No. 96-7091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GRANVILLE AMOS, et al.

Plaintiffs-Appellants,

v.

THE MARYLAND DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EN BANC SUPPLEMENTAL REPLY BRIEF
FOR THE UNITED STATES AS INTERVENOR

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TABLE OF CONTENTS

PAGE

ARGUMENT:

I. THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT 1

II. SECTION 504 OF THE REHABILITATION ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AND THE SPENDING CLAUSE 7

CONCLUSION 18

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES:

Alden v. Maine, 119 S. Ct. 2240 (1999) 16, 17

Alexander v. Choate, 469 U.S. 287 (1985) 3, 7

Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212 (4th Cir.), reh'g en banc granted, judgment vacated (Dec. 28, 1999) 8

Bell v. New Jersey, 461 U.S. 773 (1983) 17

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 11, 12

Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, petition for reh'g en banc granted, 197 F.3d 958 (8th Cir. 1999) 13, 17

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 7

Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) 17

CASES (continued): **PAGE**

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) . . . 15, 16, 17

Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ., 772 F.2d 1123 (3d Cir. 1985) 18

Department of Educ. v. Katherine D., 727 F.2d 809 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985) 17-18

FERC v. Mississippi, 456 U.S. 742 (1982) 11

Florida Nursing Home Ass'n v. Page, 616 F.2d 1355 (5th Cir. 1980), rev'd sub nom. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) 18

Grove City College v. Bell, 465 U.S. 555 (1984) 13

Helen L. v. DiDario, 46 F.3d 325 (3d Cir.), cert. denied, 516 U.S. 813 (1995) 4

Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 5

Lau v. Nichols, 414 U.S. 563 (1974) 13

L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998), aff'd in part, 119 S. Ct. 2176 (1999) 4

Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3263 (U.S. Oct. 5, 1999) (No. 99-596) 9, 14, 15

Little Rock Sch. Dist. v. Mauney, 183 F.3d 816 (8th Cir. 1999) 17

Mason v. United States, 84 U.S. 67 (1872) 9

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 17

New York v. United States, 505 U.S. 144 (1992) . . . 15, 16, 17

Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897 (2000) 7

CASES (continued): **PAGE**

North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962 (1978) 10

Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) 16

Olmstead v. L.C., 119 S. Ct. 2176 (1999) 3

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) 16

Premo v. Martin, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998) 18

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 12

Rust v. Sullivan, 500 U.S. 173 (1991) 12

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999) 17

Scanlon v. Atascadero State Hosp.,735 F.2d 359 (9th Cir.), rev'd, 469 U.S. 1032 (1984) 18

South Dakota v. Dole, 483 U.S. 203 (1987) 15, 16

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 11

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) 6

United States v. Vanhorn, 20 F.3d 104 (4th Cir. 1994) 13

United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986) 14

Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) 9

Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998) 2

Wyman v. James, 400 U.S. 309 (1971) 12

CONSTITUTION AND STATUTES: **PAGE**

United States Constitution:
Spending Clause, Art. I, § 8, Cl. 1 . . . . 9, 16
Eleventh Amendment . . . . passim
Fourteenth Amendment
Section 5 . . . . 2, 5

Americans with Disabilities Act of 1990 (ADA),
42 U.S.C. 12101(a)(3) 6
42 U.S.C. 12101(a)(5) 6
42 U.S.C. 12101(a)(7) 6
Title II,
42 U.S.C. 12131 et seq. 1-2, 7
42 U.S.C. 12132 3
42 U.S.C. 12134 . . . . 3, 4
42 U.S.C. 12134(b) 3
Title V,
42 U.S.C. 12201(a) 3

Civil Rights Act of 1964, Title VI,
42 U.S.C. 2000d 14
42 U.S.C. 2000d-7 14

Equal Access Act,
20 U.S.C. 4071 et seq. 11

Rehabilitation Act of 1973, Section 504,
29 U.S.C. 794 . . . . passim
29 U.S.C. 794(b) 8

RULES AND REGULATIONS:

Fed. R. Civ. P. 8(c) 9

28 C.F.R. 35.151(a) 4
28 C.F.R. Pt. 36, App. A 4
28 C.F.R. 41.51(b) 3
28 C.F.R. 41.53 3

41 C.F.R. Pt. 101-19.6, App. A 4

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ARGUMENT

The Supreme Court will hear oral argument in Alsbrook v. City of Maumelle, No. 99-423, on the constitutionality of the abrogation of Eleventh Amendment immunity for Title II of the Americans with Disabilities Act in April 2000. Nevertheless, because this Court has declined to stay this appeal until an opinion is issued in that case, we make the following reply to defendants' response in their En Banc Supplemental Brief and the Supplemental Brief of Amicus Curiae of the Association of State Correctional Administrators (ASCA).

I

THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Defendants agree (En Banc Supp. Br. 27) that, at least as applied to "intentionally discriminatory" conduct, Title II of

the Americans with Disabilities Act is a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment. That is, they agree with our submission that Title II has constitutional applications and thus cannot be declared facially unconstitutional.[1] As we explained in our En Banc Supplemental Brief (pp. 14-18), we think that the appropriate response to such a situation is to remand the case to the district court to adjudicate the plaintiffs' claims on the merits and then, if necessary, address any constitutional objections the defendants choose to raise. In the event this Court elects to address the Fourteenth Amendment issue further, we note the following.

1. While we agree with the defendants that Title II is constitutional to the extent that it prohibits intentional discrimination, that is not the limit of Title II's reach or Congress' Section 5 authority. We cannot agree with the defendants (En Banc Supp. Br. 27) that Title II of the ADA can be

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[1] The constitutionality of Title II, which was only addressed by the parties in response to a supplemental briefing order by the Court on remand, is not jurisdictional and need not be addressed by the Court to the extent the argument is not pressed by any of the parties. Although claims of Eleventh Amendment immunity are jurisdictional in the sense that they can be raised by a State at any time, that defense can be waived. See Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 389 (1998) ("[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. * * * Nor need a court raise [immunity] on its own. Unless the State raises the matter, a court can ignore it." (citations omitted)). While this Court has the power to address the constitutionality of parts of the statute involved in the case even when no party contests it, amicus ASCA should not be permitted to expand the issues raised by the state defendants in order to protect what it refers to (ASCA Supp. Br. 13) as "states' rights."

interpreted to prohibit only those actions that are "intentionally discriminatory." Defendants suggest (En Banc Supp. Br. 12) that the term "discrimination" in 42 U.S.C. 12132 should be given "its accepted judicial meaning" in Equal Protection case law. We do not agree that "discrimination" has such a fixed judicial meaning.[2] In any event, Congress instructed that nothing in the ADA "shall be construed to apply a lesser standard than the standards applied under" Section 504, 42 U.S.C. 12201(a), and it is clear that Section 504 was definitively interpreted to prohibit more than intentional discrimination, see Alexander v. Choate, 469 U.S. 287, 295-299, 300-302 (1985). Thus, reviewing the text and purpose of Title II in Olmstead v. L.C., 119 S. Ct. 2176 (1999), the Supreme Court rejected the very claim pressed by defendants here. It held that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than simply "uneven treatment of similarly situated individuals" or actions taken "on account of [individuals'] disabilities." 119 S. Ct. at 2186.[3]

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[2] Moreover, defendants do not assert that the prohibitions of "exclud[ing] from participation in" and "den[ying] the benefits of" government programs have "accepted judicial meanings" that would import an intent requirement.

[3] Congress' instruction that the Attorney General's Title II regulations be "consistent" with specific regulations promulgated under Section 504 that themselves prohibited more than intentional discrimination, see 42 U.S.C. 12134(b), 28 C.F.R. 41.51(b), 41.53, confirms this reading. ASCA claims (ASCA Supp. Br. 14) that the delegation by Congress to the Attorney General to promulgate regulations violates separation of powers. That argument, never raised by the defendants and not raised by ASCA in its previous amicus brief, need not be addressed at this (continued...)

2. Even so construed, the ADA is a valid exercise of Congress' Section 5 authority. We are on common ground with

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[3](...continued) stage. In any event, in making that argument ASCA ignores the detailed statutory directions in 42 U.S.C. 12134 that guide the Attorney General's discretion. See L.C. v. Olmstead, 138 F.3d 893, 898 (11th Cir. 1998) ("the plain language of the ADA makes clear that Congress * * * sought to ensure that the Attorney General's Title II regulations tracked the § 504 coordination regulations"), aff'd in part, 119 S. Ct. 2176 (1999); Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir.) ("[B]ecause Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations [of the Rehabilitation Act], the former regulations have the force of law."), cert. denied, 516 U.S. 813 (1995).

ASCA also claims (ASCA Supp. Br. 13-14) that because the accessibility regulations and others promulgated by the Attorney General are (it asserts) unreasonable and contrary to the statute, the panel erred in holding that the regulations should be examined under the standards established in Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). That argument reflects a misunderstanding of Chevron. Chevron articulates a framework for determining whether a regulation issued by an agency is consistent with the statute and reasonable. The panel did not conclude that every Title II regulation issued by the Attorney General would meet Chevron's test (although we believe they would) and left it to the district court on remand to entertain any challenges defendants wish to raise to the validity of individual regulations.

Finally, ASCA, ignoring the plain text of the regulation, continues to assert (ASCA Supp. Br. 11) that the regulations "require[] state prison systems to conform to precise [accessibility] standards" described in the regulations. As we explained in our Reply Brief to the panel on remand, the regulations require that all construction and alterations commenced after January 26, 1992, be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.151(a). While construction in compliance with either the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19.6, App. A, or the ADA Accessibility Guidelines for Buildings and Facilities, 28 C.F.R. Pt. 36, App. A, "shall be deemed to comply" with an entity's obligations, the test for public entities is not compliance with the standards but with the requirement that the facilities be "readily accessible to and usable by individuals with disabilities."

defendants that "some acts of invidious discrimination [against persons with disabilities] have occurred." Appellees' En Banc Supp. Br. 26. But while they argue that Congress' only valid response under Section 5 of the Fourteenth Amendment is to prohibit current intentional discrimination, that does not address Congress' power to remedy the past discrimination in critical areas such as institutionalization, education, and voting (and the effects that flowed from it) as well as preventing current and future discrimination through prophylactic rules. See Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000) ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text").

The critical question is not whether there was invidious and unconstitutional discrimination against persons with disabilities — of that there can be no doubt. The question is how much was there. Congress expressly found that individuals with disabilities have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society," that they "continually encounter various forms of discrimination, including outright intentional exclusion, * * * segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," and that "discrimination against individuals with disabilities

persists in such critical areas as * * * education, transportation, communication, * * * institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(7), (5), (3).

While the judicial branch is not expected to abdicate its role to make independent judgments regarding such legislative findings, neither should it dismiss them or review them as if Congress were simply a district court or an administrative agency making findings based on a "record." Even when using a form of heightened judicial scrutiny, the Supreme Court has stressed that Congress' findings are entitled to deference.

> In reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments of Congress." Our sole obligation is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." As noted in the first appeal, substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency. We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. * * * Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise. This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195-196 (1997) (citations omitted). Indeed, the factual premises that persons with disabilities have been subjected to intentional and

unconstitutional discrimination by every level of government and that the effects of that discrimination continue to be felt, is consistent with the Supreme Court's prior assessments, see Alexander, 469 U.S. at 295 n.12; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985), and thus should not require extensive documentation. Cf. Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 906 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). And as we have previously explained, Title II's requirement of "reasonable modification" to assure "meaningful access" is a congruent and proportional response intended to remedy and prevent this pervasive discriminatory conduct. U.S. En Banc Supp. Br. 29-32.[4]

II

SECTION 504 OF THE REHABILITATION ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AND THE SPENDING CLAUSE

1. Defendants concede (En Banc Supp. Br. 29) that Section 504 is valid Section 5 legislation to same extent Title II is valid Section 5 legislation. Thus, as we did in our opening en banc brief, we refrain from separately discussing Section 504's legislative record.

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[4] Because this Court must reach the Fourteenth Amendment issue in order to sustain the abrogation of Eleventh Amendment immunity in Title II, and because we believe Title II and its abrogation can be sustained as valid Section 5 legislation, we do not address why we believe the substantive provisions of Title II can also be sustained under the Commerce Clause.

2. Section 504 can also be sustained as valid Spending Clause legislation. Defendants assert that there is a "'lack of evidence in the record on the status of federal funds available to and accepted by RCI' and the DOC." Appellees' En Banc Supp. Br. 29 (quoting Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212, 223 n.9 (4th Cir. 1999)). This is true as to RCI's receipt of federal funds. But it is not correct to extend the panel's holding (as defendants attempt) to the Division of Corrections. Indeed, defendants themselves noted in their initial brief to the panel that the "present record" showed "the DOC * * * has received little in the way of monetary assistance from the federal government. The highest receipt of federal funds from 1981 - 1992 to the DOC was a mere $169,486.00, in 1987." Br. for Appellees 7 n.3; see also U.S. En Banc Supp. Br. 3 n.1.

Defendants have not addressed, much less refuted, our argument (U.S. En Banc Supp. Br. 33-35) that the text of 29 U.S.C. 794(b) makes clear that once a state department accepts federal funds, "all of the operations" of that department are covered by Section 504's requirements. As the district court properly found (J.A. 24-25), since the record is clear that the Department and Division accepted federal financial assistance, RCI is plainly covered by Section 504.

3. Defendants do not say anything about whether Section 504 itself is valid Spending Clause legislation. Indeed, while they have expressly incorporated by reference other parts of their

prior Supplemental Brief (Appellees' En Banc Supp. Br. 4, 28 n.10), they did not expressly incorporate their previous claim (Supp. Br. of Appellees 31 n.24) that Section 504 was not a valid exercise of the Spending Clause "as applied to state prison inmates." While ASCA has incorporated its previous arguments, its supplemental brief says nothing new about the Spending Clause. Thus, they have made no response to our renewed arguments (U.S. En Banc Supp. Br. 35-38) that the non-discrimination condition of Section 504 falls well within the scope of current Spending Clause jurisprudence.

Nor have defendants expanded on the argument that Section 504 is "coercive." Coercion, like duress, should be viewed as an affirmative defense that must be pressed and proved by the party attempting to void an otherwise valid "contract." See Mason v. United States, 84 U.S. 67, 74 (1872); Fed. R. Civ. P. 8(c). We stated in our supplemental brief (U.S. En Banc Supp. Br. 39) that we were not sure they had sufficiently briefed this question to preserve it, and neither defendants nor ASCA responded in any way. Thus, we believe they have forfeited any coercion argument. See Litman v. George Mason Univ., 186 F.3d 544, 553 (1999), petition for cert. filed, 68 U.S.L.W. 3263 (Oct. 5, 1999) (No. 99-596) (not addressing coercion because state did not raise it).

In any event, to the extent that "coercion" is an independent and justiciable concept, see Virginia v. Riley, 106 F.3d 559, 569-570 (4th Cir. 1997) (en banc) (plurality opinion of Luttig, J.), any argument that Section 504 is coercive is

inconsistent with Supreme Court decisions that demonstrate that States may be put to "difficult" or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive."

In North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. Id. at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an option to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." Id. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[5]

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[5] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of (continued...)

Similarly, in FERC v. Mississippi, 456 U.S. 742 (1982), the Court upheld a statute that required States to choose between regulating in light of federal standards or having the field preempted so that they could not regulate at all. The Court acknowledged that "the choice put to the States--that of either abandoning regulation of the field altogether or considering the federal standards--may be a difficult one." Id. at 766 (emphasis added). The Court agreed that "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid [the statute's] requirements. But this does not change the constitutional analysis." Id. at 767.

Finally, in Board of Education v. Mergens, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 et seq., which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to

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[5](...continued) federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976).

public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[6]

These cases demonstrate that the federal government can demand that States comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (North Carolina), losing all federal funds (Mergens), or even losing the ability to regulate certain areas (FERC), without crossing the line to coercion. Thus, we believe that the choice imposed by Section 504 is not "coercive" in the

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[6] Moreover, it is difficult to imagine that a department of a state government choosing whether to accept federal funds is under greater "coercion" than a welfare recipient. Yet the Supreme Court has upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See Wyman v. James, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude the recipient from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally require that the entity that receives federal funds not engage in conduct Congress does not wish to subsidize. See Rust v. Sullivan, 500 U.S. 173, 197-199 (1991); Regan v. Taxation with Representation, 461 U.S. 540, 544-545 (1983).

constitutional sense.[7] Instead, like the provisions upheld in Lau v. Nichols, 414 U.S. 563 (1974), and Grove City College v. Bell, 465 U.S. 555 (1984), Section 504 is a reasonable condition intended to ensure that federal money does not support or subsidize programs that unnecessarily exclude people with disabilities.[8]

3. Instead of challenging the validity of Section 504's prohibition on discrimination itself, defendants claim (Appellees' En Banc Supp. Br. 30) that it was not clear when they accepted federal financial assistance that they would be waiving their Eleventh Amendment immunity to Section 504 claims.

First, some of the language of defendants' argument (demanding that plaintiffs identify a federally-funded program

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[7] Although it is not clear how far the analogy between Spending Clause legislation and contracts extends, see United States v. Vanhorn, 20 F.3d 104, 112 (4th Cir. 1994) (rejecting claim that grant program should be governed by "ordinary contract principles"), we note that the contract defense of "economic duress" is only available if it is shown "that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree. Some wrongful conduct on the part of the Government must be shown; the mere stress of one's financial condition will not amount to duress unless the Government was somehow responsible for that condition." Id. at 113 n.19.

[8] A panel of the Eighth Circuit reached the opposite conclusion in Bradley v. Arkansas Department of Education, 189 F.3d 745 (1999). That opinion was based on the mistaken premise that the State was required to either accept no federal money or subject all its programs in every department to Section 504. The Eighth Circuit granted the United States' petition for rehearing en banc to address the Section 504 Spending Clause holding, see 197 F.3d 958 (8th Cir. 1999), and oral argument was heard January 14, 2000. The failure of defendants or ASCA to mention Bradley reinforces our contention that they have abandoned any claim of coercion.

that requires a waiver of Eleventh Amendment immunity) suggests a fundamental misapprehension about how Section 504 works. Section 504 is not itself a grant program. Instead, like Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, Section 504 is a cross-cutting statute that imposes a nondiscrimination condition on any program that receive any federal financial assistance. "Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986). Thus, so long as it is clear that defendants are accepting federal financial assistance, Section 504 obligations apply. There is no need for evidence about the nature of the particular program under which the funds are granted.

Nor does Congress need to separately condition the receipt of federal funds for each program on the waiver of Eleventh Amendment immunity. As a panel of this Court held in Litman, 186 F.3d at 553-554, and as the other courts of appeals to address the issue have agreed (U.S. En Banc Supp. Br. 44 (collecting cases)), 42 U.S.C. 2000d-7 serves to put States on notice that if they accept federal financial assistance, the entire department or agency that accepts the assistance loses its Eleventh Amendment immunity to private suits in federal court for violations of Section 504.

Finally, defendants obliquely suggest (Appellees' En Banc Supp. Br. 30 n.12) that the Supreme Court in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2226 (1999), may have held that Congress could not require States to waive their Eleventh Amendment immunity to suit as a condition for the receipt of federal funds. In doing so, they once again fail to discuss, much less distinguish, this Court's decision in Litman, in which a panel unanimously held, after College Savings Bank, that the "argument * * * that Congress cannot employ its spending power in a manner that conditions a state's receipt of funding upon a waiver of Eleventh Amendment immunity, is also without merit under current Supreme Court jurisprudence." 186 F.3d at 554.

Litman was correct. Congress may, by placing conditions on the receipt of federal funds, impose requirements on recipients that it could not impose unilaterally. See College Sav. Bank, 119 S. Ct. at 2231; South Dakota v. Dole, 483 U.S. 203, 210 (1987). And the Court has consistently upheld Congress' power to condition the receipt of federal funds on the recipient State taking actions that affect its "sovereign interests" in enacting legislation. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." New York v. United States, 505 U.S. 144, 167 (1992). Thus, in New York, this Court held that a statute in which Congress conditioned grants to the States upon the States "regulating pursuant to

federal standards" was "well within the authority of Congress" under the Spending Clause. Id. at 169, 173; see also South Dakota v. Dole, 483 U.S. 203, 210 (1987) (assuming that Constitution vested authority over drinking age solely in the States, Congress could condition the receipt of federal money on States enacting legislation setting drinking age); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on state appointing non-partisan disbursement officials).

Nor is there anything unique about the Eleventh Amendment that would bar Congress from conditioning its spending on a waiver of Eleventh Amendment immunity. Indeed, in Alden v. Maine, 119 S. Ct. 2240, 2267 (1999), the Court specifically noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits. Cf. South Dakota v. Dole, 483 U.S. 203 (1987)." Similarly, in College Savings Bank, the Court reaffirmed the holding of Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), which held that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 119 S. Ct. at 2231. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. Id. at 2231; see also id. at 2227 n.2. The Court explained that unlike Congress' power under the Commerce Clause to regulate

"otherwise lawful activity," Congress' power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. Id. at 2231.

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," Alden, 119 S. Ct. at 2246, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether to accept the federal money with the condition that it can be sued in federal court, or forgo the federal funds. See New York, 505 U.S. at 168; Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 271 (1991). But once that choice is made, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983). All the courts of appeals to address the issue, both before and after College Savings Bank, have agreed with Litman that so long as Congress has made its intentions clear, Congress has the power to condition the receipt of federal funds on a state recipient's waiver of Eleventh Amendment immunity.[9]

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[9] See Sandoval v. Hagan, 197 F.3d 484, 494 (11th Cir. 1999) (Title VI of the Civil Rights Act of 1964); Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 757 (8th Cir. 1999) (Individuals with Disabilities Education Act); Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 831-832 (8th Cir. 1999) (same); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504 of the Rehabilitation Act), cert. denied, 524 U.S. 937 (1998); Department of Education v. Katherine D., 727 F.2d 809, 818-819 (continued...)

CONCLUSION

For the foregoing reasons and the reasons stated in our En Banc Supplemental Brief, as well as our opening and reply briefs as intervenor before the panel, the constitutionality of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act should be upheld and the Eleventh Amendment should be held to be no bar to this case proceeding.

Respectfully submitted,

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[9](...continued)
(9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); Scanlon v. Atascadero State Hosp., 735 F.2d 359, 361-362 (9th Cir.) (Section 504 of the Rehabilitation Act), rev'd due to the absence of a clear statement, 469 U.S. 1032 (1984); Florida Nursing Home Ass'n v. Page, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence of a clear statement sub nom. Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981); see also Premo v. Martin, 119 F.3d 764, 770-771 (9th Cir. 1997) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998); Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ., 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 4th Cir. R. 32(b), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Based on the word-count in the word-processing system, the brief contains 5054 words. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

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