

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: May 3, 2012

Decided: January 29, 2013)

5 Docket No. 11-2215

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7 MARY JO C.,

8 Plaintiff-Appellant,

9 - v -

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

12 Defendants-Appellees.

13 -----

14 Before: SACK, RAGGI, Circuit Judges, and SWAIN, District
15 Judge.*

16
17 Appeal by the plaintiff from a judgment of the United
18 States District Court for the Eastern District of New York
19 (Sandra J. Feuerstein, Judge) dismissing the plaintiff's claims
20 pursuant to Federal Rules of Civil Procedure 12(b)(1) and
21 12(b)(6). The district court concluded principally that Title II
22 of the Americans with Disabilities Act does not require state
23 actors to violate state laws as a "reasonable modification" under
24 the Act, and that Title II does not apply to employment

* The Honorable Laura Taylor Swain, United States District Judge for the Southern District of New York, sitting by designation.

1 discrimination. Because we conclude that Title II does, in some
2 circumstances, require reasonable departures from standards
3 established by state laws, we vacate the district court's
4 judgment of dismissal in that respect. Because we conclude,
5 based principally on the structure of the Americans with
6 Disabilities Act, that Title II does not apply to employment
7 discrimination, we affirm the district court's judgment of
8 dismissal of that claim.

9 Affirmed in part; vacated and remanded in part.

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38 National Disability Rights Network, and

1 For the reasons set forth below, the district court's
2 judgment of dismissal is vacated as to the plaintiff's Title II
3 claim against the NYSLRS. The case is remanded with instructions
4 to the district court to grant the plaintiff leave to amend her
5 complaint if she so wishes to allege facts supporting her claim
6 that she was disabled, and to attempt to state a claim invoking
7 the rule of Ex parte Young, 209 U.S. 123 (1908), and to conduct
8 further proceedings as warranted. The district court's judgment
9 of dismissal is affirmed as to the plaintiff's Title II claim
10 against the Library. The district court's decision to decline to
11 exercise supplemental jurisdiction over the plaintiff's state law
12 claims is vacated for reconsideration depending on the course of
13 the further proceedings contemplated by this opinion.

14 BACKGROUND

15 Because this is an appeal from the district court's
16 grant of the defendants' motion to dismiss, we state the facts as
17 drawn from the complaint of the plaintiff "Mary Jo C." --
18 "accepting all well-pleaded allegations in the complaint as true
19 and drawing all reasonable inferences in the plaintiff's favor,"
20 Bigio v. Coca-Cola Co., 675 F.3d 163, 169 (2d Cir. 2012)
21 (internal quotation marks and brackets omitted) -- and as drawn
22 from matters of which we may take judicial notice, see Tellabs,
23 Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)
24 ("[C]ourts must consider the complaint in its entirety, as well
25 as other sources . . . , in particular, documents incorporated

1 into the complaint by reference, and matters of which a court may
2 take judicial notice."); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,
3 493 F.3d 87, 98 (2d Cir. 2007) ("[W]e may consider . . .
4 documents possessed by or known to the plaintiff and upon which
5 it relied in bringing the suit.").

6 The plaintiff is a "57[-]year-old individual who has
7 suffered from mental illness since adolescence." Complaint ¶ 12,
8 Mary Jo C. v. New York State and Local Ret. Sys., No. 09 Cv. 5635
9 (E.D.N.Y. Dec. 23, 2009) ("Compl."). She was employed by various
10 Long Island libraries between 1986 and November 2006, becoming a
11 member of defendant NYSLRS in January 1988. Id. ¶¶ 13-14. While
12 working for the Library, her employment was terminated in
13 November 2006 "[a]s a result of behaviors that were symptomatic
14 of her mental illness." Id. ¶ 16. Her last day of work at the
15 Library was on or about November 12, 2006. Id. ¶ 17. After her
16 termination, "libraries in Suffolk County communicated among
17 themselves and agreed that [the plaintiff] should not be hired as
18 a librarian." Id. ¶ 40. The plaintiff asserts that because the
19 libraries "blackballed [her] from working in the public library
20 system in Suffolk County," "it is a virtual certainty that [she]
21 will never work again." Id. ¶¶ 40-41.

22 In some circumstances, New York provides disability
23 retirement benefits for members of the NYSLRS who are "physically
24 or mentally incapacitated for the performance of gainful
25 employment." See N.Y. Ret. and Soc. Sec. Law § 605(b)(1),

1 (b)(3)(c). According to the Complaint, the plaintiff would have
2 been eligible for disability retirement benefits under New York
3 law had she filed an application with the NYSLRS within three
4 months of her last day of employment. Compl. ¶¶ 18-19. But she
5 "failed to recognize" the filing deadline "because of her mental
6 illness." Id. ¶ 20.

7 During the three-month period following her
8 termination, the plaintiff's brother spoke to an NYSLRS official,
9 who informed him that the Library could file an application on
10 the plaintiff's behalf. Id. ¶¶ 21-24. On or about February 11,
11 2007, the plaintiff's brother asked the Library to do so, but the
12 Library denied the request. Id. ¶¶ 25-26. The plaintiff's
13 brother then asked the Library to reclassify the plaintiff's
14 termination as an unpaid leave of absence, which would have
15 extended the time during which the plaintiff could file for
16 benefits, see N.Y. Ret. and Soc. Sec. Law § 605(b)(2), but the
17 Library refused to do that too. Compl. ¶¶ 27-29.

18 The plaintiff's condition improved in November 2007,
19 and she applied for disability retirement benefits. Id. ¶ 30.
20 The NYSLRS denied the application because it was not filed within
21 three months of the plaintiff's last day of work. Id. ¶ 31. On
22 or about July 23, 2008, the plaintiff requested that the NYSLRS
23 waive the filing deadline as an accommodation under the ADA. The
24 NYSLRS did not respond. Id. ¶¶ 32-33.

1 While awaiting the NYSLRS's response, the plaintiff's
2 brother received notice that the plaintiff could appeal the
3 denial of her disability retirement benefits application, and the
4 plaintiff did so. Id. ¶¶ 34-35. The NYSLRS argued before the
5 hearing officer that state law prohibited it from waiving the
6 filing deadline for any reason. Id. ¶ 36. The hearing officer
7 agreed, denying the plaintiff's appeal because there was no
8 "provision for an extension of the filing deadline" under the
9 applicable state statutes and regulations. Id. ¶¶ 37-38.

10 Thereafter, on December 23, 2009, the plaintiff brought
11 the instant action in the United States District Court for the
12 Eastern District of New York against the NYSLRS and the Library.
13 The complaint alleges that (1) the NYSLRS violated the ADA by
14 failing to "provide a requested reasonable accommodation" by
15 waiving the filing deadline, (2) the Library violated the ADA and
16 New York Executive Law section 296 by failing to file an
17 application on the plaintiff's behalf, and (3) the Library
18 violated the ADA and New York Executive Law section 296 by
19 failing to reclassify the plaintiff's termination as a leave of
20 absence. Id. ¶¶ 43-52. The plaintiff requested various
21 declaratory judgments, an injunction requiring the NYSLRS to
22 waive the filing deadline (or, if the court determined that an
23 injunction was inappropriate under the ADA, damages), and
24 attorney's fees and costs. Id. at pp. 10-12.

1 Both defendants moved to dismiss the complaint pursuant
2 to Rule 12(b)(6); the NYSLRS also moved to dismiss pursuant to
3 Rule 12(b)(1), asserting that the plaintiff lacked standing and
4 that New York's sovereign immunity barred the plaintiff's claims.
5 On May 5, 2011, the district court denied the NYSLRS's motion to
6 dismiss for lack of subject matter jurisdiction, concluding that
7 the plaintiff had standing to bring her claims. But the court
8 granted the NYSLRS's motion to dismiss because it concluded that
9 the plaintiff could not state a claim under Title II of the ADA,
10 and that the court therefore need not determine whether Congress
11 validly abrogated New York's sovereign immunity when it enacted
12 Title II. The court reasoned that (1) the filing deadline was an
13 essential eligibility requirement not subject to waiver under the
14 ADA, (2) the plaintiff's request for an accommodation was not
15 "reasonable" under the ADA because it would require the NYSLRS to
16 violate state law, and (3) the plaintiff did not allege facts
17 sufficiently plausible on their face to demonstrate, if proven,
18 that she was disabled within the meaning of Title II of the ADA.
19 Mary Jo C. v. New York State and Local Ret. Sys., 2011 WL
20 1748572, 2011 U.S. Dist. LEXIS 49567 (E.D.N.Y. May 5, 2011). As
21 for the Library's motion to dismiss, the court concluded that the
22 plaintiff's Title II claims against the library failed because
23 her exclusive remedy against the Library was a claim under Title
24 I of the ADA, id. at *12, 2011 U.S. Dist. LEXIS 49567, at *39,
25 further noting that the plaintiff did not refute the Library's

1 contention that the plaintiff had not exhausted her
2 administrative remedies under Title I. id. at *12 n.11, 2011 U.S.
3 Dist. LEXIS 49567, at *39 n.11. The district court then declined
4 to exercise supplemental jurisdiction over the state-law claims,
5 and dismissed the complaint.

6 The plaintiff appeals.

7 **DISCUSSION**

8 "We review de novo a district court's dismissal of a
9 complaint under Rule 12(b)(6), accepting all of the complaint's
10 factual allegations as true and drawing all reasonable inferences
11 in the plaintiffs' favor." Forest Park Pictures v. Universal
12 Television Network, Inc., 683 F.3d 424, 429 (2d Cir. 2012)
13 (citing Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n, 655
14 F.3d 136, 141 (2d Cir. 2011)). The complaint must state a claim
15 that is plausible on its face. Bell Atl. Corp. v. Twombly, 550
16 U.S. 544, 570 (2007). "A claim has facial plausibility when the
17 plaintiff pleads factual content that allows the court to draw
18 the reasonable inference that the defendant is liable for the
19 misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678
20 (2009). "[A] dismissal pursuant to Rule 12(b)(6) is, at bottom,
21 a declaration that the plaintiff's complaint and incorporated
22 materials are insufficient as a matter of law to support a claim
23 upon which relief may be granted." Halebian v. Berv, 644 F.3d
24 122, 130-31 (2d Cir. 2011).

1 I. ADA Title II Claims Against the NYSLRS

2 A. Sovereign Immunity

3 The NYSLRS moved to dismiss on the basis of New York
4 State's and the NYSLRS's sovereign immunity from suit. The
5 Eleventh Amendment to the United States Constitution provides
6 that "[t]he Judicial power of the United States shall not be
7 construed to extend to any suit in law or equity, commenced or
8 prosecuted against one of the United States by Citizens of
9 another State, or by Citizens or Subjects of any Foreign State."
10 U.S. CONST. amend. XI. The Eleventh Amendment has been
11 interpreted as also barring suits in federal court against a
12 state brought by that state's own citizens. See Woods v. Rondout
13 Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 236 (2d Cir.
14 2006). Although NYSLRS is not itself a state, "[t]he immunity
15 recognized by the Eleventh Amendment extends beyond the states
16 themselves to 'state agents and state instrumentalities' that
17 are, effectively, arms of a state." Id. (quoting Regents of the
18 Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997)).

19 "Congress may abrogate the states' Eleventh Amendment
20 immunity when acting pursuant to [Congressional] authority under
21 Section [five] of the Fourteenth Amendment." Id. (citing U.S.
22 CONST. amend. XIV, § 5; Tennessee v. Lane, 541 U.S. 509, 518
23 (2004)). Congress has purported to abrogate the states'
24 sovereign immunity from claims brought against them under Title
25 II of the ADA. See 42 U.S.C. § 12202. However, the validity of

1 this abrogation depends on "whether Congress acted pursuant to a
2 valid grant of constitutional authority." Lane, 541 U.S. at 517
3 (internal quotation marks omitted).

4 In United States v. Georgia, 546 U.S. 151 (2006), the
5 Supreme Court established a three-step process for analyzing
6 whether Congress has validly abrogated a state's sovereign
7 immunity from suit in the context of a particular Title II claim:

8 [A court must] determine . . . , on a
9 claim-by-claim basis, (1) which aspects of
10 the State's alleged conduct violated Title
11 II; (2) to what extent such misconduct also
12 violated the Fourteenth Amendment; and (3)
13 insofar as such misconduct violated Title II
14 but did not violate the Fourteenth Amendment,
15 whether Congress's purported abrogation of
16 sovereign immunity as to that class of
17 conduct is nevertheless valid.

18 Id. at 159. Thus, if a plaintiff cannot state a Title II claim,
19 the court's sovereign immunity inquiry is at an end. See
20 Buchanan v. Maine, 469 F.3d 158, 172-73 (1st Cir. 2006) ("If the
21 State's conduct does not violate Title II, the court does not
22 proceed to the next step in the [United States v. Georgia]
23 analysis. The claim ends.").

24 B. The "Reasonable Modification"
25 Requirement of Title II of the ADA

26 "The ADA was passed by large majorities in both Houses
27 of Congress [in 1990] after decades of deliberation and
28 investigation into the need for comprehensive legislation to
29 address discrimination against persons with disabilities." Lane,
30 541 U.S. at 516. "Congress found that 'individuals with
31 disabilities continually encounter various forms of

1 discrimination, including outright intentional exclusion, the
2 discriminatory effects of architectural, transportation, and
3 communication barriers, overprotective rules and policies, [and]
4 failure to make modifications to existing facilities and
5 practices" Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th
6 Cir. 1996) (alteration in original) (quoting 42 U.S.C. §
7 12101(a)(5)). The ADA aims "to provide a clear and comprehensive
8 national mandate for the elimination of discrimination against
9 individuals with disabilities." 42 U.S.C. §§ 12101(b)(1). "It
10 forbids discrimination against persons with disabilities in three
11 major areas of public life: employment, which is covered by Title
12 I of the statute; public services, programs, and activities,
13 which are the subject of Title II; and public accommodations,
14 which are covered by Title III." Lane, 541 U.S. at 516-17.

15 "Title II of the ADA['Public Services,'] provides that
16 'no qualified individual with a disability shall, by reason of
17 such disability, be excluded from participation in or be denied
18 the benefits of the services, programs, or activities of a public
19 entity,^[1] or be subjected to discrimination by any such entity.'" United States v. Georgia, 546 U.S. at 153 (quoting 42 U.S.C.
20 § 12132). The statute "require[s] that covered entities make
21 reasonable accommodations in order to provide qualified
22

¹ The ADA "defines 'public entity' to include 'any State or local government' and 'any department, agency, . . . or other instrumentality of a State.'" United States v. Georgia, 546 U.S. at 154 (quoting 42 U.S.C. § 12131(1)) (some internal quotation marks omitted).

1 individuals with an equal opportunity to receive benefits from or
2 to participate in programs run by such entities." Tsombanidis v.
3 West Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003) (internal
4 quotation marks omitted).

5 To prove a violation of Title II, a party
6 must therefore establish: (1) that he is a
7 "qualified individual" with a disability; (2)
8 that he was excluded from participation in a
9 public entity's services, programs or
10 activities or was otherwise discriminated
11 against by a public entity; and (3) that such
12 exclusion or discrimination was due to his
13 disability.

14 Hargrave v. Vermont, 340 F.3d 27, 34-35 (2d Cir. 2003).

15 A "'qualified individual with a disability'"
16 is defined as "an individual with a
17 disability who, with or without reasonable
18 modifications to rules, policies, or
19 practices, the removal of architectural,
20 communication, or transportation barriers, or
21 the provision of auxiliary aids and services,
22 meets the essential eligibility requirements
23 for the receipt of services or the
24 participation in programs or activities
25 provided by a public entity."

26 United States v. Georgia, 546 U.S. at 153-54 (quoting 42 U.S.C.
27 § 12131(2)). "A public entity shall make reasonable
28 modifications in policies, practices, or procedures when the
29 modifications are necessary to avoid discrimination on the basis
30 of disability, unless the public entity can demonstrate that
31 making the modifications would fundamentally alter the nature of
32 the service, program, or activity." 28 C.F.R. § 35.130(b)(7).²
33 "[A] defendant need not make an accommodation at all if the

² "We have previously made clear that 28 C.F.R. § 35.130(b)(7) was intended to implement 42 U.S.C. § 12131(2)." Hargrave, 340 F.3d at 38; see also infra note 5.

1 requested accommodation 'would fundamentally alter the nature of
2 the service, program, or activity.'" Powell v. National Bd. of
3 Medical Examiners, 364 F.3d 79, 88 (2d Cir. 2004) (quoting 28
4 C.F.R. § 35.130(b)(7)).

5 Typically, "the determination of whether a particular
6 modification is 'reasonable' involves a fact-specific,
7 case-by-case inquiry that considers, among other factors, the
8 effectiveness of the modification in light of the nature of the
9 disability in question and the cost to the organization that
10 would implement it." Staron v. McDonald's Corp., 51 F.3d 353,
11 356 (2d Cir. 1995) (applying same standard in Title III case as
12 under Title II, see infra note 6). It is a factual issue
13 "whether [a] plaintiff['s] proposed modifications . . . amount to
14 'reasonable modifications' which should be implemented, or
15 'fundamental alterations,' which the state may reject." Crowder,
16 81 F.3d at 1485.

17 C. The District Court's Decision as to Whether
18 the Plaintiff is a "Qualified Individual"

19 The district court began its analysis of whether the
20 plaintiff adequately alleged that she is a "qualified individual
21 with a disability" by observing that New York State courts have
22 interpreted a similar filing deadline provision as

23 a condition precedent to the ripening of any
24 rights" or entitlement to disability
25 benefits, and have [concluded] that the
26 statutory filing period may [not] be extended
27 or waived by the State agency, even where the
28 applicant claims that the disability giving
29 rise to his or her claim for disability
30 benefits also rendered him incapable of

1 asserting his or her claim in a timely
2 manner.

3 Mary Jo C., 2011 WL 1748572, at *8, 2011 U.S. Dist. LEXIS 49567,
4 at *24-*25 (citations and parenthetical description of cited
5 cases omitted). Relying on our statement in Henrietta D. v.
6 Bloomberg, 331 F.3d 261 (2d Cir. 2003), that the ADA's "use of
7 the term 'qualified' suggests that [courts] must look not to the
8 administration of the program for which the plaintiff is
9 qualified, but rather its formal legal eligibility requirements,"
10 id. at 277 (citing 42 U.S.C. §§ 12131-32), the court reasoned
11 that because the filing deadline is deemed a condition precedent
12 to eligibility under state law, the "plaintiff seeks a waiver of
13 an essential eligibility requirement for receipt of disability
14 benefits under [New York law], which the State courts have
15 determined the State defendant is without authority to grant."
16 Mary Jo C., 2011 WL 1748572, at *9, 2011 U.S. Dist. LEXIS 49567,
17 at *27.

18 The district court then concluded that, unlike
19 requiring "reasonable modification of the State defendant's own
20 rules, policies or practices over which it has discretion,"
21 "[r]equiring the State defendant to violate state law is not a
22 reasonable accommodation as a matter of law." Id., 2011 U.S.
23 Dist. LEXIS 49567, at *27. For this proposition, the court
24 relied principally on Herschaft v. New York Board of Elections,
25 No. 00 CV 2748, 2001 WL 940923, 2001 U.S. Dist. LEXIS 11801
26 (E.D.N.Y. Aug. 13, 2001) (denominated "NOT FOR PUBLICATION"),

1 aff'd on other grounds, 37 F. App'x 17 (2d Cir. 2002) (summary
2 order), in which the court rejected a pro se plaintiff's
3 requested modification of New York State's deadline for gathering
4 signatures for an election nominating petition. Id. at *1, 2001
5 U.S. Dist. LEXIS 11801, at *1. The Herschaft court opined,
6 without citation to authority, that

7 [A] two- to three-week extension[,] . . .
8 although not excessive in scope, is
9 unreasonable simply because it would require
10 the Board of Elections to violate a state
11 statute requiring that signatures for
12 independent nominating petitions be gathered
13 and submitted within a certain time
14 frame. . . . The Board of Elections has no
15 statutory authority to waive the requirement.
16 It is the Court's opinion that an
17 accommodation that would require a defendant
18 to violate an otherwise constitutional state
19 law is inherently unreasonable.

20
21 Id. at *6, 2001 U.S. Dist. LEXIS 11801, at *18-*19 (footnote
22 omitted). The district court also cited Aughe v. Shalala, 885 F.
23 Supp. 1428 (W.D. Wash. 1995), which reasoned that modification of
24 a federal statutory age requirement "would essentially rewrite
25 the statute, [so] it must be seen as a fundamental alteration in
26 the nature of the program," id. at 1432.

27 D. Analysis

28 1. Whether the Filing Deadline is an Essential
29 Eligibility Requirement. With respect to Title II's requirement
30 that a "qualified individual" meet the "essential eligibility
31 requirements" of a covered program, the district court apparently
32 concluded that so long as a mandatory eligibility requirement is
33 set by a state statute, it will be an "essential eligibility

1 requirement," and any modification of it will work a "fundamental
2 alteration" of the program. On appeal, the NYSLRS argues that
3 "Title II does not require waiver of the essential eligibility
4 requirements for state programs or receipt of state benefits,"
5 NYSLRS Br. 13-14, and construes our opinion in Henrietta D. as
6 deciding that "to state a reasonable modification claim under the
7 ADA, the plaintiff must meet the 'formal legal eligibility
8 requirements' for benefits or services," id. at 14 (quoting
9 Henrietta D., 331 F.3d at 277).

10 At the outset, we note that the portion of Henrietta D.
11 cited by the district court and by NYSLRS arose in an entirely
12 different setting from that presented by this case. There, the
13 state defendant argued that it should be permitted to rebut the
14 plaintiffs' prima facie Title II claim by showing that "the
15 plaintiffs are no less successful in gaining access to benefits
16 than the non-disabled. Such a showing would suggest an
17 alternative reason for the plaintiffs' low rate of obtaining
18 benefits: systemic problems that create obstacles to access for
19 everyone." Henrietta D., 331 F.3d at 277. The issue we
20 confronted was the meaning of the term "benefits" in the
21 statutory command that "no qualified individual with a disability
22 shall, by reason of such disability, be excluded from
23 participation in or be denied the benefits of the services,
24 programs, or activities of a public entity." 42 U.S.C. § 12132;
25 see 331 F.3d at 277.

1 We concluded that the ADA "plainly define[s] benefits
2 by reference to a plaintiff's facial legal entitlements."
3 Henrietta D., 331 F.3d at 277. We reasoned further that "[t]he
4 statute's use of the term 'qualified' suggests that we must look
5 not to the administration of the program for which the plaintiff
6 is qualified, but rather its formal legal eligibility
7 requirements." Id. In context, these statements cannot properly
8 be read to define "essential eligibility requirements" as all
9 "formal legal eligibility requirements." That issue was not
10 before the Henrietta D. court. The only question there was
11 whether the term "benefits" referred to the public program as it
12 was in fact administered, or the program as it was intended to
13 operate by law. See id. Although it looked to the statute's use
14 of the term "qualified" and the regulations' use of the phrase
15 "essential eligibility requirements" in order to construe the
16 statutory term "benefits," id. at 277-78, the Henrietta D. Court
17 did not construe the phrase "essential eligibility requirement"
18 itself. We thus did not determine there that the phrase
19 "essential eligibility requirements" as it is used in 42 U.S.C.
20 § 12131(2) necessarily means a program's "formal legal
21 eligibility requirements." Because Henrietta D. did not resolve
22 the issue before us, we must construe the relevant statutory
23 language in the first instance.

24 Of course, "[s]tatutory analysis necessarily begins
25 with the plain meaning of a law's text and, absent ambiguity,
26 will generally end there." Bustamante v. Napolitano, 582 F.3d

1 403, 406 (2d Cir. 2009) (internal quotation marks omitted). At
2 the outset, then, we "review the statutory text, considering the
3 ordinary or natural meaning of the words chosen by Congress, as
4 well as the placement and purpose of those words in the statutory
5 scheme." United States v. Aguilar, 585 F.3d 652, 657 (2d Cir.
6 2009) (internal quotation marks omitted). Here, the relevant
7 text defines a qualified individual as

8 an individual with a disability who, with or
9 without reasonable modifications to rules,
10 policies, or practices, the removal of
11 architectural, communication, or
12 transportation barriers, or the provision of
13 auxiliary aids and services, meets the
14 essential eligibility requirements for the
15 receipt of services or the participation in
16 programs or activities provided by a public
17 entity.

18 42 U.S.C. § 12131(2) (emphases added). The text thus
19 distinguishes between two categories of requirements: (1) rules,
20 policies, or practices, which are subject to the requirement of
21 reasonable modification, and (2) essential eligibility
22 requirements, which are not.

23 The fact that Congress provided that "rules, policies,
24 or practices" would be subject to reasonable modification, and
25 contrasted this flexibility with the requirement that a qualified
26 individual meet the "essential eligibility requirements" of a
27 program within the same sentence suggests that Congress meant
28 these categories to have different meanings. "Generally,
29 identical words used in different parts of the same statute are
30 presumed to have the same meaning. But where, as here, Congress

1 uses certain language in one part of the statute and different
2 language in another, the court assumes different meanings were
3 intended." Cruz-Miguel v. Holder, 650 F.3d 189, 196 (2d Cir.
4 2011) (citations and internal quotation marks omitted).

5 Courts have therefore reasoned that essential
6 eligibility requirements, unlike "rules, policies, [and]
7 practices," 42 U.S.C. § 12131(2), are not subject to reasonable
8 modification or waiver. See Pottgen v. Missouri State High
9 School Activities Ass'n, 40 F.3d 926, 930 (8th Cir. 1994)
10 (observing that when an individual cannot meet an eligibility
11 requirement determined to be essential, "the only possible
12 accommodation is to waive the essential requirement itself. . . .
13 [But] [w]aiving an essential eligibility standard would
14 constitute a fundamental alteration in the nature of the . . .
15 program [at issue].") (footnote omitted); cf. PGA Tour, Inc. v.
16 Martin, 532 U.S. 661, 689 (2001) ("[T]he waiver of an essential
17 rule of [a golf] competition for anyone [under Title III of the
18 ADA] would fundamentally alter the nature of [the]
19 tournaments.").

20 "[O]ne of the most basic interpretive canons[is] that
21 a statute should be construed so that effect is given to all its
22 provisions, so that no part will be inoperative or superfluous,
23 void or insignificant." Corley v. United States, 556 U.S. 303,
24 314 (2009) (internal quotation marks and alteration omitted); see
25 also Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty
26 to give effect, if possible, to every clause and word of a

1 statute." (internal quotation marks omitted)). In light of the
2 fact that Congress used the phrases "rules, policies, and
3 practices" and "essential eligibility requirements" as two
4 distinct categories, the application of this canon of statutory
5 construction presents a fundamental obstacle to construing
6 "essential eligibility requirements" to mean all "formal legal
7 eligibility requirements," as the district court did and as the
8 NYSLRS would have us do too.

9 The statute uses the phrase "essential eligibility
10 requirements," not simply "eligibility requirements." Had
11 Congress intended "all formal legal eligibility requirements" to
12 be non-waivable, the phrase "eligibility requirements" would have
13 sufficed; it would have been unnecessary to use the phrase
14 "essential eligibility requirements." Title II applies to the
15 "services, programs, or activities of a public entity," 42 U.S.C.
16 § 12132, which, being public, will typically define their
17 eligibility requirements wholly by applicable legal requirements.
18 That is the case here -- all the relevant eligibility
19 requirements for participation in the program are set by law. If
20 "essential eligibility requirements" meant "all formal legal
21 eligibility requirements," every eligibility requirement would be
22 "essential" and non-waivable, impermissibly rendering the word
23 "essential" superfluous. Therefore, the term "essential

1 eligibility requirements" does not refer to all formal legal
2 eligibility requirements.³

3 Cases interpreting the "essential eligibility
4 requirement" language indicate that whether an eligibility
5 requirement is essential is determined by consulting the
6 importance of the requirement to the program in question. See,

³ NYSLRS argues that the "rules, policies, [and] practices" subject to reasonable modification under Title II do not include state statutes. See NYSLRS Br. 19 ("Title II . . . requires reasonable modification only of 'rules, policies, or practices' -- not state statutes."). Our decision in Hargrave indicates, however, that the phrase "rules, policies, or practices" is not to be read so narrowly. There, the district court had found a Vermont statute to facially discriminate against individuals with mental illnesses when it allowed medical professionals to petition courts to invalidate durable powers of attorney executed by the mentally ill. 340 F.3d at 31-32. Vermont argued that enjoining execution of the statute "would fundamentally alter programs of civil commitment in Vermont." Id. at 37 (internal quotation marks omitted).

In rejecting this argument, we first observed that the relevant regulations required "'reasonable modifications in policies [or] practices' in order to avoid discrimination unless the modifications would constitute a fundamental alteration to the relevant 'service, program, or activity.'" Id. at 38 (quoting 28 C.F.R. § 35.130(b)(7)). We noted that this language "mirrors" and "implement[s]" the definition of a "qualified individual with a disability" as "'an individual who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity.'" Id. (quoting 42 U.S.C. § 12131(2)). We rejected Vermont's fundamental alteration argument because "Defendants have failed even to assert clearly, much less show, that the injunction issued by the District Court would fundamentally alter Vermont's program authorizing and enforcing [durable powers of attorney]." Id. By implication, the Hargrave court discussed the relevant injunction of the state statute as a "reasonable modification[] to rules, policies, or practices," which did not constitute a "fundamental alteration" of the program. Id. Hargrave thus casts doubt on the state's argument that the phrase "rules, policies, and practices" never includes state statutes.

1 e.g., Pottgen, 40 F.3d at 930 ("[T]o determine whether [the
2 plaintiff] is a 'qualified individual' under [Title II of] the
3 ADA, we must first determine whether the age limit is an
4 essential eligibility requirement by reviewing the importance of
5 the requirement to the interscholastic baseball program [at
6 issue]."); id. at 929 (deciding that high school baseball
7 program's age limit was essential because "[a]n age limit helps
8 reduce the competitive advantage flowing to teams using older
9 athletes; protects younger athletes from harm; discourages
10 student athletes from delaying their education to gain athletic
11 maturity; and prevents over-zealous coaches from engaging in
12 repeated red-shirting to gain a competitive advantage. These
13 purposes are of immense importance in any interscholastic sports
14 program.").⁴

⁴ Pottgen's analysis of the importance of the age requirement is drawn from the Eighth Circuit's discussion of claims under section 504 of the Rehabilitation Act of 1973. "The Rehabilitation Act of 1973 establishes a comprehensive federal program aimed at improving the lot of the handicapped. Among its purposes are to 'promote and expand employment opportunities in the public and private sectors for handicapped individuals and place such individuals in employment.'" Consolidated Rail v. Darrone, 465 U.S. 624, 626 (1984) (quoting 29 U.S.C. § 701(8)), superseded by statute on other grounds as stated in DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1383-84 (10th Cir. 1990). Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency" Rehabilitation Act § 504, 29 U.S.C. § 794.

Although the Eighth Circuit was discussing claims under section 504 of the Rehabilitation Act, the Pottgen court largely

1 This reading is reenforced by the regulations
2 implementing⁵ the relevant section of the ADA, which require "[a]
3 public entity [to] make reasonable modifications in policies,
4 practices, or procedures when the modifications are necessary to
5 avoid discrimination on the basis of disability, unless the
6 public entity can demonstrate that making the modifications would
7 fundamentally alter the nature of the service, program, or
8 activity." 28 C.F.R. § 35.130(b)(7). The regulations indicate
9 that "essential eligibility requirements" are those requirements

adopted its reasoning as to the Rehabilitation Act claims when it analyzed the Title II claims in the case before it. See 40 F.3d at 930-31. Other courts have looked to Rehabilitation Act precedent in deciding cases under Title II of the ADA because Congress intended that the ADA mirror the requirements of the Rehabilitation Act. See Henrietta D., 331 F.3d at 272 ("[A]lthough there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of [the Rehabilitation Act] of federally assisted programs and activities. Indeed, unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically." (internal quotation marks, brackets, and citations omitted)).

⁵ "[T]he Attorney General, at the instruction of Congress, has issued an implementing regulation that outlines the duty of a public entity to accommodate reasonably the needs of the disabled [under Title II]." Wisconsin Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 750-51 (7th Cir. 2006) (en banc) (footnote omitted). "We have previously made clear that 28 C.F.R. § 35.130(b)(7) was intended to implement 42 U.S.C. § 12131(2)." Hargrave, 340 F.3d at 38. "The Supreme Court never has decided whether these regulations are entitled to the degree of deference described in Chevron, U.S.A. Inc. v. National Resource Defense Council, Inc., 467 U.S. 837, 844 (1984). Nevertheless, the Court has said that, '[b]ecause the Department of Justice is the agency directed by Congress to issue regulations implementing Title II[,] . . . its views warrant respect.'" Wisconsin Cmty. Servs., 465 F.3d at 751 n.10 (quoting Olmstead v. L.C., 527 U.S. 581, 597-98 (1999)).

1 without which the "nature" of the program would be "fundamentally
2 alter[ed]." Id. These terms seem to us clearly to contemplate
3 that some relatively minor eligibility requirements, even if set
4 by statute, will not be deemed essential because they will not be
5 necessary to prevent the fundamental alteration of the program's
6 nature.

7 The Supreme Court's decision in PGA Tour, Inc. v.
8 Martin, 532 U.S. 661 (2001), further illustrates the point. The
9 plaintiff in Martin was a professional golfer with a disability
10 that prevented him from walking an 18-hole golf course. Id. at
11 668-69. He requested permission to use a golf-cart in
12 contravention of the PGA's rules as a reasonable accommodation
13 under Title III of the ADA,⁶ and the PGA defended on the basis

⁶ Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation." 42 U.S.C. § 12182(a). Courts have read the requirements of Title II and Title III as being consistent with each other:

The House Committee on Education and Labor indicated that Title II's prohibitions are to be "identical to those set out in the applicable provisions of titles I and III of this legislation." H.R. Rep. No. 101-485(II), at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367. More specifically, the House Report on the ADA states that the prohibitions of discrimination on the basis of association from Titles I and III should be incorporated in the regulations implementing Title II. Id.; H.R. Rep. No. 485(III), at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 474; see also Kinney v. Yerusalim, 9 F.3d 1067, 1073 n.6 (3d Cir. 1993) (legislative history indicates that

1 that allowing use of the golf-cart would work a fundamental
2 alteration in the nature of the tournament. Id. at 670-71.

3 The Court began its analysis by observing two ways in
4 which a modification of the PGA's rules might fundamentally alter
5 the tournament:

6 It might alter such an essential aspect of
7 the game of golf that it would be
8 unacceptable even if it affected all
9 competitors equally; changing the diameter of
10 the hole from three to six inches might be
11 such a modification. Alternatively, a less
12 significant change that has only a peripheral
13 impact on the game itself might nevertheless
14 give a disabled player, in addition to access
15 to the competition as required by Title III,
16 an advantage over others and, for that
17 reason, fundamentally alter the character of
18 the competition.

19 Id. at 682-83 (footnote omitted).

20 The Court reasoned that "the use of carts is not itself
21 inconsistent with the fundamental character of the game of golf"
22 because "the essence of the game [is] shotmaking -- using clubs
23 to cause a ball to progress from the teeing ground to a hole some
24 distance away with as few strokes as possible." Id. at 683. It

Titles II and III are to be read
consistently).

Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d
37, 47 (2d Cir. 1997), recognized as superseded on other grounds
by Zervos v. Verizon New York, Inc., 252 F.3d 163, 171 n.7 (2d
Cir. 2001). "Congress clearly did not intend to give public
entities more latitude than private parties to discriminate
against the disabled." Therriault v. Flynn, 162 F.3d 46, 53 n.10
(1st Cir. 1998); see also Bartlett v. New York State Bd. of Law
Examiners, 226 F.3d 69, 78 n.2 (2d Cir. 2000) ("In the context of
this case, title II and title III of the ADA impose largely the
same requirements"). Therefore, relevant cases
interpreting Title III, such as Martin, are instructive here.

1 therefore concluded that "the walking rule is at best peripheral
2 to the nature of [the PGA's] athletic events, and thus it might
3 be waived in individual cases without working a fundamental
4 alteration." Id. at 689; see also id. at 690 ("A modification
5 that provides an exception to a peripheral tournament rule
6 without impairing its purpose cannot be said to 'fundamentally
7 alter' the tournament."). The PGA's argument to the contrary
8 that "all the substantive rules for its . . . competitions are
9 sacrosanct and cannot be modified under any circumstances [was
10 for that reason] effectively a[n] [incorrect] contention that it
11 is exempt from Title III's reasonable modification requirement."
12 Id. at 689. But "Congress intended that an entity like the
13 PGA . . . carefully weigh the purpose, as well as the letter, of
14 the rule before determining that no accommodation would be
15 tolerable." Id. at 691.

16 Rather than simply deferring to the entity providing
17 the service in question, deeming the rules as set by that entity
18 as "sacrosanct," id. at 689, and construing any modification of
19 those rules as a fundamental alteration in the nature of the
20 service, the Martin Court undertook an independent analysis of
21 the importance of a rule for the service in light of the
22 service's purpose to determine whether a requested modification
23 would fundamentally alter its nature. Similarly here, we read
24 the ADA to require us to analyze the importance of an eligibility
25 requirement for a public program or benefit, rather than to defer
26 automatically to whatever "formal legal eligibility requirements"

1 may exist, no matter how unimportant for the program in question
2 they may be.⁷

3 And, perhaps most fundamentally, reading "essential
4 eligibility requirements" to mean all formal legal eligibility
5 requirements seems to us to run counter to the ADA's broad
6 remedial purpose by allowing states to insist that whatever legal
7 requirements they may set are never subject to reasonable
8 modification under Title II of the ADA. Were we to adopt such a
9 construction of the ADA, the class of "rules, policies, or
10 practices" subject to reasonable modification under Title II
11 would be vanishingly small, and nearly all eligibility
12 requirements for the receipt of public services would be non-
13 waivable "essential" eligibility requirements.

14 "In the ADA, Congress provided [a] broad mandate" to
15 "effectuate its sweeping purpose[to] . . . forbid[]
16 discrimination against disabled individuals in major areas of
17 public life, [including] . . . public services" Id. at
18 675. "As a remedial statute, the ADA must be broadly construed
19 to effectuate its purpose of providing a clear and comprehensive
20 national mandate for the elimination of discrimination against
21 individuals with disabilities." Noel v. New York City Taxi and

⁷ Our citation to Martin should in no way be construed as conflating the status of the states' sovereign function of law-making with that of a private entity's rule-making. But Martin persuasively indicates, along with the other considerations discussed, that Title II should not be construed to require automatic deference to a program's formal legal eligibility requirements, however minor they may be.

1 Limousine Comm'n, 687 F.3d 63, 68 (2d Cir. 2012) (internal
2 quotation marks omitted). To adopt the NYSLRS's construction
3 would be to render Title II effectively impotent, which would be
4 contrary to the broad remedial purpose of the ADA -- an act that
5 "has been described as 'a milestone on the path to a more decent,
6 tolerant, progressive society.'" Martin, 532 U.S. at 675
7 (quoting Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S.
8 356, 375 (2001) (Kennedy, J., concurring)).

9 Finally, here, as the plaintiff and the amici point
10 out, New York State already waives or extends the filing deadline
11 for disability retirement benefits for certain classes of
12 individuals: For example, an NYSLRS member on unpaid medical
13 leave may file an application within a year after termination of
14 employment, see N.Y. Ret. and Soc. Sec. Law § 605(b)(2), and an
15 NYSLRS member with "a qualifying World Trade Center condition"
16 faces no deadline whatsoever, see id. The fact that the State
17 itself waives the deadline in the enumerated circumstances
18 strongly suggests that the filing deadline is not "essential."
19 Cf. Martin, 532 U.S. at 685 ("[T]he walking rule is not an
20 indispensable feature of tournament golf either. [The PGA]
21 permits golf carts to be used [by non-disabled golfers] in
22 [several of its tournaments other than the one in question].").
23 At this stage, it cannot be said as a matter of law that the
24 filing deadline is an essential eligibility requirement, and
25 therefore dismissal is inappropriate because it is not clear from
26 the face of the complaint that the plaintiff's allegations are

1 "insufficient as a matter of law to support a claim upon which
2 relief may be granted." Halebian, 644 F.3d at 131.

3 As the plaintiff points out, "[t]his Court has not yet
4 established a broad rule defining when requirements imposed by a
5 state or local government constitute 'essential eligibility
6 requirements' of a program [so] as to render an individual
7 eligible for protection under Title II of the ADA." Pl.'s Reply
8 Br. 4. Cf. Parker v. Universidad de Puerto Rico, 225 F.3d 1, 4
9 (1st Cir. 2000) ("Although Title II of the ADA took effect on
10 January 26, 1992, [as of August 2000,] there [was] sparse
11 case[]law interpreting its scope and limits." (footnote
12 omitted)). But we need not do so today. In the posture of this
13 appeal, it is sufficient to conclude that the district court's
14 view that the ADA's reference to "essential eligibility
15 requirements" necessarily refers to each and every formal legal
16 eligibility requirement imposed for participation in a public
17 program or benefit is mistaken. In the context of a motion to
18 dismiss, we ask only whether the complaint states a claim that is
19 in this regard plausible on its face. Twombly, 550 U.S. at 570.
20 For the foregoing reasons, we conclude that it does.

21 2. Whether Waiving the Filing Deadline Would be a
22 Reasonable Modification. The district court also concluded that
23 "[r]equiring the State defendant to violate state law is not a
24 reasonable accommodation as a matter of law." Mary Jo C., 2011
25 WL 1748572, at *9, 2011 U.S. Dist. LEXIS 49567, at *27. The
26 court's construction of the term "reasonable modification" thus

1 provided another ground upon which it granted the NYSLRS's motion
2 to dismiss. As a matter of both statutory construction and
3 federal preemption, we must inquire whether Congress, when it
4 enacted Title II's reasonable modification provision, intended to
5 require modification of state laws under certain circumstances,
6 thereby preempting them, or whether it instead intended the
7 reasonable modification provision to stop short of encroaching on
8 state laws. See, e.g., DiFiore v. American Airlines, Inc., 646
9 F.3d 81, 85 (1st Cir. 2011) ("[F]ederal preemption[] is a
10 question of statutory construction").

11 Under the United States Constitution's Supremacy
12 Clause, the "Constitution, and the Laws of the United States
13 which shall be made in Pursuance thereof . . . shall be the
14 supreme Law of the Land; . . . any Thing in the Constitution or
15 Laws of any State to the Contrary notwithstanding." U.S. Const.
16 art. VI, cl. 2. "Under the doctrine of federal preemption,
17 'state laws that conflict with federal law are without effect.'
18 Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating
19 Dist., 673 F.3d 84, 94 (2d Cir. 2012) (quoting Altria Grp. Inc.
20 v. Good, 555 U.S. 70, 76, (2008)). "[T]he purpose of Congress is
21 the ultimate touchstone of pre-emption analysis." Cipollone v.
22 Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (internal quotation
23 marks omitted). "Absent clear congressional intent to the
24 contrary, federal preemption of state law is not favored"
25 Marsh v. Rosenbloom, 499 F.3d 165, 177-78 (2d Cir. 2007).

1 "Congress may manifest its intent to preempt
2 state or local law explicitly, through the
3 express language of a federal statute, or
4 implicitly, through the scope, structure, and
5 purpose of the federal law." [N.Y. SMSA Ltd.
6 P'ship v. Town of Clarkstown, 612 F.3d [97,
7 104 (2d Cir. 2010)]. Thus, preemption "may
8 be either express or implied, and is
9 compelled whether Congress' command is
10 explicitly stated in the statute's language
11 or implicitly contained in its structure and
12 purpose." Shaw v. Delta Air Lines, Inc., 463
13 U.S. 85, 95 (1983) (internal quotation marks
14 omitted).

15 Niagara Mohawk Power Corp., 496 F.3d at 95.

16 "[T]he ADA does not contain an express preemption
17 provision" Rubietta v. National R.R. Passenger Corp.,
18 No. 08 Civ. 7117, 2012 WL 345909, at *4, 2012 U.S. Dist. LEXIS
19 12047, at *10 (N.D. Ill. Jan 30, 2012). "Courts have recognized
20 two types of implied preemption: (1) field preemption, where
21 Congress has manifested an intent to 'occupy the field' in a
22 certain area . . . ; and (2) conflict preemption, where state law
23 'actually conflicts with federal law.'" Niagara Mohawk Power
24 Corp., 673 F.3d at 95 (quoting English v. Gen. Elec. Co., 496
25 U.S. 72, 79 (1990)).

26 "An actual conflict between state and federal law
27 exists when compliance with both federal and state regulations is
28 a physical impossibility, or when state law is an obstacle to the
29 accomplishment and execution of the full purposes and objectives
30 of Congress." Marsh, 499 F.3d at 177 (internal quotation marks
31 and citations omitted). An actual conflict also exists "where
32 federal law is in 'irreconcilable conflict' with state law."

1 Levitin v. PaineWebber, Inc., 159 F.3d 698, 705 (2d. Cir. 1998)
2 (quoting Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996)).

3 [W]hen the question is whether a Federal act
4 overrides a state law, the entire scheme of
5 the statute must of course be considered and
6 that which needs must be implied is of no
7 less force than that which is expressed. If
8 the purpose of the act cannot otherwise be
9 accomplished -- if its operation within its
10 chosen field else must be frustrated and its
11 provisions be refused their natural effect --
12 the state law must yield to the regulation of
13 Congress within the sphere of its delegated
14 power.

15 Crosby v. National Foreign Trade Council, 530 U.S. 363, 373
16 (2000) (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)).

17 "What is a sufficient obstacle is a matter of judgment, to be
18 informed by examining the federal statute as a whole and
19 identifying its purpose and intended effects." Id.

20 "Since preemption claims turn on Congress's intent, we
21 begin as we do in any exercise of statutory construction with the
22 text of the provision in question, and move on, as need be, to
23 the structure and purpose of the Act in which it occurs."

24 Metropolitan Taxicab Bd. of Trade v. City of New York, 615 F.3d

25 152, 156 (2d Cir. 2010) (quoting N.Y. State Conference of Blue

26 Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645,

27 655 (1995)) (brackets omitted). At the outset, we find nothing

28 in the statutory phrase "reasonable modification" to suggest that

29 Congress intended to exclude modifications that require violation

30 or waiver of mandatory state statutes in some circumstances. In

31 light of the broad scope and purpose of the ADA, we think it

1 unlikely that Congress would have hidden such a significant
2 limitation in such an anodyne statutory phrase. When Congress
3 did restrict the scope of the ADA, it did so explicitly. See,
4 e.g., 42 U.S.C. §§ 12208, 12210 (explicitly excluding certain
5 individuals from the definition of "qualified individual with a
6 disability"); id. § 12111(5)(A) (excluding employers having fewer
7 than fifteen employees from the coverage of Title I).

8 As noted above, "[i]n the ADA, Congress provided [a]
9 broad mandate" to "effectuate its sweeping purpose[to] . . .
10 forbid[] discrimination against disabled individuals in major
11 areas of public life, [including] . . . public services"
12 Martin, 532 U.S. at 675. "Congress found that 'individuals with
13 disabilities continually encounter various forms of
14 discrimination, including outright intentional exclusion, the
15 discriminatory effects of architectural, transportation, and
16 communication barriers, overprotective rules and policies, [and]
17 failure to make modifications to existing facilities and
18 practices'" Crowder, 81 F.3d at 1483 (alteration in
19 original) (quoting 42 U.S.C. § 12101(a)(5)). The ADA aims "to
20 provide a clear and comprehensive national mandate for the
21 elimination of discrimination against individuals with
22 disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA
23 represents Congress's attempt to apply this "clear and
24 comprehensive national mandate" to the "services, programs, or
25 activities," 42 U.S.C. § 12132, of "'any State or local
26 government' and 'any department, agency, . . . or other

1 instrumentality of a State,'" United States v. Georgia, 546 U.S.
2 at 154 (omission in original) (quoting 42 U.S.C. § 12131(1)).
3 And although Congress did not include an express preemption
4 provision, it did include a provision expressly abrogating the
5 sovereign immunity of the states. See 42 U.S.C. § 12202.

6 The "natural effect" of Title II's "reasonable
7 modification" requirement, Crosby, 530 U.S. at 373, in light of
8 the foregoing observations, requires preemption of inconsistent
9 state law when necessary to effectuate a required "reasonable
10 modification." Congress clearly meant Title II to sweep broadly.
11 If all state laws were insulated from Title II's reasonable
12 modification requirement solely because they were state laws,
13 "state law [would serve as] an obstacle to the accomplishment and
14 execution of the full purposes and objectives of Congress" in
15 enacting Title II. Marsh, 499 F.3d at 177. Far from
16 "provid[ing] a clear and comprehensive national mandate for the
17 elimination of discrimination against individuals with
18 disabilities," 42 U.S.C. § 12101(b)(1), the ADA would be
19 powerless to work any reasonable modification in any requirement
20 imposed by state law, no matter how trivial the requirement and
21 no matter how minimal the costs of doing so. We conclude that
22 the ADA's reasonable modification requirement contemplates
23 modification to state laws, thereby permitting preemption of

1 inconsistent state laws, when necessary to effectuate Title II's
2 reasonable modification provision.⁸

3 Our conclusion is further supported by Hargrave.

4 There, as we have discussed, we upheld an injunction of a
5 facially discriminatory Vermont statute. Vermont had argued that
6 in the context of the statute and implementing regulation
7 requiring states "to make 'reasonable modifications in policies
8 [or] practices' in order to avoid discrimination unless the
9 modifications would constitute a fundamental alteration to the
10 relevant 'service, program, or activity,'" Hargrave, 340 F.3d at
11 38 (quoting 28 C.F.R. § 35.130(b)(7)), enjoining the law would
12 fundamentally alter the program at issue. Rejecting this
13 argument and upholding the injunction, we spoke of the "ADA's
14 preemption of these statutory provisions." Id. at 38 n.10
15 (emphasis added). While the NYSLRS argues that Hargrave "did not
16 hold that Title II preempted facially nondiscriminatory state

⁸ The same result obtains when considering whether "federal law is in 'irreconcilable conflict' with state law." Levitin, 159 F.3d at 705. As discussed supra Part I.D.1, the relevant provision of the ADA distinguishes between two categories of requirements: "rules, policies, [and] practices" which are subject to reasonable modification, and "essential eligibility requirements," which are not. 42 U.S.C. § 12131(2). As we have seen, not all formal legal eligibility requirements are "essential eligibility requirements," which raises the possibility that, in certain cases, a state law may fall into the category of the "rules, policies, [and] practices" subject to reasonable modification. And if indeed a modification of a state law was found in a particular case to be a "reasonable modification" to a "rule[], polic[y], or practice[]," but the state law in question did not provide for modification in those circumstances, there would be an "irreconcilable conflict" between the dictates of the ADA and state law, necessitating preemption. Levitin, 159 F.3d at 705.

1 laws or mandated waiver of such laws," NYSLRS Br. at 21, it
2 provides no persuasive reason why, in light of the concerns
3 discussed above, Title II would preempt facially discriminatory
4 laws in pursuit of its broad purpose, but fail to preempt state
5 law when necessary to achieve a reasonable modification to
6 accomplish the same broad goals.

7 Last, we observe that the proposition that the ADA
8 preempts inconsistent state law when appropriate and necessary to
9 effectuate a reasonable accommodation under Title II is also
10 consistent with decisions from our sister Circuits. See, e.g.,
11 Barber v. Colorado Dep't of Revenue, 562 F.3d 1222, 1232-33 (10th
12 Cir. 2009) (ultimately concluding that there was no conflict
13 between state law and the ADA in the case before it, but
14 observing that the court "in no way affirm[ed] the district
15 court's conclusion that '[a]n accommodation that would have
16 required defendants to willfully ignore or violate the law is per
17 se not reasonable.'" (citation omitted)); Quinones v. City of
18 Evanston, Ill., 58 F.3d 275, 277 (7th Cir. 1995) ("[The
19 defendant] believes that it is compelled to follow the directive
20 from the state, but the Supremacy Clause of the Constitution
21 requires a different order of priority. A discriminatory state
22 law is not a defense to liability under federal law; it is a
23 source of liability under federal law." (emphasis in original));
24 Williams v. Gen. Foods Corp., 492 F.2d 399, 404 (7th Cir. 1974)
25 (similar). As the Ninth Circuit explained:

1 The court's obligation under the ADA . . . is
2 to ensure that the decision reached by the
3 state authority is appropriate under the law
4 and in light of proposed alternatives.
5 Otherwise, any state could adopt requirements
6 imposing unreasonable obstacles to the
7 disabled, and when haled into court could
8 evade the antidiscrimination mandate of the
9 ADA merely by explaining that the state
10 authority considered possible modifications
11 and rejected them.

12 We are mindful of the general principle that
13 courts will not second-guess the public
14 health and safety decisions of state
15 legislatures acting within their traditional
16 police powers. However, [under federal]
17 antidiscrimination laws such as the ADA which
18 require reasonable modifications to public
19 health and safety policies, it is incumbent
20 upon the courts to insure that the mandate of
21 federal law is achieved.

22 Crowder, 81 F.3d at 1485 (citation omitted).

23 The NYSLRS argues that "Title II . . . requires
24 reasonable modification only of 'rules, policies, or practices'
25 -- not state statutes," NYSLRS Br. 19, and seeks to distinguish
26 Crowder, which contemplated the modification of a mandatory
27 Hawaii State administrative regulation rather than a state
28 statute, see Crowder, 81 F.3d at 1481-85, on this ground, NYSLRS
29 Br. 21 n.6. But as a general rule, duly promulgated state
30 regulations have the force of law for these purposes as do
31 statutes. See, e.g., State v. Kotis, 91 Hawai'i 319, 331, 984
32 P.2d 78, 90 (1999) (Under Hawaii law, "[a]dministrative rules,
33 like statutes, have the force and effect of law."); Allstate Ins.
34 Co. v. Rivera, 12 N.Y.3d 602, 608, 911 N.E.2d 817, 820, 883
35 N.Y.S.2d 755, 758 (2009) (under New York law, "[a] duly

1 promulgated regulation . . . has the force of law." (internal
2 quotation marks omitted)). From the standpoint of the ADA's
3 preemptive force, we can discern no reason to distinguish between
4 the preemption of state statutes and state regulations. Cf.
5 Crosby, 530 U.S. at 372 n.6 (noting that "a variety of state laws
6 and regulations may conflict with a federal statute" and be
7 preempted). And for the reasons discussed above, we do not read
8 the ADA to prohibit reasonable modifications to state statutes
9 when appropriate.

10 We have examined NYSLRS's other arguments regarding
11 Title II and find them unpersuasive.

12 We therefore conclude that the district court erred in
13 dismissing the plaintiff's Title II claim against the NYSLRS on
14 the ground that "[r]equiring the State defendant to violate state
15 law is not a reasonable accommodation as a matter of law." Mary
16 Jo C., 2011 WL 1748572, at *9, U.S. Dist. LEXIS 49567, at *27.
17 Because "the determination of what constitutes reasonable
18 modification is [a] highly fact-specific, . . . case-by-case
19 inquiry," "[w]hether the plaintiff['s] proposed alternative" to
20 New York's filing deadline "constitute[s] [a] reasonable
21 modification[] or [a] fundamental alteration[] cannot be
22 determined as a matter of law on the record before us." Crowder,
23 81 F.3d at 1485; see also McGary v. City of Portland, 386 F.3d
24 1259, 1270 (9th Cir. 2004) ("[T]he question of what constitutes a
25 reasonable accommodation under the ADA 'requires a fact-specific,
26 individualized analysis of the disabled individual's

1 circumstances and the accommodations that might allow him to meet
2 the program's standards.'" (quoting Wong v. Regents of Univ. of
3 Cal., 192 F.3d 807, 818 (9th Cir. 1999)).

4 E. The District Court's Decision as to Whether the
5 Plaintiff Adequately Alleged that She is Disabled

6 Again: Title II of the ADA provides that "no qualified
7 individual with a disability shall, by reason of such disability,
8 be excluded from participation in or be denied the benefits of
9 the services, programs, or activities of a public entity, or be
10 subjected to discrimination by any such entity." 42 U.S.C.
11 § 12132 (emphasis added). A "disability" is defined as "(A) a
12 physical or mental impairment that substantially limits one or
13 more major life activities of such individual; (B) a record of
14 such an impairment; or (C) being regarded as having such an
15 impairment" 42 U.S.C. § 12102(1). "Major life
16 activities" are further defined to include "caring for oneself,
17 performing manual tasks, seeing, hearing, eating, sleeping,
18 walking, standing, lifting, bending, speaking, breathing,
19 learning, reading, concentrating, thinking, communicating, and
20 working." 42 U.S.C. § 12102(2).

21 Although neither defendant argued to the district court
22 that the plaintiff had failed to plead adequately that she was
23 "disabled" within the meaning of the ADA, the district court
24 considered the issue sua sponte. It concluded:

25 The complaint does not sufficiently allege
26 that plaintiff has a "disability" within the
27 meaning of the ADA. Although plaintiff
28 alleges that she has suffered from an

1 unidentified mental illness since
2 adolescence, she does not allege any
3 additional facts plausibly suggesting that
4 such mental illness substantially limited one
5 or more of her major life activities.
6 Accordingly, plaintiff's complaint does not
7 state a cognizable claim under Title II of
8 the ADA. See, e.g., Tylicki v. St. Onge, 297
9 F. App'x 65, 67 (2d Cir. Oct. 28, 2008)
10 (finding that the plaintiff's complaint did
11 not adequately plead a disability under Title
12 II of the ADA where it contained no
13 allegations describing how his supposed
14 mental condition substantially limited a
15 major life activity).

16 Mary Jo C., 2011 WL 1748572, at *7, 2011 U.S. Dist. LEXIS 49567,
17 at *21.

18 Although the district court noted that it "would be
19 possible for plaintiff to amend her Title II claims to
20 sufficiently plead this element as against the Library unless
21 those claims would otherwise be futile," id. at *10 n.7, 2011
22 U.S. Dist. LEXIS 49567, at *33 n.7, it did not afford the
23 plaintiff this opportunity because it concluded that all of the
24 plaintiff's claims against both defendants were barred on other
25 sufficient, independent grounds.

26 On appeal, the plaintiff submits that "the failure to
27 provide her with an opportunity to present evidence of disability
28 can be cured by the usual practice of this Court to grant a party
29 leave to amend the complaint on a Rule 12(b)(6) motion." Pl.'s
30 Br. 17 (citing Bellikoff v. Eaton Vance Corp., 481 F.3d 110, 118
31 (2d Cir. 2007) ("[W]hen a motion to dismiss is granted, the usual
32 practice is to grant leave to amend the complaint." (internal
33 quotation marks omitted))).

1 Inasmuch as the district court thought that it "would
2 be possible" for the plaintiff to amend her allegations regarding
3 her disability such that at least some claims could go forward,
4 Mary Jo C., 2011 WL 1748572, at *10 n.7, 2011 U.S. Dist. LEXIS
5 49567, at *33 n.7, in light of the fact that the plaintiff has
6 now requested leave to amend on appeal, and since our decision
7 today removes the futility the district court saw in allowing the
8 plaintiff to amend her complaint (at least as to claims against
9 the NYSLRS), we decline to pass on the sufficiency of the
10 plaintiff's allegations of disability on appeal. Instead, we
11 vacate the district court's decision in this regard, and remand
12 with instructions to grant the plaintiff's motion for leave to
13 amend her complaint to plead adequate allegations of disability
14 if such a motion is made.

15 F. Title II's Abrogation of Sovereign Immunity

16 NYSLRS argues that even if the plaintiff can state a
17 claim against it under Title II, Title II "fails to validly
18 abrogate the State's sovereign immunity for the reasonable
19 modification claim made here." NYSLRS Br. 22. The plaintiff
20 responds that, "[a]s appellant Mary Jo C. seeks injunctive relief
21 in connection with her claim against NYSLRS, this Court can avoid
22 adjudication of the Eleventh Amendment issue by permitting the
23 appellant to amend her complaint to" name a state official in his
24 official capacity as a defendant. Pl.'s Reply Br. 13.

25 "Under the well-known exception to [the Eleventh
26 Amendment's grant of sovereign immunity from suit] first set

1 forth in Ex parte Young, 209 U.S. 123 (1908), . . . 'a plaintiff
2 may sue a state official acting in his official capacity --
3 notwithstanding the Eleventh Amendment -- for prospective,
4 injunctive relief from violations of federal law.'" State
5 Employees Bargaining Agent Coalition v. Rowland, 494 F.3d 71, 95
6 (2d Cir. 2007) (quoting In re Deposit Ins. Agency, 482 F.3d 612,
7 617 (2d Cir. 2007)); see also Harris v. Mills, 572 F.3d 66, 72
8 (2d Cir. 2009) (similar).

9 Because of our well-settled policy of avoiding the
10 unnecessary adjudication of constitutional issues, see generally
11 Horne v. Coughlin, 191 F.3d 244, 246 (2d Cir.), cert. denied, 528
12 U.S. 1052 (1999), and because the NYSLRS concedes that the
13 "plaintiff could potentially seek injunctive relief from the
14 State Comptroller under Ex parte Young," NYSLRS Supp. Br. 17, we
15 decline to address the constitutionality of Title II's abrogation
16 of the State's sovereign immunity, and remand with instructions
17 to the district court to allow the plaintiff leave to amend her
18 complaint in an attempt to invoke the doctrine of Ex parte Young.

19 II. Title II Claim Against the Library

20 A. The District Court's Decision

21 The plaintiff also asserted a claim against the Library
22 alleging that its failure to file an application on her behalf or
23 to reclassify her termination as an unpaid leave of absence
24 violated Title II of the ADA. As noted, the ADA "forbids
25 discrimination against persons with disabilities in three major
26 areas of public life: employment, which is covered by Title I of

1 the statute; public services, programs, and activities, which are
2 the subject of Title II; and public accommodations, which are
3 covered by Title III." Lane, 541 U.S. at 516-17. The district
4 court dismissed this claim because it concluded that the
5 plaintiff, an employee of the Library, could bring a claim
6 against her employer under Title I of the ADA but not under Title
7 II.

8 Title I of the ADA, "employment," provides in pertinent
9 part that "[n]o covered entity shall discriminate against a
10 qualified individual on the basis of disability in regard to job
11 application procedures, the hiring, advancement, or discharge of
12 employees, employee compensation, job training, and other terms,
13 conditions, and privileges of employment." 42 U.S.C. § 12112(a).
14 Title I applies to government employers, which are "covered
15 entities."⁹

16 Noting that the "Supreme Court" and "the Second Circuit
17 ha[ve] not expressly considered th[e] issue" of whether Title II
18 applies to employment discrimination, Mary Jo C., 2011 WL
19 1748572, at *11-*12, 2011 U.S. Dist. LEXIS 49567, at *36, and

⁹ The term "covered entity" is defined to include an "employer," 42 U.S.C. § 12111(2), which in turn is defined to include a "person engaged in an industry affecting commerce who has 15 or more employees." Id. § 12111(5)(A). The statute further defines "person" as including, see id. § 12111(7); id. § 12111(5)(B), non-federal "governments, governmental agencies, [and] political subdivisions," id. § 2000e(a), and defines "industry affecting commerce as including "any governmental industry, business, or activity," id. § 2000e(h), see generally Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1172 (9th Cir. 1999).

1 acknowledging that "courts are split" on the issue, id. at *11,
2 2011 U.S. Dist. LEXIS 49567, at *35, the district court followed
3 what it described as the "well-reasoned decisions of the most
4 recent district court cases in this Circuit," to conclude that
5 "Title I of the ADA is the exclusive remedy for plaintiff's
6 claims of discrimination against the Library, all of which relate
7 to the 'terms, conditions, and privileges of [her] employment'
8 with that entity," id. at *12, 2011 U.S. Dist. LEXIS 49567, at
9 *39 (alteration in original) (quoting 42 U.S.C. § 12112(a)).

10 The district court also cited Zimmerman v. Oregon Dep't
11 of Justice, 170 F.3d 1169 (9th Cir. 1999), as the leading case
12 concluding that public employees' exclusive remedy against their
13 employers under the ADA is Title I. Zimmerman concluded that
14 "Congress unambiguously expressed its intent for Title II not to
15 apply to employment." Id. at 1173. It reasoned that a "common
16 understanding" of the term "services, programs, or activities" in
17 Title II's command that "no qualified individual with a
18 disability shall, by reason of such disability, be excluded from
19 participation in or be denied the benefits of the services,
20 programs, or activities of a public entity," referred "only to
21 the 'outputs' of a public agency, not to 'inputs' such as
22 employment." Id. at 1174.

23 First, employment by a public entity is not
24 commonly thought of as a "service, program,
25 or activity of a public entity." Second, the
26 "action" words in the sentence presuppose
27 that the public entity provides an output
28 that is generally available, and that an

1 individual seeks to participate in or receive
2 the benefit of such an output.

3 Consider, for example, how a Parks Department
4 would answer the question, "What are the
5 services, programs, and activities of the
6 Parks Department?" It might answer, "We
7 operate a swimming pool; we lead nature
8 walks; we maintain playgrounds." It would
9 not answer, "We buy lawnmowers and hire
10 people to operate them." The latter is a
11 means to deliver the services, programs, and
12 activities of the hypothetical Parks
13 Department, but it is not itself a service,
14 program, or activity of the Parks Department.

15 Similarly, consider how a member of the
16 public would answer the question, "What are
17 the services, programs, and activities of the
18 Parks Department in which you want to
19 participate, or whose benefits you seek to
20 receive?" The individual might answer, "I
21 want to participate in the Wednesday night
22 basketball league, or find out about the free
23 children's programs for the summer months."
24 The individual would not logically answer, "I
25 want to go to work for the Parks Department."

26 Id.

27 The Zimmerman court concluded that "when viewed as a
28 whole, the text, context and structure of the ADA show
29 unambiguously that Congress did not intend for Title II to apply
30 to employment. Under these circumstances, we do not resort to
31 legislative history, and we do not defer to the Attorney
32 General's regulation," id. at 1178, which provides that Title II
33 does apply to employment actions against public employers, see 28
34 C.F.R. § 35.140(a). Contra Bledsoe v. Palm Beach County Soil &
35 Water Conservation Dist., 133 F.3d 816, 821 (11th Cir. 1998)
36 ("Extensive legislative commentary regarding the applicability of
37 Title II to employment discrimination [in the ADA's legislative

1 history] . . . is so pervasive as to belie any contention that
2 Title II does not apply to employment actions.")

3 In addition to cases following Zimmerman's analysis,
4 the district court noted dicta from the Supreme Court's decision
5 in Board of Trustees of University of Alabama v. Garrett, 531
6 U.S. 356 (2001):

7 [N]o party has briefed the question of
8 whether Title II of the ADA . . . is
9 available for claims of employment
10 discrimination when Title I of the ADA
11 expressly deals with that subject. See,
12 e.g., Russello v. United States, 464 U.S. 16,
13 23 (1983) ("[W]here Congress includes
14 particular language in one section of a
15 statute but omits it in another section of
16 the same Act, it is generally presumed that
17 Congress acts intentionally and purposely in
18 the disparate inclusion or exclusion"
19 (internal quotation marks omitted)).
20

21 Id. at 360 n.1. Like the district court here, other district
22 courts in this Circuit have cited this language before reaching
23 the conclusion that Title II does not apply to employee claims
24 against a public employer. See Fleming v. State Univ. of N.Y.,
25 502 F. Supp. 2d 324, 332 (E.D.N.Y. 2007).

26 B. Analysis

27 "[S]tatutory analysis necessarily begins with the plain
28 meaning of the law's text, and, absent ambiguity, will generally
29 end there." Dobrova v. Holder, 607 F.3d 297, 301 (2d Cir. 2010)
30 (internal quotation marks omitted). "'Because our task is to
31 ascertain Congress's intent, we look first to the text and
32 structure of the statute' as the surest guide to congressional
33 intent." Trustees of Local 138 Pension Trust Fund v. F.W.

1 Honerkamp Co., 692 F.3d 127, 134(2d Cir. 2012) (quoting Lindsay
2 v. Ass'n of Prof'l Flight Attendants, 581 F.3d 47, 52 (2d Cir.
3 2009)). We are persuaded primarily by the structure of the ADA,
4 including differences between Title I and Title II, that Congress
5 did not intend to extend Title II to employment discrimination
6 claims, at least not those that are covered by Title I, see infra
7 note 12 and accompanying text. See Allard K. Lowenstein Intern.
8 Human Rights Project v. Dep't of Homeland Sec., 626 F.3d 678, 681
9 (2d Cir. 2010) ("Beginning, as we must, with the plain meaning of
10 the statute's text and structure, we see no ambiguity.").

11 The ADA is divided into five separate titles: Title
12 I, "Employment"; Title II, "Public Services"; Title III, "Public
13 Accommodations"; Title IV, "Telecommunications"; and Title V,
14 "Miscellaneous Provisions." Americans with Disabilities Act of
15 1990, Pub. L. No. 101-336, 104 Stat. 327, 327-28 (1990). "[T]he
16 title of a statute and the heading[s] of [its] section[s]' are
17 'tools available for the resolution of a doubt' about the meaning
18 of a statute." Almendarez-Torres v. United States, 523 U.S. 224,
19 234 (1998) (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S.
20 519, 528-29 (1947)). As the Supreme Court indicated in dicta in
21 Garrett, the fact that "Title I of the ADA expressly deals with
22 th[e] subject" of employment discrimination, whereas Title II
23 "deal[s] with the 'services, programs, or activities of a public
24 entity,'" 531 U.S. at 360 n.1 (quoting 42 U.S.C. § 12132),
25 suggests that Congress did not intend Title II to reach
26 employment discrimination, see id. (citing Russello, 464 U.S. at

1 23 ("[W]here Congress includes particular language in one section
2 of a statute but omits it in another section of the same Act, it
3 is generally presumed that Congress acts intentionally and
4 purposely in the disparate inclusion or exclusion" (internal
5 quotation marks omitted))). And reflecting Congress's decision
6 to separate the ADA into distinct titles covering different kinds
7 of discrimination, the Supreme Court has described the ADA as
8 "forbid[ding] discrimination against persons with disabilities in
9 three major areas of public life: employment, which is covered by
10 Title I of the statute; public services, programs, and
11 activities, which are the subject of Title II; and public
12 accommodations, which are covered by Title III." Lane, 541 U.S.
13 at 516-17.

14 The division between Titles I and II is further
15 illustrated by their differing definitions of a "qualified
16 individual." Title I's definition speaks in terms of employment:
17 "As used in [Title I,] . . . 'qualified individual' means an
18 individual who, with or without reasonable accommodation, can
19 perform the essential functions of the employment position that
20 such individual holds or desires." 42 U.S.C. § 12111(8). But
21 Title II defines the same term instead as an individual who
22 "meets the essential eligibility requirements for the receipt of
23 services or the participation in programs or activities provided
24 by a public entity." Id. § 12131(2).

25 Moreover, Title I prohibits discrimination by a
26 "covered entity," which it defines as, inter alia, "an employer,"

1 id. § 12111(2), whereas Title II prohibits discrimination by a
2 "public entity," which it defines as, inter alia, "any State or
3 local government [or agency thereof]," id. § 12131(1). Thus,
4 "Title II does not include any definition relevant to
5 employ[ment], [by contrast with] Title I[]." Cormier v. City of
6 Meriden, No. 03 Cv. 1819, 2004 WL 2377079, at *4, 2004 U.S. Dist.
7 LEXIS 21104, at *15 (D. Conn. Sept. 30, 2004).

8 Also, Congress delegated the authority to promulgate
9 regulations under the two titles to two different agencies.
10 Title I gives the Equal Employment Opportunity Commission the
11 authority to promulgate regulations interpreting that title. 42
12 U.S.C. § 12116. But Title II entrusts the Attorney General with
13 that responsibility. 42 U.S.C. § 12134(a). See also Zimmerman,
14 170 F.3d at 1178. And the fact that Congress included no
15 direction that the two agencies work together to avoid imposing
16 inconsistent standards governing employment discrimination suits
17 suggests "that it did not intend for the Attorney General to have
18 any power over employment under Title II; it never envisioned
19 that there could be a conflict." Id.

20 Title I also imposes various limitations on suits
21 against an employer which are absent from Title II. While Title
22 I caps the amount of compensatory damages a plaintiff may recover
23 depending on the number of employees employed by the defendant
24 employer, 42 U.S.C. § 1981a(b)(3), and disallows punitive damages
25 in suits against governmental employers, id. § 1981a(b)(1),
26 "Title II has no such limitations," Cormier, 2004 WL 2377079, at

1 *7, 2004 U.S. Dist. LEXIS 21104, at *26. And although plaintiffs
2 filing suit under Title I must first exhaust administrative
3 remedies,¹⁰ it appears that those filing suit under Title II need
4 not do so, although we find a conclusion on the point unnecessary
5 to decide this case.¹¹ It is an "elementary canon of

¹⁰ Title I incorporates the exhaustion requirement imposed by Title VII of the Civil Rights Act of 1964.

ADA Title I incorporates various provisions from Title VII of the landmark Civil Rights Act of 1964. . . . One of these provisions . . . requires a claimant to file a charge of employment discrimination with the EEOC within 180 days after the discriminatory act. See [42 U.S.C.] § 2000e-5(e)(1).

McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007).

¹¹ Title II adopts the "remedies, procedures, and rights set forth" in the Rehabilitation Act at 29 U.S.C. § 794a. 42 U.S.C. § 12133. Courts have construed that section of the Rehabilitation Act as not imposing any exhaustion requirement as to claims against a recipient of federal funding, but as imposing one as to claims against a federal employer. See, e.g., Ryan v. Shawnee Mission Unified Sch. Dist. No. 512, 437 F. Supp. 2d 1233, 1253-54 (D. Kansas 2006). But "Title II of the ADA is not applicable to the federal government," Cellular Phone Taskforce v. F.C.C., 217 F.3d 72, 73 (2d Cir. 2000), so it would appear that Title II only incorporates the Rehabilitation Act's procedures applicable to recipients of federal funding, and thus does not impose an exhaustion requirement. Other courts have concluded that Title II contains no exhaustion requirement. See Bledsoe, 133 F.3d at 824 ("[T]he regulations . . . plainly state that exhaustion is not required." (citing 28 C.F.R. § 35.172, Appendix A ("At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. [§] 12133, whether or not the designated agency finds a violation."))).

In Tsombanidis v. West Haven Fire Dept., 352 F.3d 565 (2d Cir. 2003), we strongly suggested that Title II does not impose an exhaustion requirement.

It may be that once the governmental entity denies . . . an accommodation, [Title II of] the ADA [does not] require a plaintiff to

1 construction that a statute should be interpreted so as not to
2 render one part inoperative." Mountain States Tel. & Tel. Co. v.
3 Pueblo of Santa Ana, 472 U.S. 237, 249 (1985), (quoting Colautti
4 v. Franklin, 439 U.S. 379, 392 (1979)). "[A]pplying Title II to
5 public employees would nullify these statutory limits for a
6 significant category of employment discrimination plaintiffs."
7 Cormier, 2004 WL 2377079, at *7, 2004 U.S. Dist. LEXIS 21104, at
8 *26. As the Seventh Circuit put it in a similar context -- while
9 analyzing the Rehabilitation Act -- "it would make no sense for
10 Congress to provide . . . different sets of remedies, having
11 different exhaustion requirements, for the same wrong committed
12 by the same employer." McGuinness v. U.S. Postal Serv., 744 F.2d
13 1318, 1321 (7th Cir. 1984).

exhaust the state or local administrative procedures. But a plaintiff must first use the procedures available to notify the governmental entity that it seeks an exception or variance from the facially neutral laws when pursuing a reasonable accommodation claim.

. . . .

This is not an exhaustion requirement but merely a requirement that plaintiffs first use the proper procedure to seek an exception or variance. If denied this request, they do not need to exhaust the administrative appeal process.

Id. at 579 & n.8 (emphasis in original); see also Cormier, 2004 WL 2377079, at *6, 2004 U.S. Dist. LEXIS 21104, at *22-*23 ("The Second Circuit has not decided the issue, but has suggested that Title II may not require exhaustion."). However, out of an abundance of caution, and because plaintiff does not argue otherwise, we assume for present purposes but do not decide that Title II imposes no exhaustion requirement.

1 "[W]e are required to disfavor interpretations of
2 statutes that render language superfluous." Conn. ex rel.
3 Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 88 (2d
4 Cir. 2000) (internal quotation marks omitted); see also Corley,
5 556 U.S. at 314 ("[O]ne of the most basic interpretive canons[
6 is] that a statute should be construed so that effect is given to
7 all its provisions, so that no part will be inoperative or
8 superfluous, void or insignificant." (internal quotation marks
9 and alteration omitted)); Duncan, 533 U.S. at 174 (similar). If
10 a public employee were able to bring a suit against her employer
11 for wrongful discrimination under both Title I and Title II,
12 Title I would apparently become superfluous in the context of a
13 suit against a public employer employing more than fifteen
14 persons -- compare 42 U.S.C. § 12111(5)(A) (Title I does not
15 apply to an employer with fewer than 15 employees), with 42
16 U.S.C. § 12131(1) (Title II applies to all municipal entities
17 regardless of size) -- which is a construction we find highly
18 doubtful. Even the plaintiff here concedes nearly as much. See
19 Pl.'s Reply Br. 24 ("[T]he proffered interpretation of Title II
20 does not render Title I entirely redundant.") (emphasis in
21 original).

22 Accordingly, we conclude that the statute unambiguously
23 limits employment discrimination claims to Title I. A public
24 employee may not bring a Title II claim against his or her

1 employer, at least when the defendant employer employs fifteen or
2 more employees.¹²

3 The plaintiff argues that we, like the Bledsoe court,
4 should consult Title II's legislative history. But, having found
5 the relevant provisions of the statute unambiguous, we do not
6 have warrant to do so. See, e.g., Dep't of Hous. & Urban Dev. v.
7 Rucker, 535 U.S. 125, 132 (2002) ("[R]eference to legislative
8 history is inappropriate when the text of a statute is
9 unambiguous."); Ratzlaf v. United States, 510 U.S. 135, 147-48
10 (1994) ("[W]e do not resort to legislative history to cloud a
11 statutory text that is clear.").

12 The plaintiff also argues that deference is due to the
13 Attorney General's regulations implementing Title II, which
14 contemplate employment discrimination claims. See 28 C.F.R. §
15 35.140(a) ("No qualified individual with a disability shall, on
16 the basis of disability, be subjected to discrimination in
17 employment under any service, program, or activity conducted by a
18 public entity."). But the Supreme Court has directed that before
19 deferring to an agency's regulations, a court must first employ
20 "'traditional tools of statutory construction' to determine
21 whether Congress has expressed its intent unambiguously on the
22 question before the court." Zimmerman, 170 F.3d at 1173 (quoting
23 Chevron, 467 U.S. at 843 n.9). "If the intent of Congress is

¹² We need not, and do not, decide here whether a Title II claim may be brought against a public employer employing fewer than fifteen employees inasmuch as the Library has represented that it has fifteen or more.

1 clear, that is the end of the matter; for the court, as well as
2 the agency, must give effect to the unambiguously expressed
3 intent of Congress." Chevron, 467 U.S. at 842-43. "The
4 judiciary is the final authority on issues of statutory
5 construction and must reject administrative constructions which
6 are contrary to clear congressional intent." Id. at 843 n.9.
7 Because we conclude that the statute is unambiguous, we do not
8 consider the Attorney General's regulations for this purpose.

9 The plaintiff also argues that our prior statement in
10 Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d
11 37 (2d Cir. 1997), recognized as superseded on other grounds by
12 Zervos v. Verizon New York, Inc., 252 F.3d 163, 171 n.7 (2d Cir.
13 2001), that the word "discrimination" in Title II is a "catch-all
14 phrase that prohibits all discrimination by a public entity,
15 regardless of the context," id. at 45, establishes that we have
16 already decided that Title II applies to employment. But, in
17 relevant part, Innovative only addressed (and rejected) White
18 Plains' argument that Title II did not apply to its zoning
19 decisions because "it contend[ed] that zoning does not constitute
20 a 'service, program, or activity.'" Id. at 44. The question of
21 whether Title II applies to employment discrimination was not
22 before the Court.

23 And this statement must be considered in context.
24 Title II provides that "no qualified individual with a disability
25 shall, by reason of such disability, be excluded from
26 participation in or be denied the benefits of the services,

1 programs, or activities of a public entity, or be subjected to
2 discrimination by any such entity." 42 U.S.C. § 12132. The
3 Innovative court first rejected White Plains' argument on the
4 ground that the word "activity" in the above quoted statutory
5 text was broad enough to encompass municipal zoning decisions.
6 117 F.3d at 44. This reasoning was sufficient to reject
7 completely White Plains' argument, and would have been sufficient
8 to decide the issue before the Court. But the Innovative Court
9 then offered an alternative rationale for rejecting White Plains'
10 argument: that the statutory language "or be subjected to
11 discrimination by any such entity," 42 U.S.C. § 12132, was a
12 "catch-all phrase that prohibits all discrimination by a public
13 entity, regardless of the context," 117 F.3d at 45. In any
14 event, then, the statement in Innovative "was not essential to
15 the Court's holding because it was offered in the alternative[,]
16 and therefore it is [a] dictum that is not binding on us."
17 Willis Mgmt. (VT.), Ltd. v. United States, 652 F.3d 236, 243 (2d
18 Cir. 2011).

19 For the foregoing reasons, we affirm the district
20 court's dismissal of the plaintiff's Title II claims against the
21 Library.¹³

¹³ After dismissing the plaintiff's Title II claim against the Library, the district court observed that "Plaintiff does not seek leave to amend her complaint to assert a Title I ADA claim, nor refute the Library's contention that she cannot state a valid Title I ADA claim because she failed to exhaust her administrative remedies with respect to any such claim as required by 42 U.S.C. § 12117(a)." Mary Jo C., 2011 WL 1748572, at *12 n.11, 2011 U.S. Dist. LEXIS 49567, at *39 n.11. We do not

1 **CONCLUSION**

2 For the foregoing reasons, the district court's
3 judgment of dismissal is vacated as to the plaintiff's Title II
4 claim against the NYSLRS. The case is remanded with instructions
5 to the district court to grant the plaintiff leave to amend her
6 complaint if she so wishes to allege facts supporting her claim
7 that she was disabled, and to attempt to state a claim invoking
8 the rule of Ex parte Young, 209 U.S. 123 (1908), and for further
9 proceedings consistent with this opinion. The district court's
10 judgment of dismissal is affirmed as to the plaintiff's Title II
11 claim against the Library. The district court's decision to
12 decline to exercise supplemental jurisdiction over the
13 plaintiff's state law claims is vacated for reconsideration
14 depending on the course of the further proceedings contemplated
15 by this opinion.

16 Costs of the plaintiff on appeal to be paid by NYSLRS
17 to the plaintiff; the Library shall bear its own costs.

express or mean to imply any opinion on our part as to whether
the plaintiff should be allowed to amend her claims against the
Library on remand.