No. 03-1989

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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S.C., a minor child, by his parents, C.C., K.C.,

Plaintiffs-Appellees

v.

DEPTFORD BOARD OF EDUCATION,

Defendant-Appellee

NEW JERSEY DEPARTMENT OF EDUCATION,

Defendant-Appellant

DIVISION OF DEVELOPMENTAL DISABILITIES OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES,

Defendant-Appellee

_____
_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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STATEMENT OF SUBJECT MATTER JURISDICTION

For the reasons discussed in this brief, the district court has jurisdiction over this action pursuant to 28 U.S.C. 1331.

STATEMENT OF APPELLATE JURISDICTION

The defendant New Jersey Department of Education filed a motion to dismiss the underlying action on the grounds that, *inter alia*, it enjoys Eleventh

Amendment immunity to some of the plaintiff's claims (see A64[1]). The district court entered an order denying the defendant's motion to dismiss on March 14, 2003 (A99-A101, see also A86-A96), and entered a final appealable order (see A97). The defendant filed a timely notice of appeal on April 11, 2003 (A1-A2). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The United States will address the following question:

Whether conditioning the receipt of federal grants under the Individuals with Disabilities Education Act on a state agency's waiver of Eleventh Amendment immunity to suits under that Act is a valid exercise of Congress's authority under the Spending Clause.[2]

STATEMENT OF THE CASE

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides billions of dollars to States to educate children with disabilities. The IDEA was a congressional response to the wholesale exclusion of children with disabilities from public education. See 20

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[1] References to "A__" are to pages in the Appendix filed by the Appellant; references to "Br. __" are to pages in the Appellant's opening brief.

[2] The United States does not take a position on any other issues involved in this appeal.

U.S.C. 1400(c)(2)(C).[3] Congress's two-fold goal in enacting the IDEA was to ensure both that children with disabilities receive a free appropriate public education, and that such an education takes place, whenever possible, in the regular classroom setting. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 192, 202-203 (1982).

In order to qualify for IDEA financial assistance, a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a), (a)(1)(A). To assure that each child receives such an appropriate education, Congress also conditioned the receipt of federal funds on detailed procedural requirements. See *Rowley*, 458 U.S. at 182-183, 205-206; 20 U.S.C. 1415. Congress specifically authorized private plaintiffs to enforce these rights in federal court. *Rowley*, 458 U.S. at 204-205; 20 U.S.C. 1415(i)(2), (i)(3).[4] The IDEA requires a court "not

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[3] The statute is currently known as the IDEA pursuant to the change in title effectuated by Section 901(a)(1) of the Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), (3), 104 Stat. 1141-1142 (1990). Before 1990, the statute was entitled the Education of the Handicapped Act (Pub. L. No. 91-230, 84 Stat. 175 (1970)), and was often referred to as the Education for All Handicapped Children Act, the name of the statute that amended the existing statute in significant respects, see Pub. L. No. 94-142, 89 Stat. 773 (1975).

[4] While the statute generally requires exhaustion of specified state administrative remedies before bringing suit, see 20 U.S.C. 1415(f)-(g), (i)(1), courts have held that the exhaustion requirements may be waived in a variety of circumstances. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 327 (1988); *Beth V.* v.

(continued...)

only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has" in fact complied "with the requirements of" the IDEA. *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 890 n.6 (1984) (internal quotation marks omitted); see also *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) (The IDEA "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." (citation omitted)).[5]

2. As alleged in the complaint, the plaintiff, S.C., is a child with autism whose condition poses severe barriers to his ability to learn in an ordinary education environment (A8, A24-A25). In the time period preceding this dispute,

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[4](...continued)
Carroll, 87 F.3d 80, 88-89 (3d Cir. 1996); *W.B.* v. *Matula*, 67 F.3d 484, 495-496 (3d Cir. 1995); *Komninos* v. *Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-779 (3d Cir. 1994); *Lester H.* v. *Gilhool*, 916 F.2d 865, 869-870 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991).

[5] The State, in turn, may pass on the federal assistance to local school districts that agree to comply with the requirements of the IDEA. See 20 U.S.C. 1413(a). However, the local school district's special education program is "under the general supervision" of the state education agency, which is "responsible for ensuring that * * * the requirements of [the IDEA] are met," and must "provide special education and related services directly to children with disabilities" if a local school district "is unable to establish and maintain programs of free appropriate public education that meet the requirements of" the IDEA. *Id*. at 1412(a)(11)(A)(ii)(I), (a)(11)(A)(i), 1413(h)(1)(B); see also *id*. at 1413(d)(1) (State may not make payments of IDEA funds to local school districts that violate the IDEA).

S.C. was enrolled at the Bancroft School, a facility in New Jersey that is designed to educate students with special needs (A8, A25). Because S.C. was having certain behavior problems that were negatively affecting his ability to learn, his parents asked the Deptford Township Board of Education to place S.C. in a residential program (A8, A25). Deptford denied this request, and S.C.'s parents petitioned for a due process hearing with the New Jersey Department of Education pursuant to the procedures set forth in the IDEA (A9, A25). The Administrative Law Judge found in favor of S.C. and his parents and ordered Deptford to implement an appropriate educational plan for S.C., including placement in a residential program (A9, A26).

After Deptford failed to implement the ALJ's order, S.C. and his parents filed this suit seeking declaratory and injunctive relief as well as attorneys' fees and costs (A7-A10). Along with its answer, Deptford filed a third-party complaint against the New Jersey Department of Education (DOE) and the New Jersey Department of Human Services, Division of Developmental Disabilities (DDD), claiming that the agencies are required under the IDEA to pay for at least part of S.C.'s residential placement program (A11-A20).

The state agencies moved to dismiss the third-party complaint, arguing, *inter alia*, that they are immune under the Eleventh Amendment from suits under the IDEA (see A64). The district court denied the motion to dismiss as to DOE,

holding that the agency had waived its immunity under the IDEA by accepting IDEA funds[6] (A93-A96). DOE filed this timely appeal (A1-A2).[7]

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under the Individuals with Disabilities Education Act (IDEA) to remedy alleged violations of the Act. This Court's recent decision in *A.W.* v. *Jersey City Public Schools*, No. 02-2056, 2003 WL 2192952 (3d Cir. Aug. 19, 2003), considered and rejected every argument put forth by the defendant-appellant in this case, and held that Congress validly conditioned the receipt of IDEA funds on a state agency's waiver of its sovereign immunity to private suits brought to enforce the IDEA. This Court held that, by enacting 20 U.S.C. 1403, Congress put States on clear notice that acceptance of federal IDEA funds was conditioned on a waiver of their Eleventh Amendment immunity to suits under the IDEA, and that,

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[6] The district court also held that the IDEA validly abrogates States' Eleventh Amendment immunity because it is a valid enactment under Section 5 of the Fourteenth Amendment (A89-A93). The United States agrees with the district court that the IDEA can be upheld as valid legislation under Section 5 of the Fourteenth Amendment. Because the statute is clearly valid legislation under the Spending Clause, however, the United States believes that there is no need for this Court to address the statute's validity under Section 5.

[7] In addition, the district court granted DDD's motion to dismiss, finding that DDD does not receive any IDEA funds, and is therefore not subject to suit under that statute (A94-A96). Deptford filed a timely appeal from that ruling. The United States does not take a position on whether DDD receives any IDEA funds.

by accepting the IDEA funds, a State agrees to the terms of the statute. This Court explicitly rejected the defendant's contention that the State could not have knowingly waived its immunity because it thought Section 1403 was intended to be a unilateral action by Congress. Moreover, this Court held that the IDEA is a valid exercise of Congress's authority under the Spending Clause because it furthers the federal government's interest in seeing that all children with disabilities receive a free appropriate education and because the statute is not unconstitutionally coercive.

ARGUMENT

THIS COURT HAS HELD THAT CONGRESS VALIDLY CONDITIONED IDEA FUNDS ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER THE IDEA

The Eleventh Amendment bars suits by private parties against a State, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). The state defendant argues that the plaintiff's claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, are barred by the Eleventh Amendment. The same defendant raised the exact same sovereign immunity defense before this Court in *A.W.* v. *Jersey City Public Schools*, and this Court recently[8] rejected every one of the defendant's arguments, finding that the State has in fact waived its Eleventh Amendment

[8] This Court's decision in *A.W.* was issued on August 19, 2003, after the defendant-appellant in this case filed its opening brief.

immunity to suits under the IDEA. See *A.W.* v. *Jersey City Pub. Schs.*, No. 02-2056, 2003 WL 21962952 (3d Cir. Aug. 19, 2003). Because this Court is bound by its correct decision in *A.W.*, it should affirm the ruling of the district court.

The IDEA authorizes private suits for "appropriate" relief. See 20 U.S.C. 1415(i)(2)(A), (i)(2)(B)(iii). Section 1403 of Title 20 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 IDEA. Section 1403 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal IDEA assistance. States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). "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 * * * acceptance of the funds entails an agreement to the actions." *Id.* at 686. Thus, as this Court held in *A.W.*, Congress may, and has, clearly conditioned the receipt of IDEA funds on the defendant's waiver of its Eleventh Amendment immunity to IDEA claims.

A. *Section 1403 Is A Clear Statement That Accepting IDEA Funds Constitutes A Waiver Of Immunity From Private Suits Brought Under The IDEA*

This Court held in *A.W.* that "section 1403 constitutes a clear statement of Congress's intent to condition the receipt of federal IDEA funds on a state's waiver of Eleventh Amendment immunity." 2003 WL 21962952, at *13. In so

holding, this Court considered and rejected the defendant's argument that Section 1403 does not clearly condition the receipt of IDEA funds on a state agency's waiver of its sovereign immunity.

The *A.W.* opinion first reaffirmed that Congress may condition federal funds on a State's agreement to waive its Eleventh Amendment immunity. Relying on Supreme Court and Third Circuit precedent, this Court held that, although "a state does not waive its immunity merely by accepting federal funds, * * * a state's acceptance of federal financial aid in the face of a clearly expressed condition by Congress may give rise to a waiver of sovereign immunity even in the absence of any express statement of waiver by the state or its legislature." *Id.* at *5. This holding rejects the defendant's assertion (Br. 33-34) that a state agency cannot waive its immunity to suit absent action by the state legislature.

This Court went on to hold in *A.W.* that Congress did in fact clearly condition the receipt of IDEA funds on a State's consent to waive its Eleventh Amendment immunity to claims under the IDEA. In so holding, the Court rejected the defendant's assertion (Br. 26) that Congress could not have clearly conditioned IDEA funds on a State's waiver of its Eleventh Amendment immunity because Congress intended to abrogate States' immunity. Although this Court noted that it and other courts have previously referred to Section 1403 as an abrogation provision, it held that "Section 1403 * * * is logically capable of constituting both a clear statement of abrogation and an unambiguous expression of an intent to condition the availability of federal IDEA funds on the state's relinquishment of

immunity." 2003 WL 21962952, at *10. The Court "examin[ed] the language of section 1403 itself," *id.* at *11, and concluded that the statute "satisfies the Supreme Court's rigorous standards of clarity," *id.* at *13, in expressing Congress's intent to condition certain funds on a State's waiver of its immunity.

The Court also considered and rejected the defendant's contention (Br. 27-29) that the language of Section 1403 lacks the clarity of the language in 42 U.S.C. 2000d-7, which this Court has held validly conditions the receipt of any federal financial assistance on a State's waiver of its sovereign immunity to claims under, *inter alia*, Section 504 of the Rehabilitation Act, 29 U.S.C. 794. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 170-172 (3d Cir. 2002) ("Enacting the amendment to § 2000d-7, Congress put states on notice that by accepting federal funds under the Rehabilitation Act, they would waive their Eleventh Amendment immunity to Rehabilitation Act claims."), cert. denied, 123 S. Ct. 1353 (2003). The *A.W.* Court noted that the language of Section 1403 is "nearly identical" to that of Section 2000d-7, and therefore "constitutes a clear statement of Congress's intent to condition the receipt of federal IDEA funds on a state's waiver of Eleventh Amendment immunity." 2003 WL 21962952, at *13.[9] Any state agency reading the U.S. Code would have known that after the effective date of Section 1403 it would waive its immunity to suit in federal court for violations of the

[9] The Court also rejected the defendant's argument (Br. 37-38) that the IDEA fails to provide States with sufficient notice of "the precise conduct that will subject the State to suit in Federal court." 2003 WL 21962952, at *18 n.17.

IDEA if it applied for and accepted federal IDEA funds. Section 1403 thus embodies exactly the type of unambiguous condition required by the Supreme Court, putting States on express notice that part of the "contract" for receiving IDEA funds is the requirement that they consent to suit in federal court for alleged violations of the IDEA.

B. *The State's Waiver Of Its Eleventh Amendment Immunity Was Knowing And Voluntary*

The defendant argues that it did not knowingly waive its Eleventh Amendment immunity to suits under the IDEA because the State of New Jersey "[r]easonably [b]elieved" that its immunity had already been abrogated by the IDEA (Br. 29). The *A.W.* Court expressly considered and rejected all of the arguments the defendant makes in support of its position.

The defendant relies primarily on the Fifth Circuit's now vacated decision in *Pace* v. *Bogalusa City School Board*, 325 F.3d 609, vacated and reh'g en banc granted, No. 01-31026, 2003 WL 21692677 (5th Cir. July 17, 2003),[10] and the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98

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[10] The *A.W.* opinion also noted (2003 WL 21962952, at *15) that the Fifth Circuit has applied the reasoning of *Pace* in two other cases. See *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 330 F.3d 691 (5th Cir. 2003); *Johnson* v. *Louisiana Dep't of Educ.*, 330 F.3d 362 (5th Cir. 2003). Since the decision in *Pace* was vacated and the case ordered reheard en banc, the opinions in *Miller* and *Johnson* have also been vacated and the cases ordered reheard en banc. See *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, No. 02-10190, 2003 WL 21960003 (5th Cir. Aug. 12, 2003); *Johnson* v. *Louisiana Dep't of Educ.*, No. 02-30318, 2003 WL 21983251 (5th Cir. Aug. 20, 2003).

(2d Cir. 2001), in support of its argument that it did not knowingly waive its immunity because it believed that its immunity had already been abrogated by the IDEA itself. But the *A.W.* Court explicitly considered and rejected the rationales adopted in *Pace* and *Garcia*. There is no doubt that an effective waiver of sovereign immunity must be "knowing." See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.,* 527 U.S. 666, 682 (1999). The dispute is over the proper test for determining whether a State's waiver was, in fact, knowing. With the exception of the Second Circuit and the panel in *Pace*, the courts of appeals have uniformly applied a simple, straight-forward test: if Congress clearly conditions federal funds on a waiver of sovereign immunity, and a State nonetheless voluntarily accepts federal financial assistance, a knowing waiver of sovereign immunity is established. After an in-depth examination of *Pace*, *Garcia*, and the precedents on which those cases purport to rely, the *A.W.* Court aligned itself with the majority of courts of appeals, stating, "[w]e do not adopt the view of waiver advanced by *Garcia* and its successors." 2003 WL 21962952, at *15.

The *A.W.* Court relied instead on the Supreme Court's decision in *College Savings Bank*, in which the Supreme Court indicated that "a waiver may be found in a State's acceptance of a federal grant." 2003 WL 21962952, at *16 (quoting *College Sav. Bank*, 527 U.S. at 678 n.2). That holding is in line with this Court's previous holding in *Koslow*, which applied the same straight-forward, objective test, reaching the conclusion that, if a State voluntarily accepts funds that are

clearly conditioned on a waiver of sovereign immunity, the State cannot later be heard to complain that it did not know that its actions would waive its sovereign immunity.

The Supreme Court recently endorsed such reasoning in *Lapides* v. *Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), where it found that a State had knowingly and voluntarily waived its sovereign immunity by removing state law claims to federal court. The Court began by acknowledging that it has "required a 'clear' indication of the State's intent to waive its immunity." *Id*. at 620. The Court concluded that such a "clear" indication may be found when a State engages in conduct that federal law declares will constitute a waiver of sovereign immunity. "[W]hether a particular set of state * * * activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law," the Court explained. *Id*. at 623. And federal law made clear that "voluntary appearance in federal court" would constitute a waiver of sovereign immunity. *Id*. at 619. Removing state law claims to federal court in the face of this principle, the Court held, waived the State's sovereign immunity. *Id*. at 620.

Importantly, it was undisputed that the State in *Lapides* did not "believe[] it was actually relinquishing its right to sovereign immunity." *Garcia*, 280 F.3d at 115 n.5. See *Lapides*, 535 U.S. at 622-623. Under Georgia law, the State argued, the Attorney General lacked authority to waive the State's sovereign immunity. And under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State asserted, it could reasonably believe that absent that state law authority, no

action by the Attorney General would constitute a valid waiver of the State's sovereign immunity. See 535 U.S. at 621-622.[11] Therefore, the State argued, the Attorney General's removal of the case to federal court should not be found to constitute a "clear declaration" of the State's intent to waive its sovereign immunity.

The defendant's argument in this case would have required the Supreme Court to accept Georgia's argument and hold that the State did not knowingly waive its sovereign immunity because the State reasonably believed that removing the case to federal court would not constitute a valid waiver. The Supreme Court, however, rejected the argument and held that the State had validly waived its sovereign immunity. See *id*. at 622-623. The waiver rule it was applying, the Court explained, was necessary to accommodate not only the State's interest in not being subject to suit without its consent, but also the broader interest in creating a waiver rule that can be "easily applied by both federal courts and the States themselves" and that "avoids inconsistency and unfairness." *Id*. at 623- 624. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id*. at 621. Finding that removal of state law claims represents a knowing waiver of sovereign immunity as a matter of law properly accommodated the competing interests. "[O]nce the States know or have reason to expect that removal will constitute a waiver," the Court explained, "then *it is easy enough to presume* that

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[11] In fact, this portion of the Court's holding in *Ford* was good law until the Supreme Court overruled it in *Lapides* itself. See *id*. at 622-623.

an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal." *Id.* at 624 (emphasis added) (citation and quotation marks omitted).

So, too, in this case, federal law has long made clear that a State's acceptance of clearly conditioned federal funds shall constitute a knowing and effective waiver of sovereign immunity. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985). The clarity of this rule, and of the funding condition, is sufficient to ensure that the State's waiver of its sovereign immunity is knowing. At the same time, ensuring that States accepting federal assistance are bound by the funds' valid conditions is necessary to vindicate Congress's constitutional authority to enact such conditions.

Moreover, even if the State of New Jersey did believe that Section 1403 of the IDEA validly abrogated its Eleventh Amendment immunity, the *A.W.* Court held that that belief does not invalidate the State's waiver:

> Even though the state may believe that it no longer possesses any sovereign immunity to surrender because of Congress's exercise of its constitutional power of abrogation, it still must be held to be aware that its surrender of this immunity constitutes a condition for federal financial assistance due to the unambiguity of the statutory provision itself.

2003 WL 21962952, at *16. In so holding, the Court dismissed the defendant's argument that Section 1403 cannot validly condition IDEA funds on a State's waiver of its sovereign immunity because a State could reasonably believe that Section 1403 is an abrogation provision rather than a waiver provision. 2003 WL

21962952, at *10 ("Section 1403 * * * is logically capable of constituting both a clear statement of abrogation and an unambiguous expression of an intent to condition the availability of federal IDEA funds on the state's relinquishment of immunity."). In enacting legislation, Congress may rely on any and all legislative powers available to it. Indeed, federal legislation may be upheld as a valid exercise of any congressional power under which it legitimately falls. See, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972, 1977 (2003) ("In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment's guarantees.").

The *A.W.* Court also rejected the defendant's argument that it had no immunity to waive because Section 1403 abrogates its Eleventh Amendment immunity regardless of whether it takes IDEA funds. The Court examined the text and structure of the IDEA and correctly concluded that "section 1403's application is clearly limited to states that are the beneficiaries of federal financial assistance under the IDEA." 2003 WL 21962952, at *13. Thus, the provisions of the IDEA are clearly conditional and take effect only if a State voluntarily chooses to apply for and accept IDEA funds. When New Jersey was deciding whether to apply for and accept federal IDEA funds for the coming school year, the New Jersey Department of Education's sovereign immunity to IDEA claims for the coming year was intact, and the State was faced with a clear choice: it could decline federal IDEA funds and maintain its sovereign immunity to suits under the IDEA,

or it could accept funds and submit to private suits under the statute. In choosing to accept federal funds that were clearly available only to those States willing to submit to enforcement proceedings in federal court, the State knowingly waived its sovereign immunity.

This Court is bound by the decision in *A.W.* to hold that the text of the IDEA makes clear that federal IDEA funds are clearly conditioned on a state recipient's waiver of its Eleventh Amendment immunity.

C. *The IDEA Is A Valid Exercise Of Congress's Power Under The Spending Clause*

Finally, the *A.W.* Court held that the IDEA is a valid exercise of Congress's power under the Spending Clause, explicitly rejecting every argument the defendant makes in this case in support of its contention that the IDEA exceeds Congress's spending power.

1. The Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four limitations on Congress's ability to enact legislation pursuant to its power under the Spending Clause. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress conditions the States' receipt of federal funds, it "must do so unambiguously * * *, enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on

federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid.* And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id*. at 208. The IDEA falls well within these limitations. Citing to the *Dole* limitations, the Supreme Court recently commented that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States* v. *American Library Ass'n*, 123 S. Ct. 2297, 2303 (2003).

In its brief in this Court, the defendant did not argue that the IDEA fails to satisfy all four of the *Dole* criteria. Rather the defendant challenged only the relatedness prong of the *Dole* test. Thus, as this case comes before this Court, there is no dispute that (1) the general welfare is served by providing educational services to children with disabilities, *Board of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982) (discussing the predecessor to the IDEA with approval); (2) the language of the IDEA makes clear that the obligations it imposes are conditions on the receipt of federal financial assistance, see *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) (finding that the predecessor to the IDEA "conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act"); and (3) a state agency's provision of educational services to children with disabilities and waiver of its sovereign immunity do not violate anyone's constitutional rights.

As the Court in *A.W.* found, the IDEA meets the *Dole* "relatedness" requirement as well. The Court stated:

> We find that the requirement of waiver clearly promotes [the federal government's] interests in a free appropriate public education for all disabled children and the protection of the rights of children and parents by ensuring full accountability in federal court for statutory violations committed by state educational authorities who receive federal financial assistance under the IDEA.

2003 WL 21962952, at *17. Indeed, the requirement that state funding recipients waive their sovereign immunity to suits under the IDEA as a condition of accepting IDEA funds both (1) provides a viable enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept IDEA funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipient's failure to follow the law. The federal government's interest in seeing that all children with disabilities receive a meaningful education is directly related to the money the federal government gives to States expressly for the purpose of providing such education, and "Congress may certainly insist that * * * 'public funds be spent for the purposes for which they were authorized.'" *United States* v. *American Library Ass'n*, 123 S. Ct. at 2308 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991)).

2. The defendant also argues (Br. 36-38) that the conditions in the IDEA are impermissibly coercive and "offend[] community standards of fairness." This Court also considered and rejected that argument in *A.W.* While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be

so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). Noting that every congressional spending statute "is in some measure a temptation," the Court also recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* The Court in *Dole* thus reaffirmed the default assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590). Accordingly, the Ninth Circuit has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997).

In *Koslow*, this Court rejected the defendant's argument that the conditions in Section 504 of the Rehabilitation Act are unconstitutionally coercive. 302 F.3d at 174.[12] The choice between immunity and "declining all federal funds to the

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[12] It is irrelevant that the defendant characterized the choice between immunity and federal funds as an "unconstitutional condition" in *Koslow*, while the defendant in this case complains of unconstitutional "coercion." This Court considered and rejected the argument under either label in *Koslow*. See 302 F.3d at 172 n.11 ("The District Court and the dissenting judge in *Jim C.* also focused on the possible 'coercion' engendered by the federal funding of particular state programs or activities. Those arguments are considered in the subsequent section

(continued...)

Department of Corrections," this Court acknowledged, "would doubtless result in some fiscal hardship – and possibly political consequences." *Ibid.* But the inducement did not cross the line into unconstitutional coercion. "The Commonwealth remains free to make the choice: it may decline federal aid to the Department of Corrections, but having accepted the federal funds, it is bound by the conditions of the Rehabilitation Act." *Ibid.*

The defendants can point to no legally relevant difference between the choice the state defendant made in *Koslow* in accepting federal funds for its Department of Corrections and the choice the defendant made in this case in accepting federal IDEA funds for its public schools. This Court held in *A.W.* that "the state's powers as a political sovereign, especially its authority to tax, appear more than capable of preventing undue coercion through 'economic encouragement.'" 2003 WL 21962952, at *18 (quoting *Koslow*, 302 F.3d at 174). That conclusion is binding and should be followed in this case as well.

Any argument that the IDEA is coercive would be 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

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[12](...continued)
on 'unconstitutional conditions.'"); *A.W.*, 2003 WL 21962952, at *18.

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) (emphasis added). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[13]

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[13] 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 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." No. 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).

Similarly, 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 conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not 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 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).[14]

These cases demonstrate that the federal government can place conditions on federal funding that require state agencies to make the difficult choice of losing

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[14] The Supreme Court has also 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 Congress may constitutionally condition federal funding to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); see also *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983).

federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion.

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the IDEA funds with the waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1203 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 527 U.S. at 750, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency waive its immunity to suit in federal court, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendants have accepted federal financial assistance, "[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). For all these reasons, the IDEA should be upheld under the Spending Clause.

CONCLUSION

The order of the district court denying DOE's motion to dismiss the IDEA claims on the grounds of Eleventh Amendment immunity should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of the waiver of sovereign immunity in the IDEA is also being challenged in *M.A.* v. *Newark Public Schools*, No. 02-1799.

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 6,404 words.

August 28, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2003, two copies of the foregoing Brief for the United States as Intervenor were served by overnight mail, postage prepaid, on the following counsel:

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