No. 01-1357

In the Supreme Court of the United States

OHIO ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

MICHAEL D. NIHISER AND
UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 269 F.3d 626. The opinion of the district court (Pet. App. 8a-27a) is reported at 979 F. Supp. 1168.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 2001. A petition for rehearing was denied on December 5, 2001 (Pet. App. 7a). The petition for a writ of certiorari was filed on March 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a) (1994 & Supp. V 1999). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999); *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir. 1996) (en banc).

In 1984, this Court held that Section 504 as written required only the "program or activity" that actually received federal funds to comply with the statutory nondiscrimination mandate. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 636 (1984). In response to *Darrone* and *Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984), decided the same day, Congress engaged in extensive hearings and deliberations that culminated in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28. That statute defined the term "program or activity" in Section 504 to mean, in relevant part,

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

* * * * *

> any part of which is extended Federal financial assistance.

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

In 1985, this Court held that Section 504 was not clear enough to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7(a)(1) provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. Respondent Michael Nihiser was hired by petitioner in 1978. His job responsibilities included on-site visits to investigate complaints in a twenty-three

county region in southeastern Ohio. In 1986, he injured his back in an on-the-job accident which limited his ability to walk long distances or drive for prolonged periods. Respondent informed petitioner that he required an accommodation, either in the form of a more flexible schedule or reassignment to a position that did not require driving. Petitioner initially granted respondent some flexibility, but, in 1993, petitioner imposed more rigid driving requirements on respondent and declined to transfer him to a job that did not require driving. Instead, it informed respondent that if he could not perform all his job duties, he should apply for disability retirement. Pet. App. 3a; C.A. App. 51, 54, 60.

Respondent filed suit in district court, alleging that petitioner's conduct violated Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and seeking reinstatement, back pay, and damages. The district court denied petitioner's motion for summary judgment on the merits, finding that it was undisputed that respondent was an individual with a disability and that there were material issues of fact as to whether petitioner had reasonably accommodated respondent. Pet. App. 3a; C.A. App. 60.

Petitioner then filed a motion to dismiss on the grounds of Eleventh Amendment immunity, which the district court granted. The district court found that while Congress had made clear that it intended to remove States' Eleventh Amendment immunity to suits under the Disabilities Act and Section 504, it did not have the authority under Section 5 of the Fourteenth Amendment to do so. Pet. App. 11a-27a. The court further determined that petitioner had not waived its immunity to suits under Section 504 because

Congress had not "conditioned participation in the program on the state's consent to suit in federal court." *Id.* at 10a.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the provisions conditioning the States' receipt of federal funding on the waiver of Eleventh Amendment immunity. The court of appeals reversed with regard to Section 504. Pet. App. 1a-6a.[1]

The court found that Congress had enacted 42 U.S.C. 2000d-7 in response to this Court's decision in *Atascadero*, which had held that Section 504 as originally written "fell 'far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'" Pet. App. 5a (quoting *Atascadero*, 473 U.S. at 247). Examining the plain language of Section 2000d-7, the court found that Congress made clear in "the most express language" that entities like petitioner "waive their Eleventh Amendment immunity with regard to Rehabilitation Act claims when they accept federal funds." *Id.* at 6a. Because it was undisputed that petitioner received federal financial assistance, the court reversed the district court's dismissal of respondent's Section 504 claim and remanded for further proceedings. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court has denied petitions

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[1] Relying on *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the court of appeals affirmed the dismissal of respondent's claim under Title I of the Disabilities Act. Pet. App. 4a. Further review of that holding has not been sought.

for a writ of certiorari in *Arkansas Department of Education* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488), and *George Mason University* v. *Litman*, 528 U.S. 1181 (2000) (No. 99-596), cases presenting virtually identical legal claims. Accordingly, further review is not warranted.

1. 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." Petitioner contends (Pet. 11-24) that that provision was not effective in putting it on clear notice that acceptance of federal funds would constitute a waiver of immunity to suit.

Petitioner argues (Pet. 11-22) that Section 2000d-7 was intended to act as a unilateral abrogation of immunity, and not as a condition with which the recipient was required to agree in order to receive the federal funds. It does not matter, however, whether Congress thought that Section 2000d-7 was a clear abrogation or a clear notice that acceptance of funds will constitute waiver. Either way, the obligation is incurred only when a recipient elects to accept federal financial assistance, and either way, Congress has not imposed the requirement on the States unilaterally. If a state agency does not wish to accept the conditions attached to the funds (non-discrimination and suits in federal court), it is free to decline the assistance. But if it does accept federal money, then it is clear that it has agreed to the conditions as well.[2] "Congress may, in the

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[2] This was the understanding at the time of Section 2000d-7's enactment. 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

exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * acceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

Because Congress has made it entirely clear that a State's decision to accept federal funds subjects it to suit under Section 504, there is no requirement that a state agency's assent to the waiver be manifested in a manner apart from its voluntary action in accepting the federal funds. The same is true in other settings in which the loss of Eleventh Amendment immunity is triggered by an action completely within the control of a state agency. For example, in the bankruptcy context, the courts of appeals are in agreement that after Congress made clear in 11 U.S.C. 106(b) that the effect of filing a proof of claim in a bankruptcy court would be the loss of immunity from claims arising out of the same transaction or occurrence, state agencies waive their Eleventh Amendment immunity by filing a proof of claim. See, *e.g.*, *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 27-28 (1st Cir. 2001) (so holding and collecting cases), petition for cert. pending, No. 01-1545; see also *Lapides* v. *Board of Regents*,

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powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1420 (Oct. 21, 1986).

No. 01-298 (May 13, 2002), slip op. 4-5 (discussing ability of the States to waive Eleventh Amendment immunity through litigation conduct).

Thus, the courts of appeals are in agreement that the language of Section 2000d-7 clearly forewarned recipients that acceptance of federal financial assistance would constitute a waiver of immunity to private suits alleging violations of nondiscrimination statutes and that acceptance of the federal assistance thus constitutes an agreement to the waiver. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001) (Section 504), petition for cert. pending, No. 01-1546; *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 533 U.S. 949 (2001); *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001) (Title IX of the Education Amendments); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998).

Petitioner is incorrect in asserting (Pet. 22-24) that the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001), is to the contrary. The Second Circuit agreed with the other courts of appeals 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." *Id.* at

113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4. However, *Garcia* also held that Title II of the ADA did not validly abrogate the States' immunity and that the Section 504 waiver was not knowing because the state agency did not "know" in 1995 (the latest point the alleged discrimination in *Garcia* had occurred) that its waiver of immunity under Section 504 would have a substantial fiscal effect, rather than simply result in liability substantially similar to that under Title II. According to the court, since "by all reasonable appearances state sovereign immunity [to claims of disability discrimination under the ADA] had already been lost" by virtue of the Title II abrogation, the State "could not have understood that in [accepting federal funds] it was actually abandoning its sovereign immunity from private damages suits" for the same disability discrimination under Section 504. *Id.* at 114.

The Second Circuit's conclusion about a knowing waiver is, in our view, incorrect.[3] Indeed, petitioner

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[3] It is wrong because every state agency did know from the plain text of Section 2000d-7 from the time it was enacted in 1986 that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990, and it was clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). It is thus untenable to suggest that abrogation for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute. It is clear that a waiver can be knowing and voluntary even if it was based on an incorrect understanding of the law. See *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not

does not endorse or espouse that unprecedented view. And, contrary to petitioner's contention, the Second Circuit's opinion makes clear that at the point when there is a "colorable basis for the state to suspect" that it had retained its immunity to suit, the waiver for Section 504 is effective "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity." *Garcia*, 280 F.3d at 114 n.4. Thus, under *Garcia*, as under the other appellate decisions cited above, state agencies accepting federal funds *now* will be found to have waived their immunity to Section 504 suits. The courts of appeals are in accord, at least prospectively, as regards the amenability of States to suits under Section 504.

2. Petitioner further contends (Pet. 24-29) that Congress did not have the power to condition the receipt of federal funds on an agreement to waive immunity, either generally or as applied in this case. Those contentions do not merit further review.

a. Petitioner contends (Pet. 28-29) that Congress is prohibited from conditioning the disbursement of federal funds on a state agency's agreement to waive its Eleventh Amendment immunity because Eleventh

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become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); cf. *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987) (plaintiff may waive the right to bring a 42 U.S.C. 1983 action for unknown constitutional violations). *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, when a "colorable basis for a state to suspect" that the abrogation was unconstitutional developed, see *Garcia*, 280 F.3d at 114 n.4, and has now regained its full effectiveness—creates an unprecedented patchwork of effective coverage.

Amendment immunity is a "constitutional limitation" of "fundamental" importance. That argument was not pressed by petitioner below. To the contrary, petitioner acknowledged in the court of appeals that "a State agency *may* waive its immunity in order to receive federal funds." Pet. for Reh'g at 7. Moreover, the court of appeals did not address the question whether conditioning federal funds on a State's waiver of sovereign immunity is simply beyond Congress's power. This Court does not ordinarily grant review to consider questions that were neither pressed nor passed upon below. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001); see also pp. 16-17, *infra*.

In any event, petitioner's argument that Congress has no power to condition a grant of federal funds on a State's waiver of sovereign immunity is squarely foreclosed by this Court's holding in *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987), that the Spending Clause empowers Congress to condition the receipt of federal funds in order to achieve "objectives which Congress is not empowered to achieve directly" because of federalism constraints. Indeed, this Court has consistently upheld Congress's power to condition the receipt of federal funds on the recipient State's taking actions that affect its sovereign interests. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York* v. *United States*, 505 U.S. 144, 167 (1992). Thus, in *New York*, this Court held that a statute in which Congress conditioned grants to the States upon the States' "regulating pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause. *Id.* at 169, 173; see also *Oklahoma* v. *United*

States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on State's appointing non-partisan disbursement officials).

Nor is there anything unique about Eleventh Amendment immunity that would bar Congress from making waiver of it a condition for receipt of federal grants. In *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), this Court noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits. Cf. *South Dakota* v. *Dole*, 483 U.S. 203 (1987)." Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), this Court reaffirmed the holding of *Petty* v. *Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1959), which held that Congress could condition the exercise of one of its Article I powers (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 commercial activity," Congress's exercise of its power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place reasonable conditions that a State was free to accept or reject. *Id.* at 687.

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 do its own cost-benefit analysis for each state agency and determine whether

to accept the federal money with the condition that the agency waive its immunity to suit in federal court, or forgo the federal funds. See *New York*, 505 U.S. at 168. Once a State makes that choice, 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). All the courts of appeals that have addressed the issue, both before and after *College Savings Bank*, are in accord.[4] Further review of petitioner's contention is therefore not warranted.

b. Petitioner also contends (Pet. 25-26) that, even if Congress may condition the receipt of federal funds on a waiver of immunity for valid Spending Clause statutes, Congress exceeded its authority under the Spending Clause by requiring an entire state agency to comply with Section 504's prohibition on discrimination

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[4] In addition to the cases cited on p. 8, *supra*, see *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (Individuals with Disabilities Education Act), cert. denied, 531 U.S. 824 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same); *Department of Education* 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 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 & Soc. Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

against persons with disabilities if the agency accepts any federal financial assistance.

This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id.* at 207. Second, if Congress conditions the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this 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.'" 483 U.S. at 207. And fourth, the obligations imposed by Congress may not induce a governmental recipient to violate any independent constitutional provisions. *Id.* at 209-211.

Petitioner does not contest that the conditions of Section 504 serve the general welfare, see *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval), that they are clear, see *School Bd.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (describing Section 504 as an "antidiscrimination mandate"), or that they do not require petitioner to engage in unconstitutional conduct.[5]

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[5] Petitioner does briefly suggest (Pet. 28) that a State's desire to retain its immunity from suit constitutes an "independent constitutional bar" under *Dole*. Petitioner concedes, however, that the Court in *Dole* held that "the Twenty-first Amendment, which * * * puts the police power over alcohol under the States' control * * * was not an 'independent bar' to Congress's attempt to

Instead, petitioner contends (Pet. 25-26) that the condition embodied in Section 504—that if an agency accepts federal financial assistance, it must not discriminate on the basis of disability—is not sufficiently "related" to at least some of the federal financial assistance it receives.

First, petitioner did not argue below that the breadth of the waiver required by Section 504 exceeded Congress's authority, and the court of appeals did not address any such claim. To the contrary, while petitioner asserted in the district court that there was no evidence that the division of the agency in which respondent worked had used the federal funds received by the agency, it acknowledged that no further discovery was required because the definition of "program or activity" encompassed the entire agency. R. 76; Defendant's Reply Mem. in Support of Mot. to Dismiss at 13 & n.6. Petitioner did not object to that definition on constitutional (or any other) grounds. Nor did petitioner raise the relatedness issue in either its opening brief or its supplemental brief on appeal. And as petitioner acknowledged (Pet. 26), the court of appeals did not address the contours of the "relatedness" requirement or apply it to the circumstances of this case.

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regulate that area indirectly through its spending power." *Ibid.* The same principle applies to state sovereign immunity, which is similarly "under the States' control" and similarly within Congress's ability to influence "indirectly through its spending power." Indeed, petitioner's suggestion that state sovereign immunity is an "independent constitutional bar" could be accepted only if it were the case that the Constitution barred a State from waiving its sovereign immunity—a position that petitioner does not expressly adopt and that has no support in this Court's Eleventh Amendment jurisprudence.

It is this Court's general rule that it will not grant certiorari to address arguments not pressed in, or decided by, the lower courts. See *United States* v. *Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 237 (1990). Since this is a court of "review, not one of first view," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995), the failure of petitioner to press any "relatedness" arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988).[6] While petitioner did touch on the relatedness issue in its petition for rehearing, the argument came too late to preserve it for this Court's review. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see also *Costo* v. *United States*, 922 F.2d 302, 302-303 (6th Cir. 1990) ("Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing.").[7]

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[6] The same prudential rule applies when the question involves the Eleventh Amendment. See *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997) (declining to address Eleventh Amendment argument "which w[as] neither raised nor decided below, and w[as] not presented in the petition for certiorari"); see also *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 8 n.12 (1981) (Court would not address Eleventh Amendment issue because it was not "within the scope of the questions on which review was granted").

[7] The value of having the lower courts address questions in the first instance is evidenced in this case, where petitioner's arguments are premised on a reading of the record that the lower courts were not given an opportunity to accept or reject. The deposition of Stephen A. Scoles, petitioner's deputy director for administration, was filed with the district court (R. 72) and relied

In any event, Congress may, under the Spending Clause, require an agency that elects to receive federal financial assistance to promise not to discriminate on the basis of disability in any of its operations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, is 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).[8] The Court reached a similar conclusion in

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upon by respondent to establish petitioner's receipt of federal financial assistance (R. 77, at 1-2, 4). The deposition revealed that petitioner was receiving grants from three federal agencies: the Environmental Protection Agency (EPA), the Department of Energy, and the Department of Transportation (R. 72, at 10, 23, 34). While there was testimony that the grants from the EPA did not fund the division in which respondent was employed (*id.* at 8), there is no testimony regarding whether any of the grants from the other two federal agencies benefitted that division. And there is some evidence that the federal funds could have done so. At least one of the grants from the Department of Energy authorized the purchase of computer and monitoring equipment that, after the project was completed, would become the sole property of the agency and could be used in any manner permitted by state law (*id.* Exh. 83, Attach. 1, at 1, Attach. 3, at 5-6). In addition, there was no evidence regarding whether petitioner used any of the funds from the approximately one hundred federal grants it received (*id.* at 7) to pay for administrative or overheard costs incurred by respondent's division. Cf. *OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments*, 60 Fed. Reg. 26,484, 26,504 (1995) (describing methods of allocating indirect costs).

[8] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), this Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond

Grove City College v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination in education programs by recipients of federal financial assistance, infringed the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 465 U.S. at 575.

Petitioner urges (Pet. 25) that the condition embodied in Section 504's non-discrimination requirement is not "related" because the funds were not directed "to employment of the disabled" or to non-discrimination. But the Constitution does not require that Congress provide funds to combat discrimination or help individuals with disabilities if it wishes to attach a non-discrimination requirement to its funds. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid that had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13. Instead, those cases make clear that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public

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intentional discrimination." However, the Court did not cast doubt on the Spending Clause holding in *Lau*.

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).[9]

By imposing the non-discrimination condition on all of the operations of the state agency that receives any federal funds, Congress elected to be guided by each State's own governmental structure in determining the proper breadth of coverage. State law establishes the allocation of operations and functions among departments of the state government. Congress reasonably may presume, however, that States normally place related operations with overlapping goals, constituencies, and resources in the same department. 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

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[9] Petitioner's suggestion that conditions cannot be "related" to the purpose of the federal spending unless they involve the subject-matter of a particular grant also conflicts with cases outside the civil rights area upholding, as valid exercises of the Spending Clause, conditions not tied to a particular spending program. See *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. at 129 n.1 (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Salinas*, 522 U.S. at 60-61 (upholding application of federal bribery statute covering entities receiving more than $10,000 in federal funds).

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

c. Petitioner also suggests (Pet. 27-28) that Section 504 is unconstitutionally coercive. This Court pointed out in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the only case cited in support of that proposition in *Dole* was *Steward Machine*, a decision that expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). Every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* In *Dole* the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Petitioner has not identified anything about Section 504 that overbears a sovereign State's ability to say

"no" to the offer of federal funds for any agency it does not want to be subjected to the non-discrimination requirements of Section 504. Petitioner notes (Pet. 27) that it will have to elect not to seek federal funds for an entire agency if it wishes the agency to be free of Section 504's obligation not to discriminate and attendant waiver of immunity.[10] That is also true under Title VI and Title IX, statutory schemes whose legality was upheld in *Lau* and *Grove City*, as well as the Equal Access Act, 20 U.S.C. 4071 *et seq.*, a statute that prohibits any public secondary school that receives any federal financial assistance and maintains a "limited open forum" from denying "equal access" to students based on the content of their speech. 20 U.S.C. 4071(a). In interpreting the scope of the Equal Access Act in *Board of Education of the Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226 (1990), this Court rejected the school district's argument that the Act as interpreted unduly hindered local control, noting that

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[10] Petitioner suggests (Pet. 27-28) that the court of appeals held that the entire State, and not just the relevant state agency, waived its immunity if any part of the State received federal financial assistance. To the extent the panel opinion can be read in that manner, we agree that it improperly describes the scope of the waiver. See *Nelson* v. *Miller*, 170 F.3d 641, 653 n.8 (6th Cir. 1999) (Section 504 limited to agency that receives federal funds). However, this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not "decide questions that cannot affect the rights of litigants in the case before them." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotations omitted). Since there is no dispute in this case that petitioner was an agency that received federal financial assistance that triggered coverage under Section 504 (Pet. 9), the broad language in the opinion, if construed as petitioner suggests, is at most dicta, and it has no bearing on the proper disposition of this case.

> 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.

Id. at 241 (citation omitted). Similarly, compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it elects to remain federally funded. See also *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962 (1978). In addition, the State's ability to define and allocate the functions of its state agencies also minimizes the threat of coercion.

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, 531 U.S. 1035 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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