No. 97-7210

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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MICHAEL J. ROARY,

Plaintiff-Appellant

v.

FRANKLIN FREEMAN, Secretary,
Department of Correction, et al.,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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TABLE OF CONTENTS

PAGE

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUE 2

STANDARD OF REVIEW 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT:

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY OF STATE AGENCIES ACCEPTING FEDERAL FINANCIAL ASSISTANCE 8

A. Defendants Waived Their Eleventh Amendment Immunity To Section 504 Suits By Accepting Federal Funds After The Enactment Of Section 2000d-7 9

B. Section 2000d-7 Is A Valid Exercise Of The Spending Power 12

C. Section 504 Is A Valid Exercise Of The Spending Power 14

CONCLUSION 28

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988 (4th Cir.), cert. denied, 516 U.S. 1010 (1995) 9

Alden v. Maine, 527 U.S. 706 (1999) 13, 26

Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589 (4th Cir. 1997), vacated and remanded, 524 U.S. 935 (1998) 4-5

Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212 (4th Cir. 1999), reh'g en banc granted (Dec. 8, 1999), appeal dismissed due to settlement, 205 F.3d 687 (2000) 5, 27

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 3, 9, 10

Bell v. New Jersey, 461 U.S. 773 (1983) 20

Board of Educ. v. Kelly E., 207 F.3d 931 (7th Cir. 2000), petition for cert. filed, No. 99-2027 (June 16, 2000) 12

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 23, 24

Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, reh'g en banc granted in part, and opinion vacated in part, 197 F.3d 958 (8th Cir. 1999) 26

California v. United States, 104 F.3d 1086 (9th Cir.), cert. denied, 522 U.S. 806 (1997) 21

Cannon v. University of Chicago, 441 U.S. 677 (1979) 3

Cedar Coal Co. v. United Mine Workers of Am., 560 F.2d 1153 (4th Cir. 1977), cert. denied, 434 U.S. 1047 (1978) 15

City of Boerne v. Flores, 521 U.S. 507 (1997) 4

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) . . . . .

Clark v. Barnard, 108 U.S. 436 (1883) 9

CASES (continued): **PAGE**

Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) 12

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 9, 13, 14

Edelman v. Jordan, 415 U.S. 651 (1974) 9

FERC v. Mississippi, 456 U.S. 742 (1982) 23

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 2-3, 24

Grove City College v. Bell, 465 U.S. 555 (1984) . . . 18, 25, 26

In re Collins, 173 F.3d 924 (4th Cir. 1999), cert. denied, 120 S. Ct. 785 (2000) 14, 24

In re Innes, 184 F.3d 1275 (10th Cir. 1999), cert. denied, 120 S. Ct. 1530 (2000) 12

Industrial TurnAround Corp. v. NLRB, 115 F.3d 248 (4th Cir. 1997) 8

Kansas v. United States, 214 F.3d 1196 (10th Cir. 2000) 21, 26

Lane v. Pena, 518 U.S. 187 (1996) 11

Lau v. Nichols, 414 U.S. 563 (1974) 17, 18, 25

Litman v. George Mason Univ., 186 F.3d (4th Cir. 1999), cert. denied, 120 S. Ct. 1220 (2000) . . . . passim

Little Rock Sch. Dist. v. Mauney, 183 F.3d 816 (8th Cir. 1999) 12

Mason v. United States, 84 U.S. 67 (1872) 22

Massachusetts v. Mellon, 262 U.S. 447 (1923) 20

NCAA v. Smith, 525 U.S. 459 (1999) 2, 10, 17

Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990) 21

New York v. United States, 505 U.S. 144 (1992) 13, 27

CASES (continued): **PAGE**

North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962 (1978) 22

Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981) 21

Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) 13, 19

Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994) 2, 10

Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000) 12

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 15

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 5

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) 9, 14

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 25

Rust v. Sullivan, 500 U.S. 173 (1991) 25

Salinas v. United States, 522 U.S. 52 (1997) 19

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), petition for cert. filed, No. 99-1908 (May 30, 2000) 12

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 16, 17

South Dakota v. Dole, 483 U.S. 203 (1987) . . . . . passim

Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000) 12, 26

Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) 20, 21

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 23

United States v. Presley, 52 F.3d 64 (4th Cir.), cert. denied, 516 U.S. 891 (1995) 2

CASES (continued): **PAGE**

United States v. Vanhorn, 20 F.3d 104 (4th Cir. 1994) 25

United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986) 10

University of Ala. Bd. of Trustees v. Garrett, 120 S. Ct. 1669 (Apr. 17, 2000) (No. 99-1240) 5

Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) 21, 24

Westinghouse Elec. Corp. v. West Virginia Dep't of Highways, 845 F.2d 468 (4th Cir.), cert. denied, 488 U.S. 855 (1988) 9

Wyman v. James, 400 U.S. 309 (1971) 25

CONSTITUTIONS AND STATUTES:

United States Constitution:
Spending Clause, Art. I, § 8, Cl. 1 . . . . . passim
Commerce Clause, Art. I, § 8, Cl. 3 14
Eleventh Amendment . . . . . passim
Fourteenth Amendment 15, 27

Americans with Disabilities Act (ADA), Title II, 42 U.S.C. 12131 et seq. 4

Education Amendments of 1972, Title IX, 20 U.S.C. 1681 . . . . . passim

Equal Access Act, 20 U.S.C. 4071 et seq. 23

Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d 2, 10

Rehabilitation Act of 1973, Section 504, 29 U.S.C. 794 . . . . . passim
29 U.S.C. 794(a) 2

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986) 3

Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb 4

STATUTES (continued): **PAGE**

State Criminal Alien Assistance Program,
8 U.S.C. 1231(i) 15
42 U.S.C. 13710 15

Violent Offender Incarceration and Truth-in-Sentencing Formula Grant Program,
42 U.S.C. 13701-13712 15

28 U.S.C. 1291 1

28 U.S.C. 1331 1

28 U.S.C. 2403(a) 4

42 U.S.C. 2000d-7 . . . . . passim

N.C. Gen. Stat. § 143-34.2 27

RULES AND REGULATIONS:

Federal Rules of Civil Procedure:
Rule 8(c) 22
Rule 22(c) 4

Federal Rules of Evidence:
Rule 201(b) 15

28 C.F.R. 42.503(f) 17

28 C.F.R. 42.504(a) 17

LEGISLATIVE HISTORY:

S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 10

110 Cong. Rec. 2465 (1964) (Rep. Powell) 19

110 Cong. Rec. 2468 (1964) (Rep. Celler) 19

110 Cong. Rec. 6544 (1964) (Sen. Humphrey) 19

110 Cong. Rec. 7061-7062 (1964) (Sen. Pastore) 19

131 Cong. Rec. 22,344-22,345 (1985) (Sen. Cranston) 10

131 Cong. Rec. 22,346 (1985) (Sen. Cranston) 10

LEGISLATIVE HISTORY (continued): **PAGE**

132 Cong. Rec. 28,624 (1986) 11

22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554 11

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BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff-appellant filed a complaint in the United States District Court for the Eastern District of North Carolina, alleging that the defendants violated, inter alia, Section 504 of the Rehabilitation Act, 29 U.S.C. 794. For the reasons discussed in this brief, the district court had jurisdiction over the claim pursuant to 28 U.S.C. 1331.

This appeal is from a final judgment filed on July 28, 1997, granting defendants' motion to dismiss. The plaintiff filed a timely notice of appeal on August 25, 1997. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether 42 U.S.C. 2000d-7, which removes States' Eleventh Amendment immunity from discrimination suits brought under Section 504 of the Rehabilitation Act, is a valid exercise of Congress' authority under the Spending Clause.

STANDARD OF REVIEW

This issue was not raised in the district court. Because in this case the constitutionality of a federal statute is purely one of law, this Court may determine the issue de novo. United States v. Presley, 52 F.3d 64, 67 (4th Cir.), cert. denied, 516 U.S. 891 (1995).

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any "qualified individual with a disability." 29 U.S.C. 794(a). This provision was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (race and national origin discrimination), and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 (sex discrimination). See NCAA v. Smith, 525 U.S. 459, 466 n.3, 467 (1999). Individuals alleging violations of this prohibition have a private right of action against persons receiving federal financial assistance and their officials. See Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 827-828 (4th Cir. 1994); see also Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76

(1992); Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979).

In 1985, the Supreme Court held that the language of Section 504 was not clear enough to evidence Congress' intent to authorize 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 (1986). Section 2000d-7 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.

2. According to the allegations of the complaint, Michael Roary, who is deaf, is currently incarcerated in a North Carolina Department of Correction facility (App. 17 ¶ 3). He alleges that the Department effectively excludes him from educational, vocational, and religious programs that it offers to inmates because it will not provide him a sign-language interpreter (App. 22 ¶¶ 34-37). He also alleges that the Department has a policy of only providing interpreters certified by the State for "non-routine" medical visits (App. 20 ¶ 21) and that for "routine" visits he is either provided with no interpreter or is forced to rely on inmate interpreters who do not allow him to "adequately"

communicate with medical staff (App. 19-20 ¶¶ 20, 22-23, 25). He also alleges he was not provided a qualified interpreter in 11 of his 15 mental health counseling sessions, forcing him to use hand signals, gestures, and notes in an effort to communicate (App. 21-22 ¶¶ 32-33).

In 1994, Roary filed a pro se complaint in district court against several state officials claiming that he was being denied various services because of his deafness (App. 9-11). After obtaining counsel, plaintiff filed an amended complaint naming five state officials in their official capacity, and alleging violations of Section 504 of the Rehabilitation Act (Section 504), Title II of the Americans with Disabilities Act (ADA), the Religious Freedom Restoration Act (RFRA), and the Free Exercise Clause (App. 16-27). Defendants moved to dismiss the Section 504 and ADA claims on the ground that they did not apply to prisons (App. 37, 41-45). In 1996, the magistrate judge and the district court agreed and dismissed those claims on that ground (App. 131-132, 133-136). After the other claims were disposed of adversely to plaintiff,[1/] he appealed (App. 140).

3. The appeal was abated in 1997 while this Court considered the issue of statutory coverage in Amos v. Maryland

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[1/] Defendants argued that RFRA was unconstitutional and informed the United States that they were drawing the constitutionality of that statute into question (App. 6 (3/29/96 unnumbered docket entry)). See Fed. R. Civ. P. 24(c). The United States intervened to defend RFRA's constitutionality (App. 7 (dkt. no. 47)). See 28 U.S.C. 2403(a). After the Supreme Court decided City of Boerne v. Flores, 521 U.S. 507 (1997), the United States "withdrew" as an intervenor (App. 7 (dkt. no. 55)), and the court dismissed plaintiff's RFRA claims (App. 137-138).

Department of Public Safety & Correctional Services, 126 F.3d 589 (1997), and then while the Supreme Court did the same in Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998). Yeskey held that the plain language of the ADA clearly covered state prisons even "[a]ssuming, without deciding, that the plain-statement rule does govern application of the ADA to the administration of state prisons," id. at 209, and the Court vacated and remanded Amos in light of Yeskey. See Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 524 U.S. 935 (1998).

Reactivated in July 1998, this appeal was abated in August 1998 after this Court sought supplemental briefing on the constitutionality of the ADA and Section 504 as applied to prisons in the Amos litigation. After the case was taken en banc, Amos was dismissed on March 6, 2000, due to settlement. See Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 205 F.3d 687 (2000).

On April 5, 2000, this Court issued a new briefing schedule in this appeal. On May 8, 2000, defendants, with the consent of plaintiff, moved to place the case in abeyance pending the Supreme Court's decision in University of Alabama Board of Trustees v. Garrett, 120 S. Ct. 1669 (cert. granted Apr. 17, 2000) (No. 99-1240). This Court denied the motion on May 11, 2000. Plaintiff filed his brief on May 26, 2000, arguing that the statutory ground relied on by the district court had been overruled by Yeskey and that the case should be remanded to the

district court for further proceedings. Defendants filed their brief on July 12, 2000, agreeing that both statutes covered prisons (Def. Br. 4), but arguing for the first time that neither the ADA (Def. Br. 5-31) nor Section 504 (Def. Br. 5 n.1) was a valid abrogation of their Eleventh Amendment immunity from private suit because those statutes were not appropriate exercises of Congress' authority under Section 5 of the Fourteenth Amendment. In his reply brief, plaintiff abandoned his ADA claim, and now seeks relief only under Section 504.[2/]

[2/] In the district court, defendants had pressed an additional ground for dismissal — that even if Section 504 applied to prisons, plaintiff had not stated a claim under Section 504 because he had failed to allege a "serious deprivation of a basic human need" or "deliberate[] indifferen[ce]," elements that defendants argued were required in a Section 504 case involving prisoners because "the very same standard applied in § 1983 lawsuits alleging violations of inmates' constitutional rights" (App. 46). The district court did not address this argument. Apparently anticipating that defendants might renew this argument as an alternative ground for affirmance, plaintiff argued in his opening appellate brief (Pl. Br. 11-12) that he had stated a claim under Section 504. In their appellate brief, defendants did not renew this argument. Indeed, contrary to their position in the district court, they now agree (Def. Br. 5 n.1, 18-23) that Section 504 does impose different standards than the Constitution. For these reasons, we believe the question whether plaintiff's complaint states a claim on which relief can be granted is not before the Court and thus do not address it.

SUMMARY OF ARGUMENT

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 * * *, title IX of the Education Amendments of 1972 * * * [or] title VI of the Civil Rights Act of 1964." In Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999), cert. denied, 120 S. Ct. 1220 (2000), this Court held that Section 2000d-7 put state agencies on notice that accepting federal financial assistance constitutes a waiver of Eleventh Amendment immunity to suits arising under Title IX, and that, as such, Section 2000d-7 was a valid exercise of Congress' Spending Clause power to place conditions on the receipt of federal financial assistance.

Section 2000d-7 provides state agencies the same notice for Section 504 claims as for Title IX claims. Both statutes are expressly mentioned in Section 2000d-7. And both statutes function in the same manner — they impose a condition of non-discrimination on those agencies that elect to receive federal financial assistance. Thus, the holding of Litman controls this case and there is no Eleventh Amendment bar to plaintiff's suit proceeding under Section 504.

ARGUMENT

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY OF STATE AGENCIES ACCEPTING FEDERAL FINANCIAL ASSISTANCE

Section 2000d-7 of Title 42 of the U.S. Code provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], [and] title VI of the Civil Rights Act of 1964." In Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999), cert. denied, 120 S. Ct. 1220 (2000), a panel of this Court unanimously held that Section 2000d-7 may be upheld as a valid exercise of Congress' power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance. This decision, which is binding on this Court, see Industrial TurnAround Corp. v. NLRB, 115 F.3d 248, 254 (4th Cir. 1997), applies with equal force to claims brought under Section 504.

Defendants, electing to press an Eleventh Amendment argument for the first time in their brief as appellees, have not addressed or challenged the holding of Litman. Nevertheless, because some of defendants' objections to the removal of immunity and to the substantive obligations of Section 504 could be viewed as challenges to Litman's rationale, we believe it appropriate to explain why Litman was correctly decided. Of course, by doing so, we are not suggesting that defendants have properly preserved

these arguments, see 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 993 n.7 (4th Cir.) (declining to address arguments not raised by defendants), cert. denied, 516 U.S. 1010 (1995), nor that this panel has the power to retreat from Litman's holding.

A. Defendants Waived Their Eleventh Amendment Immunity To Section 504 Suits By Accepting Federal Funds After The Enactment Of Section 2000d-7

States may waive their Eleventh Amendment immunity. See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 674 (1999); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); Clark v. Barnard, 108 U.S. 436, 447 (1883). A State may manifest its waiver in at least two ways: "(1) directly by statutory or constitutional provision, * * * or (2) 'constructively,' by voluntarily participating in a federal program when Congress has expressly conditioned state participation in that program on the state's consent to suit in federal court." Westinghouse Elec. Corp. v. West Virginia Dep't of Highways, 845 F.2d 468, 470 (4th Cir.), cert. denied, 488 U.S. 855 (1988). Under the second method of waiver, a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974).

In Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), the Court held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that

"mere receipt of federal funds" was insufficient to constitute a waiver. Id. at 246. But 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.

Section 2000d-7 was a direct response to the Supreme Court's decision in Atascadero. See 131 Cong. Rec. 22,344-22,345 (1985) (Sen. Cranston). Congress recognized that the holding of Atascadero implicated not only Section 504, but also Title VI of the Civil Rights Act and Title IX of the Education Amendments, each of which applied to those "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 831 (4th Cir. 1994); NCAA v. Smith, 525 U.S. 459, 467 (1999) (Section 504 "prohibits discrimination on the basis of disability in substantially the same terms that Title IX uses to prohibit sex discrimination."); United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) ("Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under Section 504 if they accepted federal funds. The Supreme Court, in Lane v. Pena, 518 U.S. 187, 200 (1996), acknowledged "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. As the Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554. Section 2000d-7 thus puts States on express notice that part of the "contract" for receiving federal funds is the requirement that each agency receiving funds consent to suit in federal court for alleged violations of Section 504. The entire package (nondiscrimination obligation and removal of Eleventh Amendment immunity) is conditioned on the agency accepting the federal financial assistance. This Court, after an extensive analysis of

the text and structure of the Act, held in Litman, 186 F.3d at 554, that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." This holding, arising in an action in which the underlying claim was brought under Title IX, is equally applicable to suits brought to enforce Section 504.

Every court to address this issue has agreed with Litman that the Section 2000d-7 language manifests a clear intent to condition a department's receipt of federal financial assistance on its consent to waive its Eleventh Amendment immunity. See Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); Pederson v. Louisiana State Univ., 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); Sandoval v. Hagan, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), petition for cert. filed on other grounds, No. 99-1908 (May 30, 2000); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); see also In re Innes, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum), cert. denied, 120 S. Ct. 1530 (2000); Board of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000) (addressing same language in 20 U.S.C. 1403), petition for cert. filed on other grounds, No. 99-2027 (June 16, 2000); Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 831-832 (8th Cir. 1999) (same).

B. Section 2000d-7 Is A Valid Exercise Of The Spending Power

As the Supreme Court recently reaffirmed, when Congress elects to disburse federal funds, "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." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999). The Supreme Court has consistently upheld Congress' power to condition the receipt of federal funds on the recipient State taking actions that affect its "sovereign interests." "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." New York v. United States, 505 U.S. 144, 167 (1992). Thus, in New York, the Court held that a statute in which Congress conditioned grants to the States upon the States "regulating pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause. Id. at 169, 173; see also South Dakota v. Dole, 483 U.S. 203, 210 (1987) (assuming that Constitution vested authority over drinking age solely in the States, Congress could condition the receipt of federal money on States enacting legislation setting drinking age); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on State appointing non-partisan disbursement officials).

As this Court held in Litman, there is nothing unique about the Eleventh Amendment that would bar Congress from conditioning its spending on a waiver of Eleventh Amendment immunity. Indeed, in Alden v. Maine, 527 U.S. 706, 755 (1999), the Court specifically noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits. Cf. South Dakota v. Dole, 483 U.S. 203 * * * (1987)." Similarly, in College Savings Bank, the Court reaffirmed the holding of Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. 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' power under the Commerce Clause to regulate "otherwise lawful activity," Congress' 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. This Court has reached the same conclusion in the bankruptcy context, holding that it was not unconstitutional for federal law to provide that "if a state wishes to share in the [bankruptcy] estate, it must submit to

federal jurisdiction." In re Collins, 173 F.3d 924, 930 (1999), cert. denied, 120 S. Ct. 785 (2000).

C. Section 504 Is A Valid Exercise Of The Spending Power

Much of defendants' argument, although directed at Congress' power under the Fourteenth Amendment, stresses (Def. Br. 12-13, 28-31) the importance and difficulty of operating a state prison. Although we do not believe defendants have preserved that argument as to the Spending Clause, we briefly discuss why Section 504, even as applied to prisons, is a valid exercise of Congress' Spending Clause authority.[3/]

The Supreme Court in South Dakota v. Dole, 483 U.S. 203 (1987), identified four limitations on Congress' Spending Power. First, the Spending Clause by its terms requires that Congress

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[3/] There does not appear to be any dispute that defendants received federal financial assistance. In their answer to the complaint, defendants admitted that the North Carolina Department of Correction "has, at all times relevant to this action, received federal financial assistance" (App. 3 ¶ 10, 29 ¶ 10). We are informed by the Department of Justice's Office of Justice Programs that the Department of Correction continues to receive federal financial assistance under several different programs administered by the Department of Justice, including the Violent Offender Incarceration and Truth-in-Sentencing Formula Grant Program, 42 U.S.C. 13701-13712, and the State Criminal Alien Assistance Program, 8 U.S.C. 1231(i) & 42 U.S.C. 13710, totalling $18 million in the last fiscal year, and have submitted a copy of one of the signed grant assurances for this Court's consideration under separate cover. We recognize that facts outside the record may normally not be considered, but because plaintiff filed his complaint seeking only injunctive relief almost six years ago, we provide this information to preclude any suggestion that the Section 504 claim may be moot because defendants are no longer accepting federal financial assistance. Cf. Cedar Coal Co. v. United Mine Workers of Am., 560 F.2d 1153, 1166 (4th Cir. 1977), cert. denied, 434 U.S. 1047 (1978). In addition, this Court may elect to take judicial notice of the information, which is in the public record. Cf. Fed. R. Evid. 201(b).

legislate in pursuit of "the general welfare." Id. at 207. Second, if Congress conditions 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 provisions. Id. at 208. Section 504 meets all four of the Dole criteria.

1. First, federal programs that give money to States to assist in incarcerating convicted felons, see note 3, supra, clearly further the general welfare. Similarly, the general welfare is served by prohibiting discrimination against persons with disabilities. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval). Indeed, Dole noted that the judicial deference to Congress is so substantial that there is some question "whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. at 207 n.2.

2. The language of Section 504 alone makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance. Thus, the second Dole requirement is met.

See School Bd. v. Arline, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in Pennhurst). Moreover, like the regulations discussed in Litman, 186 F.3d at 553, Department of Justice implementing regulations require that each application for financial assistance include an "assurance that the program will be conducted in compliance with the requirements of section 504 and this subpart." 28 C.F.R. 42.504(a). We have proffered under separate cover a recent "assurance of compliance," signed by Joseph L. Hamilton, Acting Secretary of the Department of Correction, submitted on behalf of the Department, in which the Department agrees to "comply * * * with * * * Section 504 of the Rehabilitation Act of 1973, as amended; * * * [and the] Department of Justice Non-Discrimination Regulations, 28 CFR Part 42, Subparts C, D, E, and G." Subpart G includes the requirement (relied on by plaintiff in this case) that a recipient "shall provide appropriate auxiliary aids [including qualified interpreters] to qualified handicapped persons with impaired sensory * * * skills where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons." 28 C.F.R. 42.503(f).

3. Section 504 meets the third Dole requirement as well. Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability, to qualified persons.

Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See NCAA v. Smith, 525 U.S. 459, 466 n.3 (1999); Arline, 480 U.S. at 278 n.2. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students, was a valid exercise of the Spending Power. "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, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, 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 in preventing the use of its funds to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services to qualified persons because of race,

gender, and disability. Thus, compliance with Section 504 is a valid condition on the receipt of all federal financial assistance.

Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance. The purposes articulated by Congress in enacting Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); id. at 7061-7062 (Sen. Pastore); id. at 2468 (Rep. Celler); id. at 2465 (Rep. Powell). Certainly, there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.[4/] Thus, as this Court held in Litman, a challenge to such a cross-cutting non-discrimination statute fails under current Spending Clause law.

[4/] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending program, see Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); Salinas v. United States, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds).

4. Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." Dole, 483 U.S. at 210. Neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates anyone's constitutional rights. Defendants might argue (Def. Br. 12) that operating prisons is a "core state function" that precludes federal intrusion under principles of federalism. But the Court has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." Ibid. This is because the federal government has not "intruded" into defendants' prisons. The Department of Correction incurs these obligations only because it applies for and receives federal funds. See Litman, 186 F.3d at 553. Once the Department chose to enter into that bargain, "[r]equiring [it] to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on [its] sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983); accord Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) ("[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject.").

5. As the Court pointed out in Dole, "[the Court's] decisions have recognized that in some circumstances the financial inducement offered by Congress 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)). But the only case the Court cited was Steward Machine, a decision that expressed doubt about the viability of such a theory. See 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation").

Every congressional spending statute "'is in some measure a temptation.'" Dole, 483 U.S. at 211. As the Court in Dole recognized, however, "'to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.'" 483 U.S. at 211.[5/] 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. 483 U.S. at 211 (quoting Steward Machine, 301 U.S. at 590). As the Ninth Circuit recently observed, the Court in Dole indicated "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary

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[5/] Other courts have recognized the inherent difficulties in determining whether a State has been "coerced" into accepting a funding condition. See Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) ("the coercion theory is unclear, suspect, and has little precedent to support its application"); California v. United States, 104 F.3d 1086, 1091-1092 (9th Cir.) (questioning whether there is "any viability" left in the coercion theory), cert. denied, 522 U.S. 806 (1997); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (recognizing "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities"), cert. denied, 493 U.S. 1070 (1990); 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.").

circumstances." California v. United States, 104 F.3d 1086, 1092, cert. denied, 522 U.S. 806 (1997).

Even accepting that "coercion" is an independent and justiciable concept, see Virginia v. Riley, 106 F.3d 559, 569-570 (4th Cir. 1997) (en banc) (plurality opinion of Luttig, J.), 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."[6/]

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

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[6/] In our view, coercion, like duress, should be viewed as an affirmative defense that must be pressed and proved by the party attempting to void an otherwise valid "contract." See Mason v. United States, 84 U.S. 67, 74 (1872); Fed. R. Civ. P. 8(c). Thus, even more so than with the arguments previously discussed, we believe they have forfeited any coercion argument. See Litman, 186 F.3d at 553 (not addressing coercion because defendants did not raise it).

mandatory requirement * * * on the State; it gives to the states an option to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." Id. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[7/]

Similarly, in FERC v. Mississippi, 456 U.S. 742 (1982), the Court upheld a statute that required States to choose between regulating in light of federal standards or having the field preempted so that they could not regulate at all. The Court acknowledged that "the choice put to the States--that of either abandoning regulation of the field altogether or considering the federal standards--may be a difficult one." Id. at 766 (emphasis added). The Court agreed that "it may be unlikely that the States will or easily can abandon regulation of public utilities

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[7/] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976).

to avoid [the statute's] requirements. But this does not change the constitutional analysis." Id. at 767.

Finally, 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 prohibits 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 be an unrealistic option, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[8/]

These cases demonstrate that the federal government can demand that States comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (North Carolina), losing all federal funds

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[8/] Like the statute in Mergens, but unlike the situation found problematic by the plurality in Riley, 106 F.3d at 569-570, the remedy in a private suit claiming a violation of Section 504 is not withholding of federal funds, but rather an injunction to bring the recipient into compliance, as well as other "appropriate" individual relief. See Franklin, 503 U.S. at 66.

(Mergens), or even losing the ability to regulate certain areas (FERC), without crossing the line to coercion. Cf. In re Collins, 173 F.3d at 931 ("[f]orcing the Commonwealth to make such a choice" between appearing in federal court or risking loss of funds "put the Commonwealth in a tough spot," but was permissible).[9/]

Thus, we believe that the choice imposed by Section 504 is not "coercive" in the constitutional sense.[10/] Instead, like the provisions upheld in Lau v. Nichols, 414 U.S. 563 (1974), and Grove City College v. Bell, 465 U.S. 555 (1984), Section 504 is a

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[9/] 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 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); Regan v. Taxation with Representation, 461 U.S. 540, 544-545 (1983).

[10/] Although it is not clear how far the analogy between Spending Clause legislation and contracts extends, see United States v. Vanhorn, 20 F.3d 104, 112 (4th Cir. 1994) (rejecting claim that grant program should be governed by "ordinary contract principles"), we note that the contract defense of "economic duress" is only available if it is shown "that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree. Some wrongful conduct on the part of the Government must be shown; the mere stress of one's financial condition will not amount to duress unless the Government was somehow responsible for that condition." Id. at 113 n.19.

reasonable condition intended to ensure that federal money does not support or subsidize programs that unnecessarily exclude people with disabilities.[11/]

As defendants point out (Def. Br. 28, 30-31), 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 largesse, each department or agency of the State, under the control of state officials, is free to decide whether they will accept the federal funds with the Section 504 "string" attached, or simply decline the funds. See Grove City, 465 U.S. at 575; Kansas v. United States, 214 F.3d 1196, 1203-1204 (10th Cir. 2000) ("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. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)).

[11/] A panel of the Eighth Circuit reached the opposite conclusion in Bradley v. Arkansas Department of Education, 189 F.3d 745 (1999). That opinion was based on the mistaken premise that the State as a whole was required to either accept no federal money or subject all its programs in every department to Section 504. See Stanley, 213 F.3d at 343. The Eighth Circuit granted the United States' petition for rehearing en banc to address the Section 504 Spending Clause holding, see 197 F.3d 958 (1999), and oral argument was heard January 14, 2000. The failure of defendants to mention Bradley reinforces our contention that they have waived any claim of coercion.

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," Alden, 527 U.S. at 750, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency can be sued in federal court, or forgo the federal funds available to that agency. See New York, 505 U.S. at 168.[12/]

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For all these reasons, Section 2000d-7 can clearly be upheld under the Spending Clause. As such, we do not discuss why it is also a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment, as a panel of this Court held in Amos v. Maryland Department of Public Safety & Correctional Services, 178 F.3d 212 (1999), reh'g en banc granted (Dec. 28, 1999), appeal dismissed due to settlement, 205 F.3d 687 (2000). But for plaintiff's decision (expressed in his reply brief) to abandon his claim under Title II of the ADA, we would likewise rely on the rationale of Amos in defending Title II's abrogation of Eleventh Amendment immunity.

[12/] Indeed, North Carolina has established a statutory mechanism for assuring that such an analysis is conducted. State agencies must submit copies of all applications for federal funds to the Office of State Management and Budget and provide "a statement of the conditions, if any, upon which such funds are to be provided." N.C. Gen. Stat. § 143-34.2. Before the Office of State Management and Budget approves any such application, that Office must assess "the current and future financial impact" of accepting such funds and provide this analysis to the Fiscal Research Division of the General Assembly. Ibid.

CONCLUSION

The Eleventh Amendment is no bar to plaintiff's claim brought under Section 504 of the Rehabilitation Act.

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