by Congress to abrogate States' sovereign immunity.

b. *Exercise of Section 5 Power*

Under the second *Seminole Tribe* prong, the Court must determine whether Congress validly exercised its Section 5 power under the Fourteenth Amendment. A valid Section 5 exercise of power by Congress "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365, 121 S.Ct. 955 (quoting *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157). The inquiry concerning the "congruence and proportionality" of Congress' legislation is two-fold: (a) Congress must make findings of discrimination by the States; and (b) the resulting Congressional legislation must be specifically tailored to address the discovered discrimination. *See id.*

However, before turning to the "congruence and proportionality" analysis this Court must first "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 at 356, 121 S.Ct. 955. Where, as here, the Equal Protection Clause concerns people with disabilities, the Supreme Court has rejected the "quasi-suspect" classification and instead applied a "rational-basis" review. *See id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). In other words, "the Fourteenth Amendment does not require States to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Id.*

Under the “rational-basis” review, the *Garrett* Court considered whether Congress validly abrogated States’ sovereign immunity under Title I of the ADA.<sup>2</sup> In its “congruence and proportionality” inquiry, the *Garrett* Court found that Congressional findings concerning employment discrimination of persons with a disability primarily involved local, not state, governments. *See id.* at 369, 121 S.Ct. 955. Moreover, the *Garrett* Court found that the few discriminatory instances involving state governments were too limited to constitute a practice or pattern of state discrimination. *See id.*

Despite its holding that there were little to no Congressional findings of state discrimination, the *Garrett* Court considered the proportionality of Title I of the ADA as a Congressional remedy. *See id.* at 370, 121 S.Ct. 955. In addition to rejecting the ADA Title I requirement for employers to make facilities accessible, the Supreme Court also determined that “the [reasonable] accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.” *Id.* The Supreme Court also noted that Title I of the ADA shifts the burden from the plaintiff to the defendant to establish that a reasonable accommodation would be an undue burden, which is a direct contradiction of the United States Constitution. *See id.* Finally, the Supreme Court compared Title I

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<sup>2</sup> Title I of the ADA prohibits States and other employers from “discriminat[ing] against a qualified individual with a disability because of th[at] disability . . . in regard to . . . terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).

of the ADA to the Voting Rights Act (“VRA”), which the Court had previously upheld in *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). The VRA specifically targeted only the States where discrimination had been found. *See id.* at 328, 86 S.Ct. 803. In stark contrast, the Supreme Court found that “Congressional enactment of the ADA represents its judgment that there should be a ‘comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’” *Id.* at 373, 86 S.Ct. 803 (quoting 42 U.S.C. § 12101(b)(1)). Based on the foregoing reasons, the *Garrett* Court held that Congress invalidly exercised its Section 5 power to abrogate States’ sovereign immunity under Title I of the ADA.

The *Garrett* Court specifically did not address Title II. However, in the wake of *Garrett*, several circuits have applied the *Garrett* Court’s analysis to Title II of the ADA. *See Garcia*, 280 F.3d 98 (holding that Congress did not validly exercise its Section 5 authority to abrogate States’ sovereign immunity under Title II of the ADA); *Thompson*, 278 F.3d at 1034 (same); *Reickenbacker*, 274 F.3d at 983 (same). *But see Popovich v. Cuyahoga Cty. Court of Common Pleas*, 276 F.3d 808, 815-16 (6th Cir.2002) (holding Congress did not validly abrogate a State’s Eleventh Amendment immunity for actions brought under Title II of the ADA relying upon the Equal Protection Clause; however, Congress did validly abrogate such immunity with respect to Due Process considerations). In light of this case law and applying the “rational-basis” review, the Court turns to the “congruence and proportionality” inquiry.

Under the first prong of the “congruence and proportionality” inquiry, this Court still considers the Congressional findings as to the States’ discrimination against

people with disabilities in the provision of public services and public accommodations. As Justice Breyer denoted in his *Garrett* dissent, Congress held thirteen congressional hearings and created a special task force to determine the extent of state discrimination of the disabled. *See Garrett*, 531 U.S. at 377-378, 121 S.Ct. 955; App. A-C. As the *Garrett* majority noted, however, “at most, . . . 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn.” *Id.* at 370 n. 7, 121 S.Ct. 955. The majority noted that almost all of these incidents were in the context of discrimination in public accommodations under Title II and III of the ADA. This Court finds that, even if all of the 50 allegations of discrimination based on disability are attributable to discrimination prohibited under Title II of the ADA, then these 50 incidents are still not sufficient to evidence a pattern or practice of disability-based discrimination by the 50 States.

Nonetheless, even if the Court were to find that these 50 incidents did constitute a practice of discrimination, Title II of the ADA is overly broad and is not specifically tailored to the alleged discrimination as required by the second prong of the “congruence and proportionality” inquiry. The Equal Protection Clause mandates that similarly situated citizens enjoy similar treatment. *See Thompson*, 278 F.3d at 1031. However, Title II of the ADA shifts the burden to public entities to affirmatively provide equal treatment to persons with a disability by requiring the public entities to make “reasonable modifications.” 42 U.S.C. § 12131(2). In particular, Title II prohibits discrimination “against an individual with a disability who with or without reasonable modifications to rules, policies,

or practices . . . meets the essential eligibility requirements for the receipt of services or activities provided by a public entity.” *Id.* This affirmative obligation created by Title II of the ADA far exceeds the constitutional mandate within the Equal Protection Clause. *See Thompson*, 278 F.3d at 1031; *see also, Garrett*, 531 U.S. at 368, 121 S.Ct. 955 (“If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.”); *Erickson v. Bd. of Governors of State Colls. & Univs. for Northeastern Ill. Univ.*, 207 F.3d 945, 950 (7th Cir.2000) (“[N]o one believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA.”). States are not constitutionally mandated to provide disabled individuals with special accommodations. *See Garrett*, 531 U.S. at 367-68, 121 S.Ct. 955. States are only required to refrain from discrimination that is not rationally related to a legitimate government purpose. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Title II of the ADA creates a nationwide affirmative obligation on public entities to accommodate disabled persons based on 50 overly broad incidents of local discrimination. Therefore, such congressional remedy is not congruent with nor proportional to the Congressional findings of state discrimination of persons with a disability.

Accordingly, this Court finds that Congress did not validly exercise its Section 5 authority under Title II of the ADA to abrogate States’ sovereign immunity.

2. *Waiver of Sovereign Immunity under the Rehabilitation Act*

Congress enacted Section 504 of the Rehabilitation Act pursuant to the spending clause.<sup>3</sup> See *Frederick L. v. Dep't of Public Welfare*, 157 F.Supp.2d 509, 520 (E.D.Pa.2001) (citing cases acknowledging Section 504 as spending clause enactment). Under the Spending Clause, Congress may use federal funds to induce States to behave in a certain way by offering federal funds to States that agree to certain congressionally imposed conditions. See *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 286-87 (4th Cir.2002) (citing *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)). Ultimately, Congress presents States with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds. See *Litman*, 186 F.3d at 547. However, specific limitations exist on the spending power of Congress. See *id.* at 552. In order for the expenditures associated with Congress' spending power to be upheld, the expenditures must (1) benefit the general welfare, and the conditions imposed on their receipt must (2) be unambiguous, (3) be reasonably related to the purpose of the expenditure, (4) not violate any independent constitutional prohibition, and (5) not be so coercive as to pass the point as to which

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<sup>3</sup> Article I, Section 8 of the United States Constitution gives Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . ." See U.S. CONST. art. I, § 8, cl. 1 ("Spending Clause").

pressure turns into compulsion. *See West Virginia*, 289 F.3d at 286-87 (citations omitted).

A state may waive its immunity by either explicitly specifying its intention to subject itself to suit in federal court, or by voluntarily participating in federal spending programs where Congress expressed a clear intent to condition receipt of a federal benefit or federal funds on the State's consent to waive. *See Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir.1997) (citation omitted). Waiver of immunity as a condition to the receipt of funds should be found only where a statute so provides "by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir.1987) (citation omitted). Mere participation by a state in a program through which the Federal Government provides assistance for the operation of a state system is insufficient to constitute consent to be sued in federal court. *See Florida Dep't of Health v. Florida Nursing Home Assoc.*, 450 U.S. 147, 150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (citing *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909)); *Edelman*, 415 U.S. at 673, 94 S.Ct. 1347.

GMU waived its sovereign immunity by accepting federal assistance under the Rehabilitation Act. Under the Rehabilitation Act, Congress stated that no disabled individual shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. *See* 29 U.S.C. § 794. Congress provided further that:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7. The Fourth Circuit has set forth that any state reading that provision would clearly understand that it was consenting to the resolution of disputes regarding alleged violations of the Act's anti-discrimination provisions. *See Bell Atlantic Maryland*, 240 F.3d at 292 (citing *Litman*, 186 F.3d at 553-54); *see also Douglas v. California Dept. of Youth Authority*, 271 F.3d 812, 819 (9th Cir.2001); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir.2000). Shepard alleges, and Defendants concede, that GMU receives federal assistance under the Rehabilitation Act. Accordingly, by receiving such funds, and due to the lack of ambiguity in the statute, GMU waived its sovereign immunity.

Defendants argue that GMU's waiver of immunity is invalid and unconstitutional for two reasons. First, Defendants argue that the waiver is invalid because GMU mistakenly believed that Congress already abrogated such immunity and therefore it did not knowingly waive its Eleventh Amendment immunity. Second, Defendants argue that GMU's waiver is unconstitutional because it was coercive. Each argument is addressed in turn.

a. *Knowing Waiver*

Defendants argue that the context of GMU's acceptance of funds raises questions about the knowing and voluntary nature of GMU's waiver of sovereign immunity.

Defendants argue that any state accepting conditioned federal funds under the Rehabilitation Act could not have understood that “in doing so it was actually abandoning its constitutional sovereign immunity from private damages suits” because the Rehabilitation Act expressly provides that a state shall not be immune under the Eleventh Amendment from an action in federal court. *See Garcia*, 280 F.3d at 110. Defendants contend that the decision of whether or not to accept funds was moot at the time such decision was made because any state would have been justified in its belief that its immunity from suit had already been abrogated by Congress.

The Court is unpersuaded by this argument. Essentially, Defendants ask the Court to disregard GMU’s knowing waiver of immunity because it mistakenly believed that it was already exposed to suit by virtue of Section 2000d-7 abrogating their immunity. GMU knew that it was exposing itself to suit for actions under the Rehabilitation Act if it received federal funds. Defendants do not argue that GMU did not knowingly and voluntarily accept the waiver – just that GMU did not appreciate the gravity of such waiver. This Court holds as a matter of law that such lack of appreciation is insufficient to eviscerate GMU’s knowing waiver.

b. *Coercive Nature of Waiver*

Defendants argue further that GMU was unconstitutionally coerced into waiving its sovereign immunity. The Supreme Court has recognized that some financial inducements by Congress might be so coercive as to turn into compulsion. *See South Dakota v. Dole*, 483 U.S. 203, 211, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Relying on

such Supreme Court precedent, six out of the thirteen judges on the Fourth Circuit found coercive the congressional withholding of a \$60 million grant on the basis that the Commonwealth of Virginia failed to provide private education services to less than one tenth of one percent (126) of the 128,000 handicapped students for whom the funds were earmarked. *See Commonwealth of Virginia v. Riley*, 106 F.3d 559, 569 (4th Cir.1997) (*en banc*) (Luttig, J.), *abrogated on other grounds by, Amos v. Maryland Dept. of Pub. Safety*, 126 F.3d 589 (4th Cir.1997). The Fourth Circuit held that such tactic began to resemble impermissible coercion because it forced a state agency to choose between providing services for a small number of students and surrendering all special education funds. *See id.* at 570 (stating in dicta that it is coercive to have a state forego the entirety of a substantial federal grant on the ground that the state agency refused to fulfill their federal obligation “in some insubstantial respect rather than submit to the demands of Washington.”). Even though this holding was not essential to the disposition in *Riley*, it stands for the proposition that “the loss of an entire block of federal funds upon a relatively minor failing by a state [is] constitutionally suspect.” *See West Virginia*, 289 F.3d at 291.

In *West Virginia*, the Fourth Circuit revisited the reasoning in *Riley* and acknowledged the quagmire that courts may become involved in when they utilize this coercion theory. *See id.* at 291 (citing cases). In *West Virginia*, the Fourth Circuit was faced with a situation where the Federal Government provided West Virginia \$1 billion in Medicaid funds each year, yet recovered less than \$2 million each year from an estate recovery plan. *See id.* at 291-92. Under the Medicaid statute at issue,

once a state failed to enact an estate recovery program within the time frame established by Congress, its Medicaid plan was no longer compliant. *See id.* At that time, “the Secretary shall notify [the] State agency that further payments will not be made to the State (or in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply.” *See id.* (citing 42 U.S.C. § 1396c). West Virginia complied with the estate recovery provisions; therefore, all that remained was a constitutional attack on the face of the statute. The Fourth Circuit held that Congress’ requirement that States participating in the Medicaid program implement the estate recovery provisions, or lose all or part of their funding, is not impermissibly coercive because it gives Congress the option of implementing less drastic means than complete withholding of all funds. *See id.* at 291-93.

Similar to the Medicaid statute, Section 504 is not unconstitutionally coercive because it is not an “all or nothing” statute. Section 504 prohibits “any program or activity” that receives federal financial assistance from discriminating against a qualified individual with a disability. *See* 29 U.S.C. § 794(a). The statute defines program or activity as all of the operations of a department, agency, or other instrumentality of a state, or each department or agency to which the federal assistance is extended. *See id.* at § 794(b). As the Eighth Circuit has noted,

[B]y accepting funds offered to an agency, the State waives its immunity only with regard to that individual agency that receives them. A State and its instrumentalities can avoid Section

504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others. The State is accordingly not required to renounce all federal funding to shield chosen state agencies from compliance with Section 504.

*Jim C.*, 235 F.3d at 1081. This choice that Congress has given to States minimizes the effect of the drastic "all or nothing" choice denounced in *Riley*, and referenced later in *West Virginia*. Therefore, the choice presented by Congress under Section 504 not to discriminate or to refuse funding under the Rehabilitation Act is not unconstitutionally coercive.

Defendants argue further that the Section 2000d-7 requirement that GMU, as a state agency, choose between waving its sovereign immunity for all Section 504 claims and forfeiting all federal funds is unconstitutionally coercive because "if GMU wishes to receive federal funds for any reason, all aspects of GMU must subject themselves to claims under § 504." (Def. Mot. to Dismiss Br. at 32.) Defendants argue as a practical matter that this is not a choice at all because GMU receives approximately \$44,183,959 or 14% of its total operating budget from federal funds. (Dean Merten Aff. ¶¶ 6-8.) This Court is disinclined to set parameters as to which point GMU's "choice" is no longer a choice, but coercion because the financial incentives are so great.<sup>4</sup> Nonetheless, this Court

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<sup>4</sup> The Supreme Court has admonished courts to attempt to avoid becoming entangled in ascertaining the point at which federal inducement becomes compulsion. *See Chas C. Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90, 57 S.Ct. 883, 81 L.Ed. 1279 (1937) ("Every rebate from a tax when conditioned upon conditions is in some measure a

(Continued on following page)

holds that GMU did have a viable choice: it could have avoided the requirements of Section 504 simply by declining federal education funds. Similar to Defendants in this case, in *Jim C.*, the defendant argued that Section 504's waiver requirement was unconstitutional because it was overly broad and placed coercive conditions on federal funds. *See Jim C.*, 235 F.3d at 1081. The Eighth Circuit rejected such contention and acknowledged that Congress may attach conditions on the receipt of federal funds and may specifically require a waiver of state immunity from suit as a condition for receiving federal funds. *See id.* (citing *Coll. Sav. Bank*, 527 U.S. 666, 119 S.Ct. 2219). The *Jim C.* court held that the state education program could have avoided the requirement of Section 504 simply by declining federal education funds. *See id.* at 1082. The court held that the sacrifice of \$250 million in federal education funds or 12% of the annual state education budget would not compel the State's decision and would not be so coercive as to exceed the limits of the Spending Clause. *See id.*; *see also New Hampshire Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir.1980) (recognizing that the state agency had a choice of declining

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temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such doctrine is the acceptance of philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."); *see also State of Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C.Cir.1981) ("[C]ourts are not suited to evaluat[e] whether the states are faced here with an offer they cannot refuse or merely a hard choice."); *New Hampshire Dep't of Employment Security*, 616 F.2d at 246 ("We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stake that controls, but the rules of the game.")

forty million-dollars in tax credits to private employer). In comparing such financial incentives with that placed before GMU, this Court holds that it was not impermissibly coercive for Congress to condition GMU's receipt of approximately \$44,183,959, or 14% of its total operating budget, on GMU's agreement to expose itself to suit in federal court. Therefore, this Court holds that GMU's waiver was constitutional.

Based on the Court's conclusion that GMU waived its sovereign immunity, such waiver was knowing, and such waiver was not impermissibly coercive, this Court holds that the doctrine of sovereign immunity does not bar Shepard from asserting her Rehabilitation Act claim against GMU, Dr. Mulherin, and Dr. Merten in their official capacities.

3. *Immunity under the Ex parte Young doctrine for claims under Title II of the ADA*

Notwithstanding Congress' failure to abrogate immunity under Title II of the ADA, Dr. Mulherin and Dr. Merten remain exposed to liability under Title II of the ADA pursuant to the *Ex parte Young* doctrine.<sup>5</sup> The *Ex parte Young* doctrine allows suits against individuals in their official capacities for declaratory or injunctive relief.

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<sup>5</sup> Defendants argue that the *Ex parte Young* doctrine does not apply to expose them to liability for claims under the Rehabilitation Act because the Rehabilitation Act contains a comprehensive remedial scheme. However, it is not necessary for the Court to reach such decision because of its holding that Defendants are already exposed to liability because GMU waived its sovereign immunity. *See infra* Part II.C.2.

See *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). To overcome immunity under the *Ex parte Young* doctrine, an action must seek prospective injunctive relief to end a continuing violation of federal law. See *Quern v. Jordan*, 440 U.S. 332, 347-48, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). For example, claims for reinstatement by university students are prospective in nature and are appropriate subjects for *Ex parte Young* actions. See *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir.2002). However, the doctrine does not apply in situations where Congress has created a remedial scheme for the enforcement of a particular federal right. See *Seminole Tribe*, 517 U.S. at 74, 116 S.Ct. 1114 (holding that suit under the *Ex parte Young* doctrine should not be allowed when the potential remedies would be impermissibly broad in light of that contemplated by Congress); *Bell Atlantic Maryland, Inc.*, 240 F.3d at 295. Moreover, the *Ex parte Young* doctrine does not apply to suits against a state or state entity, it is limited to suits against individual state officials who have a specific duty to enforce the program at issue. See *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir.2001).

The only state officials sued in their official capacity in this case are Dr. Mulherin and Dr. Merten. Moreover, Defendants acknowledge that Title II of the ADA does not contain a comprehensive remedial scheme. Therefore, the *Ex parte Young* doctrine potentially exposes Dr. Mulherin and Dr. Merten, as state entity officials, to prospective injunctive relief in their official capacities for claims under the ADA. Shepard seeks an injunction permitting her a

new trial before the Honor Council where she would be allowed representation.<sup>6</sup> Similar to a student's desire to be reinstated into a University after being expelled, this Court holds that Shepard's request qualifies as prospective injunctive relief. Accordingly, Dr. Mulherin and Dr. Merten are exposed to liability for claims by Shepard under the ADA that seek prospective injunctive relief.

D. *Immunity for Defendants in Their Individual Capacities for ADA and Rehabilitation Act Claims*

The Eleventh Amendment does not bar actions against defendants in their individual capacities. *See Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir.1999). A plaintiff may utilize 42 U.S.C. § 1983 to enforce their constitutional and federal statutory rights unless (1) such statute does not create enforceable rights, privileges or immunities within the meaning of Section 1983 or (2) Congress has foreclosed such enforcement of the statute in its enactment. *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 (11th Cir.1997) (citing *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990)). Courts should assume that Congress intended that a statutory enforcement mechanism provided in a statute is exclusive and bars a Section 1983 claim. *See Lollar v. Baker*, 196 F.3d 603, 610 (5th Cir.1999).

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<sup>6</sup> Shepard also seeks an injunction requiring Dr. Irving to provide her additional time to complete academic assignments; however, the *Ex parte Young* doctrine does not apply to Dr. Irving because Dr. Irving is not a state official who was sued in her official capacity. (Compl. ¶ 7.)

Shepard cannot use Section 1983 to enforce her rights against individuals under the ADA because the ADA does not permit a cause of action against persons in their individual capacities. *See Baird v. Rose*, 192 F.3d 462, 471 (4th Cir.1999); *Doe v. Div. of Youth and Family Servs.*, 148 F.Supp.2d, 462, 489 (D.N.J.2001). In a similar context to that of Shepard where a disabled student was seeking a reasonable accommodation, the Fourth Circuit held that the remedies available for a violation under the ADA were set forth in Title VII. *See Baird*, 192 F.3d at 472 (citing 42 U.S.C. § 12117). The court held that the enforcement provision of Title VII permits actions against employers and defines employers as “a person engaged in an industry affecting commerce who has 15 or more employees.” *See id.* (citing 42 U.S.C. § 2000e(b)). Title VII does not provide a remedy for those who do not qualify as an employer. Therefore, the Fourth Circuit held that the ADA does not permit an action against individuals who are not employers. *See id.* Under the reasoning in *Baird*, Dr. Merten, Dr. Mulherin, and Dr. Irving are not employers in their individual capacities within the context of Title VII. Therefore, Shepard cannot assert a cause of action against them in their individual capacities under the ADA.

A person cannot enforce the Rehabilitation Act pursuant to Section 1983 because the Act provides a specific comprehensive internal enforcement mechanism structured to protect the rights of disabled individuals. *See Lollar*, 196 F.3d at 609-610 (holding that comprehensive remedial scheme under the Rehabilitation Act precludes Section 1983 action); *Holbrook*, 112 F.3d at 1531 (holding that the comprehensive remedial schemes under Section 504 of the Rehabilitation Act and Title I, not Title II, of the ADA precludes Section 1983 action). Based on this

comprehensive remedial scheme, Congress intended to foreclose a plaintiff's reliance on Section 1983 to remedy alleged statutory violations. *See Lollar*, 196 F.3d at 610; *Holbrook*, 112 F.3d at 1531. Shepard alleges violations under the Rehabilitation Act against Defendants in their individual capacities for failing to reasonably accommodate her disability. (Compl. ¶ 58.) She seeks damages as well as a preliminary and permanent injunction allowing her reasonable accommodations. This remedy is addressed under the Rehabilitation Act, *see* 29 U.S.C. § 794a(a)(2), and therefore is not actionable under Section 1983. *See Holbrook*, 112 F.3d at 1531 (holding persons may not maintain Section 1983 actions in addition to a Rehabilitation Act cause of action if deprivation is of the rights deprived of under Act).

Therefore, Shepard does not have a cause of action against Defendants in their individual capacities because the ADA and Rehabilitation Act are not actionable against individuals and the plaintiff cannot bring suit under Section 1983. Accordingly, Shepard cannot sustain a cause of action against Defendants in their individual capacities for violations under the ADA and Rehabilitation Act.

E. *Qualified Immunity under First Amendment (Count I) and First Amendment (Count II) claims*

Defendants Dr. Irving, Dr. Mulherin, and Dr. Merten are entitled to qualified immunity for Shepard's claims brought pursuant to the Fourteenth Amendment and First Amendment. A citizen has the Constitutional right to free speech and to not be deprived of a liberty or property interest without Due Process under the law. *See* U.S. CONST. amend. I, XIV. Section 1983 imposes civil liability on an officer who deprives a person of her Constitutional

rights. See 42 U.S.C. § 1983. The doctrine of qualified immunity protects government officials from civil damages in Section 1983 actions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

The Supreme Court sets forth a two-prong test for analyzing a claim of qualified immunity in the context of an alleged constitutional violation. See *Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir.1996) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727). The court must determine: (1) whether there was a clearly established right, and (2) whether a reasonable officer would have known that he violated such right. See *id.* Under the first prong, the court must ascertain whether the plaintiff has alleged the deprivation of an actual constitutional right. See *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). If an actual constitutional right is alleged, then the court must determine whether that right was clearly established at the time of the alleged infringement. See *id.*; *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

In order for a right to be clearly established, “the ‘contours of the right’ must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional.” *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir.1991) (citing *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034). In order to determine whether a right was clearly established at the time of the claimed violation, courts in this circuit only need to look at decisions of the United States Supreme Court, the Fourth Circuit, and the highest court of the state in which the case arose. See *Wallace v.*

*King*, 626 F.2d 1157, 1161 (4th Cir.1980). Once this determination is made, the court must then consider whether a reasonable person in the official's position should have known that her conduct would violate the identified right. *See Harlow*, 457 U.S. at 819, 102 S.Ct. 2727. This Court need not reach the second prong of the qualified immunity test because the first prong shields Dr. Irving, Dr. Mulherin, and Dr. Mertin [sic] from liability under Shepard's Fourteenth Amendment (Count I) and First Amendment (Count II) claims.

With respect to Count I, the Court must determine whether Shepard had a clearly established right to have (1) Dr. Irving abide by GMU's policy of not filing honor charges more than fifteen days after Dr. Irving realized the violation; (2) an attorney, law student, or her mother represent her before a student disciplinary proceeding; or (3) her mother testify as a witness during the Honor Council proceedings. Shepard fails to prove that these are clearly established rights because the contours of these rights are not conclusively drawn to establish a constitutional violation.

First, a University official's failure to abide by a university's proscribed policy for disciplinary proceedings in [sic] not clearly established in this Circuit. *See Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir.1981) (holding that deviation from procedural safeguards in a university employment contract beyond those constitutionally mandated would not support a claim under the Fourteenth Amendment). Second, a university's policy of not allowing a student to be represented by an attorney, law student, or another person of her choice is not a clearly established violation of a student's Due Process rights. *See Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 74 (4th Cir.1983)

(holding that the plaintiff student was afforded sufficient due process even though he was not permitted to have his person of choice, a practicing attorney, represent him); *see also Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 85, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (holding that academic deficiency dismissals do not necessitate a hearing before a school's decision-making body; therefore, a dismissed student did not have any right to be represented by counsel or to confront and cross-examine witnesses). Third, Defendants' action of not allowing Shepard's mother to testify on her behalf is not a clearly established violation of Shepard's constitutional rights. *See Clark v. Whiting*, 607 F.2d 634, 643-45 (4th Cir.1979) (holding that the plaintiff professor was not entitled to the right to confront and cross-examine witnesses heard by the judicial panel and the process due did not have to go beyond the right to know the ground of the denial and opportunity to present his position); *see also Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (holding that if suspended for less than ten days that due process requires that the student be given oral or written notice of the charges against him, an explanation of the evidence and authorities, and an opportunity to present his side of the story). Therefore, Defendants are entitled to qualified immunity for allegations that they deprived Shepard of her right to due process under the Fourteenth Amendment.

With respect to Count II, Shepard alleges a First Amendment "right to address her grievances." Shepard never alleges the deprivation of a constitutional right. *See supra* Part II.F.2. Therefore, Defendants are entitled to qualified immunity for allegations that they deprived Shepard of her First Amendment Rights. *See Wilson*, 526

U.S. at 609, 119 S.Ct. 1692 (alluding to the fact that a failure to assert the deprivation of an actual constitutional right would entitled [sic] the defendant to qualified immunity).

Accordingly, Defendants are immune from liability for civil damages for Shepard's claims arising under the Fourteenth Amendment Due Process Clause (Count I) and the First Amendment (Count II).

In sum, immunity attaches to the respective Defendants as follows. First, the Honor Committee Members are immune from liability on all claims raised by Shepard pursuant to the doctrine of absolute immunity. Second, GMU is completely immune from liability for claims arising under Title II of the ADA because Congress failed to properly abrogate its immunity and it is not subject to suit under 42 U.S.C. § 1983. Third, all Defendants are immune from liability in their individual capacities for claims arising under Title II of the ADA and the Rehabilitation Act (Count III) because these statutes are not actionable against individuals and Shepard cannot bring suit under Section 1983. Fourth, all Defendants are immune from liability for civil damages for Shepard's claims arising under the Fourteenth Amendment Due Process Clause (Count I) and the First Amendment (Count II) because Shepard failed to assert a clearly established right of which Defendants should have known.

In light of the aforementioned holdings on immunity, the following claims remain for the Court to analyze with respect to Shepard's motion to dismiss for failure to state a claim. GMU, Dr. Mulherin, and Dr. Merten remain liable in their official capacities for claims under the Rehabilitation Act (Count III). Dr. Mulherin and Dr. Merten are exposed to prospective injunctive relief for claims arising

under Title II of the ADA (Count III). Defendants in their official capacities remain liable for relief, other than for civil damages, for claims arising under the Fourteenth Amendment (Count I) and First Amendment (Count II). The Court now turns to Defendants' motions to dismiss for failure to state a claim with respect to these remaining claims.

F. *Failure to State a Claim*

Defendants argue in the alternative, that the Court should dismiss Shepard's claims because she fails to state a claim upon which relief may be granted. For the reasons stated below, Shepard cannot prove any set of facts in support of her Fourteenth Amendment (Count I), First Amendment (Count II), or ADA and Rehabilitation Act (Count III) claims that would entitle her to relief. *See Conley*, 355 U.S. at 45-46, 78 S.Ct. 99.

1. *Due Process under the Fourteenth Amendment (Count I)*

Shepard argues that Defendants deprived her of a liberty interest to her reputation and future employment because she received a low grade on her report card.<sup>7</sup> The

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<sup>7</sup> Shepard also alleges in her Complaint that Defendants deprived her of a property interest to her education at GMU. It is possible that a person may have a property interest in their continued education. *Cf. Pittman v. Wilson County*, 839 F.2d 225, 229 (4th Cir.1988) (acknowledging that a property right to continued employment may exist). However, even if Shepard would have an interest in her continued education at GMU, she was not deprived of such interest because Shepard was never expelled nor suspended from GMU. Therefore,

(Continued on following page)

Fourteenth Amendment prohibits a state from depriving a person of liberty or property interests. *See Bd. of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The deprivation of a person's good name, reputation, honor, or integrity may constitute the deprivation of a liberty interest. *See id.* at 573, 92 S.Ct. 2701. However, injury to reputation without an injury to some other right or status previously recognized by law, does not deprive a plaintiff of a liberty interest that is protected by the Fourteenth Amendment. *See Paul v. Davis*, 424 U.S. 693, 709-10, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (acknowledging examples of "some other injury" to be termination of employment or demotion). In addition, a plaintiff has a liberty interest in being free from arbitrary restrictions on the opportunity for gainful employment that stems from reasons provided by the government for terminating such plaintiff. *See Boston v. Webb*, 783 F.2d 1163, 1167 (4th Cir.1986). However, reasons that are not publicly disclosed by the state agency will not form the basis for a deprivation of a liberty interest. *See Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (holding that the discharge of a public employee, whose position is terminable at will, does not deprive the employee of a liberty interest if there is no public disclosure of the reasons for the discharge); *Fuller v. Laurens County School District No.*, 563 F.2d 137, 141 (4th Cir.1977) (holding that the disparaging facts were not disclosed publicly by school authorities; therefore, the school officials did not deprive

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Shepard has not properly alleged the deprivation of a constitutionally protected property right.

the plaintiff of a liberty interest in her good name or reputation).

Shepard does not allege the deprivation of a liberty interest protected under the Fourteenth Amendment. Under the allegations in Shepard's Complaint, Dr. Irving filed a claim with the Honor Committee accusing Shepard of plagiarism, then the Honor Committee affirmed the "F" Shepard received in her class, issued her a reprimand, and directed her to undergo community service. (Compl. ¶¶ 24, 32.) Shepard argues that the "F" in English and being brought up on honor charges for plagiarism will forever be on her permanent record and such disparaging remarks have and will continue to hinder Shepard's ability to secure future employment.

The right to receive a passing grade in a class and not to be charged with plagiarism are not liberty interests protected under the Fourteenth Amendment to the Constitution. Neither amount to an injury to another's right or status previously recognized by law. Neither prohibited her from graduating: Shepard was neither suspended nor expelled from school. Moreover, no indication exists that Defendants disclosed the "F" or the allegations of plagiarism to the public. Ultimately, Shepard cannot challenge the procedures utilized by Defendants because they did not deprive her of a recognized constitutional interest. *See, e.g., Clark*, 607 F.2d at 641 (citing *Arnett v. Kennedy*, 416 U.S. 134, 164, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (noting that in order "to be entitled to a due process hearing, one must have suffered . . . a loss of either a property or a liberty interest.")); *see also Tigrett v. Rector and Visitors of the University of Virginia*, 290 F.3d 620, 626-27 (4th Cir.2002) (holding that because the plaintiffs were not expelled by the university judicial panel, as alleged, that

they had not been deprived of any constitutionally protected interest). Accordingly, Shepard fails to state a claim for violations of her rights under the Due Process clause of the Fourteenth Amendment.

2. *Retaliation under the First Amendment (Count II)*

Shepard fails to state a claim for retaliation under the First Amendment. The First Amendment prohibits Congress from making any law abrogating the freedom of speech. *See* U.S. CONST. amend I. In order to state a claim for retaliation under the First Amendment, it is essential for a plaintiff to show that she suffered some adversity in response to her exercise of a protected right. *See American Civil Liberties Union of Maryland, Inc. v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir.1993) (citing *Huang v. Bd. of Governors of University of North Carolina*, 902 F.2d 1134, 1140 (4th Cir.1990)). In particular, the plaintiff must allege that the defendant's actions adversely affected the plaintiff's First Amendment Rights. *See id.* (noting that the withdrawal of an ACLU paralegal is not a sufficiently adverse action to constitute retaliation).

Shepard's retaliation claim is two-fold. First, Shepard claims that in retaliation for her complaint about Dr. Irving, Dr. Irving gave her a failing grade. (Compl. ¶ 48.) Second, Shepard claims that in retaliation for Shepard contesting the grade in Honor Council, Dr. Irving disparaged Shepard's reputation, prevented her graduation, and prevented her anticipated employment. (Compl. ¶ 49.) Shepard fails to allege that Defendants' actions adversely impacted any First Amendment right to free speech or

otherwise. Accordingly, Shepard fails to state a claim for retaliation.

3. *Title II of ADA and Rehabilitation Act (Count III)*

Shepard attempts to allege causes of action against Defendants for violations under the ADA and the Rehabilitation Act. Both statutes prohibit qualified individuals from being excluded from participation in, being denied the benefit of, or otherwise being subject to discrimination in services or programs of a public entity on the basis of a person's disability. *See* 42 U.S.C. § 12132; 29 U.S.C. § 794(a). In order to state a claim under the ADA or the Rehabilitation Act, a plaintiff must allege that (1) she has a disability, or is perceived to have such disability; (2) she is otherwise qualified for the benefit or program at issue; and (3) the defendant excluded her from the benefit or program based on her disability. *See Baird*, 192 F.3d at 467. The ADA defines a qualified individual with a disability as an individual who, with or without reasonable accommodations, can perform the essential functions of the position that the individual holds. *See Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 212-13 (4th Cir.1994); 42 U.S.C. § 12111(8). Therefore, students in higher education must be able to comply with the essential functions of higher education, which includes abiding by the honor code. *See Childress v. Clement*, 5 F.Supp.2d 384, 391 (E.D.Va.1998).

Shepard fails to state a claim under the Rehabilitation Act and the ADA. Shepard properly alleges the first two prongs of a ADA and Rehabilitation Act claim. First, Shepard alleges that she has a disability, and that GMU regarded her as having a disability, as defined under the ADA and Rehabilitation Act. (Compl.¶ 54.) Second,

Shepard alleges that she is otherwise qualified for the benefit or program at issue because she is able to perform all the essential functions of being a student with reasonable accommodations. (Compl.¶ 55.) However, completely absent from Shepard's complaint is the factual allegation that Defendants excluded her from the benefit or program or otherwise discriminated against her based on her disability. Shepard argues that she was not permitted additional time to complete her assignments nor given proper representation before the Honor Council. She does not state that this was because of a disability. Therefore, Shepard fails to state a claim under the Rehabilitation Act and the ADA because the allegations in the Complaint do not allege that she was excluded from a service, program, or benefit because of her disability.

### III. CONCLUSION

Based on the foregoing analysis, this Court holds as follows. First, Shepard may maintain a private cause of action under Section 504 of the Rehabilitation Act. Second, the Honor Committee Members are entitled to absolute immunity from damages for any claims arising out of the Honor Council proceeding because they were acting in a quasi-judicial capacity. Third, Congress did not properly abrogate a State's immunity under Title II of the ADA thus shielding GMU, Dr. Mulherin, and Dr. Merten to potential liability in their official capacities. Fourth, the *Ex parte Young* doctrine exposes Dr. Mulherin and Dr. Merten to liability for prospective injunctive relief for Shepard's claims under the ADA against them in their official capacities. Fifth, Shepard does not have a cause of action against Dr. Irving, Dr. Mulherin, and Dr. Merten in their individual capacities for violations under

the ADA and Rehabilitation Act because these statutes are not actionable against individuals and Shepard cannot bring suit under 42 U.S.C. § 1983.

Sixth, the doctrine of sovereign immunity does not bar Shepard from asserting her Rehabilitation Act claims against GMU, and Dr. Mulherin, and Dr. Merten in their official capacities because GMU waived such immunity when it accepted Congressional funds. Seventh, the doctrine of qualified immunity shields all Defendants from liability for civil damages for Shepard's claims arising under the Fourteenth Amendment Due Process Clause (Count I) and the First Amendment (Count II) because Shepard never alleges the deprivation of any clearly established constitutional right.

Eighth, Shepard fails to state a claim for discrimination under the Fourteenth Amendment because she does not allege the deprivation of any recognized constitutional interest. Ninth, Shepard fails to state a claim for retaliation under the First Amendment because she fails to allege that she suffered some adversity in response to her exercise of a protected right. Finally, Shepard fails to state a claim under the Rehabilitation Act and the ADA because the allegations in the Complaint do not allege that she was excluded from any service, program, or benefit. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss the Complaint are GRANTED in their ENTIRETY.

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

FILED  
January 27, 2004

No. 02-1712  
CA-01-1093-A

AMY SHEPARD;

Plaintiff-Appellant

UNITED STATES OF AMERICA

Intervenor

v.

KATRINA IRVING, Dr., in her individual capacity; GIRARD MULHERIN, Dr., in his individual and official capacities; ALAN MERTEN, Dr., in his official capacity as President of George Mason University; THE RECTORS AND VISITORS OF GEORGE MASON UNIVERSITY; LISA STIDHAM, in her individual capacity; LEIGH ANN MURTHA, in her individual capacity; CHRISSY FORBES, in her individual capacity; JOE BOATWRIGHT, in his individual capacity; NIKKIA ANDERSON, in her individual capacity

Defendants-Appellees

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On Petition for Rehearing and Rehearing En Banc  
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The appellees' [sic] petition for rehearing and rehearing en banc was submitted to this Court. As no member of

this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge King with the concurrence of Shedd, and Judge Bullock.

For the Court,

/s/ Patricia S. Connor

CLERK

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