No. 02-1799

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

M.A., on behalf of E.S., M.A.; A.T. on behalf of G.T., A.T.; G.L. on behalf of A.O., G.L.; H.M. on behalf of M.M., H.M.; O.J. on behalf of O.D.J., O.J.; A.E. on behalf of O.D.J., O.J.; A.E. on behalf of A.J.E. and A.E.; individually and on behalf of all others similarly situated,

Plaintiffs - Appellees

UNITED STATES OF AMERICA,

Intervenor - Appellee

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Defendant

NEW JERSEY DEPARTMENT OF EDUCATION; VITO A. GAGLIARDI, Sr., Commissioner, New Jersey Department of Education, in his official and individual capacities; BARBARA GANTWERK, Director, Office of Special Education Programs, New Jersey Department of Education, in her official and individual capacities; MELINDA ZANGRILLO, Coordinator of Compliance, Office of Special Education Programs, New JerseyDepartment of Education, in her official and individual capacities,

Defendants - Appellants

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

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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LEGISLATIVE HISTORY:

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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 district court entered an order denying defendants' motion to dismiss on Eleventh Amendment grounds on February 15, 2002 (App. 3). A timely notice of appeal was filed on March 18, 2002 (App. 194). This Court has jurisdiction over the Eleventh Amendment components of this appeal pursuant to 28 U.S.C. 1291 and the collateral-order doctrine. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993). The United States takes no position on whether this Court has appellate jurisdiction under Section 1291 over defendants' arguments not involving Eleventh Amendment immunity.

STATEMENT OF THE ISSUES

The United States will address the following question:

Whether Congress validly conditioned the receipt of federal grants under the Individuals with Disabilities Education Act on a State's waiver of Eleventh Amendment immunity to suits under that Act.

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 U.S.C. 1400(c)(2)(C).[1] Congress's two-fold goal in enacting the IDEA was to ensure that children with disabilities received a free appropriate public education, and that such an education took 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 federal rights in federal court. *Id.* at

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[1] 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. 1103, 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, 775 (1975).

204-205; 20 U.S.C. 1415(i)(2), (i)(3).[2] The IDEA requires a court "not 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)).[3]

---

[2] 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. *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).

[3] 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).

2. In 1989, the Supreme Court held that the language of the IDEA did not clearly evidence Congress's intent to authorize private actions against state entities. See *Dellmuth* v. *Muth*, 491 U.S. 223, 232 (1989). In response, Congress amended the statute to add Section 1403, making it effective for violations occurring after October 30, 1990. See Pub. L. No. 101-476, tit. I, § 103, 104 Stat. 1106 (1990). Section 1403 provides in pertinent part:

> (a) In general
>
> 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 this chapter [20 U.S.C. 1400 - 1487].
>
> (b) Remedies
>
> In a suit against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a violation in the suit against any public entity other than a State.

20 U.S.C. 1403.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under the Individuals with Disabilities Education Act (IDEA) to remedy alleged violations of the Act. Congress validly conditioned federal funding on a state agency's waiver of sovereign immunity. 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. By accepting the IDEA funds, a State agreed to the terms of the statute.

Defendants' contention that they thought Section 1403 was intended to be a unilateral action by Congress is contrary to the text and structure of the statute and irrelevant to the effectiveness of their waiver of immunity upon acceptance of the federal IDEA funds.

ARGUMENT

CONGRESS VALIDLY CONDITIONED RECEIPT OF IDEA FUNDS ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER THE IDEA

The Eleventh Amendment bars private suits 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 Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.,* is a federal grant program that offers additional education funds to a State conditioned on a State's agreement to provide the substantive and procedural protections necessary to assure children with disabilities a free appropriate public education and authorizes private suits for "appropriate" relief. See 20 U.S.C. 1415(i)(2)(A), (i)(2)(B)(iii). Defendants contend (Def. Br. 16-28) that all of plaintiffs' claims under the IDEA's cause of action are barred by the Eleventh Amendment.

Plaintiffs may maintain their claims against named state officials in their official capacities for some of the relief they seek. As defendants conceded below (R. 15 at 13), under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not bar private suits brought against state officials in their official capacities seeking prospective injunctive or declaratory relief

regarding a violation of federal law regardless whether there is a valid abrogation or waiver. See *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 122 S. Ct. 1753, 1760 (2002); *University of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001); *Balgowan* v. *New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997). Nor does the Eleventh Amendment bar an award of costs and attorneys' fees ancillary to such relief. See *Missouri* v. *Jenkins*, 491 U.S. 274, 278-279 (1989). Thus, plaintiffs' claims for such relief under the IDEA (App. 82-83 ¶¶ B, C, F, H, J) against the state officials in their official capacities can plainly proceed without regard to the Eleventh Amendment.[4]

However, plaintiffs' demands (App. 82-83 ¶¶ I, E) for reimbursement of previously incurred expenses and for compensatory damages against the state agency and state officials in their official capacities clearly implicate the defendants' Eleventh Amendment immunity.[5] We thus address whether

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[4] Plaintiffs' request (App. 82 ¶ D) for "compensatory education" also appears to fall within the scope of the *Ex parte Young* doctrine under this Circuit's precedent. See *Clark* v. *Cohen*, 794 F.2d 79, 83-84 (3d Cir.), cert. denied, 479 U.S. 962 (1986). But see *id*. at 88-89 (Becker, J., concurring in judgment) (collecting cases from other circuits reaching the contrary result). The United States takes no position as to whether Count 12 (App. 81) of plaintiffs' complaint alleges a violation of the IDEA under this Court's decision in *Geis* v. *Board of Education*, 774 F.2d 575 (1985), or whether, as defendants assert (Def. Br. 28), it is simply alleging a violation of state law that cannot be the basis for an *Ex parte Young* suit. See *id*. at 580-581 (discussing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)).

[5] The Supreme Court has held that district courts may order "retroactive

(continued...)

defendants have immunity in light of 20 U.S.C. 1403, which provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the IDEA.

Section 1403 may be upheld as 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.[6] 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). And "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, Congress may, and has, conditioned the receipt of federal IDEA funds on defendants' waiver of Eleventh Amendment immunity to IDEA claims.

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[5](...continued)
reimbursement" to parents for the costs of special education services that should have been initially provided by an IDEA fund recipient. See *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 370-371 (1985). Even if compensatory damages are not a form of "appropriate" relief that a district court may award under 20 U.S.C. 1415(i)(2)(B)(iii), an issue on which the United States takes no position, this Court would have to resolve the Eleventh Amendment issue pressed by defendants and addressed in the text if reimbursement was sought (as it appears from the complaint) against the state agency and state officials in their *official* capacities. Cf. *Hafer* v. *Melo*, 502 U.S. 21, 30-31 (1991) (Eleventh Amendment no bar to suits against officials in *individual* capacity).

[6] There is no dispute that defendants receive federal IDEA funds. See R. 26 (copy of New Jersey's signed statement acknowledging receipt of federal IDEA funds).

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

Section 1403 was enacted in 1990 in response to the Supreme Court's holding in *Dellmuth* v. *Muth*, 491 U.S. 223 (1989). *Dellmuth*, in turn, relied on the Court's previous opinion in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). Section 1403 was crafted in light of the rule articulated in *Dellmuth* and *Atascadero*. See 135 Cong. Rec. 16,916-16,917 (1989); H.R. Rep. No. 544, 101st Cong., 2d Sess. 12 (1990).

In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to condition receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for claims alleging violations of Section 504 of the Rehabilitation Act (which prohibits disability discrimination by those entities receiving federal financial assistance). The Court reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. At the same time, the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247. In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7, which uses language virtually identical to that eventually used in Section 1403. Section 2000d-7(a) provides:

> (a) General provision
>
> (1) 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.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

The courts of appeals are in accord that Section 2000d-7 "clearly, unambiguously, and unequivocally conditions receipt of federal funds * * * on the State's waiver of Eleventh Amendment immunity." *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); accord *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 2002 WL 706365 (June 17, 2002); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 2002 WL 458229 (June 17, 2002); *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, 265 F.3d 541, 554-555 (7th Cir. 2001); *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); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 550-

551 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

The same is true of the similarly worded Section 1403. 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 IDEA if it accepted federal IDEA funds. Section 1403 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving IDEA funds was the requirement that they consent to suit in federal court for alleged violations of the IDEA. Indeed, defendants themselves acknowledged in their supplemental letter brief in the district court, dated December 26, 2001 (which is not reflected on the docket sheet), that the enactment of Section 1403 made them "aware of the Congressional intent to require a waiver of sovereign immunity."

Defendants suggest (Def. Br. 25) that Section 1403 is different than Section 2000d-7 because Section 1403 does not include an express reference to federal funds. But all the obligations of the IDEA are incurred only when a recipient elects to accept federal IDEA funds. If a State does not receive IDEA funding, it has no obligations under the statute and no suit can be brought relying on Section 1403. But if the State does accept federal IDEA money, it is clear that it has agreed to the conditions of the IDEA, including Section 1403. Thus, by voluntary acceptance of funding, the State waives its right to assert immunity. "[A]cceptance of the funds entails an agreement to the actions." *College Sav.*

Bank, 527 U.S. at 686.

Defendant make much (Def. Br. 24-26) of the fact that Section 1403 is entitled "Abrogation of state sovereign immunity." Whether called abrogation or waiver, however, the text and structure of the statute are clear that only the voluntary acceptance of federal IDEA funds will result in a loss of immunity. It is well-settled that section titles cannot limit the plain import of the text. See *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947) ("But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. * * * Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text."); *Sandoval* v. *Reno*, 166 F.3d 225, 235 (3d Cir. 1999) ("the Supreme Court has repeatedly noted [that] a title alone is not controlling"). In any event, as defendants acknowledged in the district court (in their Reply Brief in Support of Motion to Dismiss 17 n.3 (Nov. 20, 2001), also not reflected on the docket sheet), the Supreme Court has sometimes used the terms "abrogation" and "waiver" loosely and interchangeably. See *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) ("The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."); *Supreme Court of Va.* v. *Consumers Union, Inc.*, 446 U.S. 719, 738 (1980) ("We held * * *

that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity.").

The two courts of appeals to address the validity of Section 1403 have reached the same conclusion: the text and structure of the IDEA make clear that federal IDEA funds are conditioned on both the substantive and procedural obligations of the statute and the waiver of Eleventh Amendment immunity. See *Board of Educ. of Oak Park* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) ("Having enacted legislation under its spending power, Congress did not need to rely on § 5. States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant. One string attached to money under the IDEA is submitting to suit in federal court." (citations omitted)), cert. denied, 531 U.S. 824 (2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 753 (8th Cir. 1999) ("When it enacted [20 U.S.C.] §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a State's participation in the IDEA program and its receipt of federal IDEA funds on the State's waiver of its immunity from suit in federal court on claims made under the IDEA"). This Court should reach the same conclusion.

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

Defendants also contend (Def. Br. 27-28) that Congress "lacks the authority" to condition state participation in the IDEA funding program on the State's waiver of Eleventh Amendment immunity. But the Supreme Court and this Court have held that Congress may condition receipt of federal funding on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666 (1999), the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was

free to accept or reject. *Id*. at 687.

In *MCI Telecommunication Corp*. v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491 (2001), petition for cert. filed (Apr. 4, 2002) (No. 01-1477), this Court relied on *College Savings Bank*'s discussion of *Petty* and the Spending Clause to reach this exact conclusion. "[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; see also *Delaware Dep't of Health & Soc. Servs*. v. *Department of Educ*., 772 F.2d 1123, 1138 (3d Cir. 1985) (state participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity).

C. *The IDEA Is A Valid Exercise Of The Spending Power*

Defendants did not challenge the constitutional validity of the IDEA as Spending Clause legislation in the district court or in their opening brief on

appeal.[7] Defendants did suggest in their supplemental letter brief in the district court that Section 1403 might be unconstitutionally coercive. They did not raise that argument in their opening brief on appeal and have thus waived it. See *International Union* v. *Murata Erie N. Am., Inc.*, 980 F.2d 889, 898-899 n.7 (3d Cir. 1992). For the sake of completeness, however, we briefly address the contention.

The Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four primary limitations on Congress's Spending Power. 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 places conditions on 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 obligations. *Id.* at 208. As we noted,

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[7] In their Reply Brief in Support of Motion to Dismiss 19-21 (Nov. 20, 2001), defendants argued that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, was not valid Spending Clause legislation. See also Def. Br. 18 n.2 (discussing Section 504). Plaintiffs' complaint, however, did not allege that defendants' conduct had violated Section 504.

defendants did not argue in the district court that the IDEA generally or Section 1403 particularly failed to meet any of these requirements.

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)), 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). 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).

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

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.[8]

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[8] 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 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).

These cases demonstrate that the federal government can place conditions on federal funding that require making 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. Thus, the choice imposed by the IDEA is not "coercive" in the constitutional sense. Cf. *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).[9]

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[9] Defendants suggested in their supplemental letter brief that this case might be different because Congress added conditions in the years after defendants began

(continued...)

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 State, under the control of state officials, is free to decide whether it will accept the federal IDEA funds with the waiver "string" attached, or simply decline those 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).

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 accept the federal IDEA money with the condition that it waive its immunity to suit in federal court, or forgo the federal IDEA funds. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendants have

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[9](...continued)
relying on the money. The courts to address similar claims under other schemes have rejected the argument. See *California*, 104 F.3d at 1092; *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); *Califano*, 445 F. Supp. at 535 (three-judge court). Indeed, since Congress could eliminate the spending program entirely, regardless of the level of state reliance, it follows that Congress retains the ability to alter the program as it sees fit from year to year without affecting the statute's constitutionality.

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, Section 1403 can be upheld under the Spending Clause.[10]

CONCLUSION

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

Respectfully submitted,

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[10] Because Section 1403 can be upheld under the Spending Clause, we do not address why the district court was also correct in holding (App. 22-23) that it can be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816 (8th Cir. 1999) (so holding and collecting cases), overruled in part by *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999); see also *Muth* v. *Central Bucks Sch. Dist.*, 839 F.2d 113, 128-130 (3d Cir. 1988), rev'd on other grounds, 491 U.S. 223 (1989).

STATEMENT OF RELATED CASES

The constitutionality of 20 U.S.C. 1403 is also being challenged in *A.W.* v. *Jersey City Public Schools*, No. 02-2056.

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2002, two copies of the Brief for the United States as Intervenor-Appellee were served by first -class mail, postage prepaid, on the following counsel:

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