NO. 04-3263

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, STEPHEN V. CURTISS, *et al.*,

Appellants,

v.

BILL M., by and through his father and natural guardian, William M., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

The Honorable Richard G. Kopf, United States District Court Chief Judge

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

Plaintiffs filed an Amended Complaint alleging eight claims for relief, including one under the Americans With Disabilities Act ("ADA") on August 28, 2003. In response on October 17, 2003 Defendants filed a Motion to Dismiss Amended Complaint setting forth nine asserted grounds for dismissal of the Complaint. One of those grounds asserted sovereign immunity under the Eleventh Amendment. After briefing and due consideration, the United States District Court Judge, Richard G. Kopf, denied the motion to dismiss in its entirety on August 6, 2004. The Defendants then collectively filed their Notice of Appeal on September 7, 2004, and subsequently Appellants filed their brief. That brief seeks partial reversal of the District Court's order insofar as it denies Defendants' request to dismiss the ADA claim as to the State Agency Defendants. Appellants do not seek to dismiss any other claims, and do not seek to dismiss the ADA claim as it relates to the Individual Defendants in their official capacities.

STATEMENT PERTAINING TO ORAL ARGUMENT

Oral argument is not necessary in this case.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction to determine the Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Pursuant to 28 U.S.C. § 1291, the courts of appeals only have jurisdiction to hear appeals from final decisions of the district courts. Although the final judgment rule is subject to the collateral order exception, the exception does not apply in the case at hand. The collateral order doctrine is a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system" be treated as "final." *Digital Equipment Corporation v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S.Ct. 1992, 128 L.Ed. 2d 842 (1994). While orders denying a motion to dismiss based on sovereign immunity are subject to the "collateral order rule," in cases where the requested dismissal does not dispose of an identical claim under other law and does not relieve the State from defending the particular claim sought to be dismissed as a real party in interest, the overarching purpose of 28 U.S.C. § 1291 and its practical interpretation under the collateral order rule defeat interlocutory appellate jurisdiction.

STATEMENT OF ISSUES

The State of Nebraska has waived its Eleventh Amendment sovereign immunity with respect to suits involving alleged discrimination in the operation of its Medicaid program. Appellees submit that the issue is controlled by *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000); *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 144 L.Ed. 2d 605, 119 S.Ct. 2219, 2231 (1999); and *Doe v. The State of Nebraska*, 345 F.3d 593, (8th Cir. 2003) and 42 U.S.C. § 2000d-7.

An order denying a motion to dismiss based on sovereign immunity is not a final order within the meaning of the "collateral order rule" where the State would nonetheless continue to be obligated to defend the same claims asserted against its officials and to defend an identical claim based under other federal law. The Appellees submit that the issue is controlled by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); and *Digital Equipment Corporation v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S.Ct. 1992, 128 L.Ed. 2d 842 (1994) and 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Plaintiffs filed their Amended Complaint on August 28, 2003. (Appellants' Appendix, pages 1-41). Defendants filed their Motion to Dismiss Amended Complaint on October 17, 2003. (Appellants' Appendix, page 42). After briefing and due consideration, the United States District Court Judge, Richard G. Kopf, denied the motion to dismiss in its entirety on August 6, 2004. (Appellants' Appendix pages 45-46). A Notice of Appeal was timely filed on behalf of all four Defendants on September 7, 2004. (Appellants' Appendix page 47). A Brief has been filed by Defendants seeking reversal of the District Court's order denying Defendants' Motion to Dismiss the First Claim for Relief (the Americans with Disabilities Act of 1990, "ADA" based claim), insofar as that claim names Nebraska Department of Health and Human Services ("NDHHS") and Nebraska Department of Health and Human Services Finance and Support ("NDHHS-F&S") as Defendants.

STATEMENT OF FACTS

Plaintiffs filed their Amended Complaint on August 28, 2003. (Appellants' Appendix, pages 1-41). The Amended Complaint was filed on behalf of seven people with developmental disabilities against the NDHHS, its Director, Ron Ross, in his

official capacity, and the NDHHS-F&S, and its Director, Stephen B. Curtiss, in his official capacity. (Appellants' Appendix, pages 1-2) .

The Plaintiffs are individuals residing in the State of Nebraska, who have developmental disabilities, who are eligible for Medical Assistance Home and Community-Based Services, and who are either not receiving any funding for such services or are not receiving sufficient funding for such services to reasonably achieve the purpose of the service, assure their health and safety, or ensure their progress toward independence, interdependence, productivity and community integration. (Appellants' Appendix, pages 15-27). As a result of inadequate funding, Plaintiffs either have been, or are at risk of being, placed in more restrictive than necessary settings, such as Intermediate Care Facilities for the Mentally Retarded ("ICF/MR"), nursing homes, or institutional settings. *Id.*

Plaintiffs' Amended Complaint sets forth eight claims for relief, which are:

1. Defendants have failed to provide funding, or adequate and appropriate funding, for Home and Community-Based Services for Plaintiffs, placing Plaintiffs at risk of institutionalization, even though Plaintiffs would be better served in a less restrictive community setting. Defendants' actions and inactions violate the Americans with Disabilities Act, 42 U.S.C.

§12101 *et seq.* See, *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). (Appellants' Appendix, pages 27-28).

2. Defendants have failed to provide funding, or adequate and appropriate funding, for Home and Community-Based Services for Plaintiffs, placing Plaintiffs at risk of institutionalization, even though Plaintiffs would be better served in a less restrictive community setting. Defendants' actions and inactions violate Section 504 of the Rehabilitation Act of 1973. (Appellants' Appendix, pages 28-30).

3. Defendants have failed to furnish Plaintiffs with medical assistance for ICF/MR services or Home and Community-Based Services in a reasonably prompt manner in violation of 42 U.S.C. §1396(a)(8). (Appellants' Appendix, pages 30-31).

4. Defendants have adopted a methodology for determining the type and amount of community-based specialized supports and services which fails to provide sufficient Home and Community-Based Services to Plaintiffs in terms of such services' amount, duration and scope so as to enable the services actually received to reasonably achieve their purpose.

Defendants' actions and inactions violate 42 C.F.R. §440.230(b). (Appellants' Appendix, page 31).

5. Defendants have adopted a methodology for determining the type and amount of community-based specialized supports and services which fails to provide sufficient Home and Community-Based Services to Plaintiffs in terms of such services' amount, duration and scope so as to enable the services actually received to protect the health and welfare of Plaintiffs. Defendants' actions and inactions violate 42 U.S.C § 1396n(c)(2)(A) and guidance provided to the states by HCFA (now CMS) in its *Olmstead* letter number 4, dated January 10, 2001. (Appellants' Appendix, page 32).

6. Defendants have adopted a methodology for determining the type and amount of community-based specialized supports and services which fails to provide sufficient Home and Community-Based Services to Plaintiffs in terms of such services' amount, duration and scope so as to enable the services actually received present opportunities to increase or maintain Plaintiffs' independent functioning, self-determination, interdependence, productivity, and community integration. Defendants'

actions and inactions violate *Neb. Rev. Stat.* § 83-1202(1), 205 Nebraska Administrative Code 4-017, and 480 Nebraska Administrative Code 2-002.01. (Appellants' Appendix, pages 33-34).

7. Defendants have adopted a methodology for determining the type and amount of community-based specialized supports and services which does not comply with 205 Nebraska Administrative Code 2-011.08, which requires decisions on the type and amount of developmental disability services to be made in the local field office. (Appellants' Appendix, page 34).

8. Defendants have placed Plaintiffs on a wait list for requested services without affording Plaintiffs an opportunity to appeal such action and to obtain a hearing. Defendants' actions and inactions violate 42 U.S.C. § 1396a(a)(3), 42 C.F.R. §§ 431.200-431.250, the due process clause of the United States Constitution and Section 3 of the Nebraska State Constitution. (Appellants' Appendix, pages 34-35).

Plaintiffs' Amended Complaint seeks injunctive and declaratory relief on their eight claims for relief. Plaintiffs seek no monetary damages, excepting statutory attorneys' fees and costs.

Defendants filed their Motion to Dismiss Amended Complaint on October 17, 2003. Defendants stated they were entitled to dismissal of the complaint for the following reasons:

1. The Plaintiffs are not entitled to injunctive relief because they have an adequate remedy at law;

2. The Plaintiffs are not entitled to declaratory relief because they have another, more appropriate remedy;

3. Claims against NDHHS and NDHHS-F&S are barred by the 11th Amendment;

4. The Plaintiffs' First and Second Claims for Relief must be dismissed because they fail to show that the Plaintiffs were discriminated against on the basis of their disability;

5. The Plaintiffs' First and Second Claims for relief are not ripe;

6. The Plaintiffs' First and Second Claims for relief must be dismissed because Plaintiffs have not shown that they meet essential eligibility requirements as required by the ADA and Section 504;

7. The Plaintiffs' Third, Fourth and Fifth claims must be dismissed because they are based on Medicaid statutes and regulations and the Plaintiffs have not pled facts showing that the additional services they demand would be covered by Medicaid;

8. The Plaintiffs' Sixth and Seventh Claims for Relief must be dismissed because they are based wholly on state law and not on a federally protected right; and

9. The Plaintiffs' Seventh Claim for Relief does not include facts showing that the Plaintiffs were damaged.

(Appellants' Appendix, pages 42-43.)

After briefing and due consideration, the United States District Court Judge, Richard G. Kopf, denied the motion to dismiss in its entirety on August 6, 2004, stating:

> This is a complex case involving mentally disabled people who receive financial support from Nebraska. Among other things, the plaintiffs allege that the funding (services) they receive from Nebraska is

> insufficient and thus "discriminatory." It is "discriminatory" because the lack of funds has caused or threatens to cause their institutionalization. See *Olmstead v. L.C.*, 527 U.S. 581 (1999) ("discrimination" under the ADA results from "undue" institutionalization and may result from a lack of funding). The plaintiffs seek only injunctive and declaratory relief.
>
> The defendants have moved to dismiss this case asserting, among other things, Eleventh Amendment immunity. Having careful reviewed the arguments of the defendants, at this stage of the proceeding dismissal would be inappropriate. (Appellants' Appendix, page 45-46).

A Notice of Appeal was timely filed on behalf of all four Defendants on September 7, 2004. (Appellants' Appendix, page 47). A Brief has been filed on behalf of Appellants, NDHHS and NDHHS-F&S, seeking reversal of the District Court's order denying Defendants' Motion to Dismiss the First Claim for Relief (the ADA-based claim), insofar as that claim names NDHHS and NDHHS-F&S as Defendants. Defendants' brief addresses no other claim for relief and it does not address the First Claim for Relief as it relates to the Individual Defendants in their official capacities. In other words, the present appeal goes to only the third reason given in Defendants' Motion to Dismiss Amended Complaint, and not to any of the remaining reasons advanced by Defendants in their motion. As a result of particular note, Defendants do not seek review of the order denying dismissal with respect to the ADA claim asserted against the individual Defendants in their official capacities, and they do not seek

review of the order denying dismissal with respect to the Section 504 of the Rehabilitation Act of 1973 ("Section 504") claim as it relates to all four Defendants.

The basis urged by Defendants for partial reversal of the order on this interlocutory appeal is a claim of Eleventh Amendment sovereign immunity with respect to NDHHS and NDHHS-F&S. As already indicated, if the Court grants the requested partial reversal, the district court litigation would still proceed on all claims. The Section 504 claim would proceed against all four Defendants and the ADA claim would proceed against the named directors of the two state agencies in their official capacities.

STANDARD OF REVIEW

In reviewing a decision granting a motion to dismiss, an appellate court must accept as true all of the factual allegations contained in the complaint. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S.Ct. 992 (U.S. 2002); and *Republic of Austria v. Altmann*, 124 S.Ct. 2240, 2243 (U.S. 2004). An appellate court reviews a district court's decision to deny or grant a motion to dismiss for lack of subject matter jurisdiction pursuant to F.R.C.P. Rule 12(b)(1) under a *de novo* standard of review. *Republican Party of Minn., Third Congressional Dist. v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004); *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino*

Litigation, 340 F.3d 749 (8th Cir. 2003); *Hansen v. United States*, 248 F.3d 761, 763 (8th Cir. 2001); *Harris v. Epoch Group*, 357 F.3d 822, 824-25 (8th Cir. 2004); and *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004).

SUMMARY OF THE ARGUMENT

Plaintiffs believe this Appeals Court should deny this appeal for two reasons: 1) the State of Nebraska has waived its Eleventh Amendment sovereign immunity with respect to suits involving alleged discrimination in the operation of its Medicaid program, and 2) an order denying a motion to dismiss based on sovereign immunity is not a final order within the meaning of the "collateral order rule" where the State would nonetheless continue to be obligated to defend the same claims asserted against its officials and to defend an identical claim based under other federal law. These reasons are discussed further below.

ARGUMENT

I. THE STATE OF NEBRASKA HAS WAIVED ITS ELEVENTH AMENDMENT SOVEREIGN IMMUNITY WITH RESPECT TO SUITS INVOLVING ALLEGED DISCRIMINATION IN THE OPERATION OF ITS MEDICAID PROGRAM.

The Defendants' Motion to Dismiss the Plaintiffs' ADA claim as to the state Agency Defendants on the grounds of Eleventh Amendment immunity was properly denied. In *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), the Eighth Circuit held that 42 U.S.C. § 2000 d-7(a)(1) was a valid exercise of Congress' spending power, and incident to its spending power, Congress may attach conditions on the receipt of federal funds. "Specifically, Congress may require a waiver of state sovereign immunity as a condition of securing federal funds, even though Congress could not order the waiver directly." *Id.* at 1081, citing *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 144 L.Ed. 2d 605, 119 S.Ct. 2219, 2231 (1999).

42 U.S.C. § 2000 d-7(a)(1), which was enacted as Section 1003 (entitled "Civil Rights Remedies Equalization") of the Rehabilitation Act Amendments of 1986 (PL 99-506), states:

> 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, the Age Discrimination Act of 1975, 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.

This statute was enacted as a legislative response to *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), in which the United States Supreme Court had held that the Rehabilitation Act previously fell short of manifesting a clear intent pursuant to Spending Clause, Art. I, § 8, to condition participation in programs funded under the Rehabilitation Act on a State's consent to waive its constitutional immunity. Congress recognized the possibility the Court's rationale in *Atascadero* might be applied to other anti-discrimination statutes, and consequently the language of 42 U.S.C. § 2000d-7 was drafted to include not only Section 504 but also "any other federal statute prohibiting discrimination."

Title II of the ADA is a federal statute prohibiting discrimination. Specifically, 42 U.S.C. § 12132 states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The Agency Defendants are recipients of federal financial assistance in the relevant form of Medicaid, and the Amended Complaint clearly alleges that the Agency Defendants receive and administer federal medical assistance funds. Further, the ADA

claim relates to alleged discriminatory treatment in the Agency Defendants' administration of the state's Medicaid program. The acceptance by the Agency Defendants of federal medical assistance funds constitutes a waiver pursuant to 42 U.S.C. § 2000 d-7(a)(1) of the State of Nebraska's sovereign immunity with respect to any claims against it alleging ADA violations in the operation of its Medicaid program.

Subsequent to *Jim C., Doe v. The State of Nebraska*, 345 F.3d 593 (8th Cir. 2003), which held that NDHHS's receipt of federal funds effected a knowing waiver by contract of its sovereign immunity to actions brought under the Rehabilitation Act. Footnote 4 of the *Doe* opinion indicates that in an unpublished opinion on April 17, 2001, a three-judge panel of the 8th Circuit dismissed claims under the ADA. However, the docket entry for the 8th Circuit's April 17, 2001, judgment cites *Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001); and *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999)(en banc) in support of its ruling to dismiss. Neither of these cases were requested to address whether a state waived its sovereign immunity pursuant to 42 U.S.C. § 2000 d-7(a)(1), with respect to a given program or department by accepting federal funds for that program or department. Likewise, it appears the panel was never requested to consider whether

the state agency defendant waived its sovereign immunity pursuant to 42 U.S.C. § 2000 d-7(a)(1) to an ADA claim by accepting federal financial assistance.

Congress validly required a waiver of state sovereign immunity for a suit based on violations of federal discrimination statutes, including the ADA, as a condition for receiving federal funds, including Medicaid. Perhaps, such a waiver of state sovereign immunity explains why the U. S. Supreme Court decided the merits of *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), a case similar in nature to the present one. The Court decided *Olmstead*, even though long-standing federal court doctrine requires a federal court to refuse to decide a case on its merits until it has first determined it has jurisdiction. See, *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 287 L.Ed. 462 (1884); and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). If a suit against a state, pursuant to the ADA, for discrimination in the operation of federally-funded programs for persons with mental disabilities violated the Eleventh Amendment as the Defendants argue, then the Supreme Court could not have proceeded to decide the merits of the ADA claim in *Olmstead.* Likewise, Defendants' Appeal of the District Judge's Order denying the Defendants' Motion to Dismiss the ADA claim on the grounds of Eleventh Amendment immunity must also be denied.

II. AN ORDER DENYING A MOTION TO DISMISS BASED ON SOVEREIGN IMMUNITY IS NOT A FINAL ORDER WITHIN THE MEANING OF THE "COLLATERAL ORDER RULE" WHERE THE STATE WOULD NONETHELESS CONTINUE TO BE OBLIGATED TO DEFEND THE SAME CLAIMS ASSERTED AGAINST ITS OFFICIALS AND TO DEFEND AN IDENTICAL CLAIM BASED UNDER OTHER FEDERAL LAW.

Pursuant to 28 U.S.C. § 1291, the courts of appeals only have jurisdiction of appeals from *final* decisions of the district courts. "This statute and its judicial application reflect a strong policy against interlocutory or 'piecemeal' appeals." *United States v. Grabinski*, 674 F.2d 677 (8th Cir. 1982).

However, the final judgment rule is subject to a "collateral order" exception. The leading case setting forth this exception is *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed.1528 (1949). In *Cohen,* a corporate defendant filed a motion to require the plaintiff to give security for reasonable expenses, including attorney's fees, which the defendant might incur. The District Court judge denied the motion, and the Court of Appeals affirmed. On further appeal, the United States Supreme Court first noted:

> The effect of the statute [28 U.S.C. §1291] is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application

was concluded and closed and its decision final in that sense before the appeal was taken.

Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

However, the Court continued:

But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case. This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia v. Sweeney*, 1 Pet. 567, 569, 7 L.Ed. 265; *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 414, 46 S.Ct. 144, 145, 70 L.Ed. 339; *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542, 84 L.Ed. 783. *Id.*

The Supreme Court has more recently repeated that "the collateral order doctrine is best understood not as an exception to the "final decision" rule laid down by Congress in § 1291, but as a practical construction of it." *Digital Equipment*

Corporation v. Desktop Direct, Inc., 511 U.S. 863, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994).

The collateral order doctrine is a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system" be treated as "final." *Id* at 867. As such, the collateral order doctrine includes only those district court decisions that 1) are conclusive, 2) resolve important questions completely separate from the merits, and 3) would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. "Immediate appeals from such orders, do not go against the grain of § 1291, with its object of efficient administration of justice in the federal courts." *Id* at 867-8.

The Supreme Court has "also repeatedly stressed that the "narrow" exception should stay that way and never be allowed to swallow the general rule, that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Id* at 868. The conditions for collateral order appeal are to be stringent. *Id* at 868; and *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, 109 S.Ct. 1494, 1498, 103 L.Ed.2d 879 (1989).

In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), the United States Supreme Court permitted an interlocutory appeal on the grounds of Eleventh Amendment sovereign immunity. In *Puerto Rico Aqueduct and Sewer Authority*, the Court found with respect to the elements identified by *Cohen*:

> First, denials of Eleventh Amendment immunity claims purport to be conclusive determinations that States and their entities have no right not to be sued in federal court. Second, a motion to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection whose resolution generally will have no bearing on the merits of the underlying action. Third, the value to the States of their constitutional immunity--like the benefits conferred by qualified immunity to individual officials, see *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411– is for the most part lost as litigation proceeds past motion practice, such that the denial order will be effectively unreviewable on appeal from a final judgment. *Puerto Rico Aqueduct*, at 685.

In addition, the third prong of the foregoing analysis does not hold up in the present case. Here, the benefits of sovereign immunity, if applicable, yield little of practical utility to the Agency Defendants. This is the case, because 1) the Defendants, despite their appeal, will nonetheless be required to expend time and effort to defend the Section 504 claim which is essentially identical to the ADA claim and which is not subject to the present appeal, and 2) the Agency Defendants will nonetheless expend time and effort defending the ADA claim against the individual

directors named in their official capacities, which also is not subject to the present appeal. Due to the fact that these other claims remain, even in the event of a successful appeal herein, the value to the State in the immediate vindication of its asserted sovereign immunity rights is marginal at best, and more likely totally lacking. In such circumstances, immediate vindication of the State's Eleventh Amendment Immunity clearly does not outweigh the strong policy against interlocutory or 'piecemeal' appeals. Indeed, permitting the interlocutory appeal runs squarely counter to the *practical construction* of § 1291 which the United States Supreme Court has decreed. Permitting the State to take an interlocutory appeal in such circumstances is tantamount to permitting the State to delay the proceeding so it can pursue an appeal of no practical benefit.

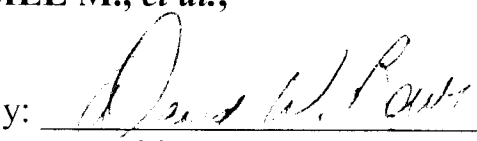
This appellate court should find that an order denying a motion to dismiss based on sovereign immunity is not a final order within the meaning of the "collateral order rule" in all cases where the state would nonetheless continue to be obligated to defend the same claims asserted against its officials and to defend an identical claim based under other similar federal law. As a result of such a ruling, this court should dismiss the present appeal for lack of appellate jurisdiction.

CONCLUSION

The State of Nebraska has waived its Eleventh Amendment sovereign immunity with respect to suits involving alleged discrimination in the operation of its Medicaid program, and an order denying a motion to dismiss based on sovereign immunity is not a final order within the meaning of the "collateral order rule" where the State would nonetheless continue to be obligated to defend the same claims asserted against its officials and to defend an identical claim based under other federal law. This Court should sustain the decision of the district court which denied the dismissal of the Plaintiffs' claims under the ADA against NDHHS and NDHHS-F&S.

Respectfully submitted,

BILL M., *et al.*,

By: 

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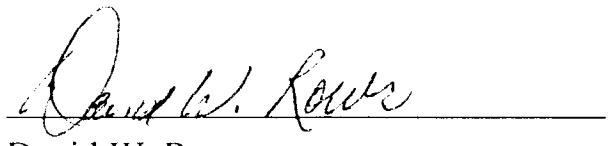
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellees has been served on November 24, 2004, upon Douglas D. Dexter, Assistant Attorney General and Jon Bruning, Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, by United States mail with proper, prepaid postage affixed thereto.

By: 

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CERTIFICATE OF COMPLIANCE REGARDING DISKETTE AND WORD PROCESSING PROGRAM

The undersigned hereby certifies that the above Brief of Appellees complies with 1) the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 4,071 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and 2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect for Windows 9.0 in 14-point Times New Roman font.

The undersigned further certifies that the above Brief of Appellees complies with the 8th Cir. R. 28A(d)(2) because a digital version of the brief has been furnished on a 3.5 inch computer diskette containing only an electronic version of the brief in one file, and the diskette has been scanned for viruses using Computer Associates E-Trust Antivirus software 7.0.139 using the InnoculateIT engine and it and was found to be virus free.