No. 02-2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN DOE; MARY DOE, individually and as Husband and Wife, and; JNT, by and through John Doe, his next friend; JAY BRUMMETT, Personal Representative of the Estate of GayLynn Brummett,

Plaintiffs - Appellees

UNITED STATES OF AMERICA,

Intervenor - Appellee

v.

THE STATE OF NEBRASKA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; MICHAEL JOHANNS, Governor of the State of Nebraska, in his official capacity; RON ROSS, Director of the Nebraska Department of Health & Human Services, in his official capacity; SANDY THOMPSON, Child Protective Services Case Manager for the Nebraska Department of Health & Human Services, in her official capacity; PATRICIA SQUIRES, Deceased, Child Protective Services Supervisor and Adoption Unit Supervisor for the Nebraska Department of Health & Human Services, in her official capacity; DARYL WUSK, Administrator of the Lincoln District Office of the Nebraska Department of Health & Human Services, in his official capacity,

Defendants - Appellants

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

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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STATEMENT OF SUBJECT MATTER JURISDICTION

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

STATEMENT OF APPELLATE JURISDICTION

The United States concurs with defendants' statement of appellate jurisdiction.

STATEMENT OF THE ISSUE

Whether conditioning the receipt of federal financial assistance on waiver of a state agency's Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002). Congress expressly conditioned receipt of federal funds on a waiver of the States' Eleventh Amendment immunity to private suits in federal court. See 42 U.S.C. 2000d-7; *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001).

2. Although initially involving multiple causes of action seeking multiple forms of relief, this case has been winnowed down to a suit for damages by Mary Doe (through her estate) and JNT under Section 504 of the Rehabilitation Act

against a Nebraska state agency and various officials sued in their official capacities. See JA 84-86, 114-127 (dismissing constitutional claims), 136 (dismissing claims for injunctive relief), 129-131 (dismissing Section 504 claims against officials in individual capacities), 129 (dismissing John Doe's Section 504 claims), 284 (dismissing Americans with Disabilities Act claims).[1]

Defendants first moved to dismiss the Section 504 claim on Eleventh Amendment grounds in January 1998. JA 138. The district court denied the motion, holding, *inter alia*, that defendants had waived their immunity by accepting federal financial assistance in light of 42 U.S.C. 2000d-7, which clearly conditions the receipt of federal funds on a waiver of a state agency's immunity. JA 146. Defendants filed an interlocutory appeal. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Section 2000d-7. The appeal was abated pending the outcome of this Court's en banc decision in *Jim C.* v. *Arkansas Department of Education.* After *Jim C.* was issued, this Court issued an unpublished opinion providing that "[a]s to plaintiff's claim under the Rehabilitation Act, 29 U.S.C. § 794, the judgment is vacated and the cause remanded for reconsideration in light of *Jim C.*" JA 156.

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[1] Because there has been no final judgment, plaintiffs have not had the opportunity to appeal the district court's dismissal of any of these claims. The United States takes no position on the propriety of the district court's judgments other than the one currently on appeal.

On remand, defendants moved for summary judgment, arguing that they had been coerced into waiving their Eleventh Amendment immunity due to the large amount of money they received from the federal government. The district court denied the motion. JA 283-294. This timely interlocutory appeal followed.

3. Plaintiffs' allegations of disability discrimination concern events that occurred between June 1993 (when defendants confirmed that Mary Doe was HIV-positive) and October 1996 (when defendants consented to Mary Doe's adoption of JNT, a foster child they had placed in her care). JA 110, 114. We thus describe the facts regarding federal funding of the relevant state agency during those three years.[2]

a. The Nebraska Department of Social Services was created by state law. State law authorized the Department to apply for and accept federal grants. JA 225, 233, 241; see Neb. Rev. St. § 81-3102(7). The ultimate decision whether and how to use the funds rested in the legislature, which had to appropriate all funds spent by state agencies, including federal funds received from grants. JA 221, 225, 233, 241; see also Neb. Op. Atty. Gen. No. 87114, 1987 WL 248506, at *1-*2 (Dec. 9, 1987). The State took no action to reduce the amount of federal funds

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[2] Defendants agreed that the funding situation remained unchanged for all relevant purposes for the period in question. JA 161 ¶ 6. The significant reorganization in which the Department of Social Services was combined with other agencies into a larger Department of Health and Human Services System did not occur until 1997. JA 161 ¶ 6, 211, 267. Unless otherwise noted, the state laws cited existed prior to the reorganization, but we cite them to their current codification.

it received. JA 223-224, 231-232, 240. To the contrary, a variety of state laws encouraged or required the Department to apply for federal grants. JA 221-223; see also, *e.g.*, Neb. Rev. St. § 71-4738 (enacted 2000) (Department "shall apply for all available federal funding to implement the [state] Infant Hearing Act"). The Department's policy was to "secure additional Federal revenues." JA 246; see, *e.g.*, Neb. Rev. St. § 79-1451 ("In the event federal funds are available to the State of Nebraska for vocational rehabilitation purposes, the Division of Rehabilitation Services is authorized to comply with such requirements as may be necessary to obtain the maximum amount of federal funds and the most advantageous proportion possible insofar as this may be done without violating other provisions of the state laws and Constitution of Nebraska."); *id.* § 83-169 (same for federal funds pertaining to alcoholism and drug abuse). The State did not identify a single federal grant program for which the Department was eligible and did not apply. JA 223-224, 231-232, 240.

If federal funds were no longer available for an existing state program, the State would assess on a case-by-case basis whether to continue that program. JA 233. It would not terminate a state program simply because federal funds were no longer available. JA 242; see also R. 289 at 27 (defendants assert they would not terminate programs "since virtually all of the services are essential basic level public assistance programs"). For example, the Department increased state spending to support victims of domestic abuse when federal funds were reduced. JA 184; cf. Neb. Rev. St. §§ 71-5203, 5205 (providing the State will fund "family

practice residency program" if federal grants not received); *id.* § 79-1132 (providing that if federal grants cannot fully cover certain special education programs, State would provide some of the funds).

The grants received by the Department from the federal government range in size. Some grants are very small, such as a grant of less than $50,000 a year to support state programs designed to prevent elder abuse. JA 217. The largest single federal grant to the Department paid a majority of the costs of medical services to low income persons (Medicaid) and totaled as much as $391 million annually during the relevant period. JA 198.

The percentage of the cost of any particular state program subsidized by the federal government also varied from program to program. Many state programs received no direct federal support. See, *e.g.*, JA 183 ("Subsidized Adoption" program), 188 ("Child Welfare"), 189 ("Family Support and Preservation"). The federal government paid approximately 64% of the costs of the state programs to assure medical services that were consistent with Medicaid. JA 190. For some state programs, the federal government pays for 100% of the program benefits. These programs include Food Stamps, the Home Energy Program, which helps low-income households meet the costs of home energy, and the Refugee Resettlement program. JA 241, 183, 188. Putting Medicaid to one side, the federal government provided the Department with approximately 56% of its annual budget: for every dollar of state funds spent by the agency, it spent at least

$1.16 in federal funds.[3]

In addition to deciding which state programs to create and which federal grants to seek, Nebraska, through its legislature, decides what state programs to combine into a single department. Nothing in federal law requires that the state department that deals with foster care and adoption also handle Medicaid or other programs operated in Nebraska by the Department. JA 233-234, 242. Instead, the State, in response to its own interests in providing more efficient services at a lower cost, elected to place these state programs in a single agency. JA 242, 267, 272. Indeed, in 1997, the State reorganized its social service agencies and shifted

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[3] The data at JA 191, 196-198 are the bases for these calculations. They are summarized below in table form:

	1992-1993	1993-1994	1994-1995
Department Expenditures	793,900,544	864,470,163	909,802,659
total Medicaid	529,827,218	586,633,199	614,987,971
federal	333,289,683	374,411,781	391,051,459
state	196,537,535	212,221,418	223,936,511
federal share of Medicaid	62.9%	63.8%	63.6%
federal/state ratio for Medicaid programs	1.70	1.76	1.75
total non-Medicaid	264,073,326	277,836,964	294,814,688
federal	147,865,996	149,218,091	166,355,447
state	116,207,330	128,618,873	128,459,242
federal share of non-Medicaid programs	56.0%	53.7%	56.4%
federal/state ratio for non-Medicaid programs	1.27	1.16	1.30

the Medicaid money to a different agency, dramatically reducing the amount and percentage of federal funds received by the Department's successor agency. JA 291 n.7.

b. JNT was a foster child who was placed with the Does with the expectation that they would adopt him if reunification with his natural parents was impossible. JA 109. Congress had enacted a variety of federal programs that financed state programs involving foster children and adoption. See, *e.g.*, Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 501 (codified as amended at 42 U.S.C. 670 *et seq.*)). Nebraska has elected to accept money under some of these programs. JA 182-183; see also Neb. Rev. St. §§ 43-117.01, 43-154. It also provides some of the same services for children who are not eligible for federally subsidized services, JA 183 (describing "Subsidized Adoption" program), and has developed programs addressing similar issues that rely only on state funds, JA 189 (describing "Family Support and Preservation" program that attempts to reduce placing children in foster care).

During the relevant time period, the state budget categories that included the state programs involved in foster care and adoption also included the federal funds budgeted for medical services to low-income persons under Medicaid. JA 161 ¶ 8. Thus, as for the Medicaid program, the data show that the federal government paid approximately 60% of the expenditures for those state programs the Department had elected to offer. JA 162 ¶ 12.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under Section 504 of the Rehabilitation Act to remedy discrimination against persons with disabilities. Congress validly conditioned receipt of federal financial assistance on waiver of States' immunity to private suits brought to enforce Section 504 of the Rehabilitation Act. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. By accepting the funds, a state agency agreed to the terms.

Section 504 itself is a valid exercise of the Spending Clause because it furthers the federal government's interest in assuring that federal funds, provided by all taxpayers, do not support recipients that discriminate. Nor is the statute unconstitutionally coercive. The State made voluntary choices regarding whether to take particular federal funds, the amount of funds to take, and the distribution of funds to state agencies defined by state law. Nothing in this case warrants deviating from this Court's holding in *Jim C.* v. *Arkansas Department of Education,* 235 F.3d 1079 (2000) (en banc), cert. denied, 533 U.S. 949 (2001), that this statutory scheme is not unconstitutionally coercive.

ARGUMENT

CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 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 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964."

This Court held in *Jim C.* v. *Arkansas Department of Education*, 235 F.3d 1079 (2000) (en banc), cert. denied, 533 U.S. 949 (2001), that Section 2000d-7 clearly conditioned receipt of federal financial assistance on a state agency waiving its immunity to Section 504 suits, and that this was a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that accept federal financial assistance. Since *Jim C.*, this Court has routinely held that state agencies that accept federal funds have waived their Eleventh Amendment immunity to private suits under the non-discrimination statutes identified in Section 2000d-7. See, *e.g.*, *Grandson* v. *University of Minn.*, 272 F.3d 568, 571 n.2 (2001) ("*Jim C.* precludes the University's Eleventh Amendment defense."), cert. denied, 122 S.Ct. 1910 (2002); *Grey* v. *Wilburn*, 270 F.3d 607, 609-610 (2001) ("[T]he *Jim C.* court concluded

that section 504 of the Rehabilitation Act is in fact a valid exercise of Congress' spending power, and that states waive their immunity with respect to section 504 suits by accepting federal funds. Based on *Jim C.*, we therefore reverse the district court's dismissal of Grey's Rehabilitation Act claim."); see also *John T.* v. *Iowa Dep't of Educ.*, 258 F.3d 860, 864 (2001) ("The State of Iowa waived its Eleventh Amendment immunity by receiving funds appropriated under IDEA.").

Nonetheless, defendants contend that they retain their immunity to this Section 504 suit because they did not knowingly waive their immunity and because Section 2000d-7 is unconstitutional as applied to their circumstance. Neither of these contentions is correct.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under Section 504*

In *Jim C.*, this Court held that Section 2000d-7 "provides a clear expression of Congress's 'intent to condition participation in the program[] . . . on a State's consent to waive its constitutional immunity.'" 235 F.3d at 1082; see also *id.* at 1081 (Section 2000d-7 "requires States that accept federal funds to waive their Eleventh Amendment immunity to suits brought in federal court for violations of Section 504"). The en banc court held, "therefore, that Arkansas waived sovereign immunity, with respect to suits under Section 504 against the [state agency that received funds] when it chose to participate in the federal spending program." *Id.* at 1082. Nevertheless, relying on the Second Circuit's decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98 (2001), defendants suggest

(Def. Br. 23-24), that they did not waive their immunity when they choose to participate in multiple federal spending programs.

Garcia agreed with this Court that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id*. at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id*. at 114 n.4. However, *Garcia* also held that Title II of the Americans with Disabilities Act of 1990 (ADA) did not validly abrogate the States' immunity and that the Section 504 waiver was not knowing because the state agency did not "know" in 1995 (the latest point the alleged discrimination in *Garcia* had occurred) that the abrogation in Title II of the ADA was not effective and thus would have thought (wrongly, in the view of the Second Circuit) that Title II's abrogation for Title II claims made the waiver for Section 504 redundant. *Id*. at 114. According to the court, since "by all reasonable appearances state sovereign immunity [to claims of disability discrimination under the ADA] had already been lost" by virtue of the Title II abrogation, the State "could not have understood that in [accepting federal funds] it was actually abandoning its sovereign immunity from private damages suits" for the same disability discrimination under Section 504. *Ibid*.

This Court is bound by *Jim C.* and thus is not free to follow *Garcia*. In any event, *Garcia* is wrongly decided. The rationale was wrong because every state agency did know from the plain text of Section 2000d-7, from the time it was enacted in 1986, that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990, and it was clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). It is thus untenable to suggest that abrogation for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute. *Garcia*'s holding -- that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's, when a "colorable basis [developed] for the state to suspect" that the abrogation was unconstitutional, see 280 F.3d at 114 n.4, and has now regained its full effectiveness -- creates an unworkable and unprecedented patchwork of coverage.

As this Court held in *Jim C.*, Section 2000d-7 "provides a clear expression" of Congress's intent to condition the receipt of federal funds on the state agency's waiver of Eleventh Amendment immunity. 235 F.3d at 1082. This clear statement in the text of the statute about the Eleventh Amendment assured that defendants knew as a matter of law that they were waiving their immunity for Section 504 claims when they applied for and took federal financial assistance. Defendants' attempts to create ambiguity where none exists should be rejected.

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity*

Defendants do not dispute that Congress has the power under the Spending Clause, Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *Jim C.*, 235 F.3d at 1081.[4] Instead, defendants contend (Def. Br. 20-23) that Section 504's non-discrimination and waiver conditions are unconstitutionally "coercive" because of the amount of money they elected to accept from the federal government.

1. While the Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), recognized that the financial inducement of federal funds "might be so coercive as

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[4] Thus, there is no dispute in this case that Sections 504 and 2000d-7 meet the four primary limitations on Congress's Spending Power identified in *South Dakota* v. *Dole*, 483 U.S. 203 (1987): (1) the general welfare is served by prohibiting discrimination against persons with disabilities, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval); *Dole*, 483 U.S. at 207 n.2 (noting substantial judicial deference to Congress on this issue); (2) the language of Section 504 makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance, see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)); (3) the condition is related to the federal government's overarching interest in not supporting or subsidizing discrimination, cf. *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (Title VI is valid Spending Clause legislation); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) (same for Title IX); and (4) neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates any constitutional rights.

to pass the point at which 'pressure turns into compulsion,'" *Id*. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)), it saw no reason generally to inquire into whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court 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 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).

In *Jim C.*, this Court rejected the contention that requiring a State to choose on an agency-by-agency basis whether to accept federal funds was unconstitutionally coercive. 235 F.3d at 1082. Instead, the Court held that Section 504 embodies the "ordinary *quid pro quo* that the Supreme Court has repeatedly approved." *Id*. at 1081. "The State may take the money or leave it. Other than the vacated panel opinion in this case, we know of no authority holding any choice so coercive as to exceed the limits of the Spending Clause. Sovereign states are fully competent to make their own choice." *Id*. at 1082; see also *West Virginia* v. *United States Dep't of Health & Hum. Servs.*, 289 F.3d 281, 289 (4th Cir. 2002) (there has been "no decision from any court finding a conditional grant to be impermissibly coercive").

2. Defendants contend that this case is different because of the amount of federal money involved. But there is nothing in *Jim C*. that suggests that the

amount or percentage of money was critical to the panel's ruling. While the Court mentioned those facts, the Court was simply acknowledging that foregoing the sums at issue ($250 million constituting 12% of the agency's budget) would in fact be "politically painful." *Id*. at 1082. It did not suggest that different figures would have resulted in a different outcome as to coercion.[5]

As the facts established in this case show, defendants, like most government entities, receive grants from a vast array of federal programs established by Congress. Consistent with state policy, defendants have apparently been successful in obtaining these grants, in varying amounts for varying purposes. It does not follow, however, that because defendants have elected to apply for and accept a number of grants for a single agency that the federal government's authority to impose conditions on each grant it offers is somehow diminished. If the federal government is justified in imposing conditions on modest expenditures of federal resources, it should not be less justified in imposing those conditions when the amount of federal money increases. As the First Circuit has explained, "[w]e do not agree that the carrot has become a club because rewards for

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[5] Defendants suggest (Def. Br. 19-20) that this Court's decision vacating and remanding the district court's prior judgment "for reconsideration in light of *Jim C*." was an "implicit[] hold[ing] that additional information is needed" in determining whether defendants waived their immunity. But a decision to vacate and remand for consideration of an intervening case is nothing more than a decision to allow the district court to apply an intervening decision in the first instance, and certainly expresses no view about how the intervening opinion should be construed or applied. See, *e.g.*, *Hicks* v. *St. Mary's Honor Ctr.*, 2 F.3d 265, 267 (8th Cir. 1993); cf. *West* v. *Vaughn*, 204 F.3d 53, 58 (3rd Cir. 2000).

conforming have increased. It is not the size of the stakes that controls, but the rules of the game." *New Hampshire Dep't of Employment Sec.* v. *Marshall*, 616 F.2d 240, 246 (1st Cir.), appeal dismissed and cert. denied, 449 U.S. 806 (1980). In addition, the State's ability to define the boundaries and functions of its state agencies minimizes the threat of coercion. This is because the State may control the amount and percentage of federal funds going to any agency by moving state programs between agencies, as the State ultimately did regarding Medicaid funds. See pp. 8-9, *supra*.

Similarly, the federal government's decision to pay for a majority of the costs of certain state programs cannot make the scheme unduly coercive. Under defendants' theory, when the United States offers to pay 100% of the costs of a program (as it did with a number of programs, see p. 7, *supra*), it has coerced the defendants into accepting the money for those programs and thus cannot impose any conditions on those funds. As a matter of logic, it simply cannot be true that the more money the federal government pays, the less authority it has to impose conditions on the receipt of those funds. By paying more than half of all the Department's expenses, the federal government is not acting coercively; it is acting generously in assisting the State in providing critical services to its shared citizenry.

3. Ultimately, defendants contend (Def. Br. 21) that the services the Department provides are too important to forego, and that without federal

assistance they would have to raise taxes to provide them.[6] But this choice is exactly the kind of policy decision that sovereign States are expected to make. 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 federal funds with the Section 504 and 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, 1202 (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).

Indeed, Supreme Court decisions 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),

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[6] At one point, defendants assert (Def. Br. 23) that the State does "not have the ability to fund the entire costs of these programs itself." Defendants point to nothing in the summary judgment record that supports this counter-intuitive assertion that the State of Nebraska does not have the resources or ability to raise funds sufficient to provide the "basic necessities of life" (Def. Br. 23) to children in need.

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.[7]

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[7] 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." 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

(continued...)

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).[8] These cases

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[7](...continued)
Supreme] Court." *Tully* v. *Griffin, Inc*., 429 U.S. 68, 74 (1976).

[8] 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 where Congress did not preclude an entity from restructuring its operations to separate its federally-supported activities from other activities, 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
(continued...)

demonstrate that the federal government can place conditions on federal funding that require States to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion.

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). "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923). For all these reasons, Section 504 and Section 2000d-7 can be upheld under the Spending Clause.

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[8](...continued)
(1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

CONCLUSION

The judgment of the district court denying defendants' motion to dismiss the Section 504 claim should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2002, two copies of the Brief for the United States as Intervenor-Appellee 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 prepaid, on the following counsel:

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