

SECOND CIRCUIT REVIEW

Expert Analysis

## Waiving Eleventh Amendment Immunity Through Conditioned Federal Funds

Earlier this year, in *T.W. v. New York State Board of Law Examiners*, the U.S. Court of Appeals for the Second Circuit considered whether the New York State Board of Law Examiners (the Board) waived Eleventh Amendment immunity when bar applicants were reimbursed for application expenses through other state agencies. In a unanimous opinion, written by Chief Circuit Judge Debra Ann Livingston, and joined by Circuit Judge Denny Chin and Judge Katherine Polk Failla of the U.S. District Court for the Southern District of New York, the Second Circuit held that the Board did not waive Eleventh Amendment immunity since (1) it did not directly request or receive federal financial assistance conditioned on waiver, and (2) it was not a “program or activity” of a department, agency, or other instrumentality that waived immunity. With this case, the Second



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Circuit joins its sister circuits in reiterating that state entities should be able to knowingly waive immunity in discrete situations without the acceptance of conditioned federal funds for some departments vitiating immunity for others. This decision, which extends beyond the specific situation of state licensing exams, highlights the importance of considering how state-use of conditioned federal funds may affect potential litigation and how best to structure various relationships—including contracts, collaborative research agreements, and assignments—to account for Eleventh Amendment immunity considerations.

### T.W.’s Testing Accommodations

Prior to attending law school, T.W. suffered a severe head injury that resulted in panic disorder without agoraphobia, cognitive disorder,

reading disorder, and amnesic disorder. During law school, T.W. received 50% extra time on exams, stop-clock breaks, and separate testing facilities to accommodate for her disabilities. She requested these same accommodations for the July 2013 New York bar exam. After appealing an original denial by the Board for testing accommodations, T.W. received some of the requested accommodations but not all. She did not pass the exam. T.W. reapplied for the July 2014 exam requesting the same accommodations as she requested the first time. The Board partially granted her request providing a different mix of accommodations. T.W. did not pass this exam either.

T.W. passed the February 2015 bar exam after the Board provided her with yet another mix of accommodations; however, she had already lost her post-graduation job due to failing the bar exam twice. T.W. sued the Board, alleging that the inadequate testing accommodations led to her failing the bar exam twice and that the two failures prevented her from finding a comparable job to the one she lost. She sought relief under Title II of the Americans with Disabilities

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Act (ADA), §504 of the Rehabilitation Act, and a few other claims that were later voluntarily withdrawn.

### The District Court's Motion To Dismiss Ruling

In response to the lawsuit, the Board moved to dismiss the case for lack of subject matter jurisdiction due to Eleventh Amendment immunity. The Eleventh Amendment generally protects nonconsenting states from suit by private individuals in federal court. Congress may, however, condition the receipt of certain federal funds by states on a waiver of Eleventh Amendment immunity. The Rehabilitation Act does just that. Under §504 of the Rehabilitation Act, there are three ways in which a state entity waives its immunity: (1) directly requesting and receiving conditioned federal funding; (2) being a “program or activity” of “a department, agency, special district, or other instrumentality of a State” where any part of which receives federal aid; or (3) indirectly receiving federal funding where another state entity requests and receives the funding and then extends it to a non-requesting entity.

The Board argued that it did not directly receive conditioned federal funding. The funds were directly provided to two other state agencies that then channeled the funds directly to bar examinees with certain disabilities as reimbursement for registration expenses. Additionally, the Board contended that it was not the indirect recipient of funds either. Unlike in previous instances where the Board had accepted vouchers

from applicants that the Board could then use to seek compensation from other state agencies, the Board has required applicants since 2011 to directly pay for the exam and to independently seek reimbursement from other entities. In response, T.W. argued that although it was the bar examinees who received reimbursements from the accepted federal funds, and not the Board, the Board was still the intended recipient since the funds were provided for the express pur-

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pose of reimbursing bar exam fees. Further, T.W. argued that the Board had waived its immunity since it was a “program or activity” of New York’s Unified Court System (UCS), which T.W. contended was a recipient of conditioned federal funds.

The district court held that the Board did not directly or indirectly receive conditioned federal funding under §504 of the Rehabilitation Act because there was no point at which the federal funds were transferred to the Board: Other state agencies not associated with the Board requested and received the funds, and the money was sent directly to bar applicants. Any money received by the Board was paid by bar applicants prior to the federal funds being

dispersed to the applicants. 996 F.3d 87, 91 (2d Cir. 2021). Further, even if the Board was an intended beneficiary of the funding, that was not sufficient to subject the Board to liability. But, the district court further held that the Board had nonetheless waived Eleventh Amendment immunity because it was a “program or activity” of UCS, which the district court agreed was a recipient of conditioned federal funds. Concluding that the suit could continue for §504 of the Rehabilitation Act, the district court declined to consider jurisdiction regarding Title II of the ADA since the two claims relied on the same legal standards and remedies. *Id.*

### The Second Circuit Opinion

On appeal, the parties stipulated that the Board did not directly or indirectly receive financial assistance from the federal government for the relevant time period. In addressing whether the Board was nevertheless the “intended recipient” of the federal funds, the court emphasized the fact that the Board did not actually receive any federal funds. Even though the Board may have benefited from the reimbursements, it was not sufficient to constitute a waiver. Analogizing to *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986)—where the Supreme Court refused to consider airlines the recipients of federal funding where the funds were directed to airport operators even though the airlines benefitted from improved airport runways—the court held that the receipt of indirect economic

benefits alone is not enough to constitute a waiver of Eleventh Amendment immunity. 996 F.3d at 94.

Turning to whether the Board was “a program or activity” of a receiving state entity that would justify waiver, the court engaged in a three-part analysis, determining: (1) which state entity received the conditioned federal funding; (2) whether the entity is a part of a broader department, agency, or other instrumentality; and (3) whether the Board is an operation of the recipient department, agency, or instrumentality. 996 F.3d at 95. As to the first part of the analysis, the court recognized that the federal funds were exclusively allocated to the Courts of Original Jurisdiction—specifically to fund services in the drug treatment, family and other specialty courts. But, the Chief Administrator, who is the principal management authority of UCS, is the signatory and authorized recipient for federal funds for all UCS court programs. Relying on the Eighth Circuit’s reasoning in *Singer v. Harris*, the court explained that the Chief Administrator did not “receive” or “distribute” funds under the Rehabilitation Act since the Chief Administrator does not make use of the funds, decide which agencies or sub-units will receive the funds, or oversee the agency or sub-unit’s fulfillment of the grant terms. Like a centralized bank, the federal funds are merely deposited to the Chief Administrator to then be transferred to the recipient state entity. 996 F.3d at 97.

Recognizing that the specialty courts were the intended recipients of the federal funds, the court

analyzed whether this situation was sufficient to subject the entire New York judiciary to the Rehabilitation Act. The court noted the need to balance Congress’s intent for the Rehabilitation Act to have broad reach with the state’s interests in preserving its sovereignty. Echoing the Seventh Circuit’s *Schroeder v. City of Chicago* decision, the court determined that the scope of the Rehabilitation Act was not broad enough to sweep up the whole state, state branch, or local government. Acceptance of conditioned federal funds by specialty courts

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was not enough to waive Eleventh Amendment immunity for the entire judiciary—rather, the waiver only extended to the Courts of Original Jurisdiction. The court noted that this outcome was consistent with the Third Circuit’s *Haybarger v. Lawrence Cnty. Adult Prob. & Parole* decision, which found that the receipt of federal funds by a sub-unit of a

judicial district was insufficient to subject the entire unified judicial system of Pennsylvania to the Rehabilitation Act. 996 F.3d 100-01. Since the Board was not a sub-unit of the Courts of Original Jurisdiction, the court determined that the Board’s Eleventh Amendment immunity was not waived when the specialty courts of the Courts of Original Jurisdiction received conditioned federal funds. *Id.* at 101.

### Conclusion

Although this decision concerned a relatively narrow analysis within the confines of the Rehabilitation Act, it reinforces key considerations for numerous interactions between private actors and state government agencies. Whether the interactions concern research agreements, assignments, commercial transactions, or other contracts, any relationship with state entities that features conditioned federal funding should lead private actors to investigate how the federal funds are channeled and applied. For state administrators, this decision provides a helpful framework for considering how to balance using conditioned federal funds while reducing regulatory demands and risk of future litigation.