No. 00-2510

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL AND KATHRYN ASBURY,
parents of DANIEL ASBURY,

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Intervenor Plaintiff

v.

MISSOURI DEPARTMENT
OF ELEMENTARY AND SECONDARY EDUCATION,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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SUMMARY OF THE CASE

Parents of a child with autism sued the Missouri Department of Elementary and Secondary Education claiming violations of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq*., and Section 504 of the Rehabilitation Act, 29 U.S.C. 794. The United States intervened in the district court, pursuant to 28 U.S.C. 2403(a), after defendant moved to dismiss the action on the grounds that Congress did not constitutionally remove its Eleventh Amendment immunity under the two statutes. The district court ruled against plaintiffs on the merits and did not

reach this constitutional issue. Defendant again asserts its constitutional challenge in its response brief as an alternative ground for affirmance.

The United States does not believe oral argument would assist the Court in resolving defendant's Eleventh Amendment challenge.

STATEMENT OF THE ISSUES

1. Whether 20 U.S.C. 1403(a), which provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the Individuals with Disabilities Education Act, is a valid exercise of Congress's powers.

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

Bradley v. *Arkansas Dep't of Educ.*, 189 F.3d 745, vacated in part for reh'g en banc *sub nom. Jim C.* v. *Arkansas Dep't of Educ.,* 197 F.3d 958 (8th Cir. 1999)

2. Whether 42 U.S.C. 2000d-7, which provides 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," is a valid exercise of Congress's powers.

Bradley v. *Arkansas Dep't of Educ.*, 189 F.3d 745, vacated in part for reh'g en banc *sub nom. Jim C.* v. *Arkansas Dep't of Educ.,* 197 F.3d 958 (8th Cir. 1999)

SUMMARY OF ARGUMENT

This Court's case law establishes that States that accept funds from the federal government under the Individuals with Disabilities Education Act have validly waived their Eleventh Amendment immunity to suits to enforce its provisions. Defendant's suggestion to the contrary is based on a misapprehension of the current state of the law.

Similarly, because of the clear notice provided by Congress in the text of 42 U.S.C. 2000d-7, a state agency that accepts federal financial assistance waives its Eleventh Amendment immunity to private suits under Section 504 of the Rehabilitation Act. This question is currently pending before the Court *en banc* in *Jim C.* v. *Arkansas Department of Education* (argued January 14, 2000). Moreover, the removal of Eleventh Amendment immunity for Section 504 suits should be upheld as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. While a panel of this Court has rejected that argument, this Court may need to revisit the question depending on the outcome of the Supreme Court's decision in *University of Alabama* v. *Garrett*, which will address the validity of a similar provision in the Americans with Disabilities Act.

ARGUMENT

I

THE ELEVENTH AMENDMENT IS NO BAR TO THIS COURT'S JURISDICTION OVER PLAINTIFFS' IDEA CLAIMS

A private suit against a State or a state agency is barred by the Eleventh Amendment unless Congress abrogated its immunity pursuant to Section 5 of the Fourteenth Amendment or a State waived its immunity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). In *Little Rock School District* v. *Mauney*, 183 F.3d 816 (8th Cir. 1999), this Court held that a provision in the Individuals with Disabilities Education Act (IDEA) that provides a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the Individuals with Disabilities Education Act, 20 U.S.C. 1403(a), put States on notice that accepting IDEA money would constitute a waiver of their Eleventh Amendment immunity. *Id.* at 831-832. The Court also held that the IDEA was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment to abrogate the State's immunity. *Id.* at 822-830.

This Court subsequently addressed the issue of the IDEA and the Eleventh Amendment in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745 (8th Cir. 1999), a consolidated opinion involving one appeal (*Bradley*) brought solely under the IDEA and another (*Jim C.*) brought under the IDEA and Section 504 of the Rehabilitation Act. The Court relied on intervening case law to reject

Mauney's Fourteenth Amendment holding. *Id*. at 751-752. But the Court reaffirmed *Mauney*'s Spending Clause holding that the State "waived its Eleventh Amendment immunity with respect to IDEA claims when it chose to participate in the federal spending program created by the IDEA." *Id*. at 753. This Court subsequently has relied on *Bradley* and *Mauney* for the proposition that a state agency's acceptance of IDEA funds constituted a waiver of immunity for private suits under the IDEA. See *Ball* v. *Greene County Technical Sch. Dist.*, No. 98-2698, 1999 WL 1219890, at *1 (8th Cir. Nov. 17, 1999).

Defendant suggests (Br. 23) that *Bradley*'s IDEA holding was vacated when the Court granted rehearing en banc in part in the *Jim C.* portion of that appeal. See *Jim C.* v. *Arkansas Dep't of Educ.,* 197 F.3d 958 (8th Cir. 1999). That is incorrect. The United States, which had intervened in the consolidated cases of *Bradley* and *Jim C.*, petitioned for rehearing *only* in *Jim C.* and *only* on a distinct question decided adversely to the United States concerning Section 504 of the Rehabilitation Act and the Eleventh Amendment. This Court granted the United States' petition, making clear that the "grant of rehearing en banc is limited to the spending clause issue *raised by the petition*" and that the "remainder of the court's opinion and judgment, including that portion of the opinion and judgment in [*Bradley*,] case No. 98-1010 is unaffected by this order." Addendum A (emphasis added). Indeed, the Court issued its mandate in *Bradley*. Addendum B.

In any event, even if the entire Spending Clause discussion in the *Bradley* opinion had been vacated (as defendant appears to suggest), it would still not be an

open question in this Circuit because this Court's earlier decision in *Mauney* would control. Thus, the controlling law in this Circuit is that there is no Eleventh Amendment bar to suits under the IDEA because States were on notice that acceptance of the federal IDEA funds constituted a waiver of immunity. Accord *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.), cert. denied, 121 S. Ct. 70 (2000) (reaching this same conclusion).

II

THE ELEVENTH AMENDMENT IS NO BAR TO THIS COURT'S JURISDICTION OVER PLAINTIFFS' SECTION 504 CLAIMS

42 U.S.C. 2000d-7 provides 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." Whether this provision validly removes Eleventh Amendment immunity of those state agencies accepting federal financial assistance from private suits under Section 504 is currently before this Court en banc in *Jim C.* (argued January 14, 2000). For the reasons we explained at length in that appeal, and consistent with the holdings of five other circuits, Section 2000d-7 is a valid exercise of Congress's Spending Clause power. See *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), cert. granted on other grounds, 121 S. Ct. 28 (2000); *Litman* v. *George Mason Univ.*, 186 F.3d 544 (4th

Cir. 1999), cert. denied, 120 S. Ct. 1220 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

In addition, we believe Section 504 of the Rehabilitation Act and Section 2000d-7 are valid exercises of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. While a panel of this Court rejected that argument in *Bradley*, the Supreme Court is currently considering whether Congress validly exercised its power under Section 5 to abrogate States' Eleventh Amendment immunity for suits under the Americans with Disabilities Act. See *Garrett* v. *University of Alabama*, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S. Ct. 1669 (No. 99-1240) (argued Oct. 14, 2000). Because "the ADA and § 504 provide essentially the same protections for the same group of individuals," *Bradley*, 189 F.3d at 756, the Supreme Court's opinion in *Garrett* may require a reexamination of this Court's holding in *Bradley* that Section 504 is not valid Section 5 legislation.

CONCLUSION

The Eleventh Amendment is no bar to this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2000, two copies of the foregoing Brief for the United States as Intervenor and one 3 ½" disk containing the brief's text, scanned for viruses and determined to be virus free, were served by first-class mail, postage pre-paid, on the following counsel:

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