IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARALEE POMEROY,

Plaintiff-Appellee

v.

WESTERN MICHIGAN UNIVERSITY,

Defendant-Appellant

ROBERT WRIGHT,

Plaintiff-Appellee

v.

LIMA CORRECTIONAL INSTITUTION,

Defendant-Appellant

MICHAEL D. NIHISER,

Plaintiff-Appellant

v.

OHIO ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee

RONALD STEPHEN SATTERFIELD,

Plaintiff-Appellant

v.

THE STATE OF TENNESSEE, et al.,

Defendants-Appellants

CONSOLIDATED SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

MISCELLANEOUS: **PAGE**

I

THE ABROGATION OF ELEVENTH AMENDMENT IMMUNITY CONTAINED IN THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Seven courts of appeals have concluded that the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., is a valid exercise of Congress' power to enforce the Equal Protection Clause.[1] Only the Eighth Circuit, in a sharply divided opinion, has reached the opposite result. See Alsbrook v. City of Maumelle, 184 F.3d 999 (1999) (en banc, with four judges dissenting), petition for cert. pending, No. 99-423.[2] All three circuits that have addressed the issue subsequent to the Eighth Circuit's decision have expressly rejected that court's narrow and untenable view of the scope of Congress' power under Section

---

[1] See Dare v. California, No. 97-56065, 1999 WL 717724 (9th Cir. Sept. 16, 1999); Martin v. Kansas, Nos. 98-3102 & 98-3118, 1999 WL 635916 (10th Cir. Aug. 19, 1999); Muller v. Costello, 187 F.3d 298 (2d Cir. 1999); Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212 (4th Cir. 1999); Seaborn v. Florida, 143 F.3d 1405 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), petition for cert. pending sub nom. Florida Dep't of Corrections v. Dickson, No. 98-829; Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997); see also Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 3 n.7 (1st Cir. 1999) ("we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the provision").

[2] The Eighth Circuit pointed to Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), petition for cert. pending, No. 99-424, as an opinion that supported its holding. In Brown, a divided panel found that the ADA's abrogation was unconstitutional as applied to a specific regulatory provision (not at issue in these cases). The Fourth Circuit has subsequently limited the holding of Brown to the facts of that case. See Amos, 178 F.3d at 221 n.8.

5 of the Fourteenth Amendment.[3] We urge this Court to join with the majority of circuits and uphold the validity of the ADA's abrogation of Eleventh Amendment immunity.

1. In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999), the Supreme Court held that Congress' attempt to abrogate Eleventh Amendment immunity for state violations of the Patent Act was in excess of its Section 5 authority to enact "appropriate" legislation. The Court specifically reaffirmed, though, that "'[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States,"'" and that "'the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies.'" Id. at 2206 (quoting City of Boerne v. Flores, 521 U.S. 507, 518, 519-520 (1997)).[4] Thus, the Court in Florida Prepaid reaffirmed the standard articulated in City of Boerne, the standard under which all the courts of appeals but the Eighth

---

[3] See Dare, 1999 WL 717724, at *6-*8; Martin, 1999 WL 635916, at *5-*6; Muller, 187 F.3d at 307-311.

[4] In the companion case of College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999), the Court did not reach the breadth of Congress' remedial authority because it found that violations of the statute at issue never could constitute violations of Due Process.

Circuit have upheld the validity of the ADA.

2. Defendants may suggest that the application of these principles in Florida Prepaid is helpful in examining the validity of the ADA. But defendants, like the Eighth Circuit in Alsbrook, would be ignoring the fundamental differences in the nature of constitutional violation at issue in Florida Prepaid compared with these cases. The legal theory of Florida Prepaid was that Congress was attempting to prevent and redress violations of procedural due process. This required the Court to focus on availability of state remedies, because a procedural due process violation requires not only a deprivation of property but also a lack of post-deprivation remedies. 119 S. Ct. at 2208-2209. Here, by contrast, when the constitutional right is based on the Equal Protection Clause, the violation is complete when the action is taken. "It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." United States v. Raines, 362 U.S. 17, 25 (1960) (citation omitted).

The Eighth Circuit thus erred in Alsbrook in suggesting that the fact that some States have laws prohibiting discrimination against persons with disabilities was relevant to whether the ADA

was "appropriate" legislation to "enforce" the Fourteenth Amendment. No one would suggest, for example, that the validity of Title VII of the Civil Rights Act of 1964 as Section 5 legislation is premised on whether States prohibited race and sex discrimination. Indeed, when Congress extended Title VII to the States in 1972, 37 States already prohibited race discrimination in employment, see S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971), yet the Supreme Court had no compunction about upholding Title VII's abrogation in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Moreover, the Eighth Circuit's decision ignored express congressional findings. Congress found that nationwide "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. 12101(a)(4). The fact that some States have provided remedies in some instances does not negate Congress' power to enact Section 5 legislation that governs all States. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), while the Court agreed that there was little evidence that literacy tests were unconstitutional in every State, it concluded that Congress had the authority to enact a nationwide ban to address what it perceived to be a more than sporadic problem. See especially id. at 283-284 (opinion of Stewart, J.); see also Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (plurality); id. at 501 n.3 (Powell, J., concurring).

3. Because Florida Prepaid involved procedural due process, and thus a constitutional violation did not exist unless a State failed to provide post-deprivation remedies, the Court found that Congress' failure to consider the existence of state remedies undermined its determination that constitutional violations existed. 119 S. Ct. at 2209. Here, by contrast, Congress made express findings that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion * * * and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," as well as having been subject to "a history of purposeful unequal treatment," and "unfair and unnecessary discrimination and prejudice" that continues to exist. 42 U.S.C. 12101(a)(5), (7) and (9). These are the very types of actions prohibited by the Equal Protection Clause as interpreted by the Supreme Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

"As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity." H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 71 (1990). Defendants, nonetheless, have suggested that States were immune from the pervasive discrimination that they

apparently concede was engaged in by all other employers. Despite the different functions performed by governmental and private employers, Congress could have reasonably concluded that the persons responsible for employment decisions in the public sector do not differ significantly from their private sector counterparts, and are thus subject to the same unsupported stereotypes and prejudices Congress found prevalent in the private sector. Cf. Jefferson County Pharm. Ass'n v. Abbott Lab., 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations").

In any event, there was specific evidence of discrimination by States in employment. A survey of state officials prior to the enactment of the ADA reported that 35% identified "negative attitudes about persons with disabilities" as a "serious impediment" to employing persons with disabilities in state government, and another 48% described them as a "moderate" impediment. Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 73 (Apr. 1989).[5] Moreover, there was evidence that even when States had good policies on paper, "implementation has sometimes been impeded by negative attitudes and misconceptions about persons

[5] ACIR was created by Congress as a bipartisan commission composed of federal, state, and local officials to study the relations between governmental entities. See 42 U.S.C. 4271-4273.

with disabilities and their performance capabilities" by those mid-level managers "who actually make hiring and promotion decisions." Id. at 75. But as the Court explained in Cleburne, 473 U.S. at 448, "mere negative attitudes * * * are not permissible bases" for making legitimate government decisions.

Congress' conclusion that public employers engage in the same types of discrimination as private employers is also consistent with its coverage of public employers under Title VII and the Age Discrimination in Employment Act (ADEA). In extending Title VII to state employers in 1972, Congress found that race discrimination was more pervasive in the public sector than in the private sector. See H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971). Similarly, in extending the ADEA to the States in 1974, Congress "established that these same conditions [that existed in the private sector] existed in the public sector." Coger v. Board of Regents, 154 F.3d 296, 306 (6th Cir. 1998), petition for cert. pending, No. 98-821. "The ADA targets particular practices--in this case, discrimination in employment--and provides a remedy following the time-tested model provided by the anti-employment discrimination provisions of Title VII of the Civil Rights Act of 1964." Muller v. Costello, 187 F.3d 298, 310 (2d Cir. 1999).

Thus, with the extensive evidence of negative employer attitudes in general, and government employer attitudes specifically, Congress could reasonably conclude that States were

acting in an unconstitutional manner when it came to employing persons with disabilities.

4. Nor does Florida Prepaid alter how to measure whether the remedial scheme for an Equal Protection violation is "congruent and proportional." This Court's recent decision in Mixon v. Ohio, No. 98-3368, 1999 WL 781802 (Sept. 30, 1999), confirms that Congress' enforcement power enables it to do more than simply prohibit constitutional violations. In Mixon, this Court upheld the abrogation of Eleventh Amendment immunity for Section 2 of the Voting Rights Act, 42 U.S.C. 1973, as a valid exercise of Congress' power to enforce the Fifteenth Amendment (which this Court found equivalent to Section 5 of the Fourteenth Amendment), id. at *5-*6, even though "Section 2 of the Voting Rights Act requires only a showing of discriminatory effect" in order for plaintiffs to prevail, id. at *15.

In Alsbrook, contrary to the seven other circuits to address the issue, the court found that the ADA's requirement of "reasonable modification" could never be enacted to remedy constitutional violations.[6] But as we explained in our reply brief in Nihiser (at 5-6), the "reasonable accommodation"

---

[6] The Eighth Circuit noted that Congress had not provided a definition of "reasonable modification" in the text of the statute, leading the court to describe the requirement as "open-ended" and "amorphous." 184 F.3d at 1009. Title I of the ADA, by contrast, defines the term "reasonable accommodation," see 42 U.S.C. 12111(9), and the courts have had no trouble interpreting the same term for the past 20 years under regulations implementing Section 504 of the Rehabilitation Act. Nonetheless, in Debose v. Nebraska, 186 F.3d 1087 (8th Cir. 1999), the Eighth Circuit extended the holding of Alsbrook to Title I without any additional analysis.

provision of Title I is a remedial measure to counteract the effects of the intentional discrimination by the persons in government who make personnel decisions, discrimination rooted in their pervasive negative attitudes towards and misconceptions about persons with disabilities.

In addressing that pervasive, nationwide problem, Congress was entitled to conclude that a simple ban on discrimination in hiring of persons with disabilities would not be sufficient to purge the employment process of the effects of past discrimination and prevent discrimination in the future. Congress could conclude that it would be difficult, on a case-by-case basis, to prove that prejudicial attitudes or misinformation about disabilities affected any particular employment decision. In many instances, individual decision makers may not be aware of their own stereotypical thinking. Moreover, employment rules that exclude those with disabilities may have originated at a time when segregation and isolation of those with disabilities was the norm. At best, those rules were devised without any consideration of how a disabled employee would do the job. At worst, the prejudices and misconceptions of the time are reflected in the rule. Even the neutral application of those rules would carry forward the effects of past discrimination. Congress required government employers to make reasonable accommodations for qualified individuals with disabilities for two reasons: that absent discriminatory attitudes employers would have made those accommodations on their own and that public

employers needed to take affirmative steps to overcome the effects of past discrimination, segregation, and isolation.

5. Whether the ADA is valid Section 5 legislation ultimately depends on how pervasively States were unconstitutionally discriminating against persons with disabilities in employment. For the greater the constitutional evil, the broader Congress' remedial power. See City of Boerne, 521 U.S. at 530. Although Congress is not required to make findings, Congress determined that as a matter of fact "discrimination against individuals with disabilities persists in such critical areas as employment," and that such discrimination was "serious and pervasive." 42 U.S.C. 12101(a)(3) and (2).

"Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." Radice v. New York, 264 U.S. 292, 294 (1924). This great deference is due not only because Congress is specifically charged by Section 5 with the power to enforce the Fourteenth Amendment. Congress also has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation, and a distinct capacity to draw relevant information from the people and communities represented by its Members. Congress can study a problem for

decades (as it did here), hold fact-finding hearings, and receive reports from the executive branch on the state of a problem across the nation. Given that employment is a field in which Congress had before it evidence of widespread unconstitutional conduct by States as employers, Congress did not exceed its "wide latitude," Florida Prepaid, 119 S. Ct. at 2206 (quoting City of Boerne, 521 U.S. at 520), in determining that the ADA was appropriate legislation to enforce the Equal Protection Clause.[7]

II

DEFENDANTS WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY FOR SECTION 504 CLAIMS

In addition to alleging violations of the ADA, plaintiffs in Nihiser and Satterfield alleged that defendants violated Section 504 of the Rehabilitation Act, 29 U.S.C. 794. Section 504 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any "qualified individual with a disability," and 42 U.S.C. 2000d-7 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act."

---

[7] For these same reasons, Section 504 is also valid Section 5 legislation. Congress expressly amended the Rehabilitation Act's findings to mirror in part those of the ADA, see 29 U.S.C. 701, and required that, as to employment discrimination, the two statutes be read to impose the same obligations, see 29 U.S.C. 794(d). Thus, if legislative history is necessary in order for a statute to be upheld as valid Section 5 legislation, Congress clearly intended that the same "record" it created for the ADA be used to judge the constitutionality of Section 504.

1. The courts to address the issue since our opening briefs have all agreed that Congress clearly intended Section 2000d-7 to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity for the government department that received the funds. The Fourth Circuit's decision in Litman v. George Mason University, 186 F.3d 544 (1999), is the most comprehensive appellate opinion to date on this issue.[8] In Litman, the court rejected the argument that Section 2000d-7 was not clear enough to constitute a valid waiver in a case involving Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which prohibits sex discrimination in federally-funded programs and activities. After a lengthy analysis, the Fourth Circuit explained that because the non-discrimination statute itself is tied to the State's voluntary decision to accept federal funds, "any state reading § 2000d-7(a)(1) in conjunction with [Title IX] would clearly understand the following consequences of accepting [federal] funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court." 186 F.3d at 554.

2. Defendant in Nihiser argued that Ohio state law prohibited it from waiving Eleventh Amendment immunity, thus

---

[8] For other cases, see Beasley v. Alabama State Univ., 3 F. Supp. 2d 1304, 1311-1316 (M.D. Ala. 1998); Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1269, 1271-1272 (M.D. Ala. 1998), appeal pending, No. 98-6598 (11th Cir.); see also Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 831-832 (8th Cir. 1999) (addressing same language in 20 U.S.C. 1403); In re Innes, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum).

suggesting that the promise it made was void. But as we showed in our reply brief, state law authorized defendant to enter into agreements with the federal government.[9] Nor should this Court permit a state agency that has accepted the benefit of the bargain (i.e., the federal money) from avoiding its promise to waive immunity on the ground that they are not able to comply as a matter of state law. Cf. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 395-397 (1998) (Kennedy, J., concurring) (suggesting that "the absence of specific authorization" to waive Eleventh Amendment immunity under state law should not be "an insuperable obstacle" to "eliminate the unfairness" otherwise permitted). The Supreme Court recently confirmed that when Congress "condition[s] its grant of funds to the States upon their taking certain actions * * * acceptance of the funds entails an agreement to the actions." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999). Indeed, the Eleventh Circuit recently rejected an attempt by a state agency to argue, post hoc, that its voluntary conduct, sufficient under federal law to constitute a waiver, was

---

[9] Defendants in Satterfield did not make any independent argument on the Spending Clause issue, but simply adopted all the arguments made in the defendant's brief in Nihiser. Assuming that defendants' incorporation of the Nihiser arguments was sufficient to make an argument about their power under Tennessee law, Tennessee also authorizes state agencies to contract with the federal government. "Any department of state government may accept and use grant-in-aid funds * * * and such department, acting through its commissioner, is authorized to enter into any and all requisite agreements with such federal agency or instrumentality for the purpose of acceptance and use of such grant-in-aid funds." Tenn. Code Ann. § 4-4-113 (1998).

insufficient because it was prohibited by state law from waiving Eleventh Amendment immunity. See In re Burke, 146 F.3d 1313, 1318 (1998) (even "in the absence of explicit consent by state statute or constitutional provision, a state may consent to a federal court's jurisdiction through its affirmative conduct"), cert. denied, 119 S. Ct. 2410 (1999).

3. Defendants may attempt to rely on the Eighth Circuit's decision in Bradley v. Arkansas Department of Education, Nos. 98-1010 & 98-1830, 1999 WL 673228 (Aug. 31, 1999), petition for reh'g en banc pending, for the proposition that Section 504 is not valid Spending Clause legislation. Assuming that argument is properly raised at this stage,[10] Bradley should not be followed.

Section 504's non-discrimination requirement is patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and Title IX, which prohibit race and sex discrimination by programs that receive federal funds, respectively. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 278 n.2 (1987).[11]

---

[10] Defendants did not previously challenge the validity of Section 504. Indeed, defendants in Satterfield acknowledged that the "State of Tennessee is not without obligation to enforce the provisions of * * * the Rehabilitation Act" (Final Br. of Defs. at 11). Although the Eleventh Amendment has jurisdictional attributes that allow it to be raised for the first time on appeal, nothing about the Eleventh Amendment permits parties to ignore the normal rules of appellate procedure and raise new legal arguments in supplemental briefs. Cf. Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 4-5 (1st Cir. 1999).

[11] While Section 504 was initially enacted as part of a spending statute, its text makes clear that it was not intended to be tied to those funds in particular. Instead, as with Title VI and Title IX, Congress intended to address this issue "across-the-board" to avoid a patchwork of federal statutes.

Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In Lau v. Nichols, 414 U.S. 563 (1974), the Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its English-only policies had on its students, was a valid exercise of the Spending Clause. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." Id. at 569 (citations omitted). The Court made a similar holding in Grove City College v. Bell, 465 U.S. 555 (1984). In Grove City, the Court addressed whether Title IX infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." Id. at 575.

These cases stand for the proposition that Congress has an interest that none of its funds are used to support, directly or indirectly, programs that discriminate or otherwise make inaccessible their benefits and services to qualified persons.[12] Thus, when a condition is designed to assure that federal money is not used to support or subsidize programs that are

---

[12] These cases do not rest on the fact that race and sex discrimination generally violate the Equal Protection Clause. Lau upheld Title VI as valid Spending Clause legislation without deciding whether the same conduct (English-only teaching) would violate the Equal Protection Clause. And Grove City involved the validity of the condition as applied to a private entity.

inaccessible to persons with disabilities, it is a valid condition on the receipt of all federal financial assistance. Cf. Cleburne, 473 U.S. at 443-444 (discussing Section 504 with approval).

To the extent Bradley can be read to hold that Section 504 is not valid because the non-discrimination provision was not tied to federal funds to support non-discrimination, see 1999 WL 673228, at *10, the same can be said of the statutes upheld in Lau and Grove City. Nor is there any reason that Congress cannot impose conditions that relate to an interest in all federal funds (i.e., that they not be used to discriminate or unnecessarily exclude any segment of the population) to all such funds in an across-the-board manner.

Bradley also suggested that Section 504 "amounts to impermissible coercion" because the definition of program or activity denied States a "meaningful choice" whether to accept or reject federal financial assistance. 1999 WL 673228, at *11. That statement was based on the erroneous premise that the entire State would have to forego all federal funds in order for any program to be exempted from Section 504's non-discrimination requirement. But Congress chose not to require the entire State to comply if it accepted any federal funds. The term "program or activity" is defined as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b)(1)(A).

As the plain language of the statute makes clear, Congress determined that, in general, States should be able choose on an "agency" or "department" basis whether to accept federal funds and the attendant obligation to make their programs and activities non-discriminatory and accessible. See Nelson v. Miller, 170 F.3d 641, 653 n.8 (6th Cir. 1999).

Properly understood, Section 504 is not coercive. In choosing which federal money to accept (if any), States are aware from the clear text of the statute that they are choosing whether the entire department will be covered by the non-discrimination duty of Section 504. Thus, only those programs that the State has chosen to place together in the same agency or department are affected. In cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that so long as Congress did not preclude the recipient from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally require that the entity that receives federal funds not engage in conduct Congress does not wish to subsidize. See Rust v. Sullivan, 500 U.S. 173, 197-199 (1991). Because Congress did not deprive States of this ability through the definition of "program or activity," it would be difficult to view the scope of coverage as "coercive."

Bradley relied on College Savings Bank, which used the word "coercion" in holding that Congress could not condition States' participation in fields of interstate commerce on their waiver of

Eleventh Amendment immunity. But in that case, the Court recognized that its holding would not carry over to Spending Clause statutes. The Court reaffirmed that no one is entitled to federal money; it is simply a "gift" that Congress is free to disburse if it so chooses. 119 S. Ct. at 2231. The Court distinguished Congress' power to place conditions of "gifts" from conditions on engaging in "otherwise lawful activity." Ibid. It explained that "what Congress threatens [in this case] if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." Ibid. In the case of Section 504, by contrast, every recipient (public or private) is faced with the choice of (1) accepting federal money (to which it has no entitlement) in exchange for its promise to use the money in a way that does not discriminate on the basis of disability and to permit federal courts to adjudicate whether a recipient is in compliance, or (2) not taking the money.

To the extent that "coercion" is a justiciable concept,[13] Bradley is inconsistent with Supreme Court decisions that States may be put to difficult or even unrealistic choices about whether to take federal funds without those conditions being "coercive."

---

[13] But see Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."); Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice.").

In North Carolina 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[s]; 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. The Supreme Court summarily affirmed, thus making the holding binding on this Court. See 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, which requires any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from 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 not be a realistic option, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." Id. at 241.

These cases show that the federal government can demand that government entities comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (North Carolina), or losing all federal funds (Mergens), without crossing the line to coercion. See also FERC v. Mississippi, 456 U.S. 742, 766-767 (1982). Thus, even if there were a cognizable coercion defense, the choice imposed by Section 504 is not coercive. Instead, like the provisions upheld in Lau and Grove City, Section 504 is a reasonable condition to ensure that federal money does not support or subsidize programs that unnecessarily exclude people with disabilities.

CONCLUSION

For the reasons stated herein, as well as the reasons previously stated in our briefs in the assorted appeals, the United States asks this Court to reverse the judgments in Nihiser and Satterfield, and affirm the judgments in Wright and Pomeroy.

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
P. O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 1999, one copy of the Motion for the United States To File the Attached Consolidated Supplemental Brief was served by first-class mail on the following counsel:

William F. Piper
Durant, Piper & Sorci
5955 West Main Street
Kalamazoo, MI 49009

Harland M. Britz, Esq.
416 North Erie Street, Suite 100
Toledo, OH 43624

Edward B. Foley, Esq.
State Solicitor
30 E. Broad Street
17th Floor State Office Tower
Columbus, OH 43215-3428

David Wigler, Esq.
Suite 775 Nations Bank Center
550 Main Avenue
Knoxville, Tennessee 37902

John S. Marshall, Esq.
Bicentennial Plaza
111 West Rich Street, Suite 430
Columbus, Ohio 43215-4126

Louis A. Jacobs
4905 Stonehaven Drive
Columbus, OH 43220

Merl H. Wayman
Suite 108
The Barrister Building
Columbus, OH 43215

Mary M. Collier
Assistant Attorney General
Office of the Attorney General
425 5th Avenue, N.
2nd Floor Cordell Hull Building
Nashville, TN 37243-0493

William J. Brown
William J. Brown & Associates
23 N. Ocoee Street
P.O. Box 1001
Cleveland, TN 37364-1001

Michael S. Bogren
Plunkett & Cooney
Skyrise Business Center, Suite 256
535 South Burdick Street, Suite 256
Kalamazoo, MI 49007-6112

SETH M. GALANTER
Attorney