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

UNITED STATES OF AMERICA,

Intervenor

_____

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

_____

REPLY BRIEF OF THE UNITED STATES AS INTERVENOR TO APPELLEES' SUPPLEMENTAL BRIEF

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CASES (continued): **PAGE**

CONSTITUTIONS AND STATUTES:

RULES AND REGULATIONS: **PAGE**

LEGISLATIVE HISTORY:

ARGUMENT

1. The Spending Clause argument is properly presented.

Defendants argue (Supp. Br. 2-4) that plaintiff forfeited the argument that Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and its removal of Eleventh Amendment immunity, 42 U.S.C. 2000d-7, were valid exercises of Congress' Spending Clause power. Plaintiff's actions, however, should not prevent the United States, intervenor on appeal, from defending the statutes as valid Spending Clause legislation. The right of the Attorney General to intervene for "argument on the question of constitutionality," 28 U.S.C. 2403(a), is not limited by the arguments made by plaintiff in defense of the statute. Indeed, one of the purposes of Section 2403(a) was to ensure that the federal government would be permitted to press arguments that might otherwise be abandoned or ignored by private counsel.[1/] Here, the Attorney General was not notified, as required by Section 2403(a), Federal Rule of Civil Procedure 24(c), and Federal Rule of Appellate Procedure 44, that defendants were challenging the statutes' constitutionality until plaintiff's counsel brought to our attention. The United States should not be penalized for defendants' failure to bring the case to the Attorney General's attention at an earlier stage of the proceedings.

[1/] See 81 Cong. Rec. 3258 (1937) (Rep. Lucas) (explaining that statute was prompted by cases in which a statute's constitutionality might have been upheld "had that case been tried on a different theory, had it been argued by the Attorney General of the United States"); see also id. at 3266 (Rep. Celler); id. at 3255 (Rep. Sumners).

2. This Court's decision in Litman controls on the question of statutory construction. Defendants argue (Supp. Br. 4-8, 13-15) that 42 U.S.C. 2000d-7 (which they refer to as Section 1003) did not put them on notice that accepting federal financial assistance would constitute a waiver of Eleventh Amendment immunity. First they rely on Atascadero v. Scanlon, 473 U.S. 234 (1985), which held that there was not sufficiently clear language in Section 504 itself to put States on notice. But as we explained in our opening brief (Br. 10-11), Section 2000d-7 was enacted to reverse the holding of Atascadero. Second, relying on Abril v. Virginia, 145 F.3d 182 (4th Cir. 1998), and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999), defendants claim the text of Section 2000d-7 could not serve as a notice of waiver. That very argument was rejected by this Court in Litman v. George Mason University, 186 F.3d 544 (1999), cert. denied, 120 S. Ct. 1220 (2000), which was decided after Abril and College Savings Bank. There, this Court held 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)." Id. at 554.

Defendants also contend (Supp. Br. 11-12 n.4, 15) that until the Supreme Court held, in Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998), that the Americans with Disabilities Act (and thus Section 504) covered state-

operated prisons, defendants did not realize their waiver encompassed such claims. Even if that argument were correct (which it is not), it would not support defendants here because they can hardly claim ignorance of their obligations after the 1998 Yeskey decision. Yet defendants continued to receive federal financial assistance,[2/] and thus there is no question that this Court currently has jurisdiction over plaintiff's complaint seeking only injunctive relief. In any event, government entities and officials sued in their official capacities, unlike officials sued in their individual capacities, are bound by the law as it is ultimately found by the Supreme Court (which is understood to be a declaration of what the law has always been), even if they earlier had reason to believe differently. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993); Owen v. City of Independence, 445 U.S. 622 (1980).

3. The requirements of Section 504 bear a relationship to all federal financial assistance. "No court * * * has ever struck down a federal statute on grounds that it exceeded the Spending Power." Virginia v. Browner, 80 F.3d 869, 881 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997). Apparently conceding that Section 504 and Section 2000d-7 meet three of

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[2/] Contrary to defendants' assertions (Supp. Br. 16-17), we do not rely on their signed assurances to show the existence or scope of the waiver. As we explained in our motion, we proffered those documents to assure the Court that defendants continued to receive assistance so that there was no question of mootness, and to provide an example of the type of funds defendants had received.

the four conditions for valid Spending Clause statutes articulated in South Dakota v. Dole, 483 U.S. 203 (1987), and outlined in our opening brief (Br. 15-16), defendants contend (Supp. Br. 10) that Section 504 is not valid Spending Clause legislation because it has no relationship to the federal financial assistance in this case. This single paragraph in their oversized supplemental brief is not sufficient to preserve the argument. See TAP Pharm. v. HHS, 163 F.3d 199, 209 (4th Cir. 1998) (Williams, J., concurring) (in order to be "properly raised," issue must be "fully briefed").

In any event, they are wrong. Defendants first suggest (Supp. Br. 10) that Congress can attach a condition prohibiting discrimination against persons with disabilities only when it is giving money specifically to assist persons with disabilities. As we previously explained (Br. 17-19), Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947), and its progeny demonstrate that defendants argument lacks merit. Just as Congress has an interest in assuring that none of its funds support political partisanship, id. at 143, Congress has an interest in preventing use of its funds to support or subsidize institutions that discriminate against otherwise qualified individuals with disabilities. And defendants' argument is directly in conflict with Grove City College v. Bell, 465 U.S. 555 (1984), in which the Court upheld Title IX as valid Spending Clause legislation even though the funds at issue were not given to the school to prevent discrimination

against women, but were instead just a form of financial aid available to all students.[3/]

Second, defendants contend (Supp. Br. 10) that Congress can only prohibit discrimination in the "same program in which the conditioned funds are received." But that is all that Section 504 does. Because Section 504 governs only a "program or activity" receiving federal financial assistance, it does not extend to the entire State; it applies on an agency-by-agency basis. See 29 U.S.C. 794(b); S. Rep. No. 64, 100th Cong., 2d Sess. 16 (1987) ("Example[]: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations."); Thomlison v. City of Omaha, 63 F.3d 786, 789 (8th Cir. 1995). A state may limit coverage by refusing federal financial assistance to some of its agencies.

Defendants may be suggesting (although it is not clear) that the Constitution requires a narrower definition of "program." It does not explain what in the Constitution imposes that limit or how it should be defined. Any narrower definition would ignore the "common-sense view that dollars are fungible," Sony Corp. of Am. v. Bank One, 85 F.3d 131, 138 (4th Cir. 1996), and thus the receipt of federal funds frees

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[3/] Defendants are mistaken (Supp. Br. 11 n.5) that the financial assistance in Litman was made "available to support the Title IX program." Title IX is not itself a program and does not provide funds to support its non-discrimination requirement. Like Section 504, Title IX applies to "any" program receiving "federal financial assistance."

up state money to use on other agency projects, see United States v. Grossi, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998); Grove City, 465 U.S. at 572 (federal assistance "has economic ripple effects throughout the aided institution" that would be "difficult, if not impossible" to trace).

In defining the term "program or activity" to include all the operations of a department that receives any federal funds, Congress elected to rely on an existing state organizational framework in determining the proper breadth of coverage. State law establishes what programs are placed in what departments, and Congress could reasonably have presumed that States normally place related programs with overlapping goals, constituencies, and resources in the same department. Either the state legislature or a politically responsible official charged with the overall authority for the management and budgeting of a set of programs, put together by the State itself because of their related attributes, determines whether to accept federal funds or not. This level of coverage is a "necessary and proper" means of assuring that no federal money supports or subsidizes programs that are not accessible to people with disabilities. See New York v. United States, 505 U.S. 144, 158-159 (1992) (noting Spending Clause power is augmented by the Necessary and Proper Clause); Rust v. Sullivan, 500 U.S. 173, 199 n.5 (1991) (Congress' power under Spending Clause includes power to condition receipt of federal

funds on recipient's promise not to use its own money to achieve goals it cannot achieve with federal funds).

4. Section 504 is not coercive. In another terse paragraph, defendants point to two cases and assert (Supp. Br. 10-11) that Section 504 is coercive. Neither case is persuasive. The first case, Bradley v. Arkansas Department of Education, 189 F.3d 745 (8th 1999), was vacated for rehearing en banc, see 197 F.3d 958 (8th 1999), and, as the Seventh Circuit explained in Stanley v. Litscher, 213 F.3d 340, 343 (2000), was premised on a misreading of the scope of Section 504.

Nor does Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc), support defendants' claims. In Riley, a plurality of the court noted, but did not resolve, a coercion challenge to a Spending Clause statute. Id. at 569. The plurality pointed to two apparently interlocking circumstances that raised a "substantial" question: that the federal government had withheld the entire grant, see id. at 569, and that the amount of the grant was very large ($60 million), see id. at 570 (contrasting with withholding a $1000 grant "insofar as their coercive potential is concerned"). Neither of those circumstances applies here. This suit, unlike Riley, is not seeking to withhold the funds, but to bring defendants into prospective compliance with the conditions it agreed to when it accepted the funds. In addition, defendants have submitted nothing to show that they would lose financial assistance

totalling anywhere near the $60 million at issue in Riley, a burden that they would bear if they were raising the affirmative defense of coercion. See U.S. Br. 22 n.6; see also North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977) (three-judge court) ("The actual loss to North Carolina should it lose all federal assistance health grants would be less than fifty million dollars; in 1974, its State revenues totaled some 3.1 billion dollars. The impact of such loss could hardly be described as 'catastrophic' or 'coercive.'"), aff'd mem., 435 U.S. 962 (1978).

In any event, these observations in the plurality opinion in Riley are in tension with, and thus must succumb to, the Supreme Court cases cited in our opening brief (U.S. Br. 21-26), including Califano and Board of Education v. Mergens, 496 U.S. 226 (1990), which countenanced statutory schemes that put public entities to tough choices about complying with certain conditions or giving up all federal funds. Defendants have thus not shown that Section 504, as well as its companion statutes prohibiting race and sex discrimination, are coercive in the constitutional sense.

CONCLUSION

For these reasons, and the reasons stated in our opening brief as intervenor, Section 2000d-7 should be upheld as a valid exercise of Congress' Spending Clause authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2000, two copies of the Reply Brief for the United States to Appellees' Supplemental Brief was served by first-class mail on the following counsel:

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