No. 02-1531

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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MICHAEL ANTHONY WILSON,

Plaintiff-Appellant

v.

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

Defendants-Appellees

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

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# BRIEF FOR THE UNITED STATES AS INTERVENOR

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## STATEMENT OF SUBJECT MATTER JURISDICTION

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

## STATEMENT OF APPELLATE JURISDICTION

The district court entered a final judgment for the defendants on January 23, 2002 (J.A. 15). A notice of appeal was filed on February 21, 2002 (J.A. 1-2). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

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

2. Whether an individual may sue a state official in his official capacity to enjoin violations of Title I of the Americans with Disabilities Act.

## 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).

2. Finding that Section 504 was not sufficient to bar discrimination against individuals with disabilities, Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to establish a "comprehensive national

mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5).

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce" as authority for its passage of the ADA. 42 U.S.C. 12101(b)(4). The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

3. This appeal involves Title I of the ADA and Section 504. Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include an "employer," which in turn is defined as a "person engaged in an industry affecting

commerce who has 15 or more employees * * * and any agent of such person." 42 U.S.C. 12111(2) and (5)(A). The term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, which includes States. 42 U.S.C. 12111(7); 42 U.S.C. 2000e(a); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976).

Title I incorporates by reference the enforcement provisions of Title VII. 42 U.S.C. 12117(a). Title VII provides that after filing a charge with the Equal Employment Opportunity Commission against any "respondent" (defined to include an "employer," 42 U.S.C. 2000e(n)), and receiving a right-to-sue notice, "a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved." 42 U.S.C. 2000e-5(f). A successful plaintiff is entitled to reinstatement, back pay, and "any other equitable relief as the court deems appropriate," 42 U.S.C. 2000e-5(g), as well as compensatory damages and attorneys fees. See 42 U.S.C. 1981a; 42 U.S.C. 2000e-5(k).

Title I defines the term "discriminate" to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [a] disability," as well as the use of employment criteria that "screen out or tend to screen out" persons with disabilities, unless the criteria are "job-related for the position in question and [are] consistent with business necessity." 42 U.S.C. 12112(b)(1) and (b)(6). In addition, unlawful discrimination includes the failure to "mak[e] reasonable accommodations to the known physical or mental limitations of an

otherwise qualified individual with a disability," unless the accommodation "would impose an undue hardship" on the employer. 42 U.S.C. 12112(b)(5)(A). A "qualified individual with a disability" is a person who "can perform the essential functions of the job" with or without reasonable accommodation. 42 U.S.C. 12111(8).

Section 504 of the Rehabilitation Act of 1973 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.* Congress instructed that in Section 504 cases involving employment discrimination, "the standards applied under title I of the Americans with Disabilities Act" shall apply. 29 U.S.C. 794(d). Section 504 may be enforced through private suits against programs or activities receiving federal

funds. See *Strathie* v. *Department of Transp.*, 716 F.2d 227, 229 (3d Cir. 1983). Congress expressly conditioned receipt of federal funds on waiver of the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

## SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Section 504 of the Rehabilitation Act to remedy discrimination against persons with disabilities. There is also no constitutional or statutory bar to plaintiff seeking prospective relief under Title I of the Americans with Disabilities Act against a state official sued in his or her official capacity.

1. Congress validly conditioned receipt of federal financial assistance on waiver of States' immunity to private suits brought to enforce Section 504 of the Rehabilitation Act. 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. 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.

2. This action may also proceed under Title I against the named state officials in their official capacity for prospective relief. Under the doctrine of *Ex parte Young*, such suits are not barred by the Eleventh Amendment. Contrary to

district court's holding, the statute does not bar such suits. In enacting Title I of the ADA, Congress intended to authorize suits against state officials in their official capacity. The statute specifically authorizes suits against "agents," which easily encompasses official-capacity suits. Title I incorporates the definitions and remedial scheme of Title VII of the Civil Rights Act of 1964, which has consistently been found (by this Court and others) to permit suits against government officials in their official capacities. To hold otherwise would cast aside clear precedent of every circuit to address the issue and would deprive individuals of an established tool to vindicate federal rights without intruding on States' sovereign immunity. Thus, the Eleventh Amendment is no bar to plaintiff's claims for injunctive relief against defendants Evanko and Bonney in their official capacity.

## ARGUMENT

### I

### CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), 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 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 financial assistance.[1] States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (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 funds on defendants' waiver of Eleventh Amendment immunity to Section 504 claims.[2]

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute 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

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[1] Defendants admitted accepting federal financial assistance. See R. 81, Exh. B.; see also J.A. 264 ¶ 20, 323 ¶ 20.

[2] Although not addressed by the district court, this argument was briefed by the parties below (R. 77 at 11-13; R. 81 at 1-3), and thus can be addressed on appeal. In any event, the right of the United States to intervene for "argument on the question of constitutionality," 28 U.S.C. 2403(a), is not limited by the arguments made by plaintiff in defense of the statute.

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 waiver of 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).[3] Any state agency reading the U.S. 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

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[3] 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 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.").

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.[4]

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 Fourth Circuit, after an extensive analysis of the text and structure of the Act, held in *Litman* v. *George Mason University*, 186 F.3d 544, 554 (1999), cert. denied, 528 U.S. 1181 (2000), that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." Six other courts of appeals agree that the Section 2000d-7 language 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.

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[4] 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. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

2001) (Section 504); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504), petition for cert. pending, No. 01-1357; *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); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998). 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.

The Second Circuit in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98, 113 (2001), agreed that 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." However, the panel held that 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. First, defendants in this case never raised this argument in the district court, and thus may not raise it on appeal. Moreover, this reasoning 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 intent to condition participation in the programs funded" required by *Atascadero*, 473 U.S. at 247, *i.e.*, a 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. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The 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 678-679 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 (2001), 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 Clause 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).

C. *Section 504 Is A Valid Exercise Of The Spending Power*

The Supreme Court has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." *Dole*, 483 U.S. at 210. This is because the federal government has not unilaterally intruded into defendants' operations. The Pennsylvania Police Department incurs these obligations only because it applies for and receives federal funds. "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

1. The Supreme Court in *Dole* 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." 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.

In the district court, defendants challenged Section 504 as valid Spending Clause legislation only with regard to the relatedness limitation (R. 77 at 12). 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); (2) the language of Section 504 makes clear that the obligations it imposes are a condition 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"); and (3) neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates anyone's constitutional rights.

Section 504 meets 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.

First, defendants suggested (R. 77 at 12) that a Spending Clause condition could only be tied to a particular federal grant. But there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending. To the contrary, it is well-settled that Congress can impose in a single statute a condition that applies to all federal financial assistance. Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *Arline*, 480 U.S. at 278 n.2. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme 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." 414 U.S. at 569 (citations omitted).[5]

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[5] In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the Court noted that it has

(continued...)

The 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 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)). Because this interest

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[5](...continued)
"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*.

extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance. The purposes articulated by Congress in enacting 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).[6]

Second, defendants suggested (R. 77 at 12) that a condition prohibiting those agencies that accept federal financial assistance from discriminating in employment could only be "related" to a grant intended to benefit persons with disabilities. In essence, they contend that the federal government is required to give federal funds to organizations that otherwise qualify for a particular federal grant even if they discriminate on the basis of disability in their operations and practices. As well as being contrary to common sense, that contention is directly

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[6] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending program, see *Oklahoma* v. *United States 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 application of federal bribery statute covering entities receiving more than $10,000 in federal funds).

contrary to *Grove City*, in which the Court held that Title IX was a "reasonable and unambiguous condition[]" on the receipt of federal financial assistance. 465 U.S. at 575. In that case, the Court held that as a matter of statutory construction, the financial aid office of the school was the "program" covered by Title IX because it received the federal financial aid on behalf of enrolled students. It made clear, however, that the non-discrimination protection was not just limited to students receiving financial aid, but also extended to the employees of the financial aid office, explaining that "employees who 'work in an education program that receive[s] federal assistance' are protected under Title IX even if their salaries are 'not funded by federal money.'" *Id*. at 571 n.21 (citation omitted).

Because Section 504 governs only a "program or activity" receiving federal financial assistance, it does not extend to the entire State; it applies on an agency-by-agency basis. See 29 U.S.C. 794(b); S. Rep. No. 64, 100th Cong., 2d Sess. 16 (1987) ("*Example*[]: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations."). Defendants may have been suggesting (although it is not clear) that the Constitution requires a narrower definition of "program." They did not explain what in the Constitution imposes that limit or how it should be defined. Any narrower definition would ignore that "[l]egally as well as economically, money is fungible," *Hoxworth* v. *Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 195 (3d Cir. 1990), and thus the receipt of federal funds frees up state money to use on

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

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

2. Defendants also argued below (R. 77 at 12-13) that Section 504's non-discrimination condition was coercive, relying solely on the panel opinion in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745 (8th Cir. 1999), which even at that time had been vacated in relevant part for rehearing en banc, see 197 F.3d 958 (1999), and which was decisively and correctly rejected by the full court in *Jim C.* v. *Arkansas Department of Education*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001).

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).

Any argument that Section 504 is 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). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[7]

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[7] 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

(continued...)

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 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).[8]

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[7](...continued)
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).

[8] 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

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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. See *Jim C.*, 235 F.3d at 1081-1082 (en banc).

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 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 Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1202 (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

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[8](...continued)
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, 544-545 (1983).

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*, 505 U.S. at 168. 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 and Section 2000d-7 can be upheld under the Spending Clause.

## II

## TITLE I OF THE AMERICANS WITH DISABILITIES ACT MAY BE ENFORCED AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR PROSPECTIVE RELIEF

### A. *The Eleventh Amendment Is No Bar To Private Suits Against State Officials To Enjoin Future Violations Of Federal Law*

The Eleventh Amendment bars private suits against a State sued in its own name, absent a valid abrogation by Congress or waiver by the State. See *Alden*, 527 U.S. at 755-756. The Supreme Court in *University of Alabama* v. *Garrett*,

531 U.S. 356 (2001), held that Congress had not validly abrogated States' immunity to claims under Title I of the ADA. However, even without a valid abrogation or waiver, it does not follow that States no longer need to comply with Title I or that private parties cannot seek relief in federal court. The Supreme Court reaffirmed in *Garrett* that the Eleventh Amendment immunity does not authorize States to violate federal law. For a holding that "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages * * * does not mean that persons with disabilities have no federal recourse against discrimination." 531 U.S. at 374 n.9; see also *Alden*, 527 U.S. at 754-755 ("The constitutional privilege of a State to assert its sovereign immunity * * * does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.").

It was to reconcile these very principles — that States have Eleventh Amendment immunity from private suits, but that they are still bound by federal law — that the Supreme Court adopted the rule of *Ex parte Young*. See *Alden*, 527 U.S. at 756.[9] *Ex parte Young*, 209 U.S. 123 (1908), held that when a state official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is

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[9] The Eleventh Amendment is also no bar to the United States suing the State. See *Garrett*, 531 U.S. at 374 n.9 (noting that United States could sue a State to recover damages under the ADA); *Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.").

acting *ultra vires* and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective relief, see *Edelman* v. *Jordan*, 415 U.S. 651, 664, 667-668 (1974), against an official in his or her official capacity, see *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985). By limiting relief to prospective injunctions of officials, the Court avoids courts entering judgments directly against the State but, at the same time, prevented the State (through its officials) from continuing illegal action.

The *Ex parte Young* doctrine has been described as a legal fiction, but it was adopted by the Supreme Court almost a century ago to serve a critical function in permitting federal courts to bring state policies and practices into compliance with federal law. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); see also *Alden*, 527 U.S. at 757 ("Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.").

This Court recognized the applicability of *Ex parte Young* in *Balgowan* v. *New Jersey*, 115 F.3d 214 (1997). In that case, even after holding that the Fair Labor Standards Act did not validly abrogate the States' Eleventh Amendment immunity, this Court held that "we may retain jurisdiction [against the state

official] under the doctrine of *Ex Parte Young*," which it described as "carv[ing] out an exception to Eleventh Amendment immunity by permitting citizens to sue state officials when the litigation seeks only prospective injunctive relief in order to end continuing violations of federal law." *Id*. at 217. In *Garrett*, the Supreme Court similarly noted that Title I's "standards can be enforced * * * by private individuals in actions for injunctive relief under *Ex parte Young*." 531 U.S. at 374 n.9. In addition to back pay and compensatory damages that would be barred by the Eleventh Amendment absent waiver, plaintiff's complaint seeks an order of instatement to a job. This is clearly the type of forward-looking relief permissible under *Ex parte Young*. See *Melo* v. *Hafer*, 912 F.2d 628, 635-636 (3d Cir. 1990), aff'd on other grounds, 502 U.S. 21 (1991). Thus, the Eleventh Amendment is no bar to a suit proceeding against defendants Evanko and Bonney in their official capacity for such relief.

### B. *State Officials In Their Official Capacities Are Appropriate Defendants In An Action To Enforce Title I*

The district court relied on the *Ex parte Young* doctrine to permit plaintiff's constitutional claim to proceed against the named state officials for injunctive relief (J.A. 3-4), but did not explain why it did not permit the Title I claim to proceed on the same basis. Defendants had acknowledged (R. 75 at 5) that a suit against a state official in his or her official capacity for prospective relief is permitted by the Eleventh Amendment but argued (R. 75 at 7-8) that a suit against a state official for injunctive relief to cure a continuing violation of federal law is

not available under Title I because Congress only intended States, and not their officials, to be named as defendants. This is a question of statutory construction, which this Court reviews *de novo*.

Title I, by incorporating the enforcement scheme of Title VII of the Civil Rights Act of 1964, see 42 U.S.C. 12117(a), authorizes private suits against a "respondent," which is defined to include an "employer." 42 U.S.C. 2000e-5(f), 2000e(n). The term "employer" is defined in both Title I and Title VII to include a "person engaged in an industry affecting commerce who has 15 or more employees * * * *and any agent of such person.*" 42 U.S.C. 12111(5)(A); 42 U.S.C. 2000e(b) (emphasis added).

The district court apparently accepted defendants' contention that employees sued in their official capacities are not appropriate defendants because they are not plaintiff's "employer." But this glosses over the distinction between suing an individual in his or her personal capacity and suing an individual in his or her official capacity. "Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see also *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991).

By definition, then, an official sued in his or her official capacity is an "agent" of the state employer. Indeed, while this Court has held that Congress did not intend to authorize Title VII suits for damages against supervisors in their *individual* capacities, see *Sheridan* v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-1078 (3d Cir. 1996) (en banc), cert. denied, 521 U.S. 1129 (1997), it has subsequently noted that "[u]nder Title VII, a public official may be held liable in her official capacity." *In re Montgomery County*, 215 F.3d 367, 372 (3d Cir. 2000), cert. denied, 531 U.S. 1126 (2001). As defendants conceded (R. 75 at 8 n.3), these Title VII cases are highly persuasive authority because Title I of the ADA utilizes the same enforcement scheme and has a virtually identical definition of "employer." See *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 606 (3d Cir. 1998), cert. denied, 525 U.S. 1093 (1999).

This Court's decisions are consistent with the views of every other court of appeals to address the issue under Title I of the ADA and Title VII of the Civil Rights Act of 1964. "The consensus of these courts is that Title VII actions brought against individual employees are against those employees in their 'official' capacities, and that liability can be imposed only upon the common employer of the plaintiff and of the individual fellow employees who are named as defendants." *Lenhardt* v. *Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380 (8th Cir. 1995).[10] Thus, a state official sued in his official capacity is an appropriate

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[10] See, *e.g.*, *Gary* v. *Long*, 59 F.3d 1391, 1399 (D.C. Cir.) ("while a supervisory

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defendant under Title I.

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[10](...continued)
employee may be joined as a party defendant in a Title VII action, that employee must be viewed as being sued in his capacity as the agent of the employer, who is alone liable for a violation of Title VII"), cert. denied, 516 U.S. 1011 (1995); *Baird* v. *Rose*, 192 F.3d 462, 472-473 (4th Cir. 1999) (upholding dismissal of Title I claims against officials in individual capacities, but reversing dismissal of claims against officials in official capacities); *Harvey* v. *Blake*, 913 F.2d 226, 227-228 (5th Cir. 1990) ("Because Ms. Blake's liability under Title VII is premised upon her role as agent of the city, any recovery to be had must be against her in her official, not her individual, capacity. * * * [T]he suit may proceed against her in her official capacity only."); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.) ("Plaintiff's claims brought against Dr. Steger and Dr. Harrison in their individual capacities under Title VII cannot go forward * * * because such claims can only proceed against individuals who otherwise qualify as employers, which Plaintiff does not allege. * * * Plaintiff is allowed to proceed with his claims brought under Title VII against the University and Dr. Steger in his official capacity."), cert. denied, 531 U.S. 1052 (2000); *EEOC* v. *AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.4 (7th Cir. 1995) (Title I suits may be brought against an employee in "his official, strictly representative capacity, which is simply one method of bringing suit against the employer"); *Bales* v. *Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1111 (8th Cir. 1998) ("the District Court properly decided that Vallejo could be liable only in his capacity as an employee of Wal-Mart"); *Ortez* v. *Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) ("employees cannot be held liable in their individual capacities under Title VII. However, we conclude that Ortez did state a Title VII claim against defendants * * * in their official capacities" (citations omitted)); *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) ("Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate."); *Yeldell* v. *Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1060 (11th Cir. 1992) (Title VII "suits may be brought only against individuals in their official capacity and/or the employing entity").

The Supreme Court has "frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in judgment). As Congress intended to allow a Title I suit to proceed against a state official in his official capacity, this case may proceed against the official defendants for injunctive relief even absent a valid abrogation of Eleventh Amendment immunity.[11]

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[11] The complaint sought prospective relief under Section 504 against the officials in their official capacities as well (J.A. 3). The district court's opinion does not make clear why this claim would also not survive under *Ex parte Young* even if Section 2000d-7 were not effective in conditioning the receipt of federal funds on defendants' waiver of immunity. To the extent that the district court intended to rely on defendants' argument that Congress did not intend to permit a suit under Section 504 to be brought against a state official in his official capacity (R. 75 at 8-9), its holding is contrary to this Court's decision in *W.B.* v. *Matula*, 67 F.3d 484, 499 & n.8 (1995), which held in a suit brought under Section 504 that "claims against defendants in their official capacities are equivalent to claims against the government entity" and thus the failure to name the entity as a defendant "does not prevent plaintiffs from maintaining the current * * * action against the remaining defendants in their official capacities." See also *Juvelis* v. *Snider*, 68 F.3d 648 (3d Cir. 1995) (affirming injunctive relief under Section 504 against Director of Public Welfare).

## CONCLUSION

The judgment of the district court dismissing the Section 504 claim against all defendants and the Title I claim against defendants Evanko and Bonney in their official capacity for prospective relief should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

The constitutionality of 42 U.S.C. 2000d-7 is also being challenged in *Koslow* v. *Commonwealth of Pennsylvania*, No. 01-2782, and *Bowers* v. *NCAA*, Nos. 01-4226, 01-4492, 02-1789.

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 8,975 words.

April 23, 2002

SETH M. GALANTER
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 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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