RALPH F. BOYD, JR.
Assistant Attorney General
Civil Rights Division
JOHN L.WODATCH
Section Chief
RENEE M. WOHLENHAUS
Deputy Section Chief
PHILIP L. BREEN
Special Legal Counsel
M. CHRISTINE FOTOPULOS
Trial Attorney
United States Department of Justice
Disability Rights Section – NYAV
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-7475
(202) 304-9775 (fax)

MICHAEL G. HEAVICAN
United States Attorney
SALLY R. JOHNSON
Chief, Civil Division
First National Federal Building
1620 Dodge Street, Suite 1400
Omaha, NE 68102
(402) 221-4774

Counsel for Plaintiff-Intervenor
United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN DOE et. al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STATE OF NEBRASKA, et. al., Defendants.	CASE NO. 4: CV 95-3381 **UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case challenges the unlawful discrimination of the State of Nebraska's Department of Health and Human Services (DHHS) against the late GayLynn Brummett and her family when the DHHS attempted to block her efforts to adopt a foster care child solely on the ground that she was HIV-positive. The case, which began more than six years ago, is scheduled to go to trial before this Court on April 8, 2002. The State defendants (hereinafter, the "State") have alleged that the State is immune from suit under the Eleventh Amendment because its waiver of immunity under Section 504 of the Rehabilitation Act of 1973 (Section 504) was not voluntary, but "coerced," based on the amount of federal funding the DHHS receives. The United States argues that the law of this circuit – and indeed the law of this case – is that Section 504's waiver condition is not unconstitutionally coercive as a matter of law, and that since Section 504 allows state agencies to control not only the amount of their federal funding but also the scope of their waivers of immunity, unconstitutional coercion cannot be shown by an individual agency's reliance on federal funds.

PROCEDURAL BACKGROUND

On January 13, 1998, the State filed a Motion for Summary Judgment, asserting that it was immune from suit under the Eleventh Amendment of the U.S. Constitution. On November 25, 1998, this Court denied that motion, holding that both Title II of the Americans with Disabilities Act of 1990 (ADA) and Section 504 were valid exercises of Congress's power to enforce the Fourteenth Amendment, and therefore validly abrogated States' Eleventh Amendment immunity. In addition, the Court found that the State had waived its immunity under Section 504 by accepting federal funds:

> Finally, I shall note that even if Congress did not properly abrogate the defendants' immunity under the Rehabilitation Act, it is likely that the State has waived any such immunity defense...In Clark [v. State of California, 123 F.3d

1267, 1271 (9th Cir. 1997), cert. denied, 118 S.Ct. 2340 (1998)], the court found that:

> the Rehabilitation Act manifests a clear intent to condition a [S]tate's participation on its consent to waive its Eleventh Amendment immunity. The amended Rehabilitation Act provides:
>
> "(1) A State shall not be immune under the Eleventh Amendment...from any suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973...or the provisions of any other Federal Statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. §2000d-7.
>
> The Supreme Court has characterized this section as "an unambiguous waiver of the States' Eleventh Amendment immunity." Lane v. Pena, 518 U.S. 187, [200], 116 S.Ct. 2092, 2100, 135 L.Ed.2d 486 (1996). Because California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment.

Clark, 123 F.3d at 1271.

> I agree with the Clark court that a State waives its sovereign immunity if it receives federal funds under the Rehabilitation Act. Section 2000d-7 contains a clear expression of Congress' intent to condition the receipt of federal funds under the Rehabilitation Act on the States' waiver of Eleventh Amendment immunity...The defendants have conceded that they have received federal funds under the Rehabilitation Act. Thus, it appears that even if Congress did not lawfully abrogate the defendants' immunity as to the Rehabilitation Act, the defendants have waived their immunity by accepting federal funds under the Act.

Memorandum and Order on Defendants' Motion for Summary Judgment, November 25, 1998, Filing # 268, p. 7 (citations omitted).

On December 22, 1998, the State appealed this Court's denial of its Motion for Summary Judgment to the Court of Appeals for the Eighth Circuit, again asserting that it was immune from suit under the Eleventh Amendment. The United States intervened pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of the abrogation provisions under both the Fourteenth Amendment and the Spending Clause. During the two and a half years that this case was pending on appeal, the Eighth Circuit handed down three major decisions that would affect

its outcome: Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000); Bradley v. Arkansas Dept. of Education, 189 F.3d 745 (8th Cir. 1999), rev'd in part sub nom; and Jim C. v. Arkansas Department of Education, 235 F.3d 1079 (8th Cir. 2000), cert. denied, 121 S.Ct. 2591 (2001).

In Alsbrook, the Eighth Circuit held that Title II of the ADA did not properly abrogate states' Eleventh Amendment immunity to suit in federal court pursuant to Section 5 of the Fourteenth Amendment. Alsbrook, 184 F.3d at 1008-1009. Subsequently, in Bradley, a panel of the Eighth Circuit reached the same conclusion with respect to Section 504, and then further held that Section 504 was also not a proper enactment under the Spending Clause. Id., 189 F.3d at 756, 758. The United States filed a petition for rehearing en banc, arguing that the Court's latter holding was wrong and literally unprecedented. The Court granted rehearing en banc "limited to the spending clause issue raised by the petition" and vacated that part of the Bradley opinion. Jim C., 197 F.3d 958 (8th Cir. 1999). Finally, in Jim C., the en banc Court held that Section 504 was a proper enactment under the Spending Clause, and that its clear provision removing states' Eleventh Amendment immunity was therefore valid. Id., 235 F.3d 1079, at 1080.

On March 2, 2001, following the U.S. Supreme Court's landmark ruling in Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001), the appeal panel requested the parties' views on the proper disposition of the appeal. The United States recommended summary reversal with respect to Title II on the basis of Alsbrook and summary affirmance with respect to Section 504 on the basis of Jim C. However, both Plaintiffs and Defendants sought further briefing, on Title II and Section 504 respectively. On March 23, 2001, one day after the State of Arkansas filed a petition for certiorari in Jim C., the State of Nebraska filed another motion urging the Court either to stay the case pending the final disposition of Jim C. or to put the case back on its regular docket for briefing and argument.

Instead, the Eighth Circuit issued its ruling on April 17, 2001, reversing the Title II claim on the basis of Alsbrook and vacating and remanding the Section 504 claim to this Court "for reconsideration in light of Jim C." On June 29, 2001, the U.S. Supreme Court denied the State of Arkansas' petition for certiorari. Arkansas Dept. of Education v. Jim C., 121 S.Ct. 2591 (2001). On October 29, 2001, the State of Nebraska filed a Renewed Motion for Summary

Judgment. In that Motion, defendants argue, *inter alia*, that the State's waiver of Eleventh Amendment immunity under Section 504 is unenforceable because the State was "coerced" into accepting federal financial assistance. See Defendant's Brief in Support of its Renewed Motion for Summary Judgment (hereinafter, "Defendant's Brief") at p. 23-28.[1]

STATUTORY BACKGROUND

Section 504 of the Rehabilitation Act of 1973 (hereinafter, "Section 504") was enacted pursuant to Congress' power under the Spending Clause, Art. I, § 8, Cl. 1 of the U.S. Constitution. It 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 or other instrumentality of a state, "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Thus, the non-discrimination obligations of Section 504 only apply to those state agencies that choose to apply for and accept federal financial assistance.

Section 504 may be enforced through private suits against recipients of federal financial

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[1/] The United States is participating in this case to defend the constitutionality of Section 504 and its waiver condition as valid enactments under the Spending Clause, and its discussion in this brief is therefore limited to that issue. More than half of the Defendants' brief (pp. 9-23) is devoted to a separate constitutional issue that is controlled by the Eighth Circuit's decision in Bradley: whether Section 504 validly abrogates states' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment. As Defendants recognize, Bradley held that it does not, and that holding remains good law. See Defendants' Brief at p. 6 ("Although the Eighth Circuit in Jim C. reversed the decision in Bradley in part by holding that Congress' actions predicating federal funding for various programs on each state's agreement to waive its sovereign immunity resulted in an effective waiver subjecting states to the Rehabilitation Act, the Jim C. decision reversed Bradley only as to the spending clause issue."); Jim C., 197 F.3d at 958 (vacating and granting rehearing en banc only on the Spending Clause issue); Id., 235 F.3d at 1080 (same). Because Bradley's holding that Section 504 does not validly abrogate states' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment is binding on this Court, we limit our discussion to the Spending Clause issue.

assistance. See Olmstead v. L.C., 527 U.S. 581, 590 n. 4 (1999); Meiner v. Missouri, 673 F.2d 969, 973-974 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1982). In 1986, Congress amended the statute specifically to clarify its intent that States would not be entitled to invoke their Eleventh Amendment immunity to private suits in federal court. See 42 U.S.C. 2000d-7, which provides in relevant part:

> [A] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972..., title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. 2000d-7(a)(1).[2] The effective date for Section 2000d-7 was October 21, 1986. See 42 U.S.C. 2000d-7(b). Thus, state entities that chose to receive federal financial assistance after that date were put on clear notice by the statute that they could not invoke their immunity as a defense to private suits seeking to enforce their obligations under Section 504.

ARGUMENT

Section 504 and 42 U.S.C. 2000d-7 Are Valid Exercises of the Spending Clause

A. Congress May Condition a Grant of Federal Funds Upon States' Agreement to Comply With Section 504's Non-Discrimination Mandate

Under the Spending Clause, Art. I, §8, Cl. 1 of the U.S. Constitution, Congress is

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[2/] Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, §1003, 100 Stat. 1845, in response to the Supreme Court's ruling in Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). In Atascadero, the Court held that Congress had not made sufficiently clear its intent that state agencies receiving federal funds would be amenable to suit for violations of Section 504. In Lane v. Pena, 518 U.S. 187, 200 (1996), the Court held that 42 U.S.C. 2000d-7 was the "clear expression of Congress's 'intent to condition participation in the program[]...on a State's consent to waive its constitutional immunity'" that its ruling in Atascadero had required. See also Jim C. at 1082 (same).

empowered to spend federal money in order to "provide for the...general Welfare of the United States." 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...and that acceptance of the funds entails an agreement to the actions." College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999); see also South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"); New York v. United States, 505 U.S. 144, 158, 167 (1992); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 ("Unlike legislation enacted under §§ 5 [of the Fourteenth Amendment]...legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" (citations omitted)); Gorrie v. Bowen, 809 F.2d. 508, 519-520 (8th Cir. 1987); Nebraska v. Tiemann, 510 F.2d 446, 448 (8th Cir. 1975).

Section 504's nondiscrimination mandate 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, respectively, by programs that receive federal funds. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 278 n.2 (1987). Like these and other Spending Clause statutes, the choice whether to be subject to conditions imposed by Section 504 belongs to the recipient, which is always free to decline federal funds and the attendant "strings." See United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) ("Under...Title VI, Title IX, and Section 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.")

The condition that recipients of federal funds not use them to discriminate has long been upheld as valid Spending Clause legislation. See Lau v. Nichols, 414 U.S. 563, 569 (1974) (upholding Title VI) ("The Federal Government has power to fix the terms on which its money

allotments to the States shall be disbursed."); Grove City College v. Bell, 465 U.S. 555, 575 (1984) (upholding Title IX) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.") In Jim C., the Eighth Circuit relied on this consistent line of Supreme Court cases to conclude that like Title VI and Title IX, Section 504 was a valid enactment under the Spending Clause. Id., 235 F.3d at 1080-1082 (citing Lau as upholding Congress's power to condition federal education funds on non-discrimination in federally funded programs and "hold[ing] that Section 504 is a valid exercise of Congress's spending power...Th[e] requirement [that the state comply with Section 504] is comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities.")

These cases stand for the proposition that Congress has an interest in ensuring that none of its funds are used to support, directly or indirectly, programs that discriminate against protected groups of persons. Thus, when a condition is designed to assure that federal money is not used to support or subsidize programs that discriminate on the basis of disability, it is a valid condition on the receipt of all federal financial assistance. See, e.g., 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, rather than adding a separate nondiscrimination provision into each grant statute.[3]

In South Dakota v. Dole, the Supreme Court identified four limitations on Congress's Spending Power. Id., 483 U.S. at 206; see also Jim C. at 1081. First, the Spending Clause by its

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[3/] 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.

terms requires that Congress legislate in pursuit of "the general welfare," with respect to which the courts must "defer substantially to the judgment of Congress." Dole at 207. Second, if Congress places conditions upon the states' receipt of federal funds, it "must do so unambiguously..., enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." Ibid. (quoting Pennhurst, 451 U.S. at 17). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" Ibid. And fourth, the obligations imposed by Congress may not induce a governmental recipient to violate any independent constitutional provisions. Id. at 209-211. These four conditions were repeated in dicta in New York, 505 U.S. at 172-173.

The State does not suggest that Section 504 fails to meet any of these requirements. Prohibiting discrimination on the basis of disability is clearly in the general welfare, especially given Congress' broad discretion in making that determination, and as with other civil rights protections, it is the appropriate subject of federal legislation. See Dole, 483 U.S. at 207 n. 2; Cleburne, 473 U.S. at 443-444. Nor is there any doubt that Section 504 makes its conditions on federal funds sufficiently clear. See Arline, 480 U.S. at 286 n.15 (describing Section 504 as an "antidiscrimination mandate"); Jim C. at 1082 (citing Lane, 518 U.S. at 200, for its conclusion that 42 U.S.C. 2000d-7 is a "clear expression of Congress's 'intent to condition participation in the program[]...on a State's consent to waive its constitutional immunity.'").

The State also does not argue that Section 504's non-discrimination mandate is "unrelated" to the federal funding it receives, even though the obligation, once invoked, applies to the entire state agency regardless of the specific purpose of each federal grant. See also Jim C. at 1082, 1084 (finding irrelevant "that the waiver...cover[s] all activities of the Department of Education, and not merely those activities specifically supported by Section 504 funds," and thus rejecting the dissent's argument that the waiver condition was not sufficiently "related" to the purpose of the federal education funds.) First, the federal government's interest in preventing federal funds from being used to subsidize discrimination by the states will always be sufficiently "related" to the purpose of any federal spending program, as such spending is

ultimately intended to benefit all citizens.[4] Secondly, to a much greater extent than the educational funds at issue in Jim C., Section 504's non-discrimination mandate is particularly "related" to the kinds of federal grants received by the State of Nebraska's Department of Health and Human Services (DHHS), the large majority of which, either directly or indirectly, serve populations that typically have large proportions of individuals with disabilities, including the elderly.[5] Finally, the State does not argue that Section 504 requires it to engage in

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[4/] See, e.g., Gebser v. Lago Vista Independent School District, 524 U.S. 274, 286 (1998) (holding that Title IX has two primary purposes: preventing federal money from being used for discriminatory purposes and protecting individuals from gender discrimination); United States v. Louisiana, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [by 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)); see also James Leonard, "The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act," 52 Ala. L. Rev. 91, 180 (2000) ("One of the obvious statutory purposes behind Section 504 is to avoid the use of federal money for discriminatory practices. Another obvious and related purpose of the Rehabilitation Act is to ensure that federal recipients make their entire operations available to all otherwise qualifying persons, regardless of disability and regardless of the specific uses of the federal money.") Moreover, the Constitution does not require that Congress provide funds specifically to combat discrimination if it wishes to attach a nondiscrimination requirement to receipt of those funds. See, e.g., Grove City, 465 U.S. at 559, 565 n.13 (enforcing Title IX where the purpose of the federal funds was to provide general financial aid, not to combat sex discrimination.)

[5/] See "Fund 4000 – Federal Grants Utilized by DHHS in State FY1998 to FY 2001 by CFDA Number," Exhibit A in the attached Index of Evidence. The majority of federal grant programs funding the entire DHHS System are intended to serve people with disabilities, either directly or indirectly (such as those that serve the elderly). See, e.g. (by CFDA number): 93.104 (Special Mental Health Services for Children), 93.150 (Mental Health Homeless "PATH" Grant), 93.630 (Developmental Disabilities Basic Support Grant), 93.778 (Medical Assistance Program – Title XIX Medicaid), 93.917 (HIV Formula "Ryan White" Grant), 93.944 (HIV/AIDS Surveillance), 93.945 (Arthritis Special Grant), 93.958 (Community Mental Health Services Block Grant), 93.959 (Substance Abuse Prevention and Treatment Block Grant), and 93.988 (Diabetes Control and Surveillance Grant); 93.041 (Title VII – Prevention of Elder Abuse), 93.042 (Ombudsman Services for the Elderly), 93.043 (Health Promotion for the Elderly), 93.044 (Senior Centers Grant Program), 93.045 (Nutrition Services for the Elderly), 93.048 (Discretionary Elderly Grant), and 93.052 (Family Caregiver Demo. Grant). For more information about the specific purposes of each federal grant program, see www.cfda.gov.

unconstitutional conduct. There is nothing unconstitutional about a State opening their programs up to people with disabilities, see Cleburne, 473 U.S. at 443-444, or waiving their Eleventh Amendment immunity, see College Savings Bank, 119 S.Ct. at 2227 n. 2, 2231.

B. Congress May Condition a Grant of Federal Funds Upon States' Waiver of Eleventh Amendment Immunity

The Supreme Court has long recognized that Congress may condition a grant of federal funds on states' waiver of their Eleventh Amendment immunity. See College Savings Bank, 527 U.S. 666, 678-679 n.2 (1999) (accepting that "a waiver [of Eleventh Amendment immunity] may be found in a State's acceptance of a federal grant"); Atascadero, 473 U.S. at 247 (as long as a statute "manifests 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 have jurisdiction over states that accept federal funds); see also Alden v. Maine, 527 U.S. 706, 755 (1999) (citing Dole for the proposition that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits.") All of the courts of appeals to address the issue have similarly held that, so long as Congress has made its intentions clear, it has the power to condition the receipt of federal funds on a state recipient's waiver of Eleventh Amendment immunity with respect to the program or activity that receives the federal assistance.[6]

[6/] See Douglas v. California Youth Auth., 271 F.3d 812, 820-821 (9th Cir. 2001) (Section 504); Nihiser v. Ohio E.P.A., 269 F.3d 626, 627 (6th Cir. 2001) (Section 504); Cherry v. University of Wis. Sys. Bd. of Regents, 265 F.3d 541, 553-555 (7th Cir. 2001) (Title IX); 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, 121 S. Ct. 1511 (2001); Litman v. George Mason Univ., 186 F.3d 544, 554 (1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); see also Board of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir.) (IDEA), cert. denied, 531 U.S. 824 (2000); Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 831-832 (8th Cir. 1999) (same); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); Department of Educ. v. Katherine D., 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); Scanlon v. Atascadero State Hosp., 735 F.2d 359, 361-362 (9th Cir. 1984) (Section 504), rev'd due to the absence of a clear statement, 473 U.S. 234 (1985); Florida Nursing Home Ass'n v. Page, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence of a clear statement sub nom. Florida Dep't

In Jim C., the Eighth Circuit ruled that Congress' requirement that states waive their immunity to suit under Section 504 was a valid enactment under the Spending Clause. Id. at 1081-1082 ("Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds...We hold, therefore, that Arkansas waived sovereign immunity [under Section 504]...when it chose to participate in the federal spending program... ."); see also Bradley at 753 ("[T]he Supreme Court continues to recognize that Congress, if acting within its spending power, may condition a state's participation in a federal spending program on the state's waiving its Eleventh Amendment immunity to claims arising from that program"). Since its ruling in Jim C., the Eighth Circuit has repeatedly affirmed that holding without undertaking any further analysis. See, e.g., Grandson v. Univ. of Minnesota, 272 F.3d 568, 568 n. 2 (8th Cir. 2001) (citing its holding in Jim C. as "preclud[ing] the [state's] Eleventh Amendment defense" in Title IX case); Grey v. Wilburn, 270 F.3d 607, 609-610 (reversing a dismissal of a claim under Section 504 "[b]ased on Jim C.")

C. Congress Has Not "Coerced" the States Into Waiving Their Eleventh Amendment Immunity Under Section 504

The State does not claim that Section 504 is not valid Spending Clause legislation, nor does it question Congress's power to attach conditions to a grant of federal funds, including the condition that states waive their Eleventh Amendment immunity to suit under Section 504. Instead, the State argues that its acceptance of federal funds in this particular case does not represent a valid waiver of its Eleventh Amendment immunity under Section 504, because the amount of federal funding its Department of Health and Human Services applies for and accepts is so great that its decision to accept those funds and thereby waive its immunity to suits under

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

Section 504 is not voluntary, but "coerced." Defendants' Brief, p. 26-27.[7] In support of this claim, the State asserts that "the Jim C. case examine[d] the level of federal funding accepted by a particular department of a state to determine whether Eleventh Amendment immunity ha[d] been voluntarily waived," and argues that although the court in that case found no coercion, it was only because the federal funding represented only 12% of the department's budget. The State claims that federal funds have traditionally amounted to 60% of the budget for its Department of Health and Human Services, and therefore, unlike the state agency at issue in Jim C., its waiver of Eleventh Amendment immunity was not voluntary, but "coerced." Ibid.

1. The Supreme Court Has Never Found Any Spending Condition to be Unconstitutionally "Coercive"

The "coercion" theory is based on language in Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937), reiterated in Dole, 483 U.S. at 211, and College Savings Bank, 119 S. Ct. at 2231, 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). But in none of those cases was the theory actually applied to find a Spending Clause

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[7] Nowhere in the State's brief does it suggest that it has been coerced into complying with the primary condition of Section 504, which is the non-discrimination mandate itself. However, there is no principled basis for distinguishing the State's agreement to comply with Section 504's non-discrimination condition from its agreement to comply with its waiver condition, since its agreement to both conditions is derived from the same act: its acceptance of federal funds. If one condition may be rendered unconstitutionally coercive solely by virtue of the alleged involuntariness of that acceptance, so must the other. Moreover, Section 504 gains a significant measure of its value from the fact that it can be enforced by private individuals in court – the invalidation of the waiver condition would seriously undercut the value of the legislation. See Erwin Chemerinsky, "Protecting the Spending Power," 4 Chap. L. Rev. 89, 104 ("[E]nsuring accountability requires that Congress be able to condition federal funds on a state's waiver of its sovereign immunity...Preventing suits against states would allow them to take federal money and disregard the conditions that Congress constitutionally has the right to impose."); see also Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (noting that if "[a private] remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.")

condition coercive.[8] Moreover, while this language has been in existence for over 60 years, no court – until the vacated panel opinion in Bradley – had ever found a Spending Clause condition to be coercive. Indeed, in New York, a case relied on by both the panel in Bradley and the en banc court in Jim C., the Supreme Court did not even mention the concept of "coercion" in explicating the limits of the Spending Clause.

Instead, the U.S. Supreme Court has repeatedly rejected claims of "coercion" under the Spending Clause, even where large amounts of federal funds were at stake. 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 to public secondary schools that maintain a "limited open forum" on the provision of "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).

Similarly, 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), the Supreme Court summarily affirmed a three–judge district court's rejection of the "coercion" argument where the state's right to receive funding under "some forty-odd federal financial assistance health programs" was at stake. Id. at 533. In order to continue to be eligible for the federal funding, new federal legislation required the State to create a "State Health Planning and Development Agency" to

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[8/] Similarly, in College Savings Bank, while the Court used the word "coercion" in holding that Congress could not condition States' participation in fields of interstate commerce on waiver of their Eleventh Amendment immunity, the Court recognized that its holding would not carry over to Spending Clause statutes. Reaffirming that no one is entitled to federal money – rather, it is simply a "gift" that Congress is free to disburse if it so chooses – the Court thus distinguished Congress' power to place conditions on "gifts" from conditions on engaging in "otherwise lawful activity." Id., 119 S. Ct. at 2231.

regulate health services within the State. Id. 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).

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 funding programs (North Carolina) or even losing all federal funds (Mergens) without crossing the line to coercion. The Eighth Circuit's ruling in Jim C. that the choice imposed by Section 504's waiver condition is not coercive is entirely in line with these decisions. Like the substantive provisions upheld in Lau and Grove City, Section 504's waiver condition is a reasonable condition intended to enforce Section 504's mandate that federal money not be used to support or subsidize programs that unnecessarily exclude people with disabilities.

2. The Eighth Circuit Ruled in Jim C. That Section 504's Waiver Condition Is Not "Coercive" Despite The Fact That It Applies to 100% of an Agency's Federal Funds

In Jim C., the en banc Court ruled that Section 504's waiver condition was valid. Id. at 1080. In doing so, the Court overruled the panel decision in Bradley, which had concluded that "Section 504...[was] not a valid exercise of Congress's spending power" because "Section 504 and its [waiver] provision impose overly broad conditions on state agencies." Bradley at 757. The panel in Bradley explained that the Supreme Court's decisions:

> recognize[] that Congress may require states to comply with conditions to receive federal funds, including waiving their Eleventh Amendment immunity. [The Court has] warn[ed], however, that "the financial inducements offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." There are also limitations on the conditions that Congress may impose on a state's receipt of federal funds. One of these limitations is that "conditions must...bear some relationship to the purpose of the federal spending;

> otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."

Id. (Citations omitted.)

Under this reasoning, the panel concluded that Section 504 and its waiver condition imposed the "overly broad condition" of requiring the state to "waive its Eleventh Amendment immunity to all claims arising under §504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with §504 or the rest of the [Rehabilitation Act]." Id. The panel concluded that

> Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the [Rehabilitation Act], if it does not want to comply with §504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under §504 or reject funding and retain its Eleventh Amendment immunity to such suits. The condition §504 imposes on recipients of federal funds exceeds the ordinary *quid pro quo* involved in a proper exercise of Congress's spending power.

Id. at 757-758.

Nowhere in the Bradley panel opinion is there any reference to the actual amount of federal funds received by the agency at issue in that case, nor to the proportion of the agency's budget that was made up of federal funds. In fact, there is no implication that the panel's conclusion was premised in any way upon the particular facts of that case. Instead, the panel concluded that Section 504 was "coercive" on its face because, as the panel understood the statutory language, it applied to the activities of the entire State if any part of the State accepted federal financial assistance. The panel thus found "coercion" not by virtue of the monetary amount at stake, but from the fact that Section 504 and its waiver condition applied across the board to all federal funding received by an agency, "including funding wholly unrelated to the [Rehabilitation Act]." Id.

In Jim C., the en banc Court reversed. The Court framed the issue as the defendant State of Arkansas had: whether "Section 504's waiver requirement exceeds Congress's spending power by placing overly broad and therefore coercive conditions on federal funds." Jim C. at

1081. The court noted that, contrary to the panel's understanding, "the State itself as a whole" is not covered by Section 504 merely because some part of the State receives federal financial assistance. Id. Instead, Section 504 and its waiver condition apply only to those individual agencies that choose to accept funds, and "acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole." Id. Thus, "[a] State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others. The State is accordingly not required to renounce all federal funding to shield chosen state agencies from compliance with Section 504." Id.

Based on this proper reading of the statute, the Court concluded that Section 504 was not unconstitutionally coercive. Id. "While it appears, as the defendant urges, that the 'financial inducements' employed by Congress can become so 'coercive as to cross the point where 'pressure turns into compulsion,'' that limit has not been crossed here. To avoid the effect of Section 504 on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary quid pro quo that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities." Id. at 1081-1082 (citations omitted). The Court specifically "[acknowledge[d] that the waiver does cover all activities of the Department of Education, and not merely those activities specifically supported by Section 504 funds," and stated that it did "not consider such a choice unconstitutionally 'coercive.'" Id. at 1082. The Court concluded that "[t]he choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice." Id.

Thus, the Jim C. decision reversed the Bradley panel ruling in mirror fashion – rejecting the panel's finding of "coercion" from the fact that Section 504 and its waiver condition applied across the board, the Jim C. Court held that, in fact, its agency-specific applicability did not render the scheme coercive. The State thus misconstrues the Jim C. opinion when it claims that the Court "examine[d] the level of federal funding" to determine whether there had been a valid

waiver of immunity. See Defendants' Brief, p. 26-27. The Court had already concluded that Section 504's waiver condition was not coercive based upon its agency-specific application when it observed that although Arkansas' "sacrifice of all federal education funds, approximately $250 million or 12 percent of the annual state education budget..., would be politically painful," it nonetheless did not "compel[] Arkansas's choice...." for purposes of finding unconstitutional coercion. Id. at 1082. Just as in the Bradley panel opinion, there is no indication in Jim C. that the Court's holding was premised upon the particular level of federal funding at issue in that case. Indeed, by making this statement, the Court seemed to be indicating the irrelevance of that consideration to its holding that Section 504 – despite the fact that it applies to 100% of an agency's federal funding – is not "unconstitutionally 'coercive' because "[t]he State may take the money or leave it." Id.[9]

3. Section 504's Non-Coercive Waiver Condition Is Not Rendered Unconstitutionally Coercive By the Amount of Federal Funds an Agency Chooses to Receive

In contrast to Spending Clause legislation that is tied to a particular spending program, Section 504, like Title VI and Title IX before it, applies to any recipient of federal financial assistance. Whether the recipient accepts one dollar or one billion dollars of federal money, its obligation to comply with Section 504 and to waive its immunity to suit thereunder is exactly the same. For this reason, the State cannot point to anything in particular about Section 504's waiver condition that overbears a particular state agency's ability to say "no" to the offer of federal funds if it does not want to be subjected to suits under Section 504 – instead, it argues that the

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[9/] This is borne out by subsequent cases decided by the Eighth Circuit since its ruling in Jim C., in which the Court has repeatedly cited its holding in Jim C. to preclude an Eleventh Amendment defense without requiring any further analysis. See, e.g., Grandson at 568 n. 2; Grey at 609-610. The Jim C. decision is also in accordance with the holdings of other circuits on this issue. See, e.g., California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (finding no coercion when state would lose all federal Medicaid funds if it did not comply with condition of providing EMS service to illegal aliens); Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981) (finding no coercion when state would lose all federal Medicaid funds if it did not comply with certain requirements in Social Security Act.)

amount of federal money it receives is what makes the statutory scheme unduly coercive. In other words, the alleged "coercion" results not from the fact that Section 504's waiver condition applies on an agency-specific basis, but rather from the fact that the State of Nebraska, and its Department of Health and Human Services in particular, has chosen to apply for and accept a great deal of federal money.

However, because Section 504's waiver condition applies not via any specific federal spending program but whenever federal money is spent, the amount of federal money at stake is completely within the State's control. Congress does not force the states to accept any federal money at all, much less does it dictate what amount they must accept. In most states, as in the State of Nebraska, the politically appointed head of each state agency, the Governor and the state legislature all participate in the decision whether to apply for and accept federal funds.[10] If a state prefers to maintain its independence from federal money, it is entirely within its power to do so.[11] Moreover, just because an agency has elected to apply for and accept numerous federal

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[10/] For example, the DHHS Director has to approve applications for federal funding and submit an annual budget to the Governor incorporating those requests. The Governor then submits a statewide budget to the legislature, which also incorporates the requests for federal funding. Finally, the state legislature has to approve the state budget, which includes the appropriation of federal funds received by the state and state agencies, and must appropriate federal funds before they can be expended by the agency. See, e.g., Deposition Responses of James Jensen, Exhibit B in attached Index of Evidence, p. 3; Neb. Op. Atty. Gen. No. 95034, 1995 WL 250350 (Apr. 26, 1995); Neb. Op. Atty. Gen. No. 87114, 1987 WL 248506 (Dec. 9, 1987).

[11/] The State has produced no evidence that the State of Nebraska is opposed to receiving federal money, or that it has taken any measures to lessen its dependence on federal funding with the intent of preserving its immunity to suit under Section 504. To the contrary, the people of the State of Nebraska, through their elected representatives in the state legislature, have specifically authorized – and in many cases instructed – the DHHS and other state agencies to "apply for, receive and administer" as much federal money as possible to run their programs. See, e.g., Neb. Rev. St. §81-3102(7) (providing that "[t]he powers and duties" of the DHHS "shall include... seek[ing] grants and other funds from federal...sources to carry out...the missions and purposes of the [DHHS] and...accept[ing] and administer[ing]...resources delegated, designated, assigned, or awarded..."); Neb. Rev. St. §68.703-01 (authorizing DHHS to use federal funds for the board and care of foster children); Neb. Rev. St. §71-501.02 (AIDS Program); Neb. Rev. St. §71-523 (Metabolic Diseases Program); and Neb. Rev. St. §71-706 (Women's Health Initiative Fund).

grants, it does not follow that the federal government's authority to impose conditions on each

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Other statutory enactments actually mandate that DHHS apply for federal funds. See, e.g., Neb. Rev. St. §71-4738 (providing that the DHHS "shall apply for all available federal funding to implement the Infant Hearing Act"); and Neb. Rev. St. §71-5043 (mandating that "[a]ll available federal...resources...should be effectively utilized" for services for people with "severe, persistent, and disabling psychiatric disorders"). Several others go even further, and not only authorize or mandate that agencies apply for federal funds, but that they comply with Section 504 and all of its requirements in order to ensure that the agency will continue to receive as much federal funding as possible. See, e.g., Neb. Rev. St. §83-210.02 (emphasis added) (providing that the DHHS "is hereby authorized to accept the provisions of [the Rehabilitation Act of 1973] and all amendments thereto, and to cooperate with the United States Government in any way necessary to enable the department to receive federal funds for the vocational rehabilitation of the blind as provided in such public law..."); Neb. Rev. St. §79-11,126 (authorizing the Division of Rehabilitation Services "to comply with such requirements as may be necessary to obtain the maximum amount of federal funds and the most advantageous proportion possible..."); Neb. Rev. St. §71-8607 and §71-8610 (mandating that the Commission for the Blind and Visually Impaired "[a]pply for, receive and administer money from any...federal agency to be used for purposes relating to blindness, including federal funds relating to vocational rehabilitation of blind persons..." and authorizing it to "accept the provisions of the federal Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq., and to cooperate with the United States Government in any way necessary to enable the commission to receive federal funds for the vocational rehabilitation of blind persons as provided in such act..."); and Neb. Rev. St. §79-11,124 (mandating that the State Board of Education "comply with such conditions as may be necessary to secure the full benefits of...federal acts and appropriations [relating to vocational rehabilitation]... .")

In many of these statutory enactments, the legislature makes clear that federal funds shall expended before state funds. See, e.g., Neb. Rev. St. §71-5205 (providing that "[t]he family practice residency program may be funded in part by grants provided by...agencies of the federal government," and that "[i]f such grants are provided, the Legislature shall not provide funding for such program"); Neb. Rev. St. §79-1132 (providing that "grants [to school districts for children with disabilities]...shall continue to be one hundred percent [of the costs of such programs] as long as the funding for such grants comes from federal funds"); Neb. Rev. St. §81-2213 and 2227 (mandating that the DHHS "accept...federal funds" for its Aging Services and submit budget requests that "include all federal funds available to the department..."); and Neb. Rev. St. §83-169 (providing that "[i]n the event federal funds are available to the State of Nebraska for alcoholism, drug abuse...or other addiction programs, the division is authorized to comply with such requirements as may be necessary to obtain the maximum amount of federal funds and the most advantageous proportion possible... .") See also Contract between the DHHS and MAXIMUS, effective August 1, 1994 through October 31, 1997, Exhibit E in attached Index of Evidence (noting as its purpose that "the Department is desirous of contracting for the generation of additional Federal revenues on behalf of the State's health human services programs.")

grant it offers is somehow diminished. If the federal government is justified in placing conditions on the receipt of modest amounts of federal resources, it is no less justified in placing those conditions on the receipt of larger amounts of federal assistance. As the First Circuit has explained, "[w]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game." New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 246 (1st Cir.), appeal dismissed and cert. denied, 449 U.S. 806 (1980); United States ex rel. Zissler v. Regents of the Univ. of Minn., 154 F.3d 870, 873 (8th Cir. 1998) ("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."); accord Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).[12]

By finding that Section 504 was not coercive despite the fact that it applied across the board to the entire agency, including activities not "specifically supported by" Section 504 funds, see id. at 1082, the Jim C. decision stands for the proposition that states are not "coerced" into waiving their immunity under Section 504 despite the fact that in order to avoid that condition, state agencies would have to decline 100% of their federal funds. By contrast, under the State's theory of coercion, the courts would be required to evaluate in each individual case the percentage that those federal funds would have constituted of the agency's budget for that year in order to determine whether, as applied to that particular agency during that year and on those facts, Section 504's waiver condition was coercive in that particular case. See Defendants' Brief, p. 27-28.

The Eighth Circuit's ruling in Jim C. did not countenance such an "as applied" interpretation of unconstitutional coercion. Neither did the Supreme Court's ruling in Dole, which saw no reason generally to undertake the "coercion" analysis in the first place, much less

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[12/] Spending Clause statutes are often analogized to contracts. When a plaintiff is seeking to void a contract on the grounds of "economic duress," it must show "acts on the part of the defendant [that] produced" the financial circumstances that made it impossible to decline the offer, and it is not enough to show that the plaintiff wants, or even needs, the money being offered. Undersea Engineering & Construction Co. v. International Tel. & Tel. Corp., 429 F.2d 543, 550 (9th Cir. 1970); accord United States v. Vanhorn, 20 F.3d 104, 113 n. 19 (4th Cir. 1994).

to analyze in each individual application of Spending Clause legislation whether the particular state agency at issue was coerced. Id., 483 U.S. at 211. Noting that every congressional spending statute "is in some measure a temptation," in Dole the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." Id., [cite] (quoting Steward Machine, 301 U.S. at 589-90.) Nowhere in the Jim C. decision is there any support for the idea that Section 504's constitutional and non-coercive waiver condition may be rendered unconstitutionally coercive in any given case based solely upon a particular state agency's unique (and annually changing) quantum of dependence upon federal money – something which, unlike most federal spending measures, is entirely under the states' control.

Indeed, it directly serves one of the critical purposes of the Eleventh Amendment – the protection of the "financial integrity of the States," Alden v. Maine, 527 U.S. 706, 750 (1999) – to permit each State to make its own cost-benefit analysis for each state agency it has established and determine whether to accept the federal money with the condition that that agency waive its immunity to suit in federal court, or to forgo the federal funds. See New York, 505 U.S. at 168. The State's theory of coercion presumes that States are incapable of making these cost-benefit assessments for themselves. At the same time, its theory would give states unilateral power to void their waivers of immunity under Section 504 simply by choosing to apply for and accept vast amounts of federal money – or an incentive to spend as little of their own money as possible – for any agency they wished to remain immune. Moreover, such a standard for unconstitutional coercion would be completely unworkable. Given the changing structure of state agencies and the inevitable variations in both the annual availability of federal funds and state agency budgets – both among different agencies and over time in a single agency – the validity of each agency's waiver would necessarily vary from agency to agency and from year to year. Neither the agencies nor their constituencies would ever know for certain whether their waivers of immunity under Section 504 were valid, and the courts would be forced to resolve the waiver issue in every single case. None of the Supreme Court's rulings in the Spending Clause context sanction the creation of such uncertainty in the relationship between the federal government and the states.

4. Section 504's Waiver Condition Allows States to Retain Complete Control Over the Scope of Their Waiver of Immunity

In addition to being completely free to determine how much federal money a given state agency will accept, States are also able to completely control the extent of Section 504's coverage, and thus the extent of its waiver of immunity. By imposing the nondiscrimination and waiver conditions on all of the operations of any state agency that receives any federal funds, Congress elected to rely on the State's own governmental framework in determining the proper breadth of coverage. Thus, the State may unilaterally determine the precise scope of its waiver of immunity by structuring the boundaries and functions of its state agencies in such a way as to minimize the coverage of Section 504. State law establishes the allocation of operations and functions among departments of the state government. See Nebraska Partnership for Health and Human Services, 1996 Neb. Laws. L.B. 1044. Congress reasonably could have presumed that States normally place related operations with overlapping goals, constituencies, and resources in the same department.[13] That level of coverage – broader than simply the discrete program that nominally receives the funds, but narrower than the entire state government – is an appropriate means of both protecting state sovereignty and assuring, through the avenue of federal judicial enforcement, that no federal money supports or facilitates programs that are not accessible to people with disabilities. Compare Rust v. Sullivan, 500 U.S. 173, 197-199 (1991) (Congress may constitutionally require that a private entity that receives federal funds not engage in conduct Congress does not wish to subsidize so long as recipient may restructure its operations to separate its federally-supported activities from other activities); Regan v. Taxation with Representation, 461 U.S. 540, 544-545 (1983).

In this case, the agency formerly known as the Department of Social Services was "sunsetted" in 1996, and reborn as the Department of Health and Human Services (DHHS),

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[13/] Indeed, this is the case here. Effective January 1, 1997, the State of Nebraska elected to combine several separate but related state agencies – the Department of Aging, Department of Health, Department of Social Services, Office of Juvenile Services (of the Department of Correctional Services) and Department of Public Institutions – into one big, three-agency system, of which the DHHS is only one part. See Nebraska Partnership for Health and Human Services Act, 1996 Neb. Laws. L.B. 1044.

which is itself only one part of a much larger, three-agency system called the Department of Health and Human Services System (hereinafter, "DHHS System").[14] Following this reorganization, the federal matching funds for Medicaid were assigned to one of the other two agencies – the DHHS Finance and Support agency – rather than the DHHS. See Executive Summary of "Nebraska Health and Human Services: Common Sense Solutions for a Healthy Nebraska," Exhibit F of attached Index of Evidence, at page ix.

Historically, 55% of all of the federal funds received by the entire DHHS System (which totalled nearly $1 billion in 2001) are expended as the federal portion of matching programs such as Medicaid, AFDC and other public assistance programs.[15] When Medicaid was placed within the DHHS Finance and Support agency, the DHHS agency's budget immediately went from being 60% comprised of federal funds (when it was the DSS) to only 40% comprised of federal funds (the total amount of those funds amounting to only approximately $86 million in 1997 and $90 million by 2001.) See Excerpts from State of Nebraska Biennial Budget as Enacted During 1997 and 1999 Legislative Sessions, Exhibit G and H in attached Index of Evidence, p. 70 and 56 respectively. That percentage has continued to fall in each subsequent year: from 40% in fiscal year 1998, to 39% in fiscal year 1999, to 37% in fiscal year 2000, to 36% in fiscal year 2001. Id.

Moreover, based on the summary of federal grant programs, nearly all of that federal money goes towards programs other than the foster care and adoption programs.[16] Based on the descriptions of the purposes of each federal grant program on the federal CFDA website, less

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[14/] In addition to the DHHS, the System includes two other agencies, the Department of Health and Human Services Regulation and Licensure and the Department of Health and Human Services Finance and Support. The System also includes a Policy Cabinet and a Partnership Council. See Executive Summary of "Nebraska Health and Human Services: Common Sense Solutions for a Healthy Nebraska," Exhibit F of attached Index of Evidence, at page v.

[15/] See Excerpts from State of Nebraska Biennial Budget as Enacted During 1997 Legislative Session, Exhibit G in attached Index of Evidence, p. 61; and Exhibit A.

[16/] See Exhibit A in attached Index of Evidence (by CFDA number): 93.556 (Safe and Stable Families Grant); 93.645 (Child Welfare Services "IV-B"); 93.658 (Foster Care – Title IV-E); 93.659 (Adoption Assistance).

than $30 million of the approximately $90 million in federal grants received by the DHHS in 2001 relate to foster care or adoption. Other than the State's choice to locate similar programs within the same agency, there is no reason – certainly no reason imposed by federal law – why the foster care and adoption programs must be located in the DHHS, or indeed why such programs could not constitute their own separate agency of the State of Nebraska. See, e.g., Deposition Response of Ron Ross at p. 5 (citing as the only reason why the foster care and adoptive programs are part of the DHHS "the opportunity for integration leading to the program being more effective and efficient.") Therefore, for example, the fact that $90 million in federal funding, as opposed to $30 million, was conditioned upon the State's waiver of immunity in FY2001 is solely the result of the State's choices. Properly undertaking its own cost-benefit analysis, the State may well have decided that the costs of accepting federal funds (complying with Section 504 and being subject to suit in federal court) were de minimus, while the benefits (receiving $90 million in federal money to have a bigger and better social services program) were substantial.

Thus, the choice imposed by Section 504 is not impermissibly "coercive" in the constitutional sense. State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funding, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See Grove City, 465 U.S. at 575; Kansas v. United States, 214 F.3d 1196, 1203-1204 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the...requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)), cert. denied, 121 S. Ct. 623 (2000). Once one of those options has been selected, however, "[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).

D. The Two Additional Cases Cited by the State In Support of its "Coercion" Theory Are Inapposite

Defendants cite two recent panel decisions as "persuasive authority" for their argument that their waiver of Eleventh Amendment immunity under Section 504 was unconstitutionally "coerced." Defendants' Brief, p. 27-28. However, neither of these cases actually addressed the "coercion" theory.

In fact, in Garrett v. Board of Trustees at the University of Alabama, 261 F.3d 1242 (11th Cir. 2001), a panel of the Eleventh Circuit didn't even address the waiver issue, and has since been vacated for that very reason. See Garrett v. Board of Trustees at the University of Alabama, 2001 WL 1636201 (11th Cir. 2001). On rehearing, the panel realized that "neither the district court, this Court, nor the Supreme Court had addressed the [Section 504 waiver] issue," and, as the state defendants themselves conceded, "'the possibility that the plaintiffs' Rehabilitation Act claims might, or might not, be the source of jurisdiction via a waiver of state immunity...simply was not analyzed or discussed; frankly, none of the parties presented much in the way of argument on the issue of waiver.'" Id. at *1. Consequently, the panel vacated its ruling and remanded the case to the district court with the instruction that it "consider the argument that defendants have voluntarily waived their Eleventh Amendment immunity under §504 of the Rehabilitation Act by their receipt of federal financial assistance conditioned upon such a waiver... ." Id.

The State also cites the recent panel opinion in Garcia v. S.U.N.Y., 2001 WL 1159970 (2nd Cir. 2001), petition for reh'g en banc pending. Defendants' Brief, p. 27-28. In Garcia, the Second Circuit found that the State of New York "had not knowingly waived its sovereign immunity from suit" under Section 504 because "[a]t the time that New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity... ." Id. at *10-11. The panel reasoned that "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign

immunity had already been lost." Id.[17]

Garcia was wrongly decided and the United States' petition for rehearing and rehearing en banc is currently pending before the Second Circuit. Should this Court wish for further briefing on that case, the United States will provide it. But no such briefing is required. Garcia did not address coercion, which is the sole ground the State is pressing at this stage in support of dismissal on Eleventh Amendment grounds. Indeed, as the State apparently realizes, the issue whether it knowingly waived its immunity to suits under Section 504 by accepting federal funds was resolved by the Eighth Circuit in Jim C. See 235 F.3d at 1082 ("With regard to the requirements of Atascadero, the Rehabilitation Act's waiver provision, 42 U.S.C. 2000d-7(a)(1), provides a clear expression of Congress's 'intent to condition participation in the program[]...on a State's consent to waive its constitutional immunity'") (Citations omitted). Nor did the State raise this argument in the prior rounds of briefing on this issue before this Court and the court of appeals. The State's opportunity to dispute this point has thus long since passed. Both as a matter of the law of this circuit and the law of this case, the State's waiver of Eleventh Amendment immunity under Section 504 was knowing. Id.; see also Little Rock School District v. Mauney, 183 F.3d 816 (1999); Douglas at 820-821; Nihiser at 627; and Stanley at 344.

In the end, by arguing that it was "coerced" into waiving its immunity under Section 504, the State is asking this Court to deny the United States one of the primary benefits of its bargain. As Section 504 makes clear, two of the conditions that Congress places upon states' receipt of federal funds is that they (1) comply with Section 504's non-discrimination mandate and (2) waive their immunity to suits seeking to enforce that obligation. It is simply not fair for a state agency to apply for and accept federal funds knowing of these conditions, but then later claim

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[17/] The State's citation of Garcia demonstrates the conceit of its "coercion" theory. The State could not have been "coerced" into waiving its immunity if at the same time it did not believe that it was waiving anything at all. In fact, there is no evidence in this case that anyone in a position to authorize the agency's annual requests for federal funds even knew about, much less relied one way or the other upon, Title II's abrogation of immunity. See, e.g., Deposition of Senator James Jensen, Exhibit B in attached Index of Evidence, p. 6 (answering "no" to the question whether he knew about the Title II abrogation at any time before or during his participation in any decision approving DHHS's acceptance of federal funding.)

that it should not be bound by its agreement to the latter condition because at the time it accepted the funds its financial situation would not have permitted it to reject them. Indeed, if the state agency's waiver of immunity were to be deemed ineffective for any part of the relevant period of time, it would seem that the DHHS would have no entitlement to retain the federal funds that were conditioned, in part, on the State's agreement to comply with Section 504 or to waive its immunity. See Oubre v. Entergy Operations, Inc., 522 U.S. 422, 425 (1998) (noting general rule that in order to avoid a contract that is voidable on the grounds of mistake, a party must "tender back any benefits received under the contract.")

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the State of Nebraska has validly waived its Eleventh Amendment to suit under Section 504 and therefore this Court should deny the State's Renewed Motion for Summary Judgment.

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Respectfully submitted,

Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division
Michael G. Hevican
United States Attorney

John L. Wodatch, Chief
Renee M. Wohlenhaus, Deputy Chief
Philip L. Breen, Special Legal Counsel
Disability Rights Section

M. Christine Fotopulos
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-7475
(202) 305-9775 (fax)

Counsel for Plaintiff-Intervenor
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2002, a true and correct copy of **United States' Brief in Opposition to Defendants' Renewed Motion for Summary Judgment** was served by first-class mail on the following parties:

D. Milo Mumgaard
626 Washington Street
Lincoln, NE 68502

Counsel for Plaintiffs

Paul R. Elofson
Alan E. Pedersen
McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O.
11404 West Dodge Road, Suite 500
Omaha, NE 68154-2584

Counsel for Defendants

M. Christine Fotopulos