No. 00-1488

In the Supreme Court of the United States

ARKANSAS DEPARTMENT OF EDUCATION, PETITIONER

v.

JIM C., INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is subject to suit for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. V 1999), because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-12a) is reported at 235 F.3d 1079. The opinion of the panel of the court of appeals (Pet. App. 16a-38a) is reported at 189 F.3d 745. The opinion of the district court (Pet. App. 39a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2000. The petition for a writ of certiorari was filed on March 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504 of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a) (1994 & Supp. V 1999). Individuals have a private right of action for damages against entities receiving federal funds that violate this prohibition. See *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999); *Miener* v. *Missouri*, 673 F.2d 969, 973-974 (8th Cir.), cert. denied, 459 U.S. 909 (1982).

In 1984, this Court held that Section 504 as written required only the "program or activity" that actually received federal funds to comply with the statutory nondiscrimination mandate. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 636 (1984). In response to *Darrone* and *Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984), decided the same day, Congress engaged in extensive hearings and deliberations that culminated in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. That statute defined the term "program or activity" in Section 504 to mean, in relevant part,

> all of the operations of—
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

> any part of which is extended Federal financial assistance.

29 U.S.C. 794(b). Similar definitions were added to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-4a, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1687, which prohibit discrimination on the basis of race and sex, respectively, by programs or activities that receive federal financial assistance.

In 1985, this Court held that Section 504 was not clear enough to evidence Congress's 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. 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. Respondents Jim and Susan C. are parents of a child with autism enrolled in public school in Arkansas. Pet. App. 40a. Petitioner is a state education agency that accepts federal financial assistance. *Id.* at 28a n.6. Respondents filed a complaint alleging, *inter alia*, that the local school district and petitioner had violated

Section 504 and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*. Pet. App. 41a-42a. Petitioner moved to dismiss the claims on the ground that they were barred by the Eleventh Amendment or, in the alternative, to enter summary judgment on the merits. *Id*. at 42a. The district court denied the motion to dismiss, concluding that Congress has validly abrogated States' immunity to IDEA and Section 504 claims pursuant to Section 5 of the Fourteenth Amendment. *Id*. at 44a-45a. The court placed petitioner's summary judgment motion in abeyance in light of petitioner's announced intention to file an interlocutory appeal. *Id*. at 46a.

3. Petitioner took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation provisions. A panel of the court of appeals reversed with regard to Section 504. Pet. App. 16a-38a.[1] The panel held that Section 504 was not a valid exercise of Congress's power to enforce the Equal Protection Clause. *Id*. at 31a-35a. The panel then articulated three conditions that must be met for a Spending Clause statute validly to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity: "(1) the federal spending program must represent a valid exercise of Congress's spending power; (2) the statute creating the federal spending

[1] Relying on prior circuit precedent, the panel upheld the waiver requirement in IDEA as valid Spending Clause legislation, Pet. App. 27a-28a, in a portion of the decision not vacated for rehearing en banc, *id.* at 15a. Petitioner has not sought further review of that holding. Pet. 5 n.2.

program must contain a clear, unambiguous warning that Congress intends to exact waiver of Eleventh Amendment immunity as a condition for participating in the program; and (3) the state must have participated in the federal spending program." *Id.* at 36a.

The panel held that Section 504 "fails the first requirement because it is not a valid exercise of Congress's spending power." Pet. App. 36a. In the panel's view, Section 504 required the entire State to waive its immunity to Section 504 suits if it receives any federal funding. *Id.* at 37a. It found such a condition "amounts to impermissible coercion" because it "does not give Arkansas, or any other state, a meaningful choice." *Ibid.*

4. On the petition for rehearing by the United States and private respondents, the court granted rehearing en banc and vacated the opinion and judgment regarding Section 504 and the Spending Clause. Pet. App. 14a-15a. The en banc court affirmed the district court's judgment. *Id.* at 1a-12a.

The court held that, contrary to the panel's understanding, "the State itself as a whole" is not covered by Section 504 merely because some part of the State receives federal financial assistance. Pet. App. 3a, 6a. Instead, Section 504 is agency-specific and "acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole." *Id.* at 4a. Thus, "[a] State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others." *Ibid.* Based on that reading of Section 504, the court found that it was not unconstitutionally coercive. *Id.* at 5a-6a. While declining federal funds might be "politically painful" to petitioner, the court refused to find

that the offer of federal funds "compels Arkansas's choice" to accept the funds with the attendant non-discrimination and waiver condition. *Id.* at 5a.

Judge Bowman, writing for himself and three other judges, dissented. Pet. App. 7a-12a. He did not dispute the majority's holding that Section 504 is agency-specific. See, *e.g.*, *id.* at 10a (stating that "the condition imposed in this case * * * go[es] * * * to all federal funds received by the Arkansas Department of Education"). In his view, however, Section 504 was not valid Spending Clause legislation for two reasons. First, he believed that "the financial inducement offered by Congress * * * is coercive" because so much federal funding is at stake. *Id.* at 7a. Second, he argued that the condition placed on the federal funding was not sufficiently "related" to the purpose for which the funds were provided. *Id.* at 9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the case is apparently about to become moot, before this Court could dispose of the case if review were granted. Further review is therefore not warranted.

1. This case is about to become moot in the near future, long before this Court could rule on the question presented even if this Court provides for further review. Petitioner did not seek a stay of the mandate pending its petition for certiorari. See Fed. R. App. P. 41(d)(2). Therefore, the case returned to the jurisdiction of the district court, and, acting on petitioner's pending motion for summary judgment, the district court entered judgment for petitioner on the Section 504 claim the day after petitioner filed its petition for

certiorari. R. 94 (filed Mar. 23, 2001). On respondents' motion for reconsideration, R. 96 (filed Apr. 5, 2001), petitioner did not ask the district court to hold the case until this Court acted on its pending petition. Instead, it argued that the court had properly entered judgment in its favor and urged the court to deny the motion to reconsider. R. 97 & 98 (filed Apr. 9, 2001). The district court concurred and issued an amended opinion entering judgment for petitioner on April 27, 2001, which was entered on the docket on April 30, 2001 (R. 101, 102). The private respondents have stated that they "do not intend to file an appeal from the district court's decision." Br. in Opp. 4. Accordingly, this case has apparently been finally resolved on its merits and it will become moot on June 29, 2001, when respondents' time for appeal expires.[2] The mootness of the case will result from petitioner's actions.[3]

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[2] Because the United States intervened to defend the constitutionality of the abrogation, it is a "party" to the case and, thus, respondents have sixty days to file a notice of appeal from the entry of the amended opinion and order. See Fed. R. App. P. 4(a)(1)(B); *United Steelworkers of Am.* v. *Jones & Lamson Mach. Co.*, 854 F.2d 629, 630 (2d Cir. 1988); cf. *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1011-1012 (8th Cir. 1984).

[3] The long-standing position of the United States has been that, if a case becomes moot during the pendency of a petition for certiorari, vacatur of the lower court's decision is not appropriate if the case would not have warranted review on the merits. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900); U.S. Br. in Opp., *Enron Power Mktg., Inc.* v. *Northern States Power Co.*, 528 U.S. 1182 (2000) (No. 99-916). Although this Court has never expressly endorsed that standard, the Court has denied certiorari in a number of such cases (including *Velsicol* and *Enron*) consistently with that rule. The Court therefore "has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult

2. In any event, the court of appeals' ruling that petitioner was not immune under the Eleventh Amendment to private suits alleging violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. V 1999), is both correct and consistent with the decisions of this Court and every court of appeals that has addressed the question. This Court recently denied a petition for a writ of certiorari in *George Mason*

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question of mootness at the certiorari stage when a case is otherwise not worthy of review." See Robert Stern et al., *Supreme Court Practice* 724 & n.29 (7th ed. 1993). Because, for the reasons stated in the text, the decision below does not warrant further review, mootness should not cause this Court to vacate the judgment of the court of appeals.

Vacatur of the decision below would be inappropriate in any event, because the mootness of the case is in large part attributable to petitioner. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25-26 (1994). It is "petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate * * * equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. As we note in the text, petitioner did not seek a stay of the court of appeals' mandate and, even while its petition for certiorari was pending, supported the district court's entry of judgment on its behalf. In such circumstances, the public interest in preserving judicial precedents issued while a case-or-controversy existed, *ibid.*, and "the orderly operation of the federal judicial system," *id.* at 27, counsel against vacating an en banc appellate decision simply because petitioner was able to prevail in the district court on the merits while its petition regarding immunity was pending in this Court. Cf. *Mahoney* v. *Babbitt*, 113 F.3d 219, 221-222 (D.C. Cir. 1997) (declining to vacate expired appellate order because losing party was responsible for mootness by failing to seek stay from Supreme Court while order was in effect); *Arthur* v. *Manch*, 12 F.3d 377, 381 (2d Cir. 1993) (declining to vacate judgment that became moot during pendency of appeal because "the mootness of the appeal was a direct result of the Mayor's inaction [in failing to seek a stay or an expedited appeal] rather than of happenstance").

University v. *Litman*, 528 U.S. 1181 (2000) (No. 99-596), a case presenting virtually identical legal claims. See also *Kansas* v. *United States*, 121 S. Ct. 623 (2000) (No. 00-329) (denying petition for certiorari by State claiming that Spending Clause statute was unconstitutionally coercive). Accordingly, further review is unwarranted.

a. Petitioner does not argue that Congress did not clearly express its intention in 42 U.S.C. 2000d-7 to condition the receipt of federal funds on the recipient's waiver of its Eleventh Amendment immunity to Section 504 suits. See, *e.g*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996). Nor does the petition argue that Congress may never condition the receipt of federal funds on the recipient's waiver of Eleventh Amendment immunity. Any such argument would be foreclosed by this Court's consistent recognition of the principle that "[w]here 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). This Court has recognized that principle both when the condition attached to the funds is a waiver of Eleventh Amendment immunity[4] and when the condition affects other sovereign prerogatives of a State.[5] All of the courts of appeals to address the

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[4] See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678-679 n.2 (1999) (accepting that "a waiver [of Eleventh Amendment immunity] may be found in a State's acceptance of a federal grant"); *Petty* v. *Tennessee-Mo. Bridge Comm'n*, 359 U.S. 275 (1959) (accepting Congress's conditioning approval of bistate compact on consent to suit of bistate commission).

[5] See *New York* v. *United States*, 505 U.S. at 169, 173 (holding that a statute that conditioned funding upon the States' "regulat-

issue have similarly held that, so long as Congress has made its intentions clear, it has the power to condition the receipt of federal funds on a state recipient's waiver of Eleventh Amendment immunity with respect to the program or activity that receives the federal assistance.[6]

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ing pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause); *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (even 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 requirement that state officials who administer funds abstain from active political partisanship); see also *Printz* v. *United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (stating that although Congress cannot require state officials to enforce Brady Handgun Violence Protection Act under the Commerce Clause, it is "free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs").

[6] 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); *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (IDEA), cert. denied, 121 S. Ct. 70 (2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 121 S. Ct. 1511 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (IDEA); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); *Department of Educ.* v. *Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); *Scanlon* v. *Atascadero State Hosp.*, 735 F.2d 359, 361-362 (9th Cir. 1984) (Section 504), rev'd due to the absence of a clear statement, 473 U.S. 234 (1985); *Florida Nursing Home Ass'n* v. *Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence

b. Petitioner does contend (Pet. 7-11) that, even if Congress may condition the receipt of federal funds on a waiver of immunity for valid Spending Clause statutes, Congress exceeded its authority under the Spending Clause by requiring an entire state agency to comply with Section 504's prohibition on discrimination against persons with disabilities if the agency accepts any federal financial assistance.

This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress 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 consequences 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 induce a governmental recipient to violate any independent constitutional provisions. *Id.* at 209-211.

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of a clear statement *sub nom. Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); see also *Premo* v. *Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

Petitioner does not contest that Section 504 is in the general welfare, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval), or that the conditions on federal funds are sufficiently clear, see *School Bd.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (describing Section 504 as an "antidiscrimination mandate"). See Pet. 7 ("Of the several limitations sketched in [*Dole*], two are particularly relevant here."). Likewise, petitioner does not submit that Section 504 requires it to engage in unconstitutional conduct. Instead, petitioner first contends (Pet. 7-8) that the condition embodied in Section 504—that if an agency accepts federal financial assistance, it must not discriminate on the basis of disability—is not sufficiently "related" to at least some of the federal financial assistance it receives.

The "relatedness" issue petitioner seeks to raise is not squarely posed by this case. The complaint in this case alleges that petitioner has discriminated against a child with a disability. Yet petitioner has also conceded (see Pet. App. 28a n.6) that it receives federal financial assistance under the IDEA, 20 U.S.C. 1400 *et seq.*, a statute enacted to provide States with federal funds to educate children with disabilities. See 20 U.S.C. 1411(f) (Supp. V 1999) (States may retain a percentage of the federal grant money to pay for costs of state administration and to fund a variety of state-level activities). Thus, petitioner accepts federal funds intended to assist in the education of children with disabilities, the precise subject matter of respondents' complaint. Accordingly, petitioner's "relatedness" claim is not presented by the facts of this case. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (declining to address facial validity of Spending Clause provision when it was clear that it was valid as applied); Pet. 5 n.2 (not challenging court of

appeals' judgment upholding constitutionality of waiver of Eleventh Amendment immunity for claims arising under IDEA).

In any event, there can be no doubt that Congress, under the Spending Clause, can require an agency that elects to receive federal financial assistance to promise not to discriminate on the basis of disability in any of its operations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 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." 414 U.S. at 569 (citations omitted).[7] The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by recipients of federal financial assistance, 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." 465 U.S. at 575.

Petitioners urge (Pet. 9 n.3) that the condition embodied in Section 504's non-discrimination requirement is not "related" because not all the funds are intended "to assist[] or prevent[] discrimination against the

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[7] In *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1519 (2001), this Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not cast doubt on the Spending Clause holding in *Lau*.

handicapped." But the Constitution does not require that Congress provide funds to combat discrimination or help minorities if it wishes to attach a non-discrimination requirement to its funds. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid that had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13. Instead, those cases make clear that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. See *United States* v. *Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of the main purposes for which public education funds are expended: equal education opportunities to all citizens." (footnote omitted)).[8]

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[8] Petitioner's suggestion that conditions cannot be "related" to the purpose of the federal spending unless they involve the subject-matter of a particular grant also conflicts with cases outside the civil rights area upholding as valid exercises of the Spending Clause conditions not tied to a particular spending program. See *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. at 129 n.1 (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

By imposing the nondiscrimination condition on all of the operations of the state agency that receives any federal funds, Congress elected to rely on the State's own governmental framework in determining the proper breadth of coverage. State law establishes the allocation of operations and functions among departments of the state government. Congress reasonably could have presumed that States normally place related operations with overlapping goals, constituencies, and resources in the same department. In most States, agencies are run by an elected person (such as the Attorney General or Secretary of State) or a political appointee. That person is normally charged by state law with the initial decision whether his agency will accept federal funds for various programs or activities.[9] Thus, either the state legislature or a politically responsible official charged with the overall authority for the management and budgeting of a set of programs or activities, put together by the State itself because of their related attributes, determines whether to accept federal funds. That level of coverage—broader than simply the discrete program that nominally receives the funds, but narrower than the entire state govern-

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in part by the United States could take "any active part in political management"); *Salinas*, 522 U.S. at 60-61 (upholding application of federal bribery statute covering entities receiving more than $10,000 in federal funds).

[9] In Arkansas, before a state agency may apply for federal funds, it must submit a report to the Department of Finance and Administration evaluating the costs of participating in the federal program. See Ark. Code Ann. § 19-4-1903 (Michie 1999). The Director of the Department of Finance and Administration submits this information to the General Assembly, see *id.* § 19-4-1907, and the General Assembly's inaction constitutes authorization to participate, see *id.* § 19-4-1908(b).

ment—is an appropriate means of assuring that no federal money supports or facilitates programs that are not accessible to people with disabilities. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991) (Congress may constitutionally require that a private entity that receives federal funds not engage in conduct Congress does not wish to subsidize so long as recipient may restructure its operations to separate its federally-supported activities from other activities).

Petitioner also suggests (Pet. 8-10) that Section 504 is unconstitutionally coercive. This Court pointed out in *Dole* that its "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. 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"); cf. Restatement (Third) of Foreign Relations Law § 331 cmt. d (1987) ("economic or political pressure" can never constitute "coercion" sufficient to invalidate agreements between sovereigns). Every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* In *Dole* the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Petitioner has 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. Petitioner notes (Pet. 10) that it will have to elect not to seek federal funds for an entire agency if it wishes the agency to be free of Section 504's obligation not to discriminate and attendant waiver of immunity. That is similar not only to Title VI and Title IX, statutory schemes whose legality was recognized in *Lau* and *Grove City*, but also the Equal Access Act, 20 U.S.C. 4071 *et seq.*, a statute that prohibits any public secondary school that receives any federal financial assistance and maintains a "limited open forum" from denying "equal access" to students based on the content of their speech. 20 U.S.C. 4071(a). In interpreting the scope of the Equal Access Act in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), this Court rejected the school district's argument that the Act as interpreted unduly hindered local control, noting 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 (citation omitted). Similarly, compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it

elects to remain federally funded. See also *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962 (1978). In addition, the State's ability to define the boundaries and functions of its state agencies also minimizes the threat of coercion.

Petitioner also claims (Pet. 10) that the amount of money involved makes the statutory scheme unduly coercive. We accept petitioner's assertion (Pet. 9 n.3), unsupported by anything in the record, that, like most government entities, it receives grants from a vast array of federal programs established by Congress. Given the amount it claims to receive from the federal government, petitioner has apparently been successful in obtaining these grants, presumably in varying amounts. It does not follow, however, that because petitioner has elected to apply for and accept a number of grants that the federal government's authority to impose conditions on each grant it offers is somehow diminished. If the federal government is justified in imposing conditions on modest expenditures of federal resources, it should not be less justified in imposing those conditions when the amount of federal money increases. As the First Circuit has explained, "[w]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game." *New Hampshire Dep't of Employment Sec.* v. *Marshall*, 616 F.2d 240, 246 (1st Cir.), appeal dismissed and cert. denied, 449 U.S. 806 (1980).

Thus, the choice imposed by Section 504 is not impermissibly "coercive" in the constitutional sense.

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 funding, 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*, 465 U.S. at 575; *Kansas* v. *United States*, 214 F.3d 1196, 1203-1204 (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. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)), cert. denied, 121 S. Ct. 623 (2000).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden* v. *Maine*, 527 U.S. 706, 750 (1999), it is perfectly appropriate to permit each State to make its own cost-benefit analysis for each state agency it has established and determine whether to accept the federal money with the condition that that agency can be sued in federal court, or forgo the federal funds. See *New York* v. *United States*, 505 U.S. at 168. But once that choice is made, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).[10]

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[10] Although petitioner cites (Pet. 13-14) the Fourth Circuit's decision in *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (1997) (en banc), petitioner wisely does not contend that there

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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is a conflict in the circuits. In *Riley*, a majority of the court held as a matter of statutory interpretation that the IDEA did not limit the State's discretion in deciding whether to educate certain children with disabilities who had been expelled from school. *Id.* at 561. In making that determination, a plurality of the court stated that reaching this result permitted it to avoid what the plurality perceived as a "substantial constitutional question" regarding the validity of IDEA under the Spending Clause. *Id.* at 561, 569-570. Even that tentative view did not garner the support of a majority of the court.