11-2215

United States Court of Appeals for the Second Circuit

MARY JO C.,

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

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

SUPPLEMENTAL BRIEF FOR STATE APPELLEE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Appellee
120 Broadway
New York, New York 10271
(212) 416-6184

BARBARA D. UNDERWOOD
Solicitor General
CECELIA C. CHANG
Deputy Solicitor General
LAURA R. JOHNSON
Assistant Solicitor General of Counsel

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PRELIMINARY STATEMENT

Plaintiff Mary Jo C. seeks disability retirement benefits from defendant New York State and Local Retirement System (NYSLRS). New York requires by statute that benefit claims be filed within three months of the retired employee's last day of employment. Plaintiff applied for benefits a year after her employment ended. She later sued NYSLRS and her former employer, a public library, claiming that that she was entitled to complete waiver of the statutory filing deadline as a "reasonable modification" under Title II of the ADA.

The district court dismissed plaintiff's ADA claim against NYSLRS for failure to plead an actionable claim under Title II, and because sovereign immunity barred plaintiff's suit. In its appellee's brief, NYSLRS argued that the district court's judgment could be affirmed on either alternate ground. This Court subsequently granted the United States, as intervenor, and NYSLRS permission to file supplemental briefs addressing the sovereign immunity issue in greater detail.

In this supplemental brief, NYSLRS further explains that the district court correctly dismissed on immunity grounds. Congress

expressly specified that the ADA does not "alter[] the standards for determining eligibility" under state "disability benefit programs." 42 U.S.C. § 12201(e). Because the ADA expressly declined to address eligibility for benefits, it cannot be read to express any unmistakable intent to abrogate state immunity to eligibility challenges. Nor is there any pattern of unconstitutional conduct with respect to the provision of state disability benefits that would permit Congress to abrogate state immunity through a valid exercise of the its enforcement powers under § 5 of the Fourteenth Amendment.

Moreover, while this Court may affirm the district court's judgment without reaching the immunity question, by affirming the dismissal of plaintiff's claim on the merits, if this Court were to conclude that plaintiff has stated a viable Title II claim, there would be no legal or prudential ground for avoiding the issue of immunity. The immunity question implicates the threshold jurisdiction of the Court and implements structural constitutional protections, recognized by the Eleventh Amendment, that would be lost if an immunity ruling were deferred.

POINT I

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

State sovereign immunity, as recognized by the Eleventh Amendment, is a fundamental feature of our constitutional system. *See, e.g., Alden v. Maine*, 527 U.S. 706, 712-13 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Congress may abrogate that immunity only if two strict requirements are met. Congress must make its intent "to abrogate unmistakably clear in the language of the statute," and must act "pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment" to enforce the substantive rights protected by that Amendment. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). Neither of these foundational requirements is met in this case.

A. Title II Does Not Unmistakably Abrogate State Immunity for Suits Challenging Eligibility Requirements for State Disability Benefits.

First, as NSYLERS noted in its appellee's brief (State Br. at 18), however broadly Congress intended the ADA to sweep with respect to other state programs and services, it included an express statutory

carve out for state "disability benefit programs." 42 U.S.C. § 12201(e). In specifying the scope of the ADA, Congress declared in unambiguous terms that:

> *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.

Id. (emphasis added). Although the United States argues in favor of abrogation, it does not dispute that the ADA *does not* regulate state eligibility requirements for disability benefits (like the disability retirement benefits at issue in this case) and *does not* authorize suits to prevent state entities from enforcing state eligibility requirements.

Rather than indicating an "unmistakably clear" intent to abrogate "the States' constitutionally secured immunity," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000) (quotation marks omitted), Congress drafted the ADA explicitly to *shield* States from suits, like plaintiff's, which seek to alter or waive eligibility requirements for receiving state disability benefits. No principle of logic or statutory interpretation would permit reading the ADA's express carve out for state "disability benefit programs" as somehow abrogating state immunity when Congress took care to specify that the ADA does not alter standards for

receipt of state disability benefits or authorize suits to accomplish that result.

B. Title II as Applied to State Disability Benefit Programs Is Not a Valid Exercise of Congress's § 5 Enforcement Power.

1. Regulating state eligibility standards would not remedy any violation of constitutional rights.

The ADA's exemption for state disability benefit programs makes sense in light of the antidiscrimination purpose of the statute. The ADA was enacted pursuant to § 5 of the Fourteenth Amendment, which grants Congress authority to abrogate state immunity for conduct that *actually violates* Fourteenth Amendment guarantees. *United States v. Georgia*, 546 U.S. 151, 158 (2006). Regulating eligibility for state disability benefits, however, does not protect against constitutional violations. There is no constitutional right to receive government disability benefits in the first place. *See, e.g., Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 141-42 (2d Cir. 1992).

Accordingly, when States *voluntarily provide* benefits to disabled individuals, as in this case, without excluding any persons based on a suspect classification such as race or gender, they may permissibly

impose rational substantive and procedural eligibility requirements that restrict the class of eligible beneficiaries. *See, e.g., Geduldig v. Aiello*, 417 U.S. 484, 496 (1974) ("There is nothing in the Constitution" that requires a State "to create a more comprehensive social insurance program [for disabled persons] than it already has."); *Weinberger v. Salfi*, 422 U.S. 749, 772-76 (1975) (Fourteenth Amendment does not bar the government from imposing durational and timing requirements for receipt of government benefits, including requirements that benefits claims be filed within a certain time period).

Title II of the ADA "seeks to enforce [the constitutional] prohibition on *irrational* disability discrimination." *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (emphasis added). That goal is not furthered by allowing private parties to sue States to waive undisputedly rational, nondiscriminatory eligibility requirements for receipt of state disability benefits. See State Br. at 12-13. Because the retirement benefits in this case are provided *only* to disabled employees, there is no "exclusion of persons with disabilities from the enjoyment of public services," which are available to comparable non-disabled employees. *Lane*, 541 U.S. at 529. Nor is this a case, as the United States suggests, about

discriminatory administration of state programs "that *largely* serve individuals with disabilities" (U.S. Supp. Br. at 14 n.2) (emphasis added). Disabled employees are the sole recipients—and sole beneficiaries—of the retirement benefits at issue here.

As Congress recognized in exempting state eligibility standards from ADA coverage, 42 U.S.C. § 12201(e), requiring States to "alter" eligibility standards for benefits provided on a voluntary basis *only to the disabled* does not target invidious discrimination nor enforce any other constitutional right. New York's provision of voluntary disability retirement benefits since 1920, for example, many decades before enactment of the ADA (State Br. at 24), is the type of conduct Congress meant to immunize, not sweep within the ADA's scope.

To be sure, Title II of the ADA does "enforce a variety of . . . basic constitutional guarantees," and not just the Equal Protection's prohibition against invidious discrimination. *Lane*, 541 U.S. at 522. But this is not a case implicating any other independent constitutional right—such as the Eighth Amendment's prohibition on cruel and unusual treatment, *Georgia*, 546 U.S. at 157; the right of access to courts, *Lane*, 541 U.S. at 522-24; or a substantive due process right to

avoid involuntary commitment, *Bolmer v. Oliveir*a, 594 F.3d 134, 147-49 (2d Cir. 2010). The United States argues that Title II may protect procedural due process rights as well (U.S. Supp. Br. at 25), but waiving statutorily imposed eligibility requirements is not a request for a procedural remedy.

Here, as plaintiff acknowledges, she received the full panoply of due process protections, including the right to appeal the denial of her benefits application and a hearing before an administrative law judge (A. 41). More procedure would not have cured the fundamental problem in this case: plaintiff's undisputed failure to meet the statutory deadline for applying for benefits, and her resulting failure to establish a "statutory entitlement" to the benefits she seeks. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). A request that statutory eligibility criteria be altered is not and could never be a cognizable procedural due process claim.

2. Regulating state eligibility standards is not a permissible exercise of Congress's prophylactic authority under § 5.

While § 5 of the Fourteenth Amendment also grants Congress authority to abrogate state immunity as to "'a somewhat broader swath

of conduct'" than actual constitutional violations "in order to remedy or deter actual violations" of constitutional rights. *Bolmer*, 594 F.3d at 146 (quoting *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 108 (2d Cir. 2001)), that prophylactic authority is subject to two key limitations: (1) there must be a history and pattern of constitutional violations by the States to support Congress's judgment that prophylactic legislation is necessary; and (2) the statutory scheme subjecting States to suit must be a congruent and proportional response to the specific history and pattern of violations Congress identified. See State Br. at 23.

There is no history and pattern of state constitutional violations in the provision of disability benefits (see State Br. at 24), and plaintiff and United States claim none. Nor would pervasive historical discrimination make sense, since the very provision of disability benefits that are not legally mandated indicates the States' willingness to assist persons with disabilities and ameliorate the challenges and difficulties they face, the opposite of unconstitutional discrimination or animus on the basis of disability.

The United States faults NYSLRS for "myopically" focusing on the provision of disability benefits rather than the "broader category of social services" in analyzing abrogation. U.S. Supp. Br. at 15-16. But the United States acknowledges that abrogation must be analyzed—at a minimum—based on the statutory classifications that Congress itself used "in enacting" the ADA. *Id.* at 17. Here, the ADA explicitly and unambiguously reflects Congress's judgment that state "disability benefit programs" are conceptually distinct—and statutorily exempt—although the ADA might otherwise regulate standards for *other types* of social service programs. See *supra* at Point I(A). If the United States believes that statutory distinction is "myopic," its dispute is with Congress, not NYSLRS's abrogation analysis, which properly respects the classification that Congress itself drew.

Even ignoring the text of the ADA, the United States's proposal to analyze abrogation by looking at the broad category of state social services, which the United States acknowledges covers almost every activity a State could engage in, is flawed. Contrary to the United States's argument, both the Supreme Court and other courts have repeatedly refused to analyze ADA abrogation by looking at Title II "as

an undifferentiated whole." *Lane*, 541 U.S. at 530. The very cases the United States relies upon prove that point. Thus, the Supreme Court in *Lane* analyzed Title II abrogation—not with respect to "social services" generally—which would cover an immense range of disparate state programs—but solely with respect to access to state judicial services. See U.S. Supp Br. at 16. And likewise, the Third Circuit in *Bowers*, which the United States also relies upon (*id.* at 16), analyzed Title II abrogation "in the context of public education," not other types of social services. *Bowers v. N.C.A.A.*, 475 F.3d 524, 554 n.33 (3d Cir. 2007).

The United States identifies no decision, and the State is aware of none, that analyzes Title II abrogation "as applied to the entire 'class of cases' involving state provision of social services" as the United States insists must be done here. U.S. Supp. Br. at 17. Such a broad undifferentiated abrogation analysis, precisely what the Supreme Court has indicated is not appropriate or necessary, *Lane*, 541 U.S. at 530-31, would make no sense in light of the "targeted" congruence and proportionality test required to authorize prophylactic legislation under § 5. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999) ("identifying the targeted constitutional

wrong or evil is still a critical part of our § 5 calculus because '[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one'").

By the United States's own account, Title II covers "a wide array" of state conduct and "enforce[s] an equally wide array of constitutional guarantees," *Lane*, 541 U.S. at 530, making any targeted or coherent congruence-and-proportionality analysis impossible if the particular type of state activity—and corresponding constitutional right—is not defined with some underlying specificity. If anything, examining Title II at the level of generality urged by the United States—sweeping in many state programs for which no historical pattern or cognizable incidence of constitutional violations is shown or *even claimed*, as in this case—would call the validity of Title II as whole into question. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999) (if "the term 'enforce' [in § 5] is to be taken seriously . . . the object of valid § 5 legislation must be the *carefully delimited* remediation or prevention of constitutional violations" (emphasis added)); *see also Lane*, 541 U.S. at 530.

And the absence of tailoring is even more problematic, because in this case, plaintiff seeks special accommodation under Title II. This Court has already determined in *Garcia* that Title II's reasonable modification requirement—to the extent it requires special accommodation and waiver of otherwise constitutional state standards and requirements—is not congruent and proportional under § 5 of the Fourteenth Amendment. *Garcia*, 280 F.3d at 109-10.

The United States points out that this Court did not apply *Garcia* in *Bolmer* (U.S. Supp. Br. at 15), but *Bolmer* was not a reasonable modification claim under the ADA. Instead, plaintiff challenged his improper commitment to a state mental hospital, a claim that asserted a violation of his substantive due process rights. *Bolmer*, 594 F.3d at 148. The United States identifies no reason why *Garcia*'s analysis of the Title II reasonable modification requirement does not remain controlling when special accommodation is sought under Title II.

"States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-68 (2001). A comprehensive statutory

obligation, like Title II's reasonable modification requirement, that broadly mandates what the Constitution does not, and does so without specifically targeting unconstitutional state conduct cannot be upheld as a valid exercise of Congress's § 5 powers. *See Garcia*, 280 F.3d at 109-10; *see also City of Boerne v. Flores*, 521 U.S. 507, 532-35 (1997).

The lack of congruence and proportionality is highlighted by an examination of what would happen if Title II were applied to regulate eligibility for state disability benefit programs as the United States and plaintiff suggest. The challenged eligibility requirement in this case is a statutory filing deadline, requiring individuals to file for disability benefits within three months of their last date of employment. Such mandatory, non-waivable filing deadlines are routinely imposed, including by the federal government itself, as condition of obtaining government benefits. State Br. at 17. *See also Weinberger*, 422 U.S. at 772-73 ("flat cutoff provision" for applying for benefits does not violate Fourteenth Amendment).

It would not be congruent and proportional to subject States to a different rule and to essentially bar state entities from imposing any mandatory filing deadlines or timing requirements at all when

providing optional disability benefits. Here, for example, plaintiff filed for benefits a *year after* her employment was terminated, yet argues that NYSLRS must still accept her application. Strict eligibility requirements have the advantage of providing qualifying rules, which are "objective and easily administered," *Weinberger*, 422 U.S. at 785, and which "obviate the necessity for large numbers of individualized determinations," *id.* at 782. Although filing deadlines and other non-waivable requirements may limit the class of persons who qualify for disability benefits, they reduce the administrative cost and burden of providing benefits to those *who are eligible*—leaving more resources, and ensuring more timely approvals and less delay, for disabled persons who do meet eligibility criteria—a legitimate, nondiscriminatory goal that would be impaired if States were continually subject to ADA suits in federal court every time they denied a disability benefits application as untimely.

For all of these reasons, but most critically because the ADA itself does not unmistakably permit plaintiff's suit, the district court properly dismissed plaintiff's Title II claim as barred by the Eleventh Amendment, and its judgment may be affirmed on that alternate ground.

POINT II

THERE IS NO LEGAL OR PRUDENTIAL REASON FOR THIS COURT TO AVOID THE IMMUNITY QUESTION

The United States also asserts that this Court should avoid deciding if NYSLRS is immune from suit. U.S. Supp. Br. at 4-10. NYSLRS does not dispute that this Court may review whether plaintiff has stated a viable Title II claim and may affirm the district court's judgment on the ground that she has not. While claims of sovereign immunity implicate this Court's jurisdiction, *see, e.g, Hale v. Mann*, 219 F.3d 61, 67 (2d Cir. 2000), and in an ordinary case "should be given priority" over merits questions, where the immunity question overlaps with and requires an assessment of whether a statute authorizes a claim against the State, this Court has discretion to consider the merits of a plaintiff's claim before reaching immunity. *See Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 778-79 (2000); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482-83 (4th Cir. 2005).

But that exception does not authorize courts to ignore immunity entirely. Thus, if this Court reaches the merits first and decides that

plaintiff *has stated* a Title II claim, there would be no remaining legal or prudential ground for deferring assessment of immunity, as the United States appears to argue. First, contrary to the United States's assertion (Br. at 2), NYSLRS moved to dismiss on Eleventh Amendment grounds; plaintiff was not surprised and fully briefed the abrogation issue; and the district court ruled on immunity in NYSLER's favor (A.19-27, 47, 95-97). Thus, the immunity issue is not raised "for the first time on appeal" as the United States contends. U.S. Supp. Br. at 1.

Likewise, the potential availability of *Ex Parte Young* relief does not moot or dispose of NYSLRS's entitlement to immunity. If this Court upholds plaintiff's claim under Title II, plaintiff could potentially seek injunctive relief from the State Comptroller under *Ex Parte Young*, 209 U.S. 123 (1908). But that would not resolve the question whether NYSLRS is entitled to be dismissed from this action. The *Ex Parte Young* exception rests on the premise that an injunction against a state officer in his or her individual capacity is not a suit against the State itself or other immune state entity. *Virginia Office of Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011)

Thus, the presence or absence of an *Ex Parte Young* claim does not alter the Court's obligation to rule on immunity if a state entity has been named as a defendant. While plaintiff's suit may still affect New York "indirectly" through a potential *Ex Parte Young* claim, that provides "no reason to deny [NYSLRS] the immunity to which it is entitled under the Eleventh Amendment." *Thomas v. Nakatani*, 309 F.3d 1203, 1208 (9th Cir. 2002). If NYSLRS "were to prevail on appeal, it would no longer be a party" to this action. *Id*. And if NYSLRS is constitutionally immune, this Court has no jurisdictional basis for engaging in the procedural remand plaintiff and the United States urge. There would no be legal ground for reversing the district court's dismissal of plaintiff's ADA claim against NYSLRS, and no predicate for the continued exercise of jurisdiction over NYSLRS for purposes of a remand or otherwise. *See Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) (a valid claim of sovereign immunity "deprive[s] this court of subject matter jurisdiction").

Moreover, while the United States invokes the prudential doctrine of constitutional avoidance, it gets the doctrine backwards. A finding of sovereign immunity might invalidate Title II on constitutional grounds

if this Court interpreted Title II to authorize plaintiff's claim. But it would do so because NYSLRS is entitled to the protection of the Eleventh Amendment, a structural protection central to our constitutional system. See *supra* at 3; *see also Virginia Office of Protection & Advocacy*, 131 S.Ct. at 1637-38. Thus, "the doctrine that statutes should be construed so as to avoid difficult constitutional questions," *Vermont Agency*, 529 U.S. at 787, counsels in favor of interpreting Title II narrowly to *avoid* subjecting NYSLRS to suit, not to avoid a ruling on the existence of immunity itself, which would deprive the Eleventh Amendment of intended effect and leave the constitutional right of immunity unenforced.

If all that were necessary to defeat consideration of a sovereign immunity claim on appeal—based on "constitutional avoidance"—is a plaintiff's willingness to assert an *Ex Parte Young* claim on remand, state entities would deprived of the very benefit of sovereign immunity: protection from suit in federal court. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). States would "have no [definitive] answer" from circuit courts "on the question of whether [they] are immune from suit under Title II of the ADA" and

would therefore be compelled to continually defend suits in federal court—losing the intended protection of immunity even if they are constitutionally immune. *Thomas*, 309 F.3d at 1208. "This surely would be inconsistent with the respect [federal courts] owe to the States" as coequal sovereigns in our constitutional system. *Id.* (citing *Metcalf & Eddy*, 506 U.S. at 146)).

Finally, the United States urges this Court to avoid sovereign immunity because the issue is "complex" and instead to remand the immunity question to the district court for further analysis. U.S. Supp. Br. at 9. But the United States intervened on appeal and proceeded to thoroughly brief the immunity issue, which is undisputedly a pure issue of law. The United States has not identified any argument not fully developed and comprehensively raised to this Court nor any reason why the district court is better positioned to rule on immunity. And while the parties disagree about whether NYSLRS is immune, all agree that the issue is controlled by the plain language of the ADA and governing Supreme Court precedent—hardly presenting an issue this Court is not fully competent and able to determine. See U.S. Supp. Br. at 10-33

(arguing that Supreme Court caselaw clearly forecloses NYSLRS's immunity claim).

CONCLUSION

For the reasons set forth above and in NYSLRS's appellee's brief, the judgment of the district court should be affirmed, and this Court may do so by finding plaintiff's claim against NYSLRS barred by sovereign immunity.

Dated: New York, NY
February 15, 2012

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Appellee

By: /s/ Laura R. Johnson
LAURA R. JOHNSON
Assistant Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6184

BARBARA D. UNDERWOOD
Solicitor General
CECELIA C. CHANG
Deputy Solicitor General
LAURA R. JOHNSON
Assistant Solicitor General of Counsel