11-2215-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARY JO C.

Plaintiff-Appellant,

-against-

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

Defendants-Appellees.

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

ON APPEAL FROM A FINAL JUDGMENT BY THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

What is telling about the briefs of appellees New York State and Local Retirement System ("NYSLRS") and Central Islip Public Library ("Library") is how much of appellant Mary Jo C.'s brief they fail to challenge. Neither appellee argues that Mary Jo C. failed to plead that she was disabled under the Americans with Disabilities Act ("ADA"). *See* Brief for Plaintiff-Appellant ("Appellant's Br.") at 15-17. NYSLRS fails to challenge the assertion that a federal court may order State officials to act in contravention of State law. Appellant's Br. at 21 (citing *United States v. City of Yonkers*, 856 F.2d 444, 459 (2d Cir. 1988). Similarly, NYSLRS fails to argue that Mary Jo C. should not be given leave to

amend her complaint to eliminate the Eleventh Amendment issue from this case. Appellant's Br. at 29, n.9.

Likewise, the Library fails to challenge the appellant's contention that the legislative history of Title II clearly demonstrates an intention to apply the provisions of the Rehabilitation Act to Title II. Appellant's Br. at 30-31. Similarly, the Library fails to challenge the appellant's contention that the Ninth's Circuit's interpretation of Title II in *Zimmerman v. Oregon Dep't of Justice,* 170 F.3d 1169 (9th Cir. 1999), cert. denied, 531 U.S. 1189 (2001), is flatly at odds with this Court's interpretation of Title II in *Innovative Health Systems, Inc. v. City of While Plains,* 117 F.3d 37, 44-46 (2d Cir. 1997). Appellant's Br. at 32-33.

This brief will establish that all the contentions of the appellees lack merit. It will first establish that the three-month requirement to file for disability retirement benefits is not an essential eligibility requirement because it is not critical to the functioning of the retirement system nor adversely impacts its purpose. This brief will then detail that well-settled precedent establishes that statutes are considered "rules" under the ADA. Next, this brief will establish that this Court can adhere to the principles of judicial restraint by permitting Mary Jo C. to add as a defendant the Comptroller of the State of New York in his official capacity, which will eliminate the Eleventh Amendment issue. However, if this Court believes it is appropriate to address the Eleventh Amendment issue,

Congress validly abrogated immunity in connection with violations of the ADA resulting from the failure to provide modifications to procedures because Congress found that the failure to modify practices has resulted in discrimination and discrimination has economically disadvantaged disabled individuals. Hence, requiring a modification to the three-month filing period is congruent and proportional to problems Congress sought to remedy when passing Title II.

This brief will then establish that when interpreting Congress' intent when it passed the ADA, it is important to understand the context in which Congress passed the ADA. Congress was not drafting a new statute from scratch, but instead simply intended to incorporate existing law: Titles III and VII of the Civil Rights Act of 1964 and section 504 of the Rehabilitation Act. This accounts for the somewhat lack of clarity in the ADA. However, it is clear that Congress sought to incorporate the provisions of section 504 of the Rehabilitation Act into Title II and section 504 prohibits employment discrimination. Accordingly, the Library's contention that this Court should not give deference to the DOJ regulations lacks merit.

ARGUMENTS

I. THE PLAINTIFF HAS STATED A CLAIM UNDER TITLE II OF THE ADA BECAUSE THE WAIVER OF THE THREE-MONTH PROCEDURAL RULE CONSTITUTES A REASONABLE MODIFICATION.

A. The Three-Month Requirement for Filing is not Critical to the Functioning of the State Retirement System.

This Court has not yet established a broad rule defining when requirements imposed by a state or local government constitute "essential eligibility requirements" of a program as to render an individual eligible for protection under Title II of the ADA, 42 U.S.C. § 12131(2).[1] However, as one court has found, a "program eligibility requirement which could discriminate against the disabled may be deemed essential only if the program's purposes could not be achieved without the requirement." *Fry v. Saenz*, 98 Cal.App.4th 256, 265 (Ct. App. 3 Dist. 2002); *see also Washington v. Indiana High Sch. Ath. Ass'n.,* 181 F.3d 840, 850 (7th Cir. 1999) (rule is essential if it's waiver would be "so at odds" with purpose behind rule that it would constitute a fundamental and unreasonable change); *McPherson v. Michigan High Sch. Ath. Ass'n. Inc.,* 119 F.3d 453, 461 (6th Cir. 1997) (en banc) (examining degree to which rule is necessary to further underlying purposes or goals served by rule); *Easly v. Snider*, 36 F.3d 297, 302-03 (3d Cir.

[1] On a case by case basis this court has determined whether a plaintiff has satisfied the essential requirements of a program for which he sought access. *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261, 277 (2d Cir. 2003).

1994) (examining whether rule is essential to the purpose and nature of the program).

NYSLRS cannot seriously dispute that the three-month rule is a procedural, not a substantive rule, which is not critical to the administration of the retirement benefits program. Rather, the three-month rule regulates the process for securing one's substantive right to disability benefits. *See Sibbach v. Wilson*, 312 U.S. 1, 14 (1941) (test for whether rule is procedural is whether rule regulates procedure – the judicial process for enforcing rights recognized by substantive law); *see also Black's Law Dictionary* 1083 (5th Ed. 1979) defining "procedure" as "mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right"); *Greene v. Locke*, 223 F.3d 1064, 1070 (9th Cir. 2000) (filing of a complaint prior to a certain deadline constitutes a procedural requirement).

While the Legislature did not distinguish between substantive and procedural criteria within Retirement and Social Security Law § 605(b), this Court must undertake such analysis; it is not enough to say, as does NYSLRS, that the Legislature placed the three-month requirement in the same statute as the ten-years of service requirement. *See McPherson*, 119 F.3d at 461 (that Title II entity "labels a rule necessary does not make it so"; responsibility of court to independently assess necessity of rule); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485

(9th Cir. 1996) (responsibility of courts to "insure that the mandate of federal law is achieved").

NYSLRS errs when it suggests that no principled reason exists for treating the ten years of service requirement differently than the three-month filing requirement. First, the ten year requirement serves a goal of providing benefits to individuals who have contributed a particular sum of money into the system. That no significant purpose is served by the three-month rule is illustrated by RSSL § 605(b) itself: members of the teachers' retirement system may file for benefits within a twelve month period. N.Y. Ret. & S.S. Law § 605(b)(2).

Accordingly, the provision of the ADA cited by NYSLRS to support its position does constitute persuasive authority – for Mary Jo C. The relevant portion of the statute is as follows:

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

42 U.S.C. § 12201(e) (emphasis added). That Congress exempted eligibility standards for modification under the ADA, but did not provide the same exemption for state procedures indicates that Congress intended to subject procedures to modification. This is so because "`[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in

the absence of a contrary legislative intent.'" *United States v. Pettus,* 303 F.3d 480, 485 (2d Cir. 2002) (quoting *United States v. Smith,* 499 U.S. 160, 167 (1991).

Likewise, for two reasons it is not relevant that some courts have refused to waive filing deadlines in different contexts for mental disability. *See* Brief for State Appellee ("NYSLRS Br.") at 17. First, the ADA imposes some administrative burdens on covered entities "that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified individuals with disabilities." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001).[2]

Second, in any case in which a party raises the issue of a waiver of a filing requirement, numerous considerations indigenous to the case at hand impact on the ruling. *See, e.g., Canales v. Sullivan,* 936 F.2d 755,758-59 (2d Cir. 1991) (applying judicial estoppel to revive some untimely applications because of inability of people with mental illness to challenge adverse determinations); *United States v. Brockamp,* 519 U.S. 347, 352-53 (1997) (attempting to decipher Congressional intent to conclude Congress would not have wanted to permit equitable tolling); *Acierno v. Barnhart,* 475 F.3d 77, 83 (2d Cir. 2007) (equitable tolling not warranted because of Congressional intent to not provide such a toll);

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[2] While *Martin* involved an application of Title III of the ADA, the standards governing Title II are the same as Title III. *See* Senate Report No. 101-116 at 42 (1989) (evincing Senate intention to apply identical concepts of discrimination within Title I through III).

Iselin v. Ret. Bd. of the Employees' Ret. Sys. Of R.I., 943 A.2d, 1045, 1051 (R.I. 2008) (legislature intended to impose stringent disability requirements).

Martin provides some instruction for this case. In *Martin,* the Supreme Court held that because the object of golf is to progress from tee to hole in as few strokes as possible, shot-making is the "essence" of golf." 532 U.S. at 683-4 and n.39. Walking is simply a method by which a player arrives at the ball and hence, not an "indispensable feature" of golf. *Id.* at 685.

Similarly, no one can seriously dispute that people join a retirement system (or open individual retirement accounts) for the purpose of obtaining some financial security. Other than matters of convenience, people care very little about how they obtain the money that they are owed as a result of payments made; it can be by mail, on-line or in person.

In *Henrietta D. v Bloomberg,* when the plaintiffs sought services to which they alleged they were entitled under state law, this Court defined essential eligibility requirements of a program by the program's formal legal eligibility requirements. 331 F.3d at 277. As detailed in Mary Jo C.'s initial brief, to always define a program's essential eligibility requirements by its formal legal requirements would eliminate the ability of a disabled individual to obtain an accommodation to a program's requirements, regardless of how unimportant the program requirement was to the overall functioning of the program.

B. No Basis Exists to Exempt State Statutes From the Reasonable Modification Provisions of Title II.

For numerous reasons, NYSLRS errs when it argues that the reasonable modification requirement to "rules, policies or practices' encompassed within Title II does not require modifications to state statutes. "[I]n virtually all controversies involving the ADA and state policies that discriminate against disabled persons, courts will be faced with legislative (or executive agency) deliberation over relevant statutes, rules and regulations." *Crowder,* 81 F.3d at 1485.

Accordingly, this Court has held that zoning laws are subject to the reasonable modification requirement of Title II. *See Innovative Health Systems, Inc. v. City of While Plains,* 117 F.3d 37, 44-46 (2d Cir. 1997). NYSLRS cannot argue that *Innovative Health* applies to only individual "zoning decisions" made by local officials but not zoning statutes themselves. A decision applying a zoning law is not a rule, policy or practice. It is the application of a statute.

Next, the requirement of modifications to "rules, policies or practices" within Title II is identical to the requirement of rules, policies or practices within the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. § 3604(f)(3)(B). No one can seriously dispute that § 3604(f)(3)(B) covers zoning laws. *See, e.g.,* H.R. Rep. No. 711, 100th Cong. 2nd Sess. at 2185 (recognizing that provisions of FHAA apply to "state or local land use and health and safety laws, regulations,

practices or decisions which discriminate against individuals with handicaps");[3] *Tsombanidis v. West Haven Fire Dep't,* 352 F.3d 565,571-73, 578 (2d Cir.2003). Accordingly, the phrase "rules, policies and practices" within Title II encompasses statutes because "[w]hen Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts ordinarily should be interpreted in the same way." *In re Cmty. Bank of N. Va.,* 418 F.3d 277, 295-96 (3d Cir. 2005).

Finally, this Court has characterized the provisions of a zoning law as a facially neutral "rule." *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 936 (2d Cir. 1988). The contention by NYSLRS that Title II applies to rules, policies and practices but not statutes constitutes the "hair splitting arguments" that should be avoided when interpreting Title II. *Innovative Health System,* 117 F.3d at 45.

For numerous reasons, NYSLRS further errs when, relying on *N.Y. State Dep't of Soc. Servs. v. Dublino,* 413 U.S. 405, 413-14 (1973), it asserts that a conclusion that federal preemption is not warranted because a court cannot infer a Congressional intent to preempt a filed from statutory language that expressly

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[3] Nor can NYSLRS argue that the legislative history details that only the provisions of 42 U.S.C. § 3604(f)(1) and(2) apply to state statutes. The legislative history stated that subsections(f)(1) and (2), which prohibit discrimination against handicapped individuals apply to state and local laws. However, the subsection (f)(3) simply defines what constitutes discrimination. *See* 42 U.S.C. § 3604(f)(3).

omits any reference to state statutes or state laws. NYSLRS Br. at 19. First, *Dublino* involved the strain of preemption law addressing whether preemption exists because Congress intended to exclusively occupy a field. *See Dublino*, 413 U.S. at 413. Whether or not Congress intended to occupy a field exclusively constitutes a different preemption question from whether a state law actually conflicts with federal law. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). In this latter instance, preemption exists "where state law `stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In this case, Congress sought to assure, *inter alia,* the equality of opportunity and economic self-sufficiency for people with disabilities. *See* 42 U.S.C. § 12101(a)(8). An application of the three-month rule within N.Y. Ret. & S.S. Law § 605(b)(2) conflicts with these Congressional goals by imposing a rigid procedural barrier that can result in the forfeiture of disability retirement benefits for which disabled individuals may be eligible. *See* Canales, 936 F.2d at 758-59.

It make little sense to authorize modifications to zoning laws that the legislatures have drafted and pursuant to which government officials have determined should not be modified, but not to statutes that provide for no discretion. First, in terms of statutory interpretation, there is no difference between the two kinds of statutes when determining whether they are encompassed by the

term "rules, policies or practices." Next, if a court can require a state official to act in contravention of state law, s*ee United States v. City of Yonkers,* 856 F.2d 444, 459(2d Cir. 1988), no question exists about the authority of Congress to so order a modification. Finally, because a legislature cannot foresee every situation to which its legislation will apply, there is less of an intrusion on state interests in those situations in which there is no individualized opportunity to assess whether the waiver of a state rule is warranted than when such discretion exists.

Next, once this Court recognizes that a statute is a "rule" within the meaning of Title II, then resolution of the issue at hand no longer becomes one of statutory interpretation. Rather, this Court must ask when assessing the reasonableness of an accommodation that seeks a modification to an application of state law, whether a basis exists to differentiate between statutes that provide discretion to state officials, and statutes that do not. Clearly, modifications to state statutes that provide for some discretion in their application may be reasonable. *See, e.g., Tsombanidis*, 352 F.3d at 580.

If modifications to statutes that provide discretion in their application are reasonable, it would follow that modifications to statutes that do not provide for discretion are reasonable. When a state official exercises discretion to apply a statute, he has taken onto account the pertinent governmental interests that warrant an application of the statute in a particular manner that best accommodates the

competing interests of the government and the person to whom the statute has been applied. When no discretion exists, there is no opportunity for the government official to attempt to accommodate competing interests, particularly those recognized under federal law. Under such circumstances, it is more appropriate to find an accommodation reasonable when it modifies the application of a statute that provides for no discretion than a statute that provides for discretion.

Finally, this Court should not be swayed by the contention that a waiver of the time period for filing would amount to a re-writing of the statute. NYSLRS Br. at 22. The statute remains in place for thousands of non-disabled individuals.

II. ELEVENTH AMENDMENT IMMUNITY DOES NOT DEFEAT THE PLAINTIFF'S CLAIM.

A. Because the Plaintiff Does Not Seek Damages From NYSLRS, the Plaintiff can Amend her Complaint to Substitute the Chief Officer of NYSLRS in his Official Capacity.

It is well-settled that principles of judicial restraint caution against deciding constitutional questions when resolution of such questions are unnecessary to the disposition of the case. *Anobile v. Pelligrino,* 303 F.3d 107, 123 (2d Cir. 2001). As appellant Mary Jo C. seeks injunctive relief in connection with her claim against NYSLRS, this Court can avoid adjudication of the Eleventh Amendment issue by permitting the appellant to amend her complaint to add twelve words in the caption preceding the words New York State and Local Retirement System: THOMAS DiNAPOLI, in his official capacity as the chief executive officer of."

It is the usual practice of this Court to grant leave to re-plead on a motion to dismiss pursuant to Rule 12(b)(6). *See, e.g., Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2007). In this case, NYSLRS moved to dismiss on jurisdictional grounds pursuant to Rule 12(b)(1). In a case such as this where the jurisdictional issue amounts to a question of law only, no reason exists to not permit Mary Jo C. to amend her pleading. Indeed, NYSLRS has not opposed the request to re-plead to name as defendant Thomas DiNapoli in his official capacity. *See* Appellant's Br. at 29, n.9. This amounts to at least a tacit concession that re-pleading is warranted.

B. Congress Validly Abrogated the State's Eleventh Amendment Immunity With Respect to the Provision of Disability Retirement Benefits.

Congressional abrogation of Eleventh Amendment immunity is valid if the conduct that Congress seeks to remedy violates both Title II and the Fourteenth Amendment. *United States v. Georgia,* 546 U.S. 151, 159 (2006). Even if the State's conduct does not violate the Fourteenth Amendment, the waiver of Eleventh Amendment immunity is valid if the remedial legislation "exhibits `a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). *Lane* makes clear that the findings of Congress serve as a basis to support a determination that the

remedial provisions of Title II are warranted. 541 U.S. at 529 (congressional findings make clear that inadequate provision of public services was an appropriate subject for prophylactic legislation); *Bd. of Trs. Of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 371 (2001) (relying upon Congressional findings to assess magnitude of discrimination faced by disabled individuals).

At the District Court, Mary Jo C. took the position that the failure to provide a reasonable accommodation did not violate the Constitution. However, she may have conceded too much. This Court has recognized that an individual "suffering from mental illness may raise a colorable due process claim when he asserts that his mental illness prevented him from proceeding . . . in timely fashion." *Canales*, 936 F.2d at 758. However, since Mary Jo C. did not raise this issue below, she will limit her Eleventh Amendment immunity argument to the congruence and proportionality issue.

The Court found in *Lane* that the duty to provide an accommodation is both consistent with the States' Fourteenth amendment obligation to provide an opportunity to be heard in courts, and is not out of proportion to the unconstitutional behavior found, the denial of such access that too often existed. *See* 529 U.S. at 532-33. Similarly, the Fourteenth Amendment also requires that States provide individuals with the opportunity for meaningful participation in

administrative hearings at which benefits to which they may be entitled are at stake. *See Goldberg v. Kelly,* 397 U.S. 254,262-71 (1970).

Accordingly, it is not relevant that there is no fundamental right to disability benefits. NYSLRS Br. at 12-13. That is so because the plaintiff possesses procedural due process rights to enforce State created property rights. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-31 (1982).

When studying the need for remedial legislation to protect people with disabilities, Congress concluded that discrimination includes, *inter alia,* harms that results from the adoption of procedures arising from indifference. Senate Report No. 101-116 at 29 (1989). Congress found that disabled individuals have encountered discrimination in the form of a failure to make modifications to existing practices and have been relegated to receipt of lesser benefits. 42 U.S.C. § 12101(a)(5). Congress further found that disabled individuals are severely disabled economically. 42 U.S.C. § 12101(a)(6). Finally, Congress recognized that the Nation's goals are to assure equality of opportunity, full participation and economic self-sufficiency for disabled individuals. 42 U.S.C. § 12101(a)(8). Based upon such finding, the remedy of a modification in the form of a removal of a procedural barrier within procedures for the receipt of disability benefits is congruent and proportional to the problems Congress found.

When addressing this congruence and proportionality issue, NYSLRS first errs when it argues that a finding of abrogation requires that Congress identified a "pervasive and widespread pattern of constitutional violations with respect to the State's provision of disability benefits programs. NYSLRS Br. at 24. Requiring Congress to find Constitutional violations in category-specific areas would "disarm" Congress in its attempt to eliminate the harms resulting from unconstitutional conduct by imposing an exceedingly high threshold for remedial intervention. *See Lane,* 541 U.S. at 537-38 (Ginsburg, J. concurring).

Likewise, NYSLRS errs when it relies on *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001), to support its contention that Congress lacked the power to eradicate, what the Court in *Garcia* referred to as the unequal effects of disparate but rational treatment. *Id.* at 110. This Court in *Bolmer v. Oliveira*, 594 F.3d 134 (2d Cir. 2010), recognized that *Garcia* "is not applicable" to the question of the scope of Congressional authority to remedy Due Process violations through the ADA. *Id.* at 148. This is so because *Garcia* addressed the authority of Congress to remedy violations of the Equal Protection Clause and the Equal Protection Clause prohibits only irrational disparate treatment. *Id.* at 146. The requirement of a finding of irrationality does not exist when focusing on discriminatory state action that violates the Due Process Clause. *See id.* 147-48.

III. BECAUSE CONGRESS INTENDED THAT TITLE II INCORPORATE THE PROVISIONS OF SECTION 504 TO STATE AND LOCAL GOVERNMENTS, TITLE II COVERS EMPLOYMENT.

A. Introduction – Understanding the Framework Underlying the Passage of the ADA.

When arguing that only Title I covers employment, the Library assumes that Congress started from scratch and wrote a carefully crafted statute in which it methodically created rights and obligations in one congruent instrument. Congress did not. Rather, the ADA can be seen as Congress choosing not to "reinvent the wheel" but instead working from a framework of existing anti-discrimination legislation. Congress simply applied terms of previously existing legislation to people with disabilities, with a few modifications in order to provide greater protection than the existing legislation.

In drafting Title I of the ADA, Congress sought to afford protections to disabled individuals already afforded to other disadvantaged groups in the employment context. To do so, Congress adopted numerous coverage provisions of Title VII, and its' remedial provisions. *See* H.R. Rep. 101-485 (II) at 54, (1990); *id.* at 82 ("people with disabilities should have the same remedies available under title VII of the Civil Rights Act of 1964"); 42 U.S.C. § 12117.[4] Likewise,

[4] On the other hand, Congress believed that in terms of substantive protections, the concepts of discrimination within the one long-standing existing anti-discrimination law, the Rehabilitation Act provided the appropriate protections. Senate Report No. 101-116 at 23-34 (1989).

Title III, which prohibits by places of public accommodation, can be viewed as an extension of Title II of the Civil Rights Act of 1964 to people with disabilities. S*ee Powell v. Nat. Bd. of Med. Exam'rs,* 364 F.3d 79, 86 (2d Cir. 2004); 42 U.S.C. § 12188.

On the other hand, in passing Title II, the focus of Congress was slightly different. Instead of extending anti-discrimination provisions that already existed in the employment and public accommodations areas to a new protected class, Congress sought to broaden the coverage of the one anti-discrimination law protecting disabled individuals by extending "'the anti-discrimination prohibition embodied in section 504 to *all actions of state and local governments.*'" *Innovative Health Systems*, 117 F.3d at 45 (quoting H.R. Rep. 101-485 (II) at 84).

B. Title I is not the Only Provision of the ADA that Addresses Employment Discrimination.

The Library argues that no Title other than Title I addresses employment discrimination claims. Brief for Defendant- Appellee Central Islip Public Library ("Library Br.") at 18. It is wrong.

First, at the time of passage of the ADA, it was well-settled that section 504 of the Rehabilitation Act prohibited employment discrimination by recipients of federal financial assistance. *See, e.g., Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 632-33 (1984). If Title II applies the provisions of section 504 of the Rehabilitation Act to state and local governments, and section 504 bars

discrimination in employment by entities subject to its provisions, Title II must cover employment.

The Library places much weight on the dicta in *Garrett* in which the Supreme Court stated "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Garrett,* 531 U.S. at 960, n.1. However, *Garrett* did not address this issue as both plaintiffs filed their ADA claims under both Title I and Title II and none of the parties addressed the issue of whether or not Title II covers employment discrimination by public entities. *Id.* Moreover, the rule of statutory construction set forth by the Court in *Garrett* is a presumption only.

Hence, it is not persuasive that "'only Title I specifically addresses employment, while Title II is devoid of any employment provisions.'" Library Br. at 28 (quoting *Fleming v. State University of New York,* 502 F. Supp.2d 324, 331 (E.D.N.Y. 2007) (other internal quotes omitted). That is so because Title II is devoid of provisions relating to any area of coverage. Congress chose not to list all actions of state and local governments that Title II prohibits but rather extended the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. H.R. Rep. 101-485(II) at 84.

Likewise, the dicta in *Harris v. Mills*, 575 F.3d 66 (2d Cir. 2009) and *Powell*, 364 F.3d at 79, in which this Court recognized that Title II requires access to services and programs under Title II is also not persuasive authority. *Harris,* 572 F.3d at 73; *Powell,* 364 F.3d at 85. The setting forth of these governing principles was appropriate to assess the merits of the plaintiff's legal claims based upon their factual presentations; at no time did the parties raise the present issue.

Mary Jo C. does not dispute the Library's contention that its actions *viz-a-viz* Mary Jo Co. do not amount to "services, programs or activities" within Title II. However, in so arguing, the Library ignores the remaining language within Title II, which contains a separate proscription against discrimination by entitles covered by Title II.[5] This Court has interpreted the phrase "or be subjected to discrimination" to constitute "a catch-all phrase that prohibits *all* discrimination by a public entity regardless of the context." *Innovative Health Systems,* 117 F.3d at 45.

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[5] Title II provides as follows:

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

42 U.S.C. § 12132.

C. The Weight of Second Circuit District Court Authority is Wrong.

Mary Jo C. concedes that the weight of district court authority within this Circuit holds that Title II does not cover employment discrimination claims. Mary Jo will specifically addresses the rationale set forth by these courts to detail the reasoning of these opinions are flawed.

1. The Text and Structure of the ADA Does not Warrant the Conclusion that Only Title I Covers Employment Discrimination.

Some courts have concluded that the text of the ADA warrants the conclusion that only Title I covers employment claims because services, programs or activities" generally do not encompass employment. *See, e.g., Syken v. State of New York,* 02 Civ. 4673, 2003 U.S. Dist. LEXIS 5358 *25-27 (S.D.N.Y. Apr. 2, 2003); *see also Scherman v. N.Y. State Banking Dep't,* 09 Civ. 2476, 2010 U.S. Dist. LEXIS 26288 * 29-30 (S.D.N.Y. Mar. 19, 2010) (same). However, this rationale ignores that in passing Title II, Congress wanted to apply the Rehabilitation Act to public entities and Congress simply adopted the language of section 504, almost verbatim, when passing Title II. It also ignores this Court's holding in *Innovative Health* that "or be subjected to discrimination by" state and local governments covers all forms of discrimination, not just discrimination occurring in programs, services or activities." 117 F.3d at 44-45.

Likewise, the court in *Melrose v. N.Y. State Dep't of Health*, 05 Civ. 8778, 2008 U.S. Dist. LEXIS 123180 (S.D.N.Y. Dec. 12, 2008), noted that 42 U.S.C. §12131(2) defines an otherwise qualified individual not in terms of employment criteria but whether the individual meets the essential criteria for services or participation in programs or activities. *Id.* at * 24. However, this ignores that this language is consistent with this Court's interpretation of Title II in *Innovative Health*. Section 12131(2) contains language that is simply consistent with both language within section 504 and case law interpreting section 504. Certainly, participating in programs can include working in them. The language within § 12131(2) is clearly not more persuasive than the legislative history of Title II, which details that Congress wanted to pass Title II for the express purpose of expanding coverage the Rehabilitation Act.

Some Courts have also relied on the structure of the ADA to conclude that Title II does not cover employment. *See, e.g., Scherman* at * 29. They have concluded that Title I clearly covers employment while Title II is silent. However, this ignores that Congress clearly wanted to expand coverage of the Rehabilitation Act and sought to prohibit *all* forms of discrimination by state and local governments and chose not to list the specific forms of discrimination. *See Innovative Health,* 117 F.3d at 45.

Courts have also concluded that a finding that Title II covers employment discrimination renders Title I redundant, at least as to public employees. *See, e.g., Syken* at * 27-28. Such a construction of Title II violates the "'cardinal rule of statutory construction that no provision should be construed to be entirely redundant.'" *Syken* at * 28 (quoting *Kungys v. United States,* 485 U.S. 759, 778 (1988)). This rationale too does not constitute particularly persuasive authority. First, the proffered interpretation of Title II does not render Title I *entirely* redundant. Moreover, the rationale of *Syken* and *Scherman* assumes that in passing the ADA, Congress was simply drafting an anti-discrimination law from scratch. It was not. *See supra* at 18-19. Some overlap exists between the coverage provided by Title VII and the Fourteenth Amendment, the latter of which Congress sought to enforce through Title II. *See Lane*, 541 U.S. at 522-23. Finally, to the extent that Congress thought about the matter, it may have wanted to give public employees the option of seeking the assistance of the Equal Employment Opportunity Commission or proceeding directly to court.

2. That Title II Does not Require Exhaustion of Administrative Remedies is not Persuasive Authority.

Some Courts have concluded that the absence of an exhaustion of administrative remedies requirement within title II warrants the conclusion that Title II does not cover employment. *See, e.g., Syken* at * 28. These courts have concluded that such an interpretation enables plaintiffs to escape a requirement

imposed by Congress. *Id.* However, this assumes that Congress wanted to impose an exhaustion requirement all disability employment discrimination plaintiffs. The more likely scenario is that Congress simply wanted to apply the protections of Title VII to disabled individuals. *See supra* at 18-19.

Furthermore, this rationale assumes that Congress imposed the procedural requirement to limit prompt access to courts. This was not the case. Rather, Congress created these enforcement procedures to strengthen the ability of the Equal Employment Opportunity Commission ("EEOC") to reduce discrimination in the workplace. House Report No. 92-238 at 3 (1971). A comparatively brief statute of limitations period for Title I claims serves to enhance the ability of the EEOC to investigate and remedy claims of discrimination. The short limitations period prevents evidence from becoming stale or otherwise difficult to gather, a necessary tool for an agency charged with remedying discrimination around the country. This concern does not exist when a disabled individual files an individual claim.

On the other hand, the brief limitations period significantly weakens one purpose of the ADA, to provide a clear and comprehensive mandate to eliminate discrimination against people with disabilities. 42 U.S.C. § 12101(b). This is so because the shorter limitations period in Title I will enable state and local governments to escape liability when a plaintiff fails to meet the shorter limitations

period, which in turn, eliminates the deterrent aspect of otherwise available damages remedy. *See Owen v. City of Independence,* 445 U.S. 622, 651 (1980).

Furthermore, not requiring exhaustion is consistent with how Congress has generally treated attempts to enforce constitutional rights. Just as Congress passes Title II to enforce the provisions of the Fourteenth Amendment, s*ee Lane,* 541 U.S. at 522-23, Congress passed 42 U.S.C. § 1983 for the same reason. *See Mitchum v. Foster*, 407 U.S. 225, 240 (1972). It is well-settled that § 1983 does not require the exhaustion of administrative remedies. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 512 (1982). Hence, not requiring exhaustion is consistent with how Congress has dealt with its most other significant attempt to enforce the Fourteenth Amendment.

3. That Congress Created Different Regulatory Authority for Titles I and II Does not Justify the Conclusion that Congress Wanted to Exclude Employment Discrimination From Title II Coverage.

Some Courts have justified their conclusion that Title II does not cover employment discrimination on the ground that Titles I and II create different regulatory authority. *E.g., Syken* at * 29. These courts have assumed that Congress would not have wanted to subject state and local governments to possibly conflicting regulatory authority. *See id.* To the extent that Congress gave this matter *any* thought, Congress could have just as well concluded that both the Department of Education and the Department of Health and Human Services possessed regulatory authority over the Rehabilitation Act and these agencies

worked in tandem to develop congruent regulations. *Compare* 34 C.F.R. §§ 104.11-104.14 *with* 45 C.F.R. §§ 84.11-84.14.

4. The Linking of the Rehabilitation Act to Title I is not Persuasive Authority.

Some courts have concluded that the linking of Title I standards to the Rehabilitation Act evinced intent by Congress to limit employment discrimination to Title I. *See Fleming v. State Univ. of N.Y.*, 502 F. Supp. 324, 331 (E.D.N.Y. 2007). However, it is understandable that Congress would reference such standards. In passing Titles I and III, Congress set forth specific provisions as to what constitutes discrimination. *See* 42 U.S.C. §§ 12112 and 12182. Congress intended that Title II encompass the identical protections. *See* H.R. Rep. 101-485(II) at 84. Under the circumstances, it made sense for Congress to reference standards that are more clearly set forth on paper.

D. The Department of Justice Regulations Withstand Chevron Analysis.

The Library has argued that this Court should disregard the views of the DOJ pertaining to the scope of Title II on the ground that these views cannot withstand scrutiny under the criteria of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In so arguing the Library fails to explain why this Court should ignore its previous willingness to seek guidance from these regulations. *See Henrietta D.*, 331 F.3d at 273-74. *See also Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 598-99 (1999) (internal quotes omitted) ("it is

enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

However, beyond this apparent deference, if this Court wishes to strictly apply the *Chevron* criteria, it is clear that this Court should adopt the views of DOJ and reject the contentions of the Library. The Library first argues that the plain text of Title II establishes a clear intent of Congress to exclude employment from Title II coverage. This appears to be wishful thinking.

Nothing in Title II specifically excludes employment. Likewise, Title I does not contain any language that states that it is the sole remedy for employment discrimination. Indeed, one must ask if the statutory language was so clear, why did numerous courts rule that Title II covers employment, often without relying on the DOJ regulations to support its conclusion? *See, e.g., Bloom v. N.Y. City Bd. of Educ.*, 00 Civ. 2728, 2003 U.S. Dist. LEXIS 5290 * 30-33 (Apr. 2, 2003); *Olson v. State of N.Y.*, 04-CV-0419, 2005 U.S. Dist. LEXIS 44929 * 12-13 (Mar. 9, 2005). Under these circumstances, the words of the ADA do not come close to establishing an "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

The Library's reliance upon the analysis set forth in *Zimmerman v. Oregon Dep't of Justice,* 170 F.3d 1169 (9th Cir. 199), cert. denied, 531 U.S. 1189 (2001),

to argue that the language of Title II is clear is equally unavailing. As detailed in Mary Jo C.'s initial brief, the Ninth Circuit in *Zimmerman* has interpreted the phrase "or be subjected to discrimination" to encompass discrimination when the government provides services or engages in programs or activities. *Zimmerman*, 170 F.3d at 1175. However, this Court has held that this phrase encompasses discrimination in any context. *Innovative Health*, 117 F.3d at 45. When parsing the language of Title II, the Ninth Circuit fails to recognize that Congress simply tracked the language of the Rehabilitation Act. Accordingly, under these circumstances, the DOJ interpretation of Title II "is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843.[6]

E. The Library's Attempts to Limit *Innovative Health* Lack Merit.

For numerous reasons, the Library errs when it asserts that *Innovative Health* is inapposite. Library Br. at 24. First, *Garrett* does not weaken *Innovative Health*. *Garrett* never addressed the scope or contents of Title II in any way. *See Garrett*, 531 U.S. at 363-74. Next, while this Court's opinions in *Powell* and *Harris* recognize that Title II requires State and local governments to make reasonable accommodations in the provision of services, *Powell*, 364 F.3d at 85; *Harris*, 572 F.3d at 74, these decisions never addressed to what extent, if any, Title II covers other activities.

[6] This is particularly true in light of the legislative history. *See supra* at 19.

CONCLUSION

For the reasons given in this brief and Mary Jo C.'s initial brief, this Court should vacate the judgment of the district court and remand this case to this district court. If this Court believes that Mary Jo C. has not set forth enough facts to establish that she is disabled under the ADA, but has otherwise raised meritorious claims, this Court should grant her leave to re-plead. If this Court believes that Congress has not validly abrogated Eleventh Amendment immunity but that Mary Jo C. has otherwise set forth a valid ADA claim, this Court should grant leave to re-plead as to enable Mary Jo C. to name the Comptroller in his official capacity in place of NYSLRS.

Dated: Central Islip, New York
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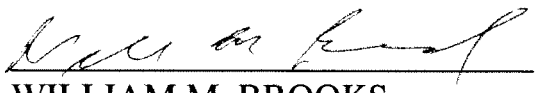
CERTIFICATE OF COMPLIANCE

William M. Brooks, the attorney for the appellant, certifies pursuant to 28 U.S.C. § 1746 and Fed.R.App.P. 32(a)(7)(C):

I used the tool format of Microsoft word, the computer program to type this brief, to obtain a word count. The program stated that this brief was 6898 words .

Dated: Central Islip, New York
December 5, 2011



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