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11-2215

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARY JO C.,

Plaintiff-Appellant

v.

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

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND AS INTERVENOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's claims pursuant to 28 U.S.C. 1331. This court has jurisdiction pursuant to 28 U.S.C. 1291.

QUESTIONS PRESENTED

The United States will address the following questions:

1. Did the district court err in holding that New York State's three-month deadline for applying for disability retirement benefits is not subject to the

reasonable modification requirements of Title II of the Americans with Disabilities Act?

2. Did the district court err in holding that Title II does not validly abrogate sovereign immunity under the circumstances of this case?

INTEREST OF THE UNITED STATES

The United States files this brief as an *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) and as intervenor in defense of the constitutionality of a federal statute pursuant to 28 U.S.C. 2403(a).

This case raises important questions as to the relationship between Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and state laws that purport to preclude public entities from making reasonable modifications to policies that discriminate against individuals with disabilities. The United States has an interest in ensuring correct construction and effective enforcement of Title II, which bars public entities from various forms of disability discrimination, 42 U.S.C. 12132, authorizes the Attorney General to bring civil enforcement actions, see 42 U.S.C. 12133; 29 U.S.C. 794a, and gives individuals the right to bring private enforcement actions, 42 U.S.C. 12133. Title II also requires the Attorney General to promulgate regulations construing its broad nondiscrimination mandate, 42 U.S.C. 12134, and the Attorney General has done so. 28 C.F.R. Pt. 35.

STATEMENT OF THE CASE

1. Plaintiff is a former librarian who was 57 years old in December 2009 (A. 38). She worked for various libraries in New York between 1986 and 2006, including defendant Central Islip Public Library (the "Library"), and is a member of defendant New York State and Local Retirement System (the "Retirement System") (A. 38). She has suffered from mental illness since adolescence (A. 38).

In November 2006, the Library fired plaintiff because of behavior caused by her mental illness (A. 38). Other libraries in the area will not hire her because of this episode (A. 42). Plaintiff alleges, and it is undisputed on this motion to dismiss, that she is sufficiently "incapacitated" to qualify for disability retirement benefits under New York law (A. 39).

New York law provides for disability retirement benefits for members of the Retirement System with at least ten years of service credit who are "physically or mentally incapacitated for performance of gainful employment." See N.Y. Retirement and Social Security Law § 605(b)(1) and (b)(3)(c). The member is entitled to a "retirement allowance" based on the member's age, final average salary, and years of service. *Id.* § 605(d)(2). In most cases, an application for such disability retirement benefits must be filed "within three months from the last date

the member was being paid on the payroll." *Id.* § 605(b)(2).[1] The application can be filed by the member or by the "head of the department in which such member is employed." *Id.* § 605(a)(2).

Due to her mental illness, plaintiff was unable to apply for disability retirement benefits during the three-month period when New York law permitted her to do so (A. 39). Her brother contacted the Retirement System, which advised him that the Library could apply on her behalf or convert her termination into a medical leave of absence, thereby extending her deadline for filing (A. 39-40).[2] However, the Library declined to take either action (A. 40). In November 2007, about a year after her termination, plaintiff's clinical condition improved and she applied for retirement benefits (A. 40). The Retirement System denied her application for failure to meet the three-month deadline (A. 40). Plaintiff asked the Retirement System to modify the deadline in light of her disability (A. 41). The Retirement System never formally responded to this request (A. 41). Plaintiff filed an administrative appeal, which was rejected on the ground that state law does not permit an extension of the filing deadline (A. 41).

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[1] A member with "a qualifying World Trade Center condition" faces no deadline. See N.Y. Retirement and Social Security Law § 605(b)(2).

[2] A filing can be made a year after termination of active employment, so long as the employee is on unpaid medical leave in the interim. See N.Y. Retirement and Social Security Law § 605(b)(2).

2. Plaintiff sued both the Retirement System and the Library. She alleges that the Retirement System violated Title II of the ADA by not waiving its three-month filing requirement (A. 42), while the Library violated Title II and state law by failing to file on her behalf or reclassify her termination as a leave of absence (A. 43-44). Plaintiff seeks a declaration of wrongdoing, an injunction requiring the Retirement System to waive the three-month deadline in her case, attorney's fees, and damages from the Library (A. 44-45).

3. The district court granted the defendants' motion to dismiss all claims. It found that plaintiff failed to state a Title II claim against the Retirement System, for three reasons. First, the district court determined, plaintiff failed to demonstrate that she had a disability, because she did not allege facts "plausibly suggesting that such mental illness substantially limited one or more of her major life activities" (A. 22).[3]

Second, the district court found, plaintiff was not a "qualified individual with a disability," because her failure to meet the three-month deadline meant she did not meet the program's "essential eligibility requirements" (A. 23) (quoting 42 U.S.C. 12131(2)). Finally, because state officials have no discretion under state

[3] We take no position on this ruling, which in any event plaintiff can cure by pleading additional facts regarding plaintiff's mental illness. See, *e.g.*, *Leibowitz* v. *Cornell Univ.*, 445 F.3d 586, 593 (2d Cir. 2006) (plaintiff entitled to plead additional facts when complaint was dismissed for failure to state a claim).

law to waive the deadline, the district court reasoned, Title II cannot require them to do so: "Requiring the State defendant to violate state law is not a reasonable accommodation as a matter of law" (A. 26).

Having found that plaintiff failed to state a Title II claim, the district court dismissed plaintiff's claim against the Retirement System on sovereign immunity grounds, reasoning that abrogation of sovereign immunity requires a viable Title II claim (A. 27). But the district court observed that the failure to state a claim would likewise doom a claim against a state official pursuant to *Ex Parte Young*, and so it denied plaintiff's motion to amend her complaint to bring such a claim (A. 27 n.6).[4]

SUMMARY OF ARGUMENT

This Court should reverse the district court's finding that plaintiff failed to state a Title II claim. The district court erred in finding, first, that a state-law application deadline is an "essential eligibility requirement" not subject to the reasonable-modification requirement, and second, that Title II never can require an

[4] With respect to the Library, the district court found that plaintiff's claim properly was brought under Title I (employment discrimination) rather than Title II (public services) (A. 29-33). Plaintiff did not bring a Title I claim against the Library – nor could she, since she failed to exhaust administrative remedies – and so the district court dismissed plaintiff's ADA claim against the Library (A. 33 & n.11). We take no position regarding plaintiff's claim against the Library.

agency to act contrary to state law. This Court also should vacate the district court's unnecessary sovereign immunity ruling.

Contrary to the district court's holding, a person whose disability prevents her from meeting a program's procedural application requirements may nonetheless be "qualified," so long as she satisfies the program's substantive eligibility requirements. The three-month application deadline at issue here is precisely such a procedural requirement, notwithstanding that mid-level New York courts have construed state law not to permit the Retirement System to waive it under appropriate circumstances.[5]

Moreover, a public entity is required to make reasonable modifications to its procedural requirements – including timing requirements – to assist a qualified person in accessing the program. Relaxing an otherwise rigid state-law application deadline is sometimes a reasonable and necessary modification with respect to programs such as this one. Indeed, the federal government and many States provide just such an accommodation to those whose disabilities or other extraordinary circumstances prevent them from timely applying for disability retirement benefits.

[5] The New York Court of Appeals has not ruled on this question. Nor does it appear that the lower courts to consider it took into account the requirements of Title II. We take no position on this question of New York law.

ARGUMENT

I

TITLE II REQUIRES THE RETIREMENT SYSTEM TO MAKE REASONABLE MODIFICATIONS TO PROCEDURAL REQUIREMENTS THAT PREVENT INDIVIDUALS WITH DISABILITIES FROM APPLYING FOR RETIREMENT BENEFITS

1. Title II provides that "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. It defines "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to *rules, policies, or practices*, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the *essential eligibility requirements* for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. 12131(2) (emphasis added); accord 28 C.F.R. 35.104.

Title II thus strikes a careful balance with respect to state laws governing public programs. It distinguishes between "essential eligibility requirements," which need not be compromised, and mere "rules, policies, or practices," which – like architectural, communication, and transportation barriers – are subject to a reasonable-modification requirement to the extent that they needlessly preclude individuals with disabilities from accessing public programs and services. The

public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless such modifications would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

Here, the "essential eligibility requirements" for receiving disability retirement benefits are: (1) being a member of the Retirement System; (2) having at least ten years' service; and (3) being "physically or mentally incapacitated for performance of gainful employment." N.Y. Retirement and Social Security Law § 605. Assuming that plaintiff meets each of those three substantive requirements, she is "eligible" for benefits.

The three-month deadline for applying for benefits, by contrast, is among the "rules, policies, or practices" for program administration that are subject to a reasonable-modification requirement. Rather than being an element of eligibility, it is a "regulatory requirement[]" that "an otherwise eligible applicant" must meet in order to receive benefits. See *Estate of Martin* v. *California Dep't of Veterans Affairs*, 560 F.3d 1042, 1047 (9th Cir.), cert. denied, 30 S. Ct. 299 (2009). And plaintiff's failure to meet such a regulatory requirement does not preclude her from being a "qualified individual" for Title II purposes. See, *e.g.*, *Radaszewski* v. *Maram*, 383 F.3d 599, 612 (7th Cir. 2004) (plaintiff was "qualified" for receipt of home health care services because he met all the substantive requirements,

notwithstanding that the cost of providing him services would exceed the state agency's limits). Rather, a "method[] of administration" must give way where it has the "effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. 35.130(b)(3)(ii).

That the three-month deadline goes to administrative procedure rather than substantive eligibility is clear. Timing requirements such as this one typically are administrative rather than substantive, and so they regularly are subjected to a reasonable-modification requirement. For example, taking an exam on a specified date is not an essential eligibility criterion for passing a law school course, and so a school must offer a reasonable modification where an individual's disability makes it impossible to take the exam on that date. See *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498-499 (4th Cir. 2005); see also 45 C.F.R. 84.44(a) (academic institutions may be required to modify "length of time permitted for the completion of degree requirements"). Similarly, a municipality was required to offer an individual with a disability additional time to clean his yard before citing him as a nuisance. See *McGary* v. *City of Portland*, 386 F.3d 1259, 1268 (9th Cir. 2004). And employers may be required to provide flexible work schedules as a reasonable accommodation unless they can demonstrate that something about the job makes adherence to a rigid schedule necessary. See 42

U.S.C. 12111(9)(B) (listing "modified work schedules" as example of reasonable accommodation). The bottom line is that failure to meet a timing requirement does not preclude an individual from being qualified, unless that timing requirement is truly essential to the program.

Nothing about the nature of a disability retirement program suggests that waiving the three-month deadline in exceptional cases such as this one would meaningfully alter the program at all, let alone fundamentally alter it. To the contrary, as explained further below, the federal government's disability retirement program provides for just such a waiver of its application deadline where the applicant's mental incompetence prevents compliance. See 5 U.S.C. 8337(b). And the New York statute itself makes clear that the three-month deadline is not an essential eligibility requirement, in that it does not require *all* filings for benefits to be made on that timetable. Rather, it provides that a filing can be made a year after termination of employment, so long as the employee is considered to be on unpaid medical leave in the interim. See N.Y. Retirement and Social Security Law § 605(b)(2). And no filing deadline at all applies where the disability is caused by "a qualifying World Trade Center condition." *Ibid.* There is no reason why a similar exception could not be made for those whose disabilities prevent them from meeting the statutory deadline.

Accordingly, even assuming the three-month deadline can be categorized as

an "eligibility requirement" at all, it certainly is not an *essential* one. And a public entity may not "impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. 35.130(b)(8).

Neither the district court nor the Retirement System in its filing below explained why the three-month deadline should be considered a substantive eligibility standard rather than an administrative requirement. They simply asserted, incorrectly, that the three-month deadline was an essential component of eligibility merely because state law requires the Retirement System to enforce it (A. 25-26). But even if state law purports to require the Retirement System to rigidly enforce the deadline, such a requirement cannot alter the deadline's basic character as a regulatory requirement rather than an essential eligibility condition. It only makes the deadline more prone to discriminate against individuals with disabilities. "A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law." *Quinones* v. *City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (Easterbrook, J.).

2. The district court also erred in reasoning that Title II can never require a state agency to accommodate an individual with a disability if the proposed

modification is contrary to state law (A. 26). Rather, to the extent that the three-month deadline unreasonably precludes otherwise qualified individuals with disabilities from obtaining public benefits, it is preempted by Title II and is unenforceable.

Under the Supremacy Clause, state law must give way to the extent it "conflicts with federal law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 378-379 (2000). Such conflicts exist not only where "it is impossible * * * to comply with both state and federal law," but also "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372-373 (internal citation, brackets, and quotation marks omitted). Accordingly, state and local governments are required to bring themselves into compliance with federal law even if state law would otherwise prohibit such action. For example, in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971), the Supreme Court recognized that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct" federal-law requirements, "it must fall." See also *Missouri* v. *Jenkins*, 495 U.S. 33, 56-57 (1990) (federal court could order a local government to support a federally mandated school desegregation plan, even if doing so exceeded the locality's authority under state law).

In particular, the courts of appeals have repeatedly held that compliance with Title II and other federal laws protecting the rights of individuals with disabilities is required even where the modification sought is the relaxing of an unnecessarily rigid state law. For example, Hawaii's law requiring the quarantine of all animals coming to the State was subject to the reasonable-modification requirement where it deprived individuals with disabilities of use of their service animals for an extended period of time. See *Crowder* v. *Kitagawa*, 81 F.3d 1480 (9th Cir. 1996). *Crowder* rejected the argument that the court should not second-guess the state legislature's decision not to permit any exceptions in the statute, observing:

> The court's obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. Otherwise, any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them.

Id. at 1485.

Similarly, a Colorado law requiring a fifteen-year-old driver to be supervised by a parent with a driver's license was subject to the reasonable-modification requirement when applied to a child whose only custodial parent was blind. See *Barber* v. *Colorado Dep't of Revenue*, 562 F.3d 1222, 1232-1233 (10th Cir. 2009). While *Barber* ultimately held that the state defendant had offered a reasonable modification, it took pains to reject the argument that the defendant was

required to follow the state law rather than Title II: "Reliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause." *Id.* at 1233. And reliance on a Puerto Rican condominium law did not excuse failure to comply with the reasonable-modification requirements of the Fair Housing Act, because the defendant was "duty bound not to enforce a statutory provision if doing so would either cause or perpetrate unlawful discrimination." See *Astralis Condo. Ass'n* v. *Secretary, United States Dep't of Hous. & Urban Dev.*, 620 F.3d 62, 69-70 (1st Cir. 2010); accord *Helen L.* v. *DiDario*, 46 F.3d 325, 338 (3d Cir.) (rejecting argument that State could not make reasonable modification because doing so would require shifting funds within the budget in violation of state procedural law), cert. denied, 516 U.S. 813 (1995).

There was, therefore, no basis for the district court's blanket statement that "[r]equiring the State defendant to violate state law is not a reasonable accommodation as a matter of law" (A. 26) (citing *Herschaft* v. *New York Bd. of Elections*, No. 00-cv-2748, 2001 WL 940923 (E.D.N.Y. Aug. 13, 2001), aff'd on other grounds, 37 F. App'x 17 (2d Cir. 2002)). The primary authority cited by the district court for this proposition was *Herschaft*'s statement that "an accommodation that would require a defendant to violate an otherwise constitutional state law is inherently unreasonable." See 2001 WL 940923, at *6.

This statement – itself unsupported by precedent or reasoning, and unnecessary to a decision that this Court ultimately affirmed on other grounds – is simply wrong.

To the extent that a reasonable modification can be reached consistent with state law, Title II does not require a public entity to consider an alternative modification that would violate state law. See *Barber*, 562 F.3d at 1232-1233. But where state law leaves no room for any reasonable modification, and thus purports to require the denial of public services or benefits to individuals with disabilities, state law must give way. See *Hargrave* v. *Vermont*, 340 F.3d 27, 38-39 (2d Cir. 2003) (finding that Title II preempted inconsistent state law).

3. The district court did not assess the reasonableness of plaintiff's proposed modification, because it found that conflict with state law alone made the modification unreasonable. The reasonableness of a proposed modification is a fact-specific question that requires case-by-case inquiry with respect to each qualified individual. See *Fulton* v. *Goord*, 591 F.3d 37, 44 (2d Cir. 2009). It is not possible on this record to ascertain whether granting this particular plaintiff the specific amount of additional time she requested would have been reasonable. However, plaintiff's allegation that accommodating her would be reasonable is sufficient to survive this motion to dismiss. As a general matter, it is reasonable for some individuals with disabilities to receive a relaxation of the three-month requirement. Indeed, public entities grant similar accommodations regularly.

Individuals with mental disabilities, in particular, can struggle to meet certain deadlines or other procedural requirements and, as a result, are at risk of having important rights compromised or lost. While nonetheless applying state law, New York courts have recognized the "obvious injustice" of this inflexible statutory scheme where the very mental disability that creates eligibility for disability retirement benefits also prevents a member from applying for them. *Callace* v. *New York State Emps.' Ret. Sys.*, 140 A.D.2d 756, 757-758 (N.Y. App. Div. 1988); accord *Hudak* v. *New York Policemen's & Firemen's Ret. Sys.*, 106 Misc. 2d 540, 541 (N.Y. Sup. Ct. 1980) ("reluctantly" upholding denial of benefits to member who was "hospitalized as a mental health patient" during time to apply).

In order to prevent such injustice, many laws permit late filings by those whose disabilities prevent them from meeting statutory deadlines. For example, New York law extends the statute of limitations for bringing a lawsuit to accommodate those who are "under a disability because of infancy or insanity at the time the cause of action accrues." N.Y. C.P.L.R. 208. And this Court has held that the deadline to challenge a denial of social security benefits can be tolled for mental illness, using reasoning that applies readily here:

> [A] due process claim seems peculiarly apropos in the context of Social Security disability benefit proceedings in which * * * the very disability that forms all or part of the basis for which the claimant seeks benefits may deprive her of the ability to understand or act upon

notice of available administrative procedures.

Canales v. *Sullivan*, 936 F.2d 755, 758 (2d Cir. 1991) (internal quotation marks and citation omitted).

In its administration of a similar disability retirement program, the federal government permits late filings under circumstances such as those presented here, indicating that such flexibility is quite workable. Federal employees must apply for disability retirement benefits within one year of leaving federal service. 5 U.S.C. 8453. However, this requirement can be waived for a retirement system member "who, at the date of separation from service or within 1 year thereafter, is mentally incompetent if the application is filed with the Office within 1 year from the date of restoration of the employee or Member to competency or the appointment of a fiduciary, whichever is earlier." *Ibid.*

Other state retirement systems similarly permit late-filed disability retirement applications under appropriate circumstances. See, *e.g.*, Alaska Stat. § 14.25.130(f) (authorizing waiver of filing deadline "if there are extraordinary circumstances that resulted in the inability to meet the filing deadline"); Md. Code, State Pers. & Pens. § 29-104(c) (permitting late filing due to "physical or mental incapacity during the filing period"); Mich. Comp. Laws § 38.24 (permitting late filing "for good cause"); N.J. Stat. § 43:15A-43 (permitting late filing due to "circumstances beyond the control of the member"). There is no obvious reason,

and the Retirement System has not suggested any, why New York could not do the same in appropriate cases.

II

THIS COURT SHOULD VACATE THE DISTRICT COURT'S UNNECESSARY HOLDING THAT TITLE II DOES NOT ABROGATE SOVEREIGN IMMUNITY UNDER THE CIRCUMSTANCES OF THIS CASE

This Court also should vacate the district court's unnecessary and erroneous holding that Title II does not abrogate sovereign immunity under the circumstances of this case. Furthermore, it should remand with instructions that the district court permit the plaintiff to amend her complaint to add an individual state official as a defendant, a step that would ensure that the validity of this important federal law will not be further questioned in this case.

1. The district court incorrectly reasoned that, in the absence of a valid Title II claim, Title II fails to abrogate state sovereign immunity (A. 22, 27). In fact, in the absence of a valid Title II claim, a court need not and should not reach the validity of Title II's abrogation at all. See *United States* v. *Georgia*, 546 U.S. 151, 159 (2006); *Haas* v. *Quest Recovery Servs.*, 549 U.S. 1163, 1163 (2007) (Ginsburg, J., concurring); *Natarelli* v. *VESID Office*, 420 F. App'x 53, 55 (2d Cir. 2011). Only after a court determines that a plaintiff has pleaded a Title II claim that does not also constitute a constitutional violation should it decide whether Title II validly abrogates sovereign immunity. *Georgia*, 546 U.S. at 159;

Buchanan v. *Maine*, 469 F.3d 158, 172-173 (1st Cir. 2006). *Georgia*'s instruction to adjudicate issues in this order is consistent with the "fundamental and longstanding principle of judicial restraint" that "courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). Even while citing *Georgia*, the district court turned this principle of constitutional avoidance on its head by deciding a statutory interpretation dispute on constitutional grounds.

Improperly dismissing a Title II claim on sovereign immunity grounds rather than for failure to state a claim is not merely an error of semantics. For one thing, it unnecessarily creates uncertainty about the constitutional validity of a federal statute. For another, it has procedural ramifications. As plaintiff correctly observes, sovereign immunity is a jurisdictional question that permits courts to consider matters beyond the pleadings. See Brief for Plaintiff-Appellant 19-20. Accordingly, a sovereign immunity defense that amounts to no more than a contention that defendant will prevail on the Title II claim must be handled as, in effect, a motion for summary judgment, with both sides entitled to submit evidence. Moreover, making an argument about the scope of Title II into an Eleventh Amendment question invites a State to take an interlocutory appeal should the plaintiff prevail. See *Deposit Ins. Agency* v. *Superintendent of Banks*,

482 F.3d 612, 615 (2d Cir. 2007) (state entities may immediately appeal denial of motion to dismiss based on Eleventh Amendment immunity); see, *e.g.*, *Bolmer* v. *Oliveira*, 594 F.3d 134, 148-149 (2d Cir. 2009) (ruling on whether plaintiff stated Title II claim in order to resolve interlocutory appeal on Eleventh Amendment question). The bottom line is that the district court erred in conflating these very different inquiries.

This Court, accordingly, should clarify that *Georgia*, far from requiring the unnecessary constitutional adjudication at issue here, actually forbids it. Additionally, "when lower courts have unnecessarily reached issues concerning the constitutionality of the ADA's abrogation of sovereign immunity, the offending portions of their decisions have been vacated on appeal." *Brockman* v. *Texas Dep't of Criminal Justice*, 397 F. App'x 18, 24 (5th Cir. 2010); accord *Zibbell* v. *Michigan Dep't of Human Servs.*, 313 F. App'x 843, 847-848 (6th Cir.), cert. denied, 129 S. Ct. 2869 (2009). This Court should do the same.

2. Additionally, this Court should instruct the district court to grant the plaintiff's motion to add an individual state officer as a defendant in order to avoid any further unnecessary constitutional adjudication. The district court denied the plaintiff's motion as futile because, it concluded, plaintiff could not state a Title II claim (A. 27 n.6). That premise was erroneous, and neither the district court nor the defendants have offered any other reason to deny plaintiff leave to amend.

Plaintiff seeks no monetary relief from the Retirement System, and it is well-established that she can receive the declaratory and injunctive relief she seeks from the state defendant pursuant to the *Ex Parte Young* doctrine without violating the Eleventh Amendment. See *Harris* v. *Mills*, 572 F.3d 66, 72-73 (2d Cir. 2009). Accordingly, permitting plaintiff to amend her complaint will ensure that Title II's constitutionality will not be called into question further.[6]

[6] Because we perceive no reason for this Court to reach the question of whether Title II validly abrogates sovereign immunity with respect to the provision of public benefits, in the interest of brevity, we do not address that question here. If this Court nonetheless finds it appropriate to reach the question, we respectfully request the opportunity to submit a supplemental brief.

CONCLUSION

This Court should reverse the district court's finding that plaintiff failed to state a Title II claim against the Retirement System and vacate the district court's order dismissing plaintiff's claim against the Retirement System on sovereign immunity grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared with Microsoft Word 2007 and contains 4937 words of proportionately spaced text. The typeface is Times New Roman, 14-point font.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

Dated: August 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011, I electronically filed the foregoing BRIEF FOR UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND AS INTERVENOR 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 also certify that six hard copies of the same were sent by certified mail.

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