No. 01-2782

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GEORGE KOSLOW,

Plaintiff-Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; DONALD VAUGHN,

Defendants-Appellees

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

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

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ARGUMENT

I

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

As we explained in our opening brief (U.S. Br. 8-9), Section 504 of the Rehabilitation Act imposes conditions on the receipt of federal financial assistance offered by the United States. Recipients generally, and state agencies particularly, that choose to take federal financial assistance are required not to discriminate on the basis of disability in any of their operations and must, consistent with the terms of 42 U.S.C. 2000d-7, be amenable to private suit in federal court for violations of this requirement.

Defendants do not dispute that when they applied for and received the federal financial assistance at issue in this case they had been put on clear notice of these conditions. Instead, they contend that the conditions are not "related" to the funds and that there is an independent constitutional provision that makes the conditions invalid. Neither of these contentions overcomes the strong presumption of constitutionality that attaches to federal statutes. See *Reno* v. *Condon*, 528 U.S. 141, 147 (2000); *Union Pac. R.R. Co.* v. *United States*, 99 U.S. (9 Otto) 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.").

A. *The Non-Discrimination Condition Of Section 504 Is Related To The Federal Funds Received By Defendants*

Defendants do not dispute that there are many circumstances in which Section 504 can be applied constitutionally. As we read defendants' brief, they do not contest that Congress may condition the receipt of a federal grant on the recipients' agreement not to discriminate in the undertaking funded by that grant. Thus, for example, if the federal government provided a state agency money to subsidize a state vocational education program, Congress can condition the money on the state agency's agreement not to discriminate against persons with disabilities in operating that program, both as to the clients and to its own employees.

Further, as we read defendants' brief, they are not contesting that Congress can validly impose such a condition on every federal grant and do so in a single statute, so long as the condition reached only the program that actually received the federal funds. Indeed, as we explained (U.S. Br. 16-18), there is no constitutional difference between Congress attaching a non-discrimination condition to each grant or enacting an across-the-board condition that applies to all grants. In fact, given the holdings of *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974), and *Grove City College* v. *Bell*, 465 U.S. 555, 575 (1984) – cases relied upon in our opening brief that defendants do not discuss, much less distinguish – defendants simply could not be arguing otherwise.[1]

Defendants assert (Def. Br. 30, 32 n.22) that there are some instances in which Section 504 will fail to meet the relatedness limitation articulated in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), because the discrimination will occur in a state operation that does not receive or benefit from the federal funds. We disagree. As we explained in our opening brief (U.S. Br. 19-21), Congress's decision to limit the coverage on an agency-by-agency basis assures that the overlapping resources, operations, and personnel of an agency will meet the

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[1] Of course, since Congress can validly condition receipt of federal funds on a recipient's agreement not to discriminate, it is similarly permissible (absent some independent constitutional bar, as discussed in part B, *infra*) to condition receipt of federal funds on the recipient's consent to adjudicate disputes about whether the recipient is in compliance with its agreement in federal court and to provide recompense if it is not. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

constitutional requirement of "relatedness" articulated by the Court in *Dole*. But that question is simply academic in this case. Defendants admitted (J.A. 739) accepting money under the State Criminal Alien Assistance Program (SCAAP), 8 U.S.C. 1231(i) & 42 U.S.C. 13710. That grant program was established to address the costs States were incurring when illegal aliens committed state crimes and were imprisoned in state correctional facilities at state expense. The funds received under this program come with no limitations as to how the money may be spent and no requirement that the state agency track or report how the money is actually spent. See 62 Fed. Reg. 35,232 (June 30, 1997) ("Award funds [under SCAAP], once properly distributed to eligible applicants, may be used by these jurisdictions for any lawful purposes and need not be applied towards reimbursement of correctional costs."); Addendum at 3 ("SCAAP has no postpayment reporting requirements.").

Thus, like a block grant, the SCAAP money simply becomes part of the agencies' general revenues and can be used to subsidize any or all of the operations of the agency. Indeed, because money is fungible, it is impossible for defendants to show that federal SCAAP dollars did not pay plaintiff's salary before he was terminated. In these circumstances, defendants' contentions (Def. Br. 30) that other federal grants they receive may or may not be "related" to plaintiff's employment is simply irrelevant. Since Section 504 validly applies to this case, it is unnecessary for the Court to determine whether the definition of "program or activity" might be in excess of the Spending Power in other cases.

See *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (upholding constitutionality of Spending Clause states "as applied to the facts of this case" and refusing to address whether statute was constitutional in every potential application); see also *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

B. *Congress May Condition The Receipt Of Federal Financial Assistance On A State Agency's Waiver Of Immunity*

Defendants also argue that Section 2000d-7's condition that state agencies waive their immunity to private suits in federal court under Section 504 is barred by "an independent [constitutional] bar to the conditional grant of federal funds." *Dole*, 483 U.S. at 208. Here, defendants contend (Def. Br. 14-29), the "independent bar" is the Eleventh Amendment as augmented by the "unconstitutional conditions" doctrine. We disagree.

1. While defendants have engaged in a wide-ranging discussion of the "unconstitutional conditions" doctrine, they have failed to point to a single case in which the Supreme Court has applied the doctrine to the relationship between two sovereigns, such as the agreement between the United States and the Commonwealth of Pennsylvania in this case. The reason for this seems plain – the unconstitutional conditions doctrine rests on the premise that many times the offers a government makes to a person are inherently coercive due to the government's ability to offer "privileges" that an individual requires for daily living. See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926) ("Having regard to form alone, the act here is an offer * * * of a privilege,

* * * which [the complainant] is free to accept or reject. In reality, [the complainant] is given no choice, except a choice between the rock and the whirlpool, – an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.").

The same is not true of the relationship between States and the federal government. The Supreme Court has recognized that States, unlike persons, have the resources and structural incentives to do what is best for their citizens even in light of substantial economic encouragement by the federal government. The Court has never held that a State may accept the federal "carrot" and then decline to comply with the attendant obligations. Cf. *Restatement (Third) of Foreign Relations Law* § 331 cmt. d (1987) ("economic or political pressure" can never invalidate agreements between sovereigns). Especially when it involves offers of financial assistance, a State's sovereign authority to tax its residents to raise funds places it on a more even footing with the federal government. As the Court explained in *New York* v. *United States*, 505 U.S. 144 (1992):

> [T]he residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. * * * Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

Id. at 168.

Indeed, in the context of States' federalism-based challenges to federal statutes, the Court has eschewed the type of analysis that defendants urge this

Court to apply. The Supreme Court's decisions in *Dole* and *New York* are clear examples of the Court's rejection of the unconstitutional conditions doctrine in assessing the ability of the federal government to encourage States to comply with federal policies. In *Dole*, the Court assumed that the Twenty-First Amendment vested the States with sole authority to set the drinking age. 483 U.S. at 209. But the Court explained that the "independent constitutional bar" rule did not prevent Congress from attempting to influence the State's exercise of that authority through an offer or withdrawal of federal funds.

> [Our] cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Id. at 210-211; see also *New York*, 505 U.S. at 167, 171-172 (relying on *Dole* for the proposition that "[w]here 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," and holding that a federal program that paid States that met certain congressional goals was a valid exercise of the Spending Clause).

Defendants may be asserting that the Eleventh Amendment differs from these other federalism-based limitations on Congress's authority. We are not sure

that such a distinction has coherence. In each case discussed above the Court assumed that Congress did not have the power to compel the States to engage in the behavior, and thus the State had a "right" under the Constitution not to engage in the behavior Congress desired. But in any event, the Supreme Court and this Court have applied the same analysis to Eleventh Amendment waivers.

In *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court held that Congress could condition the granting of a gratuity under one of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *Petty* involved two States that desired to enter an interstate compact to create a bi-state agency to build bridges and operate a ferry service. Under the Constitution, Congress must consent to such compacts. Congress agreed to authorize the compact, but only if the States agreed to accept a provision that would authorize federal courts to have jurisdiction over claims against the bi-state agency. The States agreed. The Court held that the "question here is whether Tennessee and Missouri have waived their immunity under the facts of this case," and concluded that they had because "[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id*. at 277, 281-282. Of course, this case could not have come out the same way if, as defendants contend, Congress can never require a State to waive the immunity of one of its agencies in exchange for a federal benefit.

Defendants argue (Def. Br. 26-27) that *Petty* is distinguishable, but none of their distinctions is colorable. They first insist that interstate compacts are different because they involve the joint action of three sovereigns, but it is not clear why Congress can condition a gratuity on two States waiving immunity for their joint agency, but not condition a gratuity on one State waiving immunity for its own agency. Defendants also contend that interstate compacts involve national, not merely regional, interests, but the same can be said for the appropriation and use of federal dollars. The Supreme Court, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-687 (1999), equated Congress's exercise of its authority in *Petty* with the Spending Clause power in *Dole* and suggested that Congress was free to condition either power on the waiver of the State's immunity.

Indeed, in *MCI Telecommunication Corp.* v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491 (2001), this Court read *College Savings Bank*'s discussion of *Petty* and *Dole* exactly as we urged in our opening brief. "[B]oth the grant of consent to form an interstate compact and the disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a state is not otherwise entitled to receive, and to which Congress can attach whatever conditions it chooses," including a waiver of Eleventh Amendment immunity. *Id.* at 505. This Court extended the doctrine to certain exercises of the Commerce Clause as well and held that in that case "the authority to regulate local telecommunications is a gratuity to which Congress may

attach conditions, including a waiver of immunity to suit in federal court. Thus, the submission to suit in federal court * * * is valid as a waiver, conditioned on the acceptance of a gratuity or gift, as permitted by *College Savings*." *Id.* at 509.

Defendants attempt to distinguish *MCI* (Def. Br. 27 n.20) on the basis that the state commission was exercising federal responsibilities and was being brought into federal court by private parties to review its compliance with federal law. That is all true, but we believe it is equally true in this case. When a state agency accepts federal funds, it voluntarily agrees to undertake whatever conditions are attached to the money, including the non-discrimination obligation, and federal judicial review is limited to the agency's compliance with federal law. What defendants cannot escape is that this Court held in *MCI* that the federal government may condition the receipt of a federal benefit on a waiver of immunity. See also *Delaware Dep't of Health & Soc. Servs.* v. *Department of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (State participation in federal program constitutes a waiver of Eleventh Amendment immunity).

3. Finally, even if some type of unconstitutional conditions inquiry were appropriate in dealings between sovereigns, we cannot agree with defendants' description of the doctrine. The unconstitutional conditions doctrine does not provide that Congress may *never* condition a benefit on the waiver of a constitutional right. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited

amounts on campaign); *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's consent to inspection of home without probable cause). Instead, the doctrine simply provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has *little or no relationship* to the [right]." *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added).

This requirement of some kind of "relationship" between the condition and the benefit evokes the *Dole* "relatedness" limitation. In our view, the Court's established doctrines for Spending Clause statutes embody the same interests and concerns as are manifested in unconstitutional conditions doctrine. Thus, relatedness requirements of the two doctrines are sufficiently kindred (if not identical) that compliance with the latter suffices for purposes of the former. And as we have discussed at length in our opening brief and in Part A, *supra*, the requirement that state agencies waive immunity to private suits for violations of Section 504 is related to Congress's interest that people with disabilities are not excluded from programs supported, directly or indirectly, by federal funds.

As we noted in our opening brief (U.S. Br. 11-12), seven circuits have upheld Section 2000d-7 under the Spending Clause. After our opening brief was filed, the Ninth Circuit reaffirmed its holding in light of *College Savings Bank*. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 n.5 (9th Cir. 2001). This district court's contrary judgment should be reversed.

II

TITLE I OF THE AMERICANS WITH DISABILITIES ACT MAY BE ENFORCED AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR PROSPECTIVE RELIEF

Plaintiff's claim under Title I of the Americans with Disabilities Act against defendant Vaughn in his official capacity for prospective relief should also be reinstated.

Defendants agree (Def. Br. 34-35) with the contention in our opening brief (U.S. Br. 26-27) that Title I authorizes suits against an official sued in his or her official (also known as representative) capacity, but not in his or her individual (also known as personal) capacity. They contend (Def. Br. 35-36), however, that the Eleventh Amendment permits only suits against officials in their individual capacities and that, absent a waiver or abrogation, it bars suits for any type of relief against officials in their official capacities.

Defendants' contention reflects a clear misunderstanding of the *Ex parte Young* doctrine. As we acknowledged in our opening brief (U.S. 23), the Court in *Ex parte Young*, 209 U.S. 123 (1908), relied on the fiction that a state official who violated federal law was not entitled to the State's immunity because he was no longer acting within his official capacity. But the ability to seek prospective relief against state officials for violations of federal law has never been limited to individual-capacity suits. See Richard Fallon, Daniel Meltzer & David Shapiro, *Hart and Weschsler's: The Federal Courts and The Federal System* 1125 (4th ed. 1996) (cautioning that persons should not "be confused by the fact that even in an

official capacity suit, the authority-stripping rationale of Ex parte Young applies").[2] To the contrary, the Supreme Court has held on many occasions that "[u]nless a State has waived its Eleventh Amendment immunity or Congress has overridden it, * * * implementation of state policy or custom may be reached in federal court only because *official-capacity actions* for prospective relief are not treated as actions against the State. See *Ex parte Young*, 209 U.S. 123 (1908)." *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985) (emphasis added).[3]

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[2] Of course, the Eleventh Amendment is no bar to suits against state officials in their individual capacities for either damages or injunctive relief. See *Hafer* v. *Melo*, 502 U.S. 21, 30-31 (1991). The reason that individual capacity suits for injunctive relief are not brought more often is that prevailing in such a suit will only bind the individual official, and not his successors (or other state officials who might otherwise be deemed his agents). See *Hart and Weschsler's*, *supra*, at 1125 n.1.

[3] See also, *e.g., Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 785 n.3 (1991) ("Such injunction suits can only be brought against state officers in their official capacity and not against the State in its own name."); *Supreme Court of Va.* v. *Consumers Union, Inc.*, 446 U.S. 719, 737 n.16 (1980) ("prospective relief was properly awarded against the chief justice in his official capacity"); *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) ("In the landmark decision in *Ex parte Young*, 209 U.S. 123, the Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities."); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself. * * * Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (citations omitted)). This also was the rule in cases decided before *Ex parte Young*. See, *e.g.*, *Prout* v. *Starr*, 188 U.S. 537, 543-544 (1903) (rejecting

(continued...)

This Court's cases are in accord. See, *e.g.*, *Hindes* v. *FDIC*, 137 F.3d 148, 165 (3d Cir. 1998) ("The principle which emerges from *Young* and its progeny is that a state official sued in his official capacity for prospective injunctive relief is a person within section 1983, and the Eleventh Amendment does not bar such a suit."). Indeed, this Court has held in cases like this one – in which a former employee of a state agency sought reinstatement from his state employer because of alleged violations of federal law – that the Eleventh Amendment was no bar to a suit brought against the appropriate state official in his or her official capacity. See *Melo* v. *Hafer*, 912 F.2d 628, 635-636 (3d Cir. 1990) ("the district court erred insofar as it dismissed the Gurley plaintiffs' claim for reinstatement against Hafer" which was "asserted against the defendant in her official capacity" because "'official-capacity actions for prospective relief are not treated as actions against the State'"), aff'd on other grounds, 502 U.S. 21 (1991); *Skehan* v. *Board of Trustees*, 590 F.2d 470, 486 (3d Cir. 1978) ("the eleventh amendment presented no impediment to Skehan's request for prospective reinstatement" because "[t]he eleventh amendment has been construed by the Supreme Court not to bar an action

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[3](...continued)
argument that Eleventh Amendment barred action brought against defendant "in his official capacity as attorney general of the State of Nebraska, and not in his individual capacity as a citizen thereof" because "[i]t is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.").

in federal court against the state or its officers acting in their official capacities for prospective injunctive relief from unconstitutional state actions"), cert. denied, 444 U.S. 832 (1979).

Because it is uncontested that Title I authorizes suits against state officials in their official capacities and because such suits are not barred by the Eleventh Amendment to the extent they seek prospective relief, the district court's dismissal of the Title I claim against defendant Vaughn should be reversed.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the judgment of the district court dismissing the Section 504 claim against both state defendants and the Title I claim against defendant Vaughn in his official capacity for prospective relief should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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I hereby certify that on December 13, 2001, two copies of the foregoing Reply Brief for the United States as Intervenor were served by First Class mail, on each of the following persons:

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