C. v. New York State and Local Retir Doc. 109

11-2215

United States Court of Appeals for the Second Circuit

MARY JO C.,

Plaintiff - Appellant,

v.

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM,
CENTRAL ISLIP PUBLIC LIBRARY,

Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR STATE APPELLEE

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PRELIMINARY STATEMENT

Plaintiff Mary Jo C., a member of the New York State and Local Retirement System (NYSLRS), applied for disability retirement benefits one year after her employment was terminated by Central Islip Public Library. NYSLRS denied her application because plaintiff failed to file for benefits within three months of her last day of employment as required by the New York State Retirement and Social Security Law (RSSL). After a hearing officer denied her administrative appeal, plaintiff filed this action in federal court—asserting disability discrimination claims against both NYSLRS and the Library.

Plaintiff alleged that NYSLRS violated Title II of the Americans with Disabilities Act by not granting her accommodation in the form of a *complete waiver* of the statutory filing deadline. The United States District Court for the Eastern District of New York (Feuerstein, J.) dismissed plaintiff's ADA claim against NYSLRS. The court's judgment should be affirmed.[1]

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[1] The district court also dismissed all of plaintiff's claims against the Library. NYSLRS takes no position as to those separate claims.

Looking to the text of the RSSL and state court decisions interpreting the statute, the district court properly concluded that the statutory filing deadline in this case was "an essential eligibility requirement for receipt of disability benefits" (A. 26). Plaintiff's request to waive the mandatory statutory deadline was therefore not a "reasonable modification" under ADA. While plaintiff and the United States, as intervenor, challenge that holding, the text of the ADA itself validates the district court's conclusion.

The ADA requires reasonable modification of "rules, policies, or practices"; it does not preempt facially neutral, nondiscriminatory state laws. 42 U.S.C. § 12131(2). Moreover, the ADA expressly clarifies that "[n]othing in this chapter *alters the standards* for determining eligibility for benefits" under "State . . . disability benefit programs." 42 U.S.C. § 12201(e) (emphasis added). Here, plaintiff seeks not merely to alter, but to waive, an eligibility standard the New York legislature imposed, and which New York courts have confirmed is mandatory for the disability benefits at issue. The ADA does not override—and expressly disclaims any intent to override—state law in this context.

ISSUE PRESENTED FOR REVIEW

Is waiver of a statutory filing deadline, which state courts have confirmed is a mandatory prerequisite for qualifying for disability retirement benefits, a "reasonable modification" under Title II of the ADA?

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of plaintiff's Title II claim against NYSLRS. Plaintiff's assertion that she was entitled to a waiver of the filing deadline for disability retirement benefits does not state a claim under Title II. The filing deadline is imposed by a facially neutral, nondiscriminatory state statute, RSSL § 605. The text of RSSL § 605, and state decisions interpreting the statute confirm that compliance with the statutory filing deadline is an essential requirement for qualifying for disability retirement benefits. Moreover, because Title II's reasonable modification provision does not preempt nondiscriminatory state laws, waiver of a nondiscriminatory state statute is not a reasonable modification under Title II.

Finally, even if plaintiff had stated a viable Title II claim, dismissal would be required on sovereign immunity grounds. Congress did not identify any pattern of pervasive constitutional violations by States with respect to the provision of disability benefit programs sufficient to invoke its remedial powers under the Fourteenth Amendment. Moreover, Title II does not provide for congruent and proportional remedies in this case. Plaintiff concedes that defendants did not violate the Fourteenth Amendment and alleges no discriminatory animus. Requiring alteration of state eligibility requirements here is not a reasonable and proportional remedy aimed at preventing Fourteenth Amendment violations.

STATEMENT OF THE CASE

A. The Disability Retirement Statute

New York provides disability retirement benefits to many classes of state and local employees. NYSLRS members like Mary Jo C. are eligible for disability retirement benefits under article 15 of the RSSL. To qualify for benefits under article 15, a member must satisfy three threshold eligibility requirements. The member:

- must "[h]ave at least ten years of total service credit";

- file an application "within three months from the last date the member was being paid on the payroll"; and

- be "physically or mentally incapacitated for the performance of gainful employment."

RSSL § 605(b)(1)-(2) & (3)(c).[2]

Applications for article 15 disability retirement are available from an employer or from the NYSLRS website at http://www.osc.state.ny.us /retire/forms/rs6340.pdf. The entire application is three pages long, and can be submitted by the member, or in most cases, by the member's employer. RSSL § 605(a)(1)-(2). NYSLRS makes extensive information about disability retirement benefits available to members, including through an informational brochure, *Life Changes: Applying for Disability Retirement*.[3] The brochure explains that in the event a

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[2] Article 15 applies different eligibility and benefit standards to members of the state teachers' retirement system; members who were placed on a leave of absence without pay before termination of employment; and members disabled by a qualifying World Trade Center condition. RSSL § 605(b)(2) & (h).

[3] *Available at* http://www.osc.state.ny.us/retire/publications /vo1802.htm. The table of contents divides the page "chapter."

member is unable to file an application for benefits, someone with power of attorney can do so, as can the member's employer on the member's behalf. *Id.*, ch.1. Individuals with questions about applying for benefits are encouraged to write, call a toll free number, or visit one of NYSLRS sixteen offices for in-person assistance. *Id.*, ch. 5.

NYSLRS warns members that "[f]ailure to file within . . . time limits will make you ineligible for a benefit." *Id.*, ch. 1. NYSLRS explanation of eligibility criteria is based on the text of RSSL and state precedent. State courts have held—without exception—that the timing deadlines imposed by the RSSL are mandatory, non-waivable statutory requirements, necessary to establish eligibility for disability retirement benefits. *See, e.g., Matter of Banks v. N.Y. State & Local Employees' Ret. Sys.*, 294 A.D.2d 164, 165 (1st Dep't 2002) (statutory filing deadline is a "condition precedent" to entitlement to disability retirement benefits) (quoting *Matter of Grossman v. McCall*, 262 A.D.2d 923, 924

(3d Dep't 1999)); *see also Matter of Callace v. N.Y. State Employees' Ret. Sys.*, 140 A.D.2d 756, 757 (3d Dep't 1988) (same).[4]

B. Factual Background

The following facts are taken from plaintiff's complaint. Plaintiff alleges that she has suffered from a unspecified mental illness since adolescence. Between 1986 and 2006, plaintiff "worked intermittently as a librarian for various libraries on Long Island" (A. 38), and as a result, has been a member of NYSLRS since 1988. Plaintiff last worked as a librarian for defendant Central Islip Public Library. She alleges that the Library fired her in November 2006 because of certain behaviors she exhibited "that were symptomatic of her mental illness." (A. 38.)

Plaintiff contends that "because of her mental illness, [she] failed to recognize that state law required her to file [a disability] retirement benefits application within three months of her last day of employment"

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[4] Although these decisions interpret RSSL § 62, which applies to state employees, § 62 contains a ninety-day eligibility requirement that is largely identical to the three-month requirement in § 605, and it is undisputed that the analysis of the New York courts applies equally to § 605.

(A. 39). During the three-month application period, plaintiff's brother spoke to a NYSLRS Disability Retirement Director, who informed him than the Library could apply for retirement benefits on plaintiff's behalf (A. 39).

In February 2007, plaintiff's brother asked the Library to file a benefits application for plaintiff and to reclassify her termination as a "leave of absence." The reclassification allegedly would have enabled plaintiff "to file for retirement disability benefits once her clinical condition improved" even if she missed the three-month deadline (A. 40.) The complaint does not explain why plaintiff's brother did not take independent steps to file for benefits on plaintiff's behalf or to inform plaintiff of the need to file a timely application.

The Library denied plaintiff's brother's requests. In November 2007, one year after her termination, plaintiff's "clinical condition improved," and she submitted an application for disability retirement benefits. (A. 40.) NYSLRS denied the application because plaintiff "failed to comply with the [statutory] requirement" of filing "within three months of her last day of employment." (A. 40.) After the denial, plaintiff requested accommodation in the form of a complete "waiver" of

the statutory filing deadline. Plaintiff also pursued an administrative appeal, challenging NYSLRS's denial of her late application. At the administrative hearing, NYSLRS explained "that state law prohibited [it] from waiving filing requirements." The hearing officer affirmed. (A. 41.)

C. Proceedings Below

Plaintiff declined to seek further review in state court. Instead, she filed this federal action in December 2009, naming both the Library and NYSLRS as defendants. Plaintiff alleged that the Library violated Title II of the ADA by failing to file a retirement benefits application on her behalf "when it was clear that she lacked the ability" to do so "on her own" and by failing to "reclassify" her termination as "leave of absence," which would have allegedly allowed her to take advantage of a longer statutory deadline for submitting a benefits application (A. 42-43). Plaintiff also asserted a reasonable accommodation claim against NYSLRS—alleging that NYSLRS violated Title II of the ADA by not waiving the statutory deadline for filing for disability retirement benefits (A. 42). Plaintiff's complaint seeks declaratory and injunctive relief against NYSLRS and damages from the Library (A. 45.)

NYSLRS and the Library filed separate motions to dismiss (A. 47, 66). NYSLRS sought dismissal under Federal Rule of Civil Procedure 12(b)(1) and (6), arguing that the Eleventh Amendment barred plaintiff's suit, and that plaintiff failed state a claim for violation of Title II ADA. In an opinion and order issued on May 5, 2011, the district court granted defendants' motions and dismissed plaintiff's complaint in its entirety (A. 9-34).

As to the ADA claim against NYSLRS, the court found that plaintiff's claim failed for several overlapping and interrelated reasons. First, plaintiff did not allege sufficient facts to show that she was disabled (A. 22). But even if that could be cured, the district court surveyed relevant state court decisions, and concluded based on those decisions and the text of RSSL § 605 itself, that compliance with § 605's three-month filing deadline is an "essential eligibility requirement" for receiving disability retirement benefits under New York law. Accordingly, waiver of the filing deadline—as plaintiff requested—is not a "reasonable modification" compelled by the ADA (A. 25-26).

In addition, because plaintiff failed to state a valid Title II claim, the district court concluded that NYSLRS was entitled to dismissal on

sovereign immunity grounds (A. 27). The court further denied plaintiff leave to name individual state officers as additional defendants (which plaintiff requested to avoid an Eleventh Amendment bar), concluding that amendment would be futile since plaintiff could not state an ADA claim based on waiver of the statutory filing deadline (A. 27 n.6).

Plaintiff appealed. (A. 7.) On August 29, 2011, the United States filed a brief as amicus curiae and intervenor pursuant to 28 U.S.C. § 2403(a).

ARGUMENT

Plaintiff's claim that she was entitled to waiver of the statutory filing deadline for retirement benefits was properly dismissed, both because it fails to state a cause of action under Title II of the ADA, and because plaintiff's claim is barred by Eleventh Amendment sovereign immunity. While the district court may have overlooked that these are two distinct points (*see* A. 27), the court properly ruled against plaintiff on both grounds, and either one alone is sufficient to support the dismissal. This brief first addresses plaintiff's failure to state a cause of

action under Title II of the ADA, and then turns to the Eleventh Amendment bar.

POINT I

PLAINTIFF FAILS TO STATE A CLAIM AGAINST NYSLRS UNDER TITLE II OF THE ADA

Plaintiff seeks complete, unqualified waiver of a facially neutral and nondiscriminatory state statute imposing eligibility requirements for state disability benefits. Plaintiff and the United States both argue that the ADA "supersedes" or "preempts" state law. Pl. Br. at 21-23; U.S. Br. at 13-16. But the decisions they cite are about a fundamentally different type of ADA claim, involving direct discrimination and unequal treatment of persons with disabilities, or disparate impact in relation to disabled individuals' exercise of a fundamental right, facts not raised in this case.

Plaintiff's suit is not about unequal treatment. Plaintiff does not allege that RSSL § 605's three-month filing deadline is facially discriminatory, has disparate impact on persons with disabilities, or burdens a fundamental right. Nor could she. There is no fundamental right to government disability benefits. *See Disabled Am. Veterans v.*

U.S. Dep't of Veterans Affairs, 962 F.2d 136, 141-42 (2d Cir. 1992). And plaintiff acknowledges that state law makes the three-month filing deadline mandatory for all applicants as a condition of eligibility. The requirement is not applied differently to non-disabled applicants, or to plaintiff because of her mental illness. All applicants are subject to *same* filing deadline.

A. RSSL § 605's Three-Month Filing Deadline Is an Essential Eligibility Requirement that Cannot Be Waived.

Plaintiff's claim, as the district court correctly recognized, is a claim for "reasonable modification" under Title II of the ADA. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. In conjunction with this requirement, the ADA defines a "qualified individual," as someone who with "reasonable modifications to rules, policies, or practices . . . meets the *essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2) (emphasis added). Title II does not require waiver of the essential eligibility

requirements for state programs or receipt of state benefits. *See, e.g.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 277 (2d Cir. 2003) (to state a reasonable modification claim under the ADA, the plaintiff must the meet the "formal legal eligibility requirements" for benefits or services); *Pottgen v. Mo. High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (since there was no way for learning-disabled plaintiff to satisfy statutory age limit for program, "no reasonable accommodation exists").

The district court properly concluded that plaintiff failed to state a Title II claim because the three-month filing deadline imposed by RSSL § 605 is an essential eligibility requirement for receiving disability retirement benefits. On its face, RSSL § 605 sets out the three-month application deadline as an essential requirement for qualifying for benefits. In enacting the statute, the Legislature did not distinguish between "substantive" and "administrative" requirements as the plaintiff and the United States claim. Pl Br. at 26; US Br. at 10. The three-month filing period is not a ministerial or regulatory procedure adopted by NYSLRS as a rule of administrative convenience. It is imposed by the Legislature itself as a core component of eligibility.

Moreover, nothing in the statute indicates that the filing deadline is somehow immaterial or non-substantive. To the contrary, the Legislature placed the three-month filing requirement in the *same* statutory provision as the requirement that a member have ten years' of prior service. RSSL § 605(b). The United States acknowledges that the years-of-service requirement is an essential eligibility requirement. U.S. Br. at 9. Yet it offers no principled reason for treating one mandatory statutory requirement differently from the other—when the Legislature gave both equal weight and prominence in the statute as necessary predicates for eligibility.

And if the statute's clear language were not enough, New York caselaw confirms that compliance with statutory filing deadlines is a nonwaivable eligibility requirement for receipt of disability retirement benefits. See *supra* at 6; A. 24 (comprehensively surveying state decisions). Both plaintiff and the United States criticize the district court's reliance on state precedent. The United States suggests that the mandatory filing period should be deemed purely procedural "notwithstanding [how] mid-level New York courts" have construed state law, because there is no decision from the New York Court of

Appeals on this precise issue. U.S. Br. at 7 & n.5. But the New York Court of Appeals *denied* further appeal in very same cases the United States attempts to sweep away as noncontrolling[5]—leaving in place as governing law the Appellate Division decisions the district court appropriately relied upon. *See Pahula v. Massey-Ferguson, Inc.,* 170 F.3d 125, 134 (2d Cir. 1999) ("We are bound . . . to apply the law as interpreted by New York's intermediate appellate courts unless we find persuasive evidence that the New York Court of Appeals . . . would reach a different conclusion").

And critically, if the plain eligibility provisions of a state statute are not dispositive, and federal courts must also disregard uniform, controlling state decisions interpreting the statute, it is unclear what body of law or what legal standards should be used to determine the "essential eligibility requirements" for state programs. The United States suggests a filing deadline cannot be "essential" because some federal and state statutes authorize late filing or tolling of deadlines for

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[5] *See, e.g., Matter of Grossman v. McCall*, 94 N.Y.2d 765 (2000)(denying leave to appeal); *Matter of Callace v. N.Y. State Employees' Ret. Sys.*, 72 N.Y.2d 806 (1988) (same).

persons with mental disability. U.S. Br. at 17-19. But in those cases, the statute itself confirms that the legislature deemed a filing deadline nonessential and waivable. RSSL § 605, in sharp contrast to the statutes cited by the United States, does not authorize waiver of the three-month filing deadline.

Nor is there anything unusual about strict eligibility periods or application deadlines in the field of disability benefits that renders such requirements nonessential as a matter of law. Rhode Island, for example, interprets its filing deadline for disability benefits, similarly to New York, as non-waivable. *See Iselin v. Ret. Bd. of the Employees' Ret. Sys. of R.I.*, 943 A.2d 1045, 1049-51 (R.I. 2008). And under federal law, the statutory period for applying for income tax refunds cannot be equitably tolled, even for a taxpayer's mental disability, *United States v. Brockamp*, 519 U.S. 347 (1997), and same is true for the deadline for applying for federal surviving spouse annuity benefits, *Iacono v. Office of Pers. Mgmt.*, 974 F.2d 1326 (Fed. Cir. 1992). Likewise, in *Acierno v. Barnhart,* 475 F.3d 77 (2d Cir. 2007), this Court concluded that the statutory time limit for filing federal tax returns could not be excused—although adherence to the time limit meant that that the mentally ill

plaintiff, who would otherwise qualify for disability benefits, received none. While that result was "harsh," this Court explained it was for Congress to amend the statute to allow for tolling, not the courts to decide whether statutory time limits are essential or not. *Id*. at 83.

Finally, overriding RSSL § 605 is especially inappropriate here in light of the ADA's express deference to state eligibility standards for disability benefit programs. Whatever the consequence of statutory deadlines and eligibility periods for *other types* of state programs, the ADA confirms that it does not impinge on the States' traditional right to establish their own standards for payment of state disability benefits. The ADA expressly states:

> Nothing in this chapter alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

42 U.S.C. § 12201(e). Plaintiff's suit seeks to accomplish precisely what the ADA confirms is not required: alteration of the standards for determining eligibility for disability retirement benefits under New York Law. The ADA does not compel that result.

B. Title II's Reasonable Modification Provision Does Not Preempt Nondiscriminatory State Statutes.

In addition, even if RSSL § 605's mandatory filing deadline could be deemed nonessential, the district court also properly found that waiver of a state statute is not a "reasonable modification" under Title II. Plaintiff and the United States contend that waiver of a nondiscriminatory state statute can be a required modification under the ADA, but that ignores the plain language of Title II, which requires reasonable modification only of "rules, policies, or practices"—not state statutes. As the United States acknowledges, a contrary rule would result in *preemption* of state law across a broad range of subject matter, including in areas of traditional state concern, relating to any public service, program, or benefit. U.S. Br. at 13. Intent to impose federal preemption of such sweeping scope must be clearly expressed and certainly cannot be inferred from statutory language that *expressly omits* any reference to preempting state statutes and state law. *See, e.g., N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413-14 (1973) (quotation marks omitted) (noting "[i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of

the state unless there is a clear manifestation of intention to do so . . . in direct and unambiguous language").

Precisely because "Title II . . . strikes a careful balance with respect to state laws governing public programs," (U.S. Br. at 8), the distinction between *discretionary* rules, policies and practices, and *mandatory* state statutes makes sense. Rules, policies and practices can be modified, revised, or even waived by the administrative or executive officials who imposed them in the first place. State statutes, by contrast, reflect the independent judgments and standards imposed by state legislators. State officials cannot modify a statute: that power rests exclusively with the legislative branch. *See, e.g., Olegario v. United States*, 629 F.2d 204, 224 (2d Cir. 1980); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 103 (2d Cir. 2003) (state officials are charged with enforcing state laws, not questioning their wisdom).

This Court's decision in *Hargrave v. Vermont*, 340 F.3d 27 (2d Cir. 2003) does not support preemption under Title II's reasonable modification requirement, as plaintiff and the United States assert. In *Hargrave*, the challenged Vermont statute, "*facially discriminate[d]* against the mentally disabled." *Id.* at 30 (emphasis added). *Hargrave*

did not analyze Title II's reasonable modification standard and did not hold that Title II preempted facially nondiscriminatory state laws or mandated waiver of such laws.

While suggesting that the district court misinterpreted Title II, neither plaintiff, nor the United States, identifies a single decision that interprets Title II's reasonable modification requirement to supersede, rather than incorporate, nondiscriminatory and facially neutral state laws.[6] Instead, as the district court and other courts have recognized, there is no conflict between state law and Title II's reasonable modification requirement: the determination of whether a requested modification is "reasonable" necessarily and logically includes

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[6] *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), involved modification of agency regulations, not waiver of a state statute. The other decisions the United States relies upon (US Br. at 14-15) all involve situations where the defendant could have voluntarily complied with state law and granted the requested modification, unlike in this case. *See Astralis Condo Ass'n v. Sec'y, U.S. Dep't of Hous. & Urban Dev.,* 620 F.3d 62, 69 (1st Cir. 2010) (defendant condominium association could have complied with federal fair housing requirements without violating Puerto Rico property transfer statute); *Helen L. v. DiDario*, 46 F.3d 325, 338 & n.24 (3d Cir. 1995) (defendant agency could fund relief through other means; only one particular method was barred by state law); *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1232 (10th Cir. 2009) (finding "no conflict" between state statute and federal law).

consideration of applicable background state statutes. *See, e.g., Herschaft v. N.Y. Bd. of Elections*, No. 00cv2748, 2001 WL 940923, *6 (E.D.N.Y. Aug. 13, 2001) ("an accommodation that would require a defendant to violate *an otherwise constitutional state law* is inherently unreasonable") (emphasis added); *see also Aughe v. Shalala*, 885 F. Supp. 1428, 1432 (W.D. Wash. 1995) (waiver of a neutral statutory age limit that would "essentially rewrite the statute" cannot be a reasonable modification).

POINT II

TITLE II DOES NOT VALIDLY ABROGATE THE STATE'S SOVEREIGN IMMUNITY WITH RESPECT TO THE PROVISION OF DISABILITY BENEFIT PROGRAMS

Whether or not plaintiff has stated a valid Title II claim, dismissal is independently required because Title II fails to validly abrogate the State's sovereign immunity for the reasonable modification claim made here—relating to the State's provision of disability benefits. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the ADA did not validly abrogate the States' sovereign immunity because Congress failed to establish a

pattern of widespread, unconstitutional employment discrimination by the States—a necessary predicate for the exercise of Congress's remedial power under § 5 of the Fourteenth Amendment to permissibly subject non-consenting States to suit.

In *Tennessee v. Lane*, 541 U.S. 509, 522-31 (2004), the Supreme Court applied *Garrett* to Title II of the ADA. *Lane* held that for Title II to validly apply against state defendants there must be both a history of constitutional violations to support Congress's determination that prophylactic legislation was necessary, and Title II's remedial scheme must also be a congruent and proportional response to the specific history and pattern of violations Congress identified. Given the wide range of state programs and activities covered by Title II—in areas such as health care, zoning, jury service, the penal system, public education, and voting—*Lane* further made clear that abrogation analysis should not be conducted as to Title II "as an undifferentiated whole," but instead must focus on the particular class or type of public service or program for which the plaintiff is alleging discrimination or seeking reasonable accommodation. *Id.* at 529-30.

Here, the test for abrogation is not satisfied. Neither plaintiff nor the United States contend that Congress identified a pervasive and widespread pattern of constitutional violations with respect to the States' provision of disability benefit programs. The very fact that States voluntarily provide such benefits (New York has offered a disability retirement benefit since 1920) is evidence of the *absence* of discriminatory intent towards disabled employees. "[T]he scope of "Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment," *United States v. Georgia*, 546 U.S. 151, 158, (2006), is not at issue in this case because there is no pattern of constitutional violations to justify the exercise of that power at all.

Moreover, application of Title II to require *waiver* of nondiscriminatory state statues, as plaintiff seeks, is also not a congruent and proportional remedy given the complete absence of any pattern of constitutional violations in the States' provision of disability benefits. Plaintiff concedes (A. 21, 96), as she must, that there is no constitutional violation in this case; she makes no claim of discriminatory animus; and she acknowledges that waiver of the statutory filing deadline is not required under the Fourteenth

Amendment. *But see Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 109-10 (2d Cir. 2001) (discussing ways in which Title II's reasonable modification requirements exceed constitutional requirements and proportionality principles when these requirements are not satisfied).

Plaintiff argues that Title II's remedial scheme is nonetheless congruent and proportional because "provid[ing] a preference to people with disabilities" will cure their unique disadvantages, such as being "poorer than other Americans." Pl. Br. at 28-29. But this Court has already rejected that argument—holding that it is not within the legitimate scope of Congress's § 5 power to require state governments to make modifications to "eradicat[e] . . . unequal effects" for persons with disabilities. *Garcia*, 280 F.3d at 110. As a result, Title II does not validly abrogate the State's immunity for plaintiff's claim, and her claim must be independently dismissed on that ground. [7]

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[7] This appeal does not require the Court to decide broader issues about whether the merits of Title II claims must be decided first before district courts reach the issue of sovereign immunity.

The United States relies on two unpublished circuit decisions, interpreting *Georgia*, to establish its preferred rule that merits be

(*continues on next page*)

decided before immunity. U.S. Br. at 21. *Georgia* does not mention, however, let alone displace—longstanding Supreme Court precedent recognizing the questions of immunity deserve priority and that "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost" if States are subject to prolonged proceedings in federal court. *P. R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993).

Here, the United States has not even briefed the abrogation question, yet it would send the State back for further proceedings in district court, denying the State the very immunity from suit the Eleventh Amendment guarantees.

CONCLUSION

For the reasons set forth above, the district court's judgment should be affirmed.

Dated: New York, NY
November 21, 2011

Respectfully submitted,

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