IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

A.W.,

Plaintiff-Appellee

v.

JERSEY CITY PUBLIC SCHOOLS,

Defendant-Appellee

NEW JERSEY DEPARTMENT OF EDUCATION; JEFFREY OSOWSKI, former Director, Division of Special Education; BARBARA GANTWERK, Director, Office of Special Education Programs; MELINDA ZANGRILLO, Coordinator of Compliance,

Defendants-Appellants

SYLVIA ELIAS, former Executive Director of Pupil Personnel Services; PRISCILLA HERNANDEZ PETROSKY, Associate Superintendent for Special Education; JOHN IWANOSKI; MARY HEPBURN; JOAN EDMISTON; DENISE BRAAK; MARY MACEACHERN; EDWARD FAUERBACH, Learning Disabilities Teacher-Consultants; NORMA CHRISOMALIS; LINDA COLON; RONNE BASSMAN; WILLIAM RONZITTI; ROXANNE JOHNSON, Supervisors of Special Education; SHANETTE GREEN, Teacher; GWENDOLYN JACKSON,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS INTERVENOR

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES:

STATUTES (continued): **PAGE**

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

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STATEMENT OF SUBJECT MATTER JURISDICTION

For the reasons discussed in this brief, the district court has jurisdiction over the action pursuant to 28 U.S.C. 1331.

STATEMENT OF APPELLATE JURISDICTION

The defendants filed a motion to dismiss the underlying action on the grounds that, *inter alia*, they enjoy Eleventh Amendment immunity to some of the plaintiff's claims (see A7[1]). The district court entered an order denying the defendants' motion to dismiss on March 18, 2002 (A4-A29). The defendant filed a timely notice of appeal on April 17, 2002 (A1-A2). This Court has jurisdiction pursuant to 28 U.S.C. 1291 over the defendants' appeal from the district court's ruling that they do not enjoy Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993). The United States takes no position on whether this Court has appellate jurisdiction under Section 1291 over the defendants' arguments not involving Eleventh Amendment immunity.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether conditioning the receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for suits under Section 504 of

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[1] References to "A__" are to pages in the Defendants-Appellants' Appendix; references to "Def. Br. __" are to pages in the Defendants-Appellants' opening brief.

the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

2. Whether conditioning the receipt of federal grants under the Individuals with Disabilities Education Act on a State's waiver of Eleventh Amendment immunity to suits under that Act is a valid exercise of Congress's authority under the Spending Clause.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

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

the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is, those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002). Congress expressly conditioned receipt of federal funds on a waiver of the States' Eleventh Amendment immunity to private suits in federal court. See 42 U.S.C. 2000d-7; *Koslow* v. *Pennsylvania*, 302 F.3d 161 (3d Cir. 2002).

2. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides billions of dollars to States to educate children with disabilities. The IDEA was a congressional response to the wholesale exclusion of children with disabilities from public education. See 20 U.S.C. 1400(c)(2)(C).[2] Congress's two-fold goal in enacting the IDEA was to

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[2] The statute is currently known as the IDEA pursuant to the change in title effectuated by Section 901(a)(1) of the Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), (3), 104 Stat. 1103, 1141-1142 (1990). Before 1990, the statute was entitled the Education of the

(continued...)

ensure both that children with disabilities receive a free appropriate public education, and that such an education takes place, whenever possible, in the regular classroom setting. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 192, 202-203 (1982).

In order to qualify for IDEA financial assistance, a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a), (a)(1)(A). To assure that each child receives such an appropriate education, Congress also conditioned the receipt of federal funds on detailed procedural requirements. See *Rowley*, 458 U.S. at 182-183, 205-206; 20 U.S.C. 1415. Congress specifically authorized private plaintiffs to enforce these rights in federal court. *Id.* at 204-205; 20 U.S.C. 1415(i)(2), (i)(3).[3] The IDEA requires a court "not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but

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[2](...continued)
Handicapped Act (Pub. L. No. 91-230, 84 Stat. 175 (1970)), and was often referred to as the Education for All Handicapped Children Act, the name of the statute that amended the existing statute in significant respects, see Pub. L. No. 94-142, 89 Stat. 773 (1975).

[3] While the statute generally requires exhaustion of specified state administrative remedies before bringing suit, see 20 U.S.C. 1415(f)-(g), (i)(1), courts have held that the exhaustion requirements may be waived in a variety of circumstances. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 305, 327 (1988); *Beth V.* v. *Carroll*, 87 F.3d 80, 88-89 (3d Cir. 1996); *W.B.* v. *Matula*, 67 F.3d 484, 495-496 (3d Cir. 1995); *Komninos* v. *Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-779 (3d Cir. 1994); *Lester H.* v. *Gilhool*, 916 F.2d 865, 869-870 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991).

also to determine that the State has" in fact complied "with the requirements of" the IDEA. *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 890 n.6 (1984) (internal quotation marks omitted); see also *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) (The IDEA "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." (citation omitted)).[4]

3. As alleged in the complaint, the plaintiff, A.W., is a student with a disability who is eligible for the services and protections of Section 504 and the IDEA (A56 at ¶ 4). A.W. has been enrolled in the Jersey City School District since 1988 (A61 at ¶ 36). He is currently a 21 year-old ninth grade student with severe dyslexia (A60 at ¶ 26; A62 at ¶ 37). A.W. alleges, *inter alia*, that the defendants – the Jersey City Public Schools, the New Jersey Department of Education, and various state and local officials – failed to provide to A.W. the free appropriate education to which he is entitled under the IDEA and otherwise discriminated

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[4] The State, in turn, may pass on the federal assistance to local school districts that agree to comply with the requirements of the IDEA. See 20 U.S.C. 1413(a). However, the local school district's special education program is "under the general supervision" of the state education agency, which is "responsible for ensuring that * * * the requirements of [the IDEA] are met," and must "provide special education and related services directly to children with disabilities" if a local school district "is unable to establish and maintain programs of free appropriate public education that meet the requirements of" the IDEA. *Id*. at 1412(a)(11)(A)(ii)(I), (a)(11)(A)(i), 1413(h)(1)(B); see also *id*. at 1413(d)(1) (State may not make payments of IDEA funds to local school districts that violate the IDEA).

against him in violation of Section 504 (A54-A75). He seeks a declaration that the defendants have violated his rights, as well as damages and attorneys' fees (A74-A75).

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff both under Section 504 of the Rehabilitation Act, to remedy discrimination against persons with disabilities, and under the Individuals with Disabilities Education Act (IDEA), to remedy alleged violations of the Act. Congress validly conditioned receipt of federal financial assistance on waiver of States' immunity to private suits brought to enforce Section 504 and the IDEA. By enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. By accepting the funds, a state agency agreed to the terms. Similarly, by enacting 20 U.S.C. 1403, Congress put States on clear notice that acceptance of federal IDEA funds was conditioned on a waiver of their Eleventh Amendment immunity to suits under the IDEA. By accepting the IDEA funds, a State agreed to the terms of the statute. The defendants' contention that they thought Section 1403 was intended to be a unilateral action by Congress is contrary to the text and structure of the statute and irrelevant to the effectiveness of their waiver of immunity upon acceptance of the federal IDEA funds.

Moreover, Section 504 itself is a valid exercise of the Spending Clause because it furthers the federal government's interest in assuring that federal funds, provided by all taxpayers, do not support recipients that discriminate. The IDEA is also a valid exercise of Congress's authority under the Spending Clause because it furthers the federal government's interest in seeing that all children with disabilities receive a free appropriate education. Nor is either statute unconstitutionally coercive. The State made voluntary choices to accept particular federal funds in particular amounts and to distribute those funds to particular state agencies.

ARGUMENT

CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER BOTH SECTION 504 AND THE IDEA

The Eleventh Amendment bars suits by private parties against a State, absent a valid abrogation by Congress or waiver by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). The state defendants argue that the plaintiff's claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794(a), and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, are barred by the Eleventh Amendment. In fact, the State has waived its Eleventh Amendment immunity to suits under both Section 504 and the IDEA.

Section 504 prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a

violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964." Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance. States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). And "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." *Id.* at 686. Thus, Congress may, and has, conditioned the receipt of federal financial assistance on the defendants' waiver of Eleventh Amendment immunity to Section 504 claims.

The IDEA is a federal grant program that offers supplemental education funds to a State conditioned on that State's agreement to provide the substantive and procedural protections necessary to assure children with disabilities a free appropriate public education and authorizes private suits for "appropriate" relief. See 20 U.S.C. 1415(i)(2)(A), (i)(2)(B)(iii). Section 1403 of Title 20 provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the IDEA. Section 1403 may be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal IDEA assistance. As with Section 504, therefore, because States are

free to waive their Eleventh Amendment immunity, Congress may, and has, conditioned the receipt of IDEA funds on defendants' waiver of Eleventh Amendment immunity to claims under the IDEA.

A. *This Court Has Held That Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Constitutes A Waiver To Private Suits Brought Under Section 504*

Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to condition receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. 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 makes unambiguously clear that Congress intended to condition federal funding on States' waiver of Eleventh Amendment immunity to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance).[5] Any state agency reading the U.S.

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[5] Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title

(continued...)

Code would have known that after the effective date of Section 2000d-7 it would waive its immunity to suit in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.[6]

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[5](...continued)
IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "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 *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.").

[6] 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. 1420 (Oct. 21, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

Thus, the Supreme Court, in *Lane* v. *Peña*, 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. The text and structure of the statutes make clear that federal financial assistance is conditioned on both the nondiscrimination obligation and waiver of Eleventh Amendment immunity.

Indeed, this Court recently held that 42 U.S.C. 2000d-7 constitutes a clear waiver of States' Eleventh Amendment immunity when they accept federal financial assistance. In *Koslow* v. *Pennsylvania*, 302 F.3d 161, 170-172 (3d Cir. 2002), this Court explicitly found:

> Section 2000d-7 of the Rehabilitation Act, as amended, represents a "clear intention," as mandated by *Atascadero State Hospital*. Enacting the amendment to § 2000d-7, Congress put states on notice that by accepting federal funds under the Rehabilitation Act, they would waive their Eleventh Amendment immunity to Rehabilitation Act claims.

302 F.3d at 170 (footnote omitted). The Court further concluded that, "if a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency." *Id.* at 171. The Court acknowledged that "[m]ere participation in a federal program is not sufficient to waive immunity," and held that, "where a state participates in a federal financial assistance program 'in light of the existing state of the law,' the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity." *Id.* at 172. Seven other

courts of appeals agree that the language in Section 2000d-7 clearly manifests an intent to condition receipt of federal financial assistance on consent to waive Eleventh Amendment immunity. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001) (Section 504), cert. denied, 122 S. Ct. 2591 (2002); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 533 U.S. 949 (2001); *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), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998).

The defendants urge this Court to adopt the Second Circuit's reasoning in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98, 113 (2001), which held that, although Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity," the waiver was not effective because the state agency did not "know" in 1995 (the latest point the alleged discrimination had occurred) that the abrogation in Title II of the ADA was not effective and thus would have thought (wrongly, in the view of the Second Circuit) that Title II's abrogation for

Title II claims made the waiver for Section 504 redundant. *Id*. at 114. This Court explicitly and correctly rejected the reasoning of *Garcia* in *Koslow*, noting that:

> [T]he ADA was not enacted to alter existing causes of action. *See* 42 U.S.C. § 12201(b) (retaining existing causes of action). Therefore, the "clear intent to condition participation in the programs funded," required by *Atascadero*, ensured the [state defendant] knew that by accepting certain funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities.

Koslow, 302 F.3d at 172 n.12 (internal citation omitted). This Court should adhere to the *Koslow* panel's rejection of *Garcia*. First, defendants in this case never raised this argument in the district court, and thus may not raise it on appeal. Moreover, as the *Koslow* panel found, the reasoning of *Garcia* is incorrect. It is wrong because it ignores what every state agency did know from the plain text of Section 2000d-7 since it was enacted in 1986 – that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. *Garcia*'s holding – that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's – also fails to recognize that state agencies knew that plaintiffs could continue to bring independent claims under each statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). The statute was not amended or altered by the enactment of Title II in 1990. Thus, the clear statement in the text of the statute about the Eleventh Amendment and non-discrimination statutes tied to federal financial assistance, assured that defendants knew as a matter of law that they were waiving their immunity when they applied for and took federal financial assistance.

B. *Section 1403 Is A Clear Statement That Accepting IDEA Funds Constitutes A Waiver Of Immunity From Private Suits Brought Under The IDEA*

Section 1403 was enacted in 1990 in response to the Supreme Court's holding in *Dellmuth* v. *Muth*, 491 U.S. 223 (1989). *Dellmuth*, in turn, relied on the Court's previous opinion in *Atascadero*. Section 1403 was crafted in light of the rule articulated in *Dellmuth* and *Atascadero*. See 135 Cong. Rec. 16,916-16,917 (1989); H.R. Rep. No. 544, 101st Cong., 2d Sess. 12 (1990).

Section 1403 uses language that is virtually identical to the language of Section 2000d-7. Just as this Court in *Koslow* found that Section 2000d-7 constitutes a clear and unambiguous statement that States waive their immunity when they accept federal financial assistance, so should this Court hold that the language in Section 1403 unambiguously expresses Congress's intent that the acceptance of funds under the IDEA by States constitutes a waiver of their Eleventh Amendment immunity to IDEA suits. As is true with Section 2000d-7, any state agency reading the U.S. Code would have known that after the effective date of Section 1403 it would waive its immunity to suit in federal court for violations of the IDEA if it accepted federal IDEA funds. Section 1403 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving IDEA funds was the requirement that they consent to suit in federal court for alleged violations of the IDEA.

The defendants make much of the fact that Section 1403 is entitled "Abrogation of state sovereign immunity" (Def. Br. 24). Whether called abrogation or waiver, however, the text and structure of the statute make clear that only the voluntary acceptance of federal IDEA funds will result in a loss of immunity. It is well-settled that section titles cannot limit the plain import of the text. See *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947) ("But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. * * * Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text."); *Sandoval* v. *Reno*, 166 F.3d 225, 235 (3d Cir. 1999) ("the Supreme Court has repeatedly noted [that] a title alone is not controlling"). In any event, the Supreme Court has sometimes used the terms "abrogation" and "waiver" loosely and interchangeably. See *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) ("The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."); *Supreme Ct. of Va.* v. *Consumers Union, Inc.*, 446 U.S. 719, 738 (1980) ("We held * * * that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was

based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity.").

The two courts of appeals to address the validity of Section 1403 have reached the same conclusion: the text and structure of the IDEA make clear that federal IDEA funds are conditioned on both the substantive and procedural obligations of the statute and the waiver of Eleventh Amendment immunity. See *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) ("Having enacted legislation under its spending power, Congress did not need to rely on § 5. States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant. One string attached to money under the IDEA is submitting to suit in federal court." (citations omitted)), cert. denied, 531 U.S. 824 (2000); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 753 (8th Cir. 1999) ("When it enacted [20 U.S.C.] §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA"). This Court should reach the same conclusion.

C. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On A State Waiving Its Eleventh Amendment Immunity*

Congress may condition its spending on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666 (1999), 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 (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 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 n.2. The Court explained that, unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's 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.

In *MCI Telecommunication Corp.* v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3d Cir. 2001), cert. denied, 2002 WL 554458 (Oct. 7, 2002), this Court relied on *College Savings Bank*'s discussion of *Petty* and the Spending Clause to reach

this exact conclusion. "[B]oth the grant of consent to form an interstate compact and the disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a state is not otherwise entitled to receive, and to which Congress can attach whatever conditions it chooses," including a waiver of Eleventh Amendment immunity. *Id*. at 505. This Court extended the doctrine to certain exercises of the Commerce Power as well and held that in that case "the authority to regulate local telecommunications is a gratuity to which Congress may attach conditions, including a waiver of immunity to suit in federal court. Thus, the submission to suit in federal court * * * is valid as a waiver, conditioned on the acceptance of a gratuity or gift, as permitted by *College Savings*." *Id*. at 509; see also *Delaware Dep't of Health & Social Servs.* v. *Department of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity). Moreover, this Court reached the same conclusion with respect to Section 504 in *Koslow*. 302 F.3d at 173-174.

D. *Section 504 And The IDEA Are Valid Exercises Of Congress's Power Under The Spending Clause*

1. The Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four limitations on Congress's ability to enact legislation pursuant to its Spending power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. 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. Both Section 504 and the IDEA fall well within these limitations.

In their motion to dismiss in the district court, the defendants did not argue that Section 504 and the IDEA fail to satisfy all four of the *Dole* criteria. Although they challenged both statutes on relatedness grounds in their district court reply brief, the district court did not address whether Section 504 and the IDEA are valid Spending Clause statutes. The defendants reasserted their relatedness challenge on appeal, but have *not* alleged that Section 504 and the IDEA fail to satisfy the other requirements of *Dole*. Thus, as this case comes before this Court, there is no dispute that (1) 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); *Dole*, 483 U.S. at 207 n.2 (noting substantial judicial deference to Congress on this issue), and providing educational services to children with disabilities, *Board of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982) (discussing the predecessor to the IDEA with approval); (2) the language of Section 504 and of the IDEA makes clear that the obligations it

imposes are conditions on the receipt of federal financial assistance, see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst*); 28 C.F.R. 42.504(a) (Department of Justice regulation requiring 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"); *Honig* v. *Doe*, 484 U.S. 305, 310 (1988) (finding that the predecessor to the IDEA "conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act"); and (3) providing meaningful access to people with disabilities, providing educational services to children with disabilities, and waiving sovereign immunity do not violate anyone's constitutional rights.

Section 504 and the IDEA meet the *Dole* "relatedness" 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. And the IDEA furthers the federal interest in assuring that all children with disabilities receive a free appropriate education. The requirement in each statute that a state funding recipient waive its Eleventh Amendment immunity as a condition of accepting federal financial assistance is also related to these important federal interests. The United States and relies on private litigants to assist in enforcing federal programs, and in particular in enforcing federal nondiscrimination mandates. The requirement that state funding recipients waive their sovereign immunity to suits

under Section 504 as a condition of accepting federal financial assistance and to suits under the IDEA as a condition of accepting IDEA funds both (1) provides a viable enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept federal funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipient's failure to follow the law.

This Court held in *Koslow* that Section 504 satisfies the relatedness prong of *Dole*. Rejecting the defendant's argument that "an Eleventh Amendment waiver must be specifically 'tailored' to a particular federal interest," the Court held that the federal government has an "undeniably significant" interest "in eliminating disability-based discrimination in state departments or agencies," and that the "waiver of the [state defendant's] immunity from Rehabilitation Act claims * * * furthers that interest directly." *Koslow*, 302 F.3d at 175-176. The Court further found that the federal government's interest in not promoting discrimination against persons with disabilities "flows with every dollar spent by a department or agency receiving federal funds." *Ibid.* The *Koslow* Court was correct in reaching its conclusion that "the conditions imposed on the [state defendant] for accepting [federal financial assistance] do not abridge the Spending Clause," *id.* at 176, and this panel is bound by that decision. For the same reasons, the IDEA satisfies *Dole*'s relatedness requirement. The federal government's interest in seeing that all children with disabilities receive a meaningful education is directly related to

the money the federal government gives to States expressly for the purpose of providing such education.

Finally, the State's contention (Def. Br. 19-21) that Congress must make a finding of relatedness in "the text of the statute itself" in order to enact valid Spending Clause legislation is wholly unsupported by any precedent. Although the defendants repeatedly cite to *Dole* to support this assertion, nothing in the binding majority opinion in *Dole* even suggests such a requirement. Moreover, this Court found in *Koslow* that "one need only identify a discernible relationship imposed by a [funding statute's] condition on a 'department or agency' and a federal interest in a program it funds." 302 F.3d at 175. There is no question that such a discernible relationship can be found in both Section 504 and the IDEA.

2. The defendants also argue (Def. Br. 18) that the conditions in Section 504 and the IDEA are impermissibly coercive. While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "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)), it saw no reason generally to inquire into whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* 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. *Ibid*. (quoting *Steward Mach*., 301 U.S. at 590). Accordingly, the Ninth Circuit has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997).

In *Koslow*, this Court rejected the Commonwealth's "unconstitutional conditions" argument which, this Court held, "is based on the proposition that government incentives may be inherently coercive." *Id*. at 174.[7] The use of incentives under Section 504, however, did not amount to unconstitutional coercion. The choice between immunity and "declining all federal funds to the Department of Corrections," this Court acknowledged, "would doubtless result in some fiscal hardship – and possibly political consequences." *Ibid*. But the inducement did not cross the line into unconstitutional coercion. "The Commonwealth remains free to make the choice: it may decline federal aid to the Department of Corrections, but having accepted the federal funds, it is bound by the conditions of the Rehabilitation Act." *Ibid*.

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[7] It is irrelevant that the Commonwealth characterized the choice between immunity and federal funds as an "unconstitutional condition" in *Koslow* and as unconstitutional "coercion" in this case. This Court considered and rejected the argument under either label in *Koslow*. See 302 F.3d at 172 n.11 ("The District Court and the dissenting judge in *Jim C.* also focused on the possible 'coercion' engendered by the federal funding of particular state programs or activities. Those arguments are considered in the subsequent section on 'unconstitutional conditions.'").

The defendants can point to no legally relevant difference between the choice the state defendant made in *Koslow* in accepting federal funds for its Department of Corrections and the choice the defendant made in this case in accepting federal funds for its public schools. This Court's opinion in *Koslow* indicated that the same reasons that led it to reject the state defendant's "unconstitutional conditions" argument in that case also require rejection of the coercion defense identified by the district court in that case and by the dissent in *Jim C.*. See 302 F.3d at 172 n.11. The same reasons should lead this Court to reject the same argument, based on the same authorities, in this case.

Any argument that Section 504 and the IDEA are coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to difficult or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id.* at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option*

to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id*. at 535-536 (footnote omitted) (emphasis added). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[8]

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations

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[8] 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).

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).[9]

These cases demonstrate that the federal government can place conditions on federal funding that require States to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. Cf. *Jim C.*, 235 F.3d at 1081-1082.

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state

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

officials, is free to decide whether it will accept the federal funds and the IDEA funds with the waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1203 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000).

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 waive its immunity to suit in federal court, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendants have accepted federal financial assistance, "[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). For all these reasons, Section 504, Section 2000d-7, and the IDEA should be upheld under the Spending Clause.[10]

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[10] The United States believes that Section 504 and the IDEA can also be upheld as valid legislation under Section 5 of the Fourteenth Amendment. Because

(continued...)

CONCLUSION

The order of the district court denying defendants' motion to dismiss the Section 504 and IDEA claims on the grounds of Eleventh Amendment immunity should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is also being challenged in *Wilson* v. *Pennsylvania State Police Department*, No. 02-1531, and *Bowers* v. *NCAA*, Nos. 01-4226, 01-4492, 02-1789, 02-3236. The constitutionality of the abrogation in the IDEA is also being challenged in *M.A.* v. *Newark Public Schools*, No. 02-1799.

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[10](...continued)
both statutes are clearly valid legislation under the Spending Clause, however, the United States believes that there is no need for this Court to address this issue.

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 7,405 words.

October 24, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2002, two copies of the foregoing Brief for the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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