No. 02-1531

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAEL ANTHONY WILSON,

Plaintiff-Appellant

v.

PENNSYLVANIA STATE POLICE DEPARTMENT;
PAUL J. EVANKO, in his official capacity as Commissioner of the Pennsylvania State Police; and LINDA M. BONNEY, in her official capacity as Director of Bureau of Personnel, Pennsylvania State Police Department,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

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As we explained in our opening brief (U.S. Br. 8-11), Section 504 of the Rehabilitation Act imposes conditions on the receipt of federal financial assistance offered by the United States. Recipients generally, and state agencies particularly, that choose to take federal financial assistance accept as conditions that they not discriminate on the basis of disability in any of their operations and, consistent with the terms of 42 U.S.C. 2000d-7, that they waive their immunity to private suit in federal court for violations of the non-discrimination condition.

Defendants do not contest that Congress has clearly conditioned the receipt of federal financial assistance on their waiver of Eleventh Amendment immunity

to Section 504 claims. Instead, defendants contend they should not be held to the clear conditions to which they agreed when they accepted federal financial assistance because Sections 504 and 2000d-7 are not valid exercises of the Spending Clause. But as we noted (U.S. Br. 11-12), every court of appeals to address the question has sustained the constitutionality of Section 2000d-7 as a valid exercise of Congress's power under the Spending Clause.[1] Defendants' contrary arguments do not warrant a different conclusion, particularly in light of the strong presumption of constitutionality that attaches to federal statutes. See *Reno* v. *Condon*, 528 U.S. 141, 147 (2000); *Union Pac. R.R. Co.* v. *United States*, 99 U.S. (9 Otto) 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.").

1. *Relatedness*: Defendants assert (Def. Br. 26) that conditioning federal financial assistance on a recipient's agreement not to discriminate against otherwise qualified individuals with disabilities cannot be "related" to federal funds in the abstract. But as we explained in our opening brief (U.S. Br. 17-20), the Supreme Court has upheld similar non-discrimination conditions as valid

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[1] The Fifth Circuit in *Reickenbacker* v. *Foster*, 274 F.3d 974 (2001), held that Congress did not have the power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity to suits under Section 504, but reserved the question whether Congress conditioned the receipt of federal financial assistance on a recipient's waiver of its Eleventh Amendment immunity to Section 504 claims for a case in which the issue was properly raised. *Id*. at 984.

Spending Clause legislation in *Lau* v. *Nichols*, 414 U.S. 563 (1974), and *Grove City College* v. *Bell*, 465 U.S. 555 (1984). Defendants do not discuss, much less distinguish, these decisions. More fundamentally, they do not attempt to explain why the federal government should be forced to support and subsidize entities that want to retain the freedom to discriminate on the basis of disability. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("the Government enjoys the unrestricted power * * * to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases").

Defendants also contend (Def. Br. 26-27) that the non-discrimination and waiver conditions are not appropriate because Congress has not made a "particularized showing" that the States are discriminating or that this scheme of private enforcement will reduce the amount of discrimination. These objections are not aimed at the relatedness of the conditions to the federal interest, but to the need for legislation to deal with discrimination on the basis of disability. It is inappropriate, however, for a court to inquire into the need or desirability of legislation when assessing the constitutionality of Spending Clause statutes. "It is for Congress to decide which expenditures will promote the general welfare * * *. Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant; Congress has concluded that the means are 'necessary and proper' to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, § 8." *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976).

2. *Coercion*: Defendants also contend (Def. Br. 25-26, 27-28) that Section 504 is unconstitutionally coercive. But defendants have pointed to nothing that distinguishes this statute from the strong "encouragement" Congress is permitted to employ under the Spending Clause in order to achieve through "financial inducement" what it may not accomplish through unilateral action. See *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987).

Paraphrasing the vacated panel opinion in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745, 757-758 (8th Cir. 1999), vacated for reh'g en banc, 197 F.3d 958 (1999), defendants suggest (Def. Br. 27-28) that Section 504 applies to the entire state -- instead of just the agency that accepted the funds -- and that this makes the statute unconstitutionally coercive. But the plain language of the statute cannot support such a reading. Section 504(b) is clear that it is the operations of the "department, agency * * * or other instrumentality of a State" that are covered if "any part" of that department or agency "is extended Federal financial assistance." 29 U.S.C. 794(b); see also U.S. Br. 20 (citing legislative history). Indeed, when the Eighth Circuit took the *Bradley* case en banc, both the majority and the dissent acknowledged that the panel opinion had misread the statute. The entire court agreed that, by its terms, Section 504 only applies to those state agencies that accept federal funds and receipt of federal funds by an agency does not trigger statewide coverage. See *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); *id.* at 1085 (Bowman, J., dissenting); see also, *e.g.*, *Nelson* v. *Miller*, 170

F.3d 641, 653 n.8 (6th Cir. 1999); *O'Connor* v. *Davis*, 126 F.3d 112, 117 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *Lightbourn* v. *County of El Paso*, 118 F.3d 421, 426-427 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); *Schroeder* v. *City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991).

Defendants assert (Def. Br. 25-26) that even limited to the State Police Department, the statute is unconstitutionally coercive. But defendants have failed to distinguish these conditions from "the ordinary *quid pro quo* that the Supreme Court has repeatedly approved." *Jim C.*, 235 F.3d at 1081 (citing *Lau* v. *Nichols*, 414 U.S. 563, 566-567 (1974)). Other than noting that the Supreme Court cases relied upon by the United States in its brief do not involve Section 504, defendants do not explain how this statutory scheme differs from those in which the Supreme Court has sanctioned statutes that put a recipient to a similar choice. See U.S. Br. 23-24 (discussing *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962 (1978), and *Board of Education* v. *Mergens*, 496 U.S. 226 (1990)). Indeed, other than their bald assertion, defendants have not identified anything about Section 504 that overbears a sovereign State's ability to say "no" to the offer of federal funds for any agency it does not want to be subjected to the non-discrimination requirements of Section 504.

As the Fourth Circuit recently noted, there has been "no decision from any court finding a conditional grant to be impermissibly coercive." *West Virginia* v. *United States Dep't of Health & Hum. Servs.*, No. 01-1443, 2002 WL 864263, at

*6 (May 7, 2002). Defendants have provided no grounds for taking such an extraordinary step in this case.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court dismissing the Section 504 claim against all defendants should be reversed and the case remanded for further proceedings.[2]

Respectfully submitted,

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[2] In our opening brief, we argued (U.S. Br. 26-33) that individuals could, under the *Ex parte Young* doctrine, seek prospective injunctive relief against state officials in their official capacities to enforce Title I of the Americans with Disabilities Act. Contrary to our understanding, plaintiffs-appellants have not asked this Court to review the dismissal of their Title I claims. Thus, we concur with defendants (Def. Br. 40-41) that plaintiffs have abandoned that issue. We will therefore not explain why defendants' contentions on this point are incorrect.

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2002, two copies of the foregoing Reply Brief for the United States were served by first -class mail, postage prepaid, on the following counsel:

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