

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-2215 Caption [use short title]

Motion for: setting briefing schedule for constitutional challenge Mary Jo C. v. New York State and Local Retirement System, Central Islip Public Library

Set forth below precise, complete statement of relief sought:

The United States respectfully requests that this Court set a schedule for briefing the State's constitutional challenge to Title II of the ADA.

MOVING PARTY: United States (Intervenor - not listed below) OPPOSING PARTY: New York State and Local Retirement System

Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Sasha Samberg-Champion OPPOSING ATTORNEY: Laura R. Johnson

United States Department of Justice, Civil Rights Division New York State Office of the Attorney General
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Court-Judge/Agency appealed from: United States District Court for the Eastern District of New York - Judge Feuerstein

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency:

Opposing counsel's position on motion:
Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: 57 Sasna Samberg-Champion Date: 12/01/2011 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 11-2215

MARY JO C.,

Plaintiff-Appellant

v.

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

Defendants-Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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INTERVENOR UNITED STATES' MOTION TO SET BRIEFING SCHEDULE  
FOR CONSTITUTIONAL CHALLENGE TO FEDERAL LAW

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The United States, which intervened in this case to defend the constitutionality of the abrogation of state sovereign immunity accomplished by Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, hereby moves this Court to set a schedule for briefing that question. In support of that motion, the United States submits the following:

1. This appeal arises out of a claim by plaintiff-appellant that both defendants – the New York State and Local Retirement System (the “State”) and

the Central Islip Public Library (the “Library”) – violated her rights under Title II. The district court dismissed her complaint, finding that she had failed to state a claim against either party. It also found that Title II does not validly abrogate the State’s sovereign immunity, simply because of that failure to state a claim.

2. Plaintiff appealed, and the United States intervened in defense of the constitutionality of Title II’s abrogation of sovereign immunity.<sup>1</sup> It pointed out that the district court erred in finding that the abrogation was invalid simply because the plaintiff failed to state a claim and asked this Court to vacate the district court’s erroneous ruling. See Br. for the United States as Amicus Curiae in Support of Plaintiff-Appellant and as Intervenor at 19-21. The State did not raise below the larger question of whether Title II’s abrogation of sovereign immunity is constitutional in all cases involving the provision of public benefits, and the district court did not rule on that question, and so the United States did not at that time brief the issue. It did, however, ask for the opportunity to submit a supplemental brief should the larger constitutional question be raised. See *id.* at 22 n.6.

3. In its response brief, the State does not defend the reasoning of the district court regarding the abrogation question. Instead, for the first time, it argues that Title II fails to validly abrogate sovereign immunity for all claims regarding

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<sup>1</sup> The United States also filed as *amicus curiae* in support of plaintiff’s Title II claim against the State. The United States does not seek to file anything further in that capacity.

the provision of disability benefit programs. See Br. for State Appellee at 22-25.

4. Because the constitutionality of an Act of Congress now has been brought into question, the United States is entitled to present argument in defense of the constitutionality of its statute. See 28 U.S.C. 2403(a); Fed. R. App. P. 44(a).

5. The United States respectfully asks this Court to set a schedule for the briefing of this question. After conferring with the State, the United States proposes to submit a brief in defense of the constitutionality of Title II's abrogation of sovereign immunity by January 9, 2012. The United States further proposes that the State be permitted to respond to that brief by February 13, 2012. The State consents to this schedule. The United States also has conferred with counsel for the plaintiff, who consents.<sup>2</sup>

6. Accordingly, the United States asks this Court to set a schedule, as outlined above, for briefing the State's constitutional challenge to Title II of the ADA.

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<sup>2</sup> The Library is not protected by sovereign immunity, and therefore has no interest in this issue.

Respectfully submitted,

THOMAS E. PEREZ  
Assistant Attorney General

s/ Sasha Samberg-Champion  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2011, I electronically filed the foregoing INTERVENOR UNITED STATES' MOTION TO SET BRIEFING SCHEDULE FOR CONSTITUTIONAL CHALLENGE TO FEDERAL LAW with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sasha Samberg-Champion  
SASHA SAMBERG-CHAMPION  
Attorney