No. 01-16544

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA A. PUGLIESE,

Plaintiff - Appellant

v.

JACK DILLENBERG, in his individual capacity and official capacity as Director of the Arizona Department of Health Services, WAYNE LEBLANCE, in his individual capacity and official capacity as Assistant Chief of the Arizona Department of Health Services, Office of Human Rights, STATE OF ARIZONA,

Defendants - Appellees

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF JURISDICTION

Plaintiff brought this action under, among other statutes, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The district court had jurisdiction pursuant to 28 U.S.C. 1345, and entered a final judgment on June 15, 2001. Appellants filed a timely notice of appeal on July 13, 2001. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Congress validly conditioned the receipt of federal financial assistance on the waiver of Eleventh Amendment immunity to private claims under Section 504 of the Rehabilitation Act of 1973 (Section 504).

2. Whether the State was unconstitutionally coerced into waiving its sovereign immunity to Section 504 claims.

STATEMENT OF THE CASE

1. Plaintiff sued the State of Arizona alleging disability-based employment discrimination in violation of, among other things, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794. The district court entered summary judgment against Plaintiff on the merits on July 1, 1998, but this Court reversed that order in part and remanded for further proceedings. See *Pugliese* v. *Arizona Dep't of Health & Human Servs.*, 147 F. Supp. 2d 985, 986 (D. Ariz. 2001). On remand, the district court held that Section 504 did not validly abrogate the State's sovereign immunity and that the State of Arizona did not waive its immunity to Section 504 claims by accepting federal funds. *Id.* at 987-991. This appeal followed.

2. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). This

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

Section 504 applies to a "program or activity," a term defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it imposes "undue financial" or "administrative burdens" on the grantee, or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 819 (9th Cir. 2001), opinion amended, 271 F.3d 910, cert. denied, 122 S. Ct. 2591 (2002).

3. In 1985, the Supreme Court held that Section 504 did not, with sufficient clarity, demonstrate Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7(a)(1) provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Section 504 of the Rehabilitation Act of 1973 to remedy discrimination against persons with disabilities.

In *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998), this Court held that in enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to private suits under Section 504. Thus, by accepting federal financial assistance a state

agency waives its sovereign immunity to such suits. *Id*. at 1271. This Court has repeatedly, and recently, reaffirmed that holding. See *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3284 (U.S. Jan 13, 2003); *Vinson* v. *Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3021 (U.S. Jan 13, 2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir. 2001), opinion amended, 271 F.3d 910, cert. denied, 122 S. Ct. 2591 (2002); *Armstrong* v. *Davis*, 275 F.3d 849, 878-879 (9th Cir. 2001). There is no basis for a different conclusion here.

Moreover, this Court recently held in *Lovell*, that California was not unconstitutionally coerced into accepting federal funds and waiving its Eleventh Amendment immunity to private suits under Section 504. No court of appeals has ever held a federal funding statute unconstitutional on coercion grounds. In the case of Section 504, the federal government's offer of financial assistance to a state agency does not present the extraordinary circumstances this Court has required to support a finding of unconstitutional coercion. In particular, neither the amount of federal assistance received, nor the State's decision to rely heavily on federal funding for its mental health program, renders the federal offer of assistance unconstitutionally coercive.

ARGUMENT

I. CONGRESS VALIDLY CONDITIONED THE RECEIPT OF FEDERAL FINANCIAL ASSISTANCE ON THE WAIVER OF ELEVENTH AMENDMENT IMMUNITY TO PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." This Court and eight other courts of appeals agree that Section 2000d-7 clearly manifests an intent to condition receipt of federal financial assistance on consent to waive Eleventh Amendment immunity.[1] This Court was one of the earliest courts to have so ruled. See *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

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[1] See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), petition for cert. pending, No. 01-2782; *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2001); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S.Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) ; *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3284 (U.S. Jan 13, 2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002) (same); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999) (same), rev'd on other grounds, 532 U.S. 275 (2001).

The district court acknowledged this Court's holding in *Clark*, but concluded that it was no longer binding because *Clark* relied upon a theory of "constructive waiver" that was repudiated by the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666 (1999). See *Pugliese* v. *Dep't of Health & Human Servs.*, 147 F. Supp. 2d. 985, 989-991 (D. Ariz. 2001). The district court concluded that under *College Savings Bank*, a State waives its sovereign immunity only if it "has made a 'clear declaration' that it will submit itself" to federal court jurisdiction, and that acceptance of federal funds in the face of Section 2000d-7 did not constitute such a clear declaration. *Id*. at 990.

Subsequent decisions of this Court, however, have made clear that the district court's interpretation of *College Savings Bank*, and disregard of *Clark*, were in error. In fact, in *Douglas* v. *California Department of Youth Authority*, this Court rejected the district court's interpretation of *College Savings Bank* through a specific reference to the district court decision in this case:

> The only district court to rule that acceptance of federal Rehabilitation Act funds does *not* waive immunity under the Act relied * * * upon the Supreme Court's decision in *College Sav. Bank*. ***Pugliese*, 147 F. Supp. 2d at 990.** Such reliance is misplaced. In *College Sav. Bank*, the Supreme Court revisited the doctrine of constructive waiver as cast in *Parden* v. *Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). In *Parden*, the Court held that although the Federal Employers Liability Act ("FELA") did not expressly condition participation in an interstate commerce activity upon waiver of immunity under FELA, a state constructively waived its sovereign immunity defense by operating a railroad in interstate commerce. *College Sav. Bank*, 527 U.S. at 677, 119

> S.Ct. 2219 (citing *Parden*, at 192, 84 S.Ct. 1207) ("By enacting [FELA] ... Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act.").
>
> In *College Sav. Bank*, the Supreme Court overruled the constructive waiver doctrine in the *Parden* context. *Id.* at 680, 119 S.Ct. 2219. While refusing to recognize waivers implied from participation of a state in a federal program, the Supreme Court carefully distinguished the "fundamentally different" case of constructive waivers implied from a state's acceptance of federal funds. *Id.* at 686, 119 S.Ct. 2219. "Conditions attached to a state's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." *Id*. at 678 n. 2, 119 S.Ct. 2219. *College Sav. Bank* stands as a clear reaffirmation that Congress may exercise its spending power to condition the grant of federal funds upon the states' agreement to waive Eleventh Amendment immunity. *Id*. at 686, 119 S.Ct. 2219; accord *Jim C.*, 235 F.3d at 1081 (citing *College Sav. Bank*, 527 U.S. at 686, 119 S.Ct. 2219) ("Specifically, Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly.").

271 F.3d 812, 820 n.5 (9th Cir. 2001) (bold emphasis added), opinion amended, 271 F.3d 910, cert. denied, 122 S. Ct. 2591 (2002).[2] Thus, in reaching its decision in *Douglas*, this Court clearly rejected the rationale for the district court's decision in this case. There is no basis for a different result now.

The district court also concluded that the State did not knowingly waive sovereign immunity to Section 504 claims because it reasonably (but wrongly)

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[2] This Court has similarly reaffirmed *Clark* in a number of other cases after *College Savings Bank*. See *Lovell*, 303 F.3d at 1051-1052; *Vinson* v. *Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002), cert. denied, 71 U.S.L.W. 3021 (U.S. Jan 13, 2003); *Armstrong* v. *Davis*, 275 F.3d 849, 878-879 (9th Cir. 2001).

believed that its immunity to similar claims under Title I of the ADA had already been abrogated. 147 F. Supp. 2d at 991. This was the view of Judge O'Scannlain and three other members of this Court who dissented from the denial of rehearing en banc in *Douglas*. See 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J.). However, that view failed to carry the day in *Douglas* and, as Judge O'Scannlain subsequently noted, this argument is no longer viable in this Circuit. See *Vinson* v. *Thomas*, 288 F.3d 1145, 1157 (9th Cir. 2002) (O'Scannlain, J., dissenting) (noting prior dissent in *Douglas* but joining that portion of the majority's opinion in *Vinson* holding that the State waived its Eleventh Amendment immunity to Section 504 claims by accepting federal funds), cert. denied, 71 U.S.L.W. 3021 (U.S. Jan 13, 2003).

In any case, the argument is without merit. Defendant cannot claim that its waiver of sovereign immunity was "unknowing" in any traditional sense. The State understood that if it voluntarily accepted federal funds, it waived its Eleventh immunity to Section 504 claims. See 42 U.S.C. 2000d-7; *Clark*, 123 F.3d at 1271. Congress also made clear that nothing in the ADA abrogated a State's sovereign immunity to Section 504 claims or otherwise affected the pre-existing statutory scheme under Section 504.[3] Thus, Defendant was on notice that

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[3] See 42 U.S.C. 12202 (ADA abrogation provision, providing that a "State shall not be immune * * * from an action in Federal or State court of competent jurisdiction for a violation of *this* chapter") (emphasis added); See 42 U.S.C. 12201(b) ("Nothing in [the ADA] shall be construed to invalidate or limit the

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regardless of the efficacy of the ADA and its abrogation provision, the State would be liable to claims under Section 504 if it chose to accept federal funding.[4] The State may not have thought that waiving sovereign immunity to Section 504 claims was much of a sacrifice at the time, since it would have been liable for similar conduct under Title I of the ADA even if it declined federal funds. But this does not mean that the State was unaware that, in fact, its voluntary acceptance of federal funds constituted a waiver of its sovereign immunity to Section 504 claims. The district court cited no authority for the proposition that an agreement is unknowing simply because a party miscalculates the practical consequences of its agreement. Nor is there any basis to conclude that the State's misunderstanding of the legal landscape is a basis for relieving it of its waiver. Cf. *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("[A] voluntary plea of guilty intelligently made in the light of then applicable law does not become

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[3](...continued)
remedies, rights, and procedures of any Federal law * * * that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.").

[4] Section 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 of 1973." Section 504, in turn, prohibits discrimination "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").[5]

II. THE STATE WAS NOT UNCONSTITUTIONALLY COERCED INTO WAIVING ITS SOVEREIGN IMMUNITY TO SECTION 504 CLAIMS

Although the district court did not reach the question, the State also argued below that its waiver of sovereign immunity was unconstitutionally coerced, because of the amount of federal financial assistance offered and the State's decision to rely heavily on that assistance to fund its mental health programs. No court of appeals has ever held that these factors constitute coercion, and this Court has recently and specifically rejected it as applied to Section 504.

While the Supreme Court in *South Dakota* v. *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" it saw no reason generally to inquire into whether a State was coerced. 483 U.S. 203, 211 (1987) (citation omitted). It also cautioned that every congressional spending statute "is in some measure a temptation." *Ibid.* (citation omitted). "[T]o hold that motive or temptation is equivalent to coercion," the Court warned, "is to plunge the law in endless

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[5] The State has not, for example, relied on the contract law principle of mistake of law, perhaps because that doctrine ordinarily would require the State to show that the mistake would have made a difference to its decision to accept federal funds and because the State normally would be required to return the funds in order to avoid its obligations under the contract. See Restatement (Second) of Contracts §§ 153, 158, 376, 384 (1981).

difficulties." *Ibid.* The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that a State voluntarily exercises its power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid.* (citation omitted).

Accordingly, this Court 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). See also *Nevada* v. *Skinner*, 884 F.2d 445, 448 (9th Cir. 1989). This Court recently held that such extraordinary circumstances are not presented by Section 504. In *Lovell* v. *Chandler*, the Court rejected the assertion that "Congress exceeded its Spending Clause powers and the conditions set forth in *South Dakota* v. *Dole,*" including the coercion condition. 303 F.3d at 1051. Because Section 504 applies on an agency-by-agency basis, the Court observed, a State may retain its sovereign immunity for specific agencies by declining federal funds for that agency. *Ibid.* "If a state does not wish to relinquish immunity, it could follow the 'simple expedient of not yielding.'" *Ibid.* (quoting *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143-144 (1947).

That decision in *Lovell* was correct, and is binding upon this panel. Any argument that Section 504 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.[6]

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[6] 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

(continued...)

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on a school's 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).[7]

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[6](...continued)
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).

[7] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude
(continued...)

Thus, the federal government can place conditions on federal funding that require state agencies to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Nor does the amount of funding at issue in this case, or the State's purported dependence on it, render the offer of assistance unconstitutionally coercive. For example, in *California* v. *United States*, this Court rejected the claim that Congress unconstitutionally coerced the State of California into providing emergency medical care to undocumented aliens by conditioning receipt of Medicaid funding on that requirement. See 104 F.3d 1086, 1092 (9th Cir. 1997), cert. denied, 522 U.S. 806 (1997). Other courts have likewise held that conditions attached to large federal grant programs, such as Medicaid, are not coercive.[8]

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[7](...continued)
an entity from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally condition federal funding to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

[8] See, e.g., *West Virginia* v. *United States Dep't of Health & Human Servs.*, 289 F.3d 281, 284 & n.2 (4th Cir. 2002) (enforcing Medicaid requirement where State received more than $1 billion in federal funds, representing approximately 75% of the State's Medicaid budget); *Texas* v. *United States*, 106 F.3d 661 (5th Cir. 1997) (Medicaid conditions not coercive); *Padavan* v. *United States*, 82 F.3d 23, 29 (2d Cir. 1996) (same); *Oklahoma* v. *Schweiker*, 655 F.2d 401, 413-414 (D.C. Cir. 1981) (same); see also *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001) (enforcing Section
(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 department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1203 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000).[9]

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[8](...continued)
504 where state Department of Education received "$250 million or 12 per cent. of the annual state education budget" in federal funds); *Kansas* v. *United States*, 214 F.3d 1196, 1198, 1201-1202 (10th Cir.) (enforcing condition in federal welfare program that provided $130 million, constituting 66% of state funds for child support enforcement program), cert. denied, 531 U.S. 1035 (2000).

[9] Spending Clause statutes are often analogized to contracts. In this vein, we note that when a plaintiff is seeking to void a contract on the grounds of "economic duress," it must show "acts on the part of the defendant which produced" the financial circumstances that made it impossible to decline the offer, and that it is not enough to show that the plaintiff wants, or even needs, the money being offered. *Undersea Eng'g & Constr. Co.* v. *International Tel. & Tel. Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); accord *United States* v. *Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994).

For these reasons, the Third and Eighth Circuits have, like this Court, rejected coercion arguments against Section 504. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002) (while "declining all federal funds" for a particular State agency "would doubtless result in some fiscal hardship – and possibly political consequences – it is a free and deliberate choice"), petition for cert. pending, No. 01-2782; *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) ("The sacrifice of all federal education funds * * * would be politically painful, but we cannot say that it compels Arkansas's choice."), cert. denied, 533 U.S. 949 (2001). There is no basis for this Court to reach a contrary conclusion here.[10]

[10] Because Section 2000d-7 can be upheld as valid Spending Clause legislation, there is no need to address whether it can also be upheld as a valid exercise of Congress's authority to abrogate a State's Eleventh Amendment immunity. See *Douglas*, 271 F.3d at 819-820.

CONCLUSION

The Eleventh Amendment is no bar to Plaintiff's Section 504 claim. The district court's judgment should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is also at issue in *Miranda B.* v. *Kitzhaber*, No. 01-35950 (scheduled for oral argument Mar. 6, 2003), and in *Patrick W.* v. *Lemahieu* and consolidated appeals, Nos. 01-15944, 01-16240, 01-16328 & 01-16582 (briefing completed, oral argument not yet scheduled).

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

KEVIN RUSSELL
Attorney

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Notice of Intervention Pursuant to 28 U.S.C. 2403(a) were sent by first-class mail postage pre-paid this 3d day of February, 2003 to the following counsel of record:

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