No. 98-1830

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JIM AND SUSAN C.,
individually and as parents and next friends of J.C.,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor on Appeal

v.

ATKINS SCHOOL DISTRICT;
ARCH FORD EDUCATION SERVICE COOPERATIVE,

Defendants

ARKANSAS DEPARTMENT OF EDUCATION,

Defendant-Appellant

ON APPEAL FROM THEUNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC BY THE UNITED STATES AS INTERVENOR

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RULE 35(A) STATEMENT

The panel opinion resolved a question of exceptional importance:

Whether 29 U.S.C. 794 (originally enacted as Section 504 of the Rehabilitation Act of 1973), which prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any "qualified individual with a disability," is unconstitutionally coercive as applied to States and thus an invalid exercise of Congress' power to place conditions on state agencies' receipt of federal funds under the Spending Clause, Art. I, § 8, Cl. 1.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision conflicts with the decisions of the United States Supreme Court 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), FERC v. Mississippi, 456 U.S. 742 (1982), and Board of Education v. Mergens, 496 U.S. 226 (1990), and the decisions of this Court in Klinger v. Department of Corrections, 107 F.3d 609 (1997), and United States ex rel. Zissler v. Regents of the University of Minnesota, 154 F.3d 870 (1998), and that consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

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SETH M. GALANTER

ATTORNEY OF RECORD FOR
THE UNITED STATES

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiffs are the parents of a child with autism. They alleged that defendant Arkansas Department of Education failed to comply with its obligations under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Defendant sought to dismiss on Eleventh Amendment grounds. The district court denied the motion to dismiss, holding that both IDEA and Section 504 were enactments to enforce the Equal Protection Clause, and thus the clear provisions removing Eleventh Amendment immunity, 20 U.S.C. 1403 and 42 U.S.C. 2000d-7, were valid.

On defendant's appeal, the United States intervened pursuant to 28 U.S.C. 2403(a) and filed a brief arguing that the statutes contained valid abrogations of Eleventh Amendment immunity enacted pursuant to Section 5 of the Fourteenth Amendment and, in the alternative, that defendant had waived its immunity to suits under both statutes by continuing to accept federal funds after the effective dates of the abrogations.[1]

In its opening brief, defendant argued (Br. 9-15, 16) that IDEA and Section 504 were not valid Section 5 legislation. In addition, it argued (Br. 16-18) that Section 504 did not apply to education. In its reply brief, it stated (Reply Br. 1) that it "st[oo]d on their [sic] main brief" on the Section 504 issue. As to IDEA, it reiterated its argument (Reply Br. 3-8) that IDEA was not valid Section 5 legislation, and argued (Reply Br. 9-11) that the abrogation in IDEA could not be upheld as a waiver because (Reply Br. 9) "IDEA does not clearly condition the receipt of federal funds upon such a waiver." At no point did it suggest that Section 504 was unconstitutionally

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[1/] On appeal, the case was consolidated for purposes of submission with Bradley v. Arkansas Department of Education, No. 98-1010, which involved only the constitutionality of the removal of Eleventh Amendment immunity for IDEA claims. The United States does not seek rehearing in Bradley.

coercive and thus beyond Congress' Spending Power.

While the appeal was pending, this Court issued its en banc ruling in Alsbrook v. City of Maumelle, 184 F.3d 999 (1999), petition for cert. pending, No. 99-423, which held that Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq., was not valid Section 5 legislation. Following Alsbrook, the panel in this case held that neither IDEA nor Section 504 could be upheld as valid Section 5 legislation. Slip op. 9-11, 16-19.[2] But it held that the Eleventh Amendment was no bar to the IDEA suit because the Department had waived its Eleventh Amendment immunity when it accepted federal IDEA funds. Id. at 13.

However, the panel found that the Department had not waived its immunity to Section 504 suits. It articulated a three-part test for waiver: (1) the federal spending program must represent a valid exercise of Congress' spending power; (2) there must be a clear warning that waiver of Eleventh Amendment immunity is a condition for accepting the money; and (3) the State must have participated in the federal spending program. Id. at 20. The panel held Section 504 failed to meet the first requirement "because it is not a valid exercise of Congress's spending power" as to state agencies. Ibid. The panel stated that because the nondiscrimination obligation applies to the activities of the entire State if any part of the State accepts any federal financial assistance, "imposition of such conditions on a state * * * amounts to impermissible coercion," and thus is in excess of Congress' power under the Spending Clause. Id. at 21.

[2/] Although we disagree with the panel's reasoning and conclusions, we do not seek further review of the Section 5 holdings at this time in light of Alsbrook.

ARGUMENT AND AUTHORITIES

The panel held that 29 U.S.C. 794 (originally enacted as Section 504 of the Rehabilitation Act of 1973), which prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any "qualified individual with a disability," was "not a valid exercise of Congress's spending power" as applied to state agencies. Slip op. 21. This holding is wrong and literally unprecedented. As the Fourth Circuit recently noted, "[n]o court * * * has ever struck down a federal statute on grounds that it exceeded the Spending Power." Virginia v. Browner, 80 F.3d 869, 881 (1996) (emphasis added), cert. denied, 519 U.S. 1090 (1997); see also Oklahoma v. Schweiker, 655 F.2d 401, 406 (D.C. Cir. 1981) ("we have been unable to uncover any instance in which a court has invalidated a funding condition"). This historic decision certainly constitutes a question of "exceptional importance" that merits en banc review. See Fed. R. App. P. 35(a)(2).

The panel's determination that Section 504 is "coercive" for States was based on a misreading of the relevant statutory language and a constricted view of Congress' power to assure that federal money, collected from all taxpayers, not be used to support, subsidize, or condone practices that improperly exclude qualified persons with disabilities.[3]

[3/] Although this case arose in the context of defendant's challenge to 42 U.S.C. 2000d-7 as a valid waiver of Eleventh Amendment immunity, there is nothing specific to the Eleventh Amendment about the panel's holding that Section 504 was "not a valid exercise of Congress's spending power." Slip op. 21. Indeed, the only challenge defendant raised to the effectiveness of Section 504 as a waiver of Eleventh Amendment immunity (and thus the only issue previously briefed) was whether it was clear that Congress intended to extract a waiver in exchange for federal funds. The panel did not address that issue as to Section 504, but held that identical language in 20 U.S.C. 1403 was sufficient in the context of IDEA. Slip. op. 13. This is in accord with this Court's decision in Little Rock School District v. Mauney, 183 F.3d 816, 831-832, reh'g en banc denied (1999), as well as every other court of appeals to address the issue. See Litman v. George Mason Univ., 186 F.3d 544, 553-554 (4th Cir. 1999); Clark v. California,

(continued...)

1. In order to understand the error in the panel opinion, it is important to understand the nature and function of Section 504. Congress does not (and cannot) force people to take federal funds. But when Congress elects to disburse federal funds, "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * acceptance of the funds entails an agreement to the actions." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999); see also Gorrie v. Bowen, 809 F.2d 508, 519-520 (8th Cir. 1987); Nebraska v. Tiemann, 510 F.2d 446, 448 (8th Cir. 1975).

Among those conditions long upheld as valid Spending Clause legislation are those that demand that recipients assure that their programs will not discriminate. Section 504's nondiscrimination requirement is patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which prohibit race and sex discrimination by programs that receive federal funds, respectively. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 278 n.2 (1987). Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In Lau v. Nichols, 414 U.S. 563 (1974), the Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." Id. at 569 (citations omitted). The

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[3/](...continued)
123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also In re Innes, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum).

Court made a similar holding in Grove City College v. Bell, 465 U.S. 555 (1984). In Grove City, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." Id. at 575.

These cases stand for the proposition that Congress has an interest that none of its funds are used to support, directly or indirectly, programs that discriminate or otherwise make inaccessible their benefits and services to qualified persons.[4] Thus, when a condition is designed to assure that federal money is not used to support or subsidize programs that are inaccessible to persons with disabilities, it is a valid condition on the receipt of all federal financial assistance. Cf. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval). Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance,

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[4/] In neither case was there any suggestion that the funds had to be targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in Grove City was simply general financial aid, and had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13.

Both Title VI and Title IX, as applied to government entities, are valid exercises of Congress' power to enforce the Equal Protection Clause. See Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (Title IX); Lesage v. Texas, 158 F.3d 213 (5th Cir. 1998), petition for cert. pending, No. 98-1111 (Title VI). But these cases cannot be read simply to permit Congress to impose the nondiscrimination standard of the Equal Protection Clause on recipients of federal funds. Lau upheld Title VI as valid Spending Clause legislation without deciding whether the same conduct would violate the Equal Protection Clause. See also Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (holding that Title VI regulations prohibiting discriminatory effects were valid). And Grove City involved imposing a prophylactic assurance of compliance requirement on a private entity, which is not governed by the Equal Protection Clause.

rather than adding a separate nondiscrimination provision into each grant statute. The purposes articulated by Congress in selecting this means of establishing the condition in Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); id. at 7061-7062 (Sen. Pastore); id. at 2468 (Rep. Celler); id. at 2465 (Rep. Powell). Certainly, there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.[5]

2. The panel's holding was based on the erroneous premise that "§ 504 mandates that Arkansas waive its Eleventh Amendment immunity to all claims arising under § 504 if it receives any federal funding." Slip. op. 21. That misreads Section 504's definition of "program or activity." In response to Grove City College v. Bell, 465 U.S. 555 (1984), which construed the term narrowly, 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 (1988). That statute defined the term "program or activity" in Section 504, Title VI, and Title IX to mean, for general governmental entities, "all of the operations of * * * a department, agency, special purpose

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[5/] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to any particular spending program, see Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); Salinas v. United States, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds); see also United States ex rel. Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 873 (8th Cir. 1998) (upholding False Claims Act, 37 U.S.C. 3729 et seq., which applies to all "false or fraudulent claim[s] for payment or approval," as valid Spending Clause legislation).

district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b)(1)(A); 42 U.S.C. 2000d-4a(1)(A); 20 U.S.C. 1687(1)(A). (The full statutory definitions are reprinted as an addendum to this brief.).

In doing so, Congress chose not to require the entire State to comply if it accepted any federal funds. Instead, as the plain language of the statute makes clear, Congress determined that, in general, States should be able to choose on an "agency" or "department" basis whether to accept federal funds and the attendant obligation to make their programs and activities nondiscriminatory and accessible. This Court's cases interpreting the definition of "program or activity" have thus consistently recognized that the coverage is not so broad as to put States to the all-or-nothing choice described by the panel. See Klinger v. Department of Corrections, 107 F.3d 609, 615 (8th Cir. 1997) ("For State and local governments, only the department or agency which receives the aid is covered." (quoting S. Rep. No. 64, 100th Cong., 2d Sess. 4 (1987))); Thomlison v. City of Omaha, 63 F.3d 786, 789 (8th Cir. 1995) ("Because the definition of program or activity covers all the operations of a department, here the Public Safety Department, and part of the Department received federal assistance, the entire Department is subject to the Rehabilitation Act.").

3. The "coercion" doctrine relied on by the panel is based on dictum in Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937), reiterated in South Dakota v. Dole, 483 U.S. 203, 211 (1987), and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219, 2231 (1999), that there may be some instance in which "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" (emphasis added). While this dictum has been in existence for over 60

years, until the panel's decision no court had ever found a Spending Clause condition to be coercive. See Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party."), cert. denied, 493 U.S. 1070 (1990).

The panel held that Section 504 "amounts to impermissible coercion" because the definition of program or activity denied States a "meaningful choice" whether to accept or reject federal financial assistance. Slip op. 21. That holding was premised on a misreading of the statute discussed above. Properly interpreted, Section 504 is not "coercive." In choosing which federal money to accept (if any), States are aware from the clear text of the statute that they are choosing that the entire department will be covered by the nondiscrimination duty of Section 504. Therefore, States are not faced with the all-or-nothing choice the panel envisioned.

4. In any event, when it comes to the relationship between a State and the United States, "coercion" is a concept not capable of judicial enforcement. See Steward Machine Co., 301 U.S. at 590 ("Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation."). As the Ninth Circuit noted,

> [C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds--or is the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.

Nevada, 884 F.2d at 448 (footnote omitted); see Oklahoma v. Schweiker, 655 F.2d 401, 414

(D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice."). Indeed, in New York v. United States, 505 U.S. 144 (1992), a case relied on by the panel, the Court did not mention the concept of "coercion" in explicating the limits of the Spending Clause.

The panel relied on College Savings Bank, which used the word "coercion" in holding that Congress could not condition States' participation in fields of interstate commerce on their waiver of Eleventh Amendment immunity. But in College Savings Bank itself, the Court recognized that its holding would not carry over to Spending Clause statutes. The Court reaffirmed that no one is entitled to federal money; it is simply a "gift" that Congress is free to disburse if it so chooses. 119 S. Ct. at 2231; see also 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"). The Court distinguished Congress' power to place conditions on "gifts" from conditions on engaging in "otherwise lawful activity." 119 S. Ct. at 2231. It explained that "what Congress threatens [in this case] if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." Ibid.

In the case of Section 504, by contrast, every recipient (public or private) is faced with the choice of: (1) accepting federal money (to which it has no entitlement) in exchange for its promise to use the money in a way that does not discriminate on the basis of disability and to permit federal courts to adjudicate whether a recipient is in compliance; or (2) not taking the money. "There is no coercion in subjecting States to the same conditions for federal funding as other grantees: States may avoid these requirements simply by declining to apply for and to

accept these funds. But if they take the King's shilling, they take it cum onere." United States ex rel. Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 873 (8th Cir. 1998); accord Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).

5. To the extent that "coercion" is an independent and justiciable concept, the panel's holding that Section 504 is coercive (prompted by its misreading of the breadth of the statutory coverage) is inconsistent with Supreme Court decisions that demonstrate that States may be put to "difficult" or even "unrealistic" choices about whether to take federal benefits with such conditions without becoming "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). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[6]

[6/] 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

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Similarly, in FERC v. Mississippi, 456 U.S. 742 (1982), the Court upheld a statute that required States to choose between regulating in light of federal standards or having the field preempted so that they could not regulate at all. The Court acknowledged that "the choice put to the States--that of either abandoning regulation of the field altogether or considering the federal standards--may be a difficult one." Id. at 766 (emphasis added). The Court agreed that "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid [the statute's] requirements. But this does not change the constitutional analysis." Id. at 767.

Finally, in Board of Education v. Mergens, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 et seq., which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related

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[6/](...continued)
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 * * * [t]his Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by this Court." Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976); Jenkins v. Missouri, 807 F.2d 657, 680 (8th Cir. 1986) (looking at "central thrust of the jurisdictional statement" in determining whether summary affirmance "provides precedential guidance for us"), cert. denied, 484 U.S. 816 (1987).

student groups." 496 U.S. at 241 (emphasis added, citation omitted).[7]

These cases demonstrate that the federal government can demand that States comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (North Carolina), losing all federal funds (Mergens), or even losing the ability to regulate certain areas (FERC), without crossing the line to coercion. Thus, even if there were a judicially-cognizable coercion defense, we believe the panel erred in holding that the choice imposed by Section 504 is "coercive." Instead, like the provisions upheld in Lau and Grove City, Section 504 is a reasonable condition intended to ensure that federal money does not support or subsidize programs that unnecessarily exclude people with disabilities.

CONCLUSION

In holding that Section 504 was unconstitutionally coercive and thus was not valid as to the States, the panel has gone where no court has gone before. As one scholar has noted, the Supreme Court's decisions in cases challenging conditions on federal funds offered the States "are strikingly consistent: the Court has never invalidated such an enactment." Lynn A. Baker,

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[7] Moreover, it is difficult to imagine that a department of a state government choosing whether to accept federal funds has a less "meaningful choice" and is under greater "coercion" than a welfare recipient. Yet the Supreme Court has 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."); see also Gorrie v. Bowen, 809 F.2d 508, 523 (8th Cir. 1987) ("Any compulsion to apply or to change family living arrangements comes not from threat or coercion by the government, but from a desire to increase family income through the receipt of AFDC assistance."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude the recipient from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally require that the entity that receives federal funds not engage in conduct Congress does not wish to subsidize. See Rust v. Sullivan, 500 U.S. 173, 197-199 (1991); Regan v. Taxation with Representation, 461 U.S. 540, 544-545 (1983).

Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1924 (1995) (emphasis added). The panel's opinion, based on a misreading of the statute and relying on a ground not raised by defendant, has brought this Court's jurisprudence in conflict with the Supreme Court's decisions that permit the federal government to condition its funds, even if it is "difficult" for a state entity to decline the funds. Further review of this novel holding, with potential ramifications for a host of other conditions placed on state receipients of federal funds, is required.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 1999, two copies of the foregoing Petition for Rehearing and Petition for Rehearing En Banc by the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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