

NOTES

To Allow to Sue, or Not to Allow to Sue: *Zimmerman v. Oregon Department of Justice* Decides Title II of the Americans with Disabilities Act Does Not Apply to Employment Discrimination

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I. INTRODUCTION

When we attend *Hamlet*, we expect to see a young prince and hear his immortal words, “[t]o be, or not to be.”¹ Although we may assume that the director or actors will allow themselves some creative latitude, the end result, Hamlet’s deep despair and unfortunate death, is fixed. We certainly do not expect an actor to change the meaning of the play by saying the words while laughing hysterically or while standing on his head. Doing so would leave the language intact, but to change the meaning of those words is to change Shakespeare’s intent.

Likewise, when we read a federal statute, we expect certain words to be contained within that statute and we expect those words to have certain meanings. As we read the statute, the clear and unambiguous words should be our guide to the statute’s particular purpose. By reading the statute, in many instances, we know the end result. The interpretation and ultimate end of the statute should not change because a judge does not like the tragic ending.

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1. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1 (Philip Edwards ed., Cambridge Univ. Press 1985).

Title I of the Americans with Disabilities Act (ADA) is labeled "Employment."² In Title I, we find rights, remedies, and procedures for those discriminated against in employment because of a disability. Title II of the ADA is labeled "Public Services."³ Here, we find rights, remedies, and procedures, for those prevented from utilizing a public service because of a disability. The courts, however, have read the language of Title II differently.

Like an actor portraying a comedic Hamlet, many courts have read Title II to protect public employees from employment discrimination.⁴ Yet there is no mention of employment in Title II. Recognizing this misinterpretation, in *Zimmerman v. Oregon Dept. of Justice*,⁵ the Ninth Circuit held that the plain language of Title II clearly indicates that public employees may not bring an employment discrimination claim under Title II. Instead, public employees must sue under Title I, adhering to the same strict administrative requirements as private sector employees.⁶

Rather than allowing an actor to turn *Hamlet* into a comedy, the director might have him perform *Much Ado About Nothing* instead. Similarly, Congress gives the disabled protection from discrimination at public facilities in Title II. In Title I, Congress provides them with separate protection from employment discrimination. In the interest of judicial economy and avoiding frivolous law suits, the decision in *Zimmerman* was the correct interpretation of Title II.

In 1995, the Oregon Department of Justice hired Scot Zimmerman as a child support agent.⁷ Because he suffered from a disabling eye condition, Mr. Zimmerman requested certain accommodations to do his job.⁸ The Department refused to comply and fired Mr. Zimmerman within one year.⁹ After his dismissal, Mr. Zimmerman failed to file a timely complaint with the Equal Employment Opportunity Commission (EEOC) prior to bringing suit, as required under Title I of the ADA.¹⁰ Therefore, his Title I claim was dismissed.¹¹ Mr. Zim-

2. 42 U.S.C. § 12111 (1994).

3. 42 U.S.C. § 12131 (1994).

4. See, e.g., *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999); *Bledsoe v. Palm Beach Co. Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998); *Holmes v. Texas A&M Univ.*, 145 F.3d 681 (5th Cir. 1998); *Innovative Health Sys., Inc. v. White Plains*, 117 F.3d 37 (2d Cir. 1997); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995).

5. 170 F.3d 1169, 1183 (9th Cir. 1999).

6. *Id.*

7. *Id.* at 1171.

8. *Id.*

9. *Id.*

10. 42 U.S.C. § 2000e-5(e)(1) (1994).

11. *Zimmerman v. Oregon Dept. of Justice*, 983 F. Supp. 1327, 1328-29 (D. Or. 1997).

merman also brought a claim under Title II as a public employee.¹² By also filing under Title II, Mr. Zimmerman was not required to first exhaust his administrative remedies.¹³

At trial, Mr. Zimmerman's Title II claim was dismissed pursuant to a federal rule 12(b)(6) motion.¹⁴ The trial court held that Title II did not apply to employment because that would be inconsistent with the structure of the ADA as a whole.¹⁵ Title I would become redundant as to public employees because they could bypass those administrative requirements and sue under Title II.¹⁶ On appeal, the Ninth Circuit affirmed the trial court's decision.¹⁷ Mr. Zimmerman petitioned the Ninth Circuit for rehearing en banc, but his request was denied.¹⁸ Mr. Zimmerman then petitioned the U.S. Supreme Court for certiorari, but his petition was denied.¹⁹

This Note will analyze Title II and explain why, in the interests of judicial economy, the *Zimmerman* court correctly held that Title II does not apply to employment discrimination. First, this Note will discuss the particular wording of the ADA, specifically comparing the language of Title I to the language of Title II. Next, this Note will briefly consider the Rehabilitation Act of 1973, because Title II should be interpreted consistently with that Act.²⁰ Then, using the analysis announced by the Supreme Court in *Chevron v. Natural Resources Defense Council, Inc.*²¹, this Note will examine the Title II regulations promulgated by the Department of Justice. Finally, this Note will analyze the five key arguments used by the Ninth Circuit in *Zimmerman*.

This analysis is critical to the interpretation of the ADA for several reasons. First, *Zimmerman* was decided in the face of considerable precedent to the contrary. As of today, at least five other circuits have

12. *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1171 (9th Cir. 1999).

13. *Id.*

14. *Zimmerman*, 983 F. Supp. at 1329-30.

15. *Id.*

16. *Id.*

17. *Zimmerman*, 170 F.3d at 1184.

18. *Zimmerman v. Oregon Dept. of Justice*, 183 F.3d 1161 (9th Cir. 1999). In the Ninth Circuit, a request for a rehearing en banc is required before a party may petition the Supreme Court.

19. *Zimmerman v. Oregon Dept. of Justice*, 121 S. Ct. 1186 (2001). In a recent United States Supreme Court opinion, *Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 960 n.1 (2001), the Court recognized the disagreement among the circuits, but dismissed the question of whether employees may sue their state employers under Title II, holding that certiorari was improvidently granted.

20. 42 U.S.C. § 12133.

21. 467 U.S. 837 (1984).

held that Title II does apply to employment discrimination,²² creating a split of authority among the circuits. Second, if public employees are allowed to bypass Title I and sue under Title II, Title I becomes redundant as to public employees, and congressional intent is ignored. By suing under Title II, public employees, unlike all other employees, are not required to obtain a right to sue letter from the EEOC.²³ Without requiring employees to exhaust administrative requirements that might provide a remedy in lieu of litigation, public employee claims bypass a legitimate screening mechanism intended to conserve judicial resources and give employers an opportunity to remedy violations prior to being brought into court. Public employees would be more protected than other employees, which might be an unfair advantage that Congress did not intend.

Additionally, many public employees already have state statutory provisions in place that protect them from employment discrimination. For example, Oregon's Revised Statutes, title 22, "Public Officers and Employees," chapter 241, "Civil Service for County Employees," contains a provision requiring that an employee be dismissed only for cause.²⁴ Similarly, certain specified Oregon State employees have the right to appeal their dismissals to the Employee Relations Board.²⁵ Washington also protects employees from dismissal and allows them to appeal to the Personnel Appeals Board under its "State Civil Service Law."²⁶

Finally, a comparison of the ADA with other discrimination statutes demonstrates that *Zimmerman* applied the correct analysis. Under Title VII²⁷ and Title IX²⁸, all employees are required to exhaust administrative requirements before the EEOC prior to filing a discrimination suit. Title I of the ADA adopts the same administrative

22. See *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999); *Bledsoe v. Palm Beach Co. Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998); *Holmes v. Texas A&M Univ.*, 145 F.3d 681 (5th Cir. 1998); *Innovative Health Sys., Inc. v. White Plains*, 117 F.3d 37 (2d Cir. 1997); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995).

23. Title II follows the administrative regulations of the Rehabilitation Act. The Rehabilitation Act does not have an exhaustion requirement. See 42 U.S.C. § 12134 (1994). Title I adopts the guidelines set out in Title VII of the Civil Rights Act. See 42 U.S.C. § 12117(a) (1994). Under Title VII, a charge must be filed against an employer within 180 days of the unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1) (1994).

24. "No person in the classified civil service who has been permanently appointed under ORS 241.020 to 241.990 shall be dismissed except for cause, and only upon the written accusation of the appointing power or the commission." OR. REV. STAT. § 241.430 (1999).

25. OR. REV. STAT. § 240.560 (1999).

26. WASH. REV. CODE § 41.06.170 (1999). Additionally, under WASH. REV. CODE § 49.60, Washington has a discrimination law that also protects disabled individuals. The Washington statute may actually be more protective than some federal laws.

27. 42 U.S.C. § 2000e-5(e)(1).

28. 20 U.S.C. § 1681 (1994).

requirements as Title VII.²⁹ Thus, the ADA should be interpreted similarly.

As a particularly persuasive example of Congress' intent that public employees be held to the same standards as all other employees, consider the Government Employee Rights Act (GERA), passed one year after the ADA, which applies the same antidiscrimination laws to federal government employees excluded from the ADA.³⁰ The statute specifically states that federal employees must file a complaint with the EEOC and receive a right to sue letter.³¹ These employees may not bypass the administrative requirements.³² Allowing similarly situated state government employees to bypass administrative requirements and sue under Title II of the ADA would be irreconcilable. Because federal and state employees are so similar, it is inconsistent for Congress to allow state government employees one set of rights, while granting federal government employees not covered by the ADA another.

II. THE WORDING OF TITLE I COMPARED TO THE WORDING OF TITLE II: "WHAT DO YOU READ MY LORD?" "WORDS, WORDS, WORDS"³³

Title I of the ADA is titled "Employment,"³⁴ while Title II is titled "Public Services."³⁵ While a title does not tell all about a particular statute, it is a good starting point. Title I is a comprehensive employment statute that details everything from how one with a disability might be discriminated against in the workplace,³⁶ to who is considered an employer,³⁷ to what an employee must do in order to file suit.³⁸ Congress intended employment discrimination to fall under "Employment," or it likely would not have taken up several pages in the United States Code with such specific employment provisions.

In contrast, Title II does not contain the word "employment," "employer," or "employee." Instead, Title II defines "public entity"³⁹ and discusses architectural, communication, and transportation bar-

29. 42 U.S.C. § 12117(a) (1994).

30. 2 U.S.C. §§ 1201-1220 (1994 & Supp. IV 1998).

31. 2 U.S.C. § 1220.

32. *Id.*

33. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

34. 42 U.S.C. § 12111.

35. 42 U.S.C. § 12131.

36. 42 U.S.C. § 12112.

37. 42 U.S.C. § 12111(5).

38. 42 U.S.C. § 12117.

39. 42 U.S.C. § 12131(1).

riers to services.⁴⁰ One might suspect that because Congress so thoroughly detailed employment discrimination in Title I, where all employees—public employees included—may file a complaint, no need existed to address the issue in Title II.

However, even though the words “employment discrimination” are not found in Title II, the courts have adopted various ways of reading the statute so that it might encompass employment. Ignoring the clear language of Title II, courts have devised other ways of finding that the statute provides for public employee discrimination claims. The following sections discuss the various interpretations of Title II’s definition of employment discrimination.

A. *Some Courts Have Broken the Language of Title II into Two Separate Clauses*

In response to not finding the words “employment” anywhere within the province of Title II, some courts have broken the language of Title II’s discrimination section⁴¹ into two separate clauses in order to read “employment” into the statute.⁴² The first clause states: “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. . . .”⁴³ The second clause states: “or be subjected to discrimination by any such entity.”⁴⁴ By reading these clauses separately and distinctly from one another, some courts have held that the second clause is a “catch-all phrase” encompassing employment discrimination.⁴⁵ This reading fails for several reasons.

Breaking the language of Title II into two separate clauses ignores statutory construction and misconstrues the meaning of Title II. First, statutory construction demands that the statute be read broadly, not in small abbreviated parts.⁴⁶ Second, even if read separately, the second clause applies to the public entity’s “services, programs, or activities,” not to any and all forms of discrimination.⁴⁷

40. 42 U.S.C. § 12131(2).

41. 42 U.S.C. § 12132.

42. See, e.g., *Bledsoe v. Palm Beach Co. Soil and Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998); *Innovative Health Sys., Inc. v. White Plains*, 117 F.3d 37, 45 (2d Cir. 1997).

43. 42 U.S.C. § 12132.

44. *Id.*

45. See, e.g., *Bledsoe*, 133 F.3d at 822.

46. See generally *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.”).

47. 42 U.S.C. § 12132.

Third, when compared to the discrimination language of Title I, Title II contains none of the same detail or form.⁴⁸ Fourth, if Congress intended the clauses to be read separately, it would have drafted two separate clauses. Finally, the two clauses intend to prohibit two different types of discrimination: the first prohibits disparate treatment, and the second prohibits intentional discrimination.

For example, in *Crowder v. Kitagawa*,⁴⁹ the Ninth Circuit reasoned that most people would agree that a public agency with stairs but no elevator is not intentionally discriminatory. Instead, one might say that the stairs are a barrier to that public agency or that the stairs prevent one class of people from gaining access to a “service, program, or activity.” (i.e. disparate treatment).⁵⁰ Preventing a disabled individual from participating in a class or from going on a walk just because she is disabled (when she would otherwise be able to gain access to the program) is intentionally discriminatory.⁵¹ In other words, disparate treatment unintentionally prevents a disabled individual from participating in a public program because of an unforeseen barrier (i.e. not having books available in Braille), whereas intentional discrimination deliberately prevents a disabled individual from participating (i.e. declaring she cannot take the class because she is blind). These two different types of discrimination are covered by each clause in Title II—employment is not.

B. *Some Courts Apply the Second Clause to “All Operations of Government”*

Some courts have also attempted to characterize Title II’s wording as two distinct clauses with the second clause applying to “all operations of local government,” thus allowing the court to include zoning regulations within Title II’s language. Although courts have used the second clause to invalidate zoning regulations in *Bay Area Addiction Research and Treatment v. City of Antioch* (hereinafter *Bay Area*)⁵² and *Innovative Health Systems v. White Plains*,⁵³ it is arguable that these regulations could have just as easily been invalidated

48. Title I states, “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to *job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*” 42 U.S.C. § 12112(a) (emphasis added). Obviously, the language of Title I applies unconditionally to employment discrimination, while Title II contains none of the same language.

49. 81 F.3d 1480, 1483-84 (9th Cir. 1996).

50. *Id.*

51. *Id.*

52. 179 F.3d 725, 731 (9th Cir. 1999).

53. 117 F.3d 37, 44-45 (2d Cir. 1997).

because zoning is a "service, program, or activity" of local government.

Both *Bay Area* and *Innovative Health Systems* involved alcohol and drug clinics that were denied zoning permits to build on or near residential property. Refusing to allow an exemption for zoning activities, each court declined to draw an arbitrary distinction that would permit public entities to discriminate in some activities and not in others.⁵⁴ In both cases, the courts held that Title II was applicable to local government zoning ordinances, and that zoning was "a normal function of a government entity."⁵⁵

The ADA does not specifically define "service, program, or activity." To interpret this language, courts look at section 504 of the Rehabilitation Act, on which Title II is modeled.⁵⁶ The Rehabilitation Act defines "program or activity" as "all of the operations" of specific entities, including "a department, agency, special purpose district or other instrumentality of a state or of a local government."⁵⁷ Zoning regulations are a normal function of a government entity that may impermissibly discriminate against the disabled.⁵⁸ Zoning regulations are one specific "output," or public service, that Title II looks to monitor. Therefore, zoning regulations are distinguishable from employment as a governmental "output."

C. *The Zimmerman Court Adopts an "Outputs" Versus "Inputs" Analysis*

The *Zimmerman* court adopted an "outputs" versus "inputs" analysis, which seems to most accurately describe the wording of Title II.⁵⁹ The court reasoned that the first clause of Title II actually refers only to the "outputs" of a public agency.⁶⁰ An example of such an output is French classes at a local community college.⁶¹ In contrast, the professor hired to teach the class would be an "input" and would not fall within the protection of Title II.⁶² The second clause in Title II only differs in its method of prohibiting discrimination in public services, it is not a catch-all phrase.⁶³ In its analysis, the *Zimmerman*

54. *Id.* at 45.

55. *Id.* at 44-45; *Bay Area*, 179 F.3d at 731.

56. *See, e.g.,* *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).

57. 29 U.S.C. § 794(b)(1)(A) (1994).

58. *See Innovative Health Sys.*, 117 F.3d at 44.

59. 170 F.3d 1169, 1174 (9th Cir. 1999).

60. *Id.*

61. *See generally* *Decker v. Univ. of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1997).

62. *See generally id.*

63. *See Zimmerman*, 170 F.3d at 1175.

court looked at what services, programs, or activities the public entity expects to provide and what services, programs, or activities the public expects to receive.⁶⁴ In both instances, the public and the agency expect either a nature walk from the parks department or an art class from the local community college, but not the park ranger's or teacher's employment.⁶⁵ The public does not expect to receive employment and the agency certainly does not expect to provide employment under Title II.⁶⁶ In filing an employment discrimination claim, the individual is not attempting to obtain a public service, but rather to claim discrimination in an employment action. Therefore, following the Rehabilitation Act and correctly interpreting congressional intent, the *Zimmerman* court concluded that Title II's language does not protect a person from employment discrimination.

III. SECTION 504 OF THE REHABILITATION ACT OF 1973: "WHAT A PIECE OF WORK IS A MAN!"⁶⁷

Congress specifically modeled Title II of the ADA on section 504 of the Rehabilitation Act.⁶⁸ Section 504 prevents discrimination by those public entities receiving federal funding.⁶⁹ With the enactment of Title II, Congress broadened the scope of section 504 to include all public entities, regardless of whether or not they receive federal funding.⁷⁰ Congress even included similar language in Title II: "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights the subchapter provides. . . ."⁷¹ Thus, the language of section 504 is inescapably tied to the language of Title II.

Congress also required that the regulations contained in section 504 be construed consistently with any regulations established under Title II.⁷² Yet, although these regulations must be compatible with one another, it is only to the extent that they overlap. Congress did not mean to incorporate section 504 regulations into Title II.⁷³ An explanation of Congress' intent that the two sets of regulations be construed consistently is discussed below in Section Five.

64. *Id.*

65. *Id.*

66. *Id.*

67. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

68. See *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978-79 (9th Cir. 1997).

69. 29 U.S.C. § 794(a).

70. 42 U.S.C. § 12132.

71. 42 U.S.C. § 12133.

72. 42 U.S.C. § 12134(b).

73. *Id.*

Based on the interconnectedness of these two statutes, one might be tempted to simply construe Title II in the same manner as section 504. For example, because section 504 was found to prohibit employment discrimination prior to the enactment of the ADA,⁷⁴ courts have connected the two and found that Title II must, likewise, apply to employment.⁷⁵ Even though these statutes are visibly intertwined, a closer look at the language of both statutes does not require Title II and section 504 to be coextensive. First, although the wording of the two statutes is similar, the context is fundamentally different. Additionally, section 504 contains sections specifically concerning employment, while Title II contains no employment language. Further, although section 504 does apply to employment discrimination, it is linked to Title I, not to Title II.

Although section 504 and Title II use similar wording, they are meant to apply to fundamentally different types of discrimination. Rather than adopting the broad language of section 504 in Title II, Congress chose to narrow the language to specifically cover a public entity's "services, programs, or activities."⁷⁶ Because section 504 is primarily concerned with federal funding, its goal is to prevent discrimination in the entire operation:

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government[.]⁷⁷

In contrast, under Title II, Congress is only concerned that individuals with a disability not "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. . . ."⁷⁸ The language is much broader in section 504, where

74. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 631-34 (1984).

75. See, e.g., *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995) ("Because the language of the two statutes is substantially the same, we apply the same analysis to both."); *Bledsoe v. Palm Beach Co. Soil and Water Conservation Dist.*, 133 F.3d 816, 821 (11th Cir. 1998) (holding that because Title II was intended to work in the same manner as section 504, it is unquestionable that Title II applies to employment discrimination).

76. 42 U.S.C. § 12132.

77. 29 U.S.C. § 794(b) (1994).

78. 42 U.S.C. § 12132.

Congress intended to prevent federal dollars from going to discriminatory employers. Therefore, the adoption of such an all-encompassing statute meant Congress could prevent employment and other types of discrimination against individuals with disabilities. The Title II language is narrower because the same employees Congress was concerned about in section 504 are covered in Title I. Congress' decision to narrow the focus in Title II demonstrates its intent that Title II not be coextensive with section 504.⁷⁹

Additionally, the history of section 504 demonstrates that employment discrimination was always part of the Rehabilitation Act, while Title II contains no language evidencing that employment was ever meant to be included. At the time section 504 was adopted, the goal was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals."⁸⁰ Section 504 contains several employment provisions. For example, the term "handicapped individual" is defined solely in relation to employment: "[t]he term 'handicapped individual' means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment; and (ii) can reasonably be expected to benefit in terms of employability."⁸¹ Because section 504 contains no separate employment section, and because of the express employment language included in the statute, it is apparent that Congress meant section 504 to apply to employment. In contrast, Title II contains no provisions concerning employment. Instead, the ADA has a separate section governing employment where all employment related provisions are found—Title I.

Further, section 504 links its employment provisions to Title I. The Act states, "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under [T]itle I of the Americans with Disabilities Act of 1990. . . ."⁸² It seems irreconcilable that Congress would link the Rehabilitation Act to Title I (the "employment" section), while the court would link Title II to employment through the Rehabilitation Act. Congress' amendment to the Rehabilitation Act in 1992 linking the employment sections to Title I of the ADA is clear evidence that Congress did not intend Title II to apply to employment. Congress demonstrated with these 1992 amendments that it knows how to make its intent clear by

79. See *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1181 (9th Cir. 1999).

80. 29 U.S.C. § 701(8) (1973).

81. 29 U.S.C. § 706(7)(A) (1994).

82. 29 U.S.C. § 794(d) (1994).

linking the employment provisions of the two statutes together. Congress could have also created a link between Title I and Title II, but failed to do so. Therefore, Title II is not meant to apply to employment discrimination.

IV. THE *CHEVRON*⁸³ ANALYSIS: "MADNESS IN GREAT ONES MUST NOT UNWATCHED GO"⁸⁴

A *Chevron* analysis is used by courts to review an agency's construction of a statute that the agency administers.⁸⁵ In *Zimmerman*, the court was concerned with the Attorney General's regulation construing Title II,⁸⁶ which states "[f]or purposes of this part, the requirements of Title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of Title I."⁸⁷

Under *Chevron*, the first question the court must ask is whether Congress has spoken to the precise question at issue.⁸⁸ If congressional intent is clear on the statute's face, then the court and agency "must give effect to the unambiguously expressed intent of Congress."⁸⁹ If, however, Congress has not directly addressed the issue, the court will not impose its own construction of the statute; rather, the agency's interpretation must be based on a permissible construction of the statute.⁹⁰ When the court looks at an administrative agency's regulation, the court must give controlling weight to the regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute."⁹¹

The *Zimmerman* court determined that Congress answered the precise question at issue: is employment discrimination included within Title II of the ADA?⁹² According to *Zimmerman*, Congress unambiguously expressed its intent—Title II does not apply to employment.⁹³ Because congressional intent is clear, the court gave

83. 467 U.S. 837 (1984).

84. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

85. *Chevron*, 467 U.S. at 842-43.

86. The Attorney General's office is the agency appointed to promulgate regulations concerning Title II. See 42 U.S.C. § 12134(a).

87. 28 C.F.R. § 35.140 (b)(1) (2001).

88. *Chevron*, 467 U.S. at 842.

89. *Id.* at 843.

90. *Id.*

91. *Id.* at 844.

92. See *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999).

93. *Id.*

the Attorney General's regulation no weight.⁹⁴ Other courts have also found that because employment is not mentioned in Title II, Congress' clear intent is that Title II does not apply to employment.⁹⁵

Only one of the five circuits that disagree with *Zimmerman* did a *Chevron* analysis, *Bledsoe v. Palm Beach Co. Soil & Water Conservation Dist.*⁹⁶ In *Bledsoe*, however, rather than performing the first step and analyzing whether or not Congress unambiguously showed its intent on this issue, the court, without discussion, proceeded to apply the second step of the *Chevron* analysis, which examines whether the regulation is "arbitrary, capricious, or manifestly contrary to the statute."⁹⁷ The court concluded that the regulation was none of the above and gave deference to the Attorney General's regulation authorizing employment claims under Title II.⁹⁸

The *Bledsoe* analysis is flawed because it unnecessarily reaches the legislative history and congressional intent issues. Rather than considering the legislative commentary, the court should have recognized that when the language of the statute is plain, there is no reason to consider administrative interpretation of the statute. The plain language of Title II makes no mention of employment discrimination. None of the rights, remedies, and procedures so diligently laid out in Title I are part of Title II. Therefore, the plain language of Title II should govern the court's interpretation and should prevent employment claims under Title II.

Other circuits holding that Title II applies to employment have done so without a *Chevron* analysis, relying instead on the Rehabilitation Act to extend Title II to employment.⁹⁹ For example, in *Holmes*, a professor was dismissed for his inability to provide effective classroom teaching due to a stroke; the court declined to decide whether the exhaustion of administrative remedies under Title I was necessary.¹⁰⁰ Instead, the court held that Title II is identical to the Rehabilitation Act, and, therefore, employees must be entitled to sue

94. See *Chevron*, 467 U.S. at 843; *Zimmerman*, 170 F.3d at 1173.

95. See *Patterson v. Illinois Dept. of Corrections*, 35 F. Supp. 2d 1103, 1109-10 (C.D. Ill. 1999) (supplying several different reasons showing that Congress did not intend Title II to encompass employment including: (1) Title II does not use or define any employment terms; (2) Title II is titled "Public Services"; and (3) Title II does not set forth any defenses); *Decker v. University of Houston*, 970 F. Supp. 575, 579 (S.D. Tex. 1997) ("It is unambiguous that Congress intended that public employees be required to file a charge of discrimination before bringing an ADA suit.").

96. 133 F.3d 816, 822-23 (11th Cir. 1998).

97. *Id.* at 823.

98. *Id.*

99. See *Holmes v. Texas A&M Univ.*, 145 F.3d 681, 684 (5th Cir. 1998); *Davoll v. Webb*, 194 F.3d 1116, 1130 (10th Cir. 1999).

100. 145 F.3d at 684.

under Title II.¹⁰¹ In a recent Tenth Circuit decision involving two police officers injured on the job, *Davoll v. Webb*, the court passed on the issue of whether Title II applies to employment because the issue was not raised on appeal.¹⁰² Instead, the court assumed that Title II does apply to employment discrimination without discussion.¹⁰³ Other courts have addressed the issue similarly.¹⁰⁴

By applying Title II to employment without a *Chevron* analysis, several courts have made a dangerous assumption that congressional intent is not clear from the plain language of Title II. Courts either skip the first step of the analysis or do not consider *Chevron* at all. As a result, public employees are allowed to bypass a well-constructed set of administrative procedures and bring their claims directly to federal court. Exhaustion requirements are enacted to promote efficiency and judicial economy in an already overcrowded judicial system. Without looking at the language of the statute, these courts allow into their courtrooms potentially frivolous claims that could possibly have been settled prior to litigation. In contrast, the following arguments presented in *Zimmerman* and in other cases lend support to the claim that Congress intended employment discrimination claims to go through the exhaustion requirement of Title I.

V. ARGUMENTS MADE IN *ZIMMERMAN* AND SUPPORT FROM OTHER DECISIONS THAT TITLE II DOES NOT APPLY TO EMPLOYMENT DISCRIMINATION: "SOMETHING IS ROTTEN IN THE STATE OF DENMARK"¹⁰⁵

A. *Title I Provides Detailed and Comprehensive Employment Provisions*

Title I provides comprehensive employment provisions, such as definitions of "employer" and "employee" and possible defenses for employers who fail to provide employment accommodations.¹⁰⁶ In contrast, Title II is completely devoid of any employment provisions. The comprehensive employment scheme found in Title I is similar to those found in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA).¹⁰⁷

101. *Id.* at 683-84.

102. 194 F.3d at 1130.

103. *Id.*

104. *See Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995); *Castellano v. New York*, 142 F.3d 58, 70 (2d Cir. 1998) (assuming without discussion that these employees fall within Title II of the ADA).

105. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 4.

106. 42 U.S.C. § 12111.

107. 42 U.S.C. § 2000 et. seq. (1994); 29 U.S.C. § 626 et. seq. (1994).

In Title I, “employee” and “employer” are specifically defined. An employer must have fifteen or more employees for each working day.¹⁰⁸ The United States government is not considered an employer.¹⁰⁹ The statutory scheme also allows employers certain defenses, such as business necessity, health and safety standard requirements, or religious standards.¹¹⁰ Congress has chosen to limit the defenses in order to remain consistent with the overall goal of preventing discrimination. Limiting these employment definitions to Title I demonstrates that Congress intended employment claims to fall under this Title of the ADA. Title II contains absolutely no mention of the root or any derivatives of “employ.” If employees could sue under Title II, none of the requirements of Title I would need to be met—neither the minimum number of employees nor the prohibition against suing the government. Title II could be construed entirely inconsistently with Title I, something Congress likely never intended.

Additionally, Title I’s employment scheme is similar to the employment schemes found in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA). Title VII and the ADEA require a complainant to file his or her charges with the appropriate agency within 180 days of the discrimination before he or she may file suit.¹¹¹ Similarly, Title I of the ADA follows the requirements set forth in 42 U.S.C. § 2000e-5 of the Civil Rights Act.¹¹² The purpose of such an administrative review apparatus in these titles is “(1) to give the employer prompt notice of the complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before a civil action is filed.”¹¹³ With such a similar statutory requirement in Title I, Congress likely did not expect some employees would be able to bypass these administrative guidelines.

According to the court in *Decker v. University of Houston*, reading the entire statute as a whole, “it is unambiguous that Congress intended that public employees be required to file a charge of discrimination before filing an ADA suit.”¹¹⁴ To read the ADA any other way would completely ignore Congress’ statutory scheme.

According to the Supreme Court in *Russello v. United States*,¹¹⁵ “where Congress includes particular language in one section of a

108. 42 U.S.C. § 12111(5)(A).

109. 42 U.S.C. § 12111(5)(B)(I).

110. 42 U.S.C. § 12113.

111. 42 U.S.C. § 2000e-5(e) (Title VII); 29 U.S.C. § 626(d) (ADEA).

112. 42 U.S.C. § 12117(a).

113. *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996).

114. 970 F. Supp. 575, 579 (S.D. Tex. 1997).

115. 464 U.S. 16 (1983).

statute but omits it in another section of the Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."¹¹⁶ Thus, without relevant employment language in Title II relating to correcting employment discrimination in an employment setting, we can assume Congress intended Title I, not Title II, to apply to employment.

B. Congress Defined "Qualified Individual with a Disability" Differently in Title I Than in Title II

Title I specifically defines a "qualified individual with a disability," addressing an employee's ability to work, while Title II discusses a person's eligibility to participate in publicly provided programs or activities. Title I ("Employment") defines "qualified individual with a disability" as follows:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.¹¹⁷

Compare that to the language of Title II, which states:

The term "qualified individual with a disability" means 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.¹¹⁸

Two very different descriptions of "qualified individual with a disability," with only one focusing on employment, is further evidence that Congress did not intend both titles to encompass employment. Because Title I gives a specific description of employment barriers versus the architectural or transportation barriers in Title II, the language seems clear. Title II was not meant to address employment.

116. *Id.* at 23.

117. 42 U.S.C. § 12111(8).

118. 42 U.S.C. § 12131(2).

As further support, Title I provides a very detailed description of a "reasonable accommodation" in the employment context:

(9) Reasonable accommodation

(A) making existing facilities used by employees readily accessible to an usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹¹⁹

Title II contains no similar definition of the term "reasonable accommodation"; actually, it contains no definition at all. Why would Congress leave the Attorney General the authority to consider appropriate reasonable accommodations under Title II, while Congress did not leave similar authority to the more experienced EEOC under Title I? It is reasonable to assume Congress did not intend Title II to apply to employment.

Another example may help. Under Title I, applicants currently using illegal drugs are statutorily excluded from the definition of disabled employees.¹²⁰ However, if employment discrimination was covered under Title II, the decision of whether to include these individuals would be left to the Attorney General. Once again, unless Congress did not intend for Title II to apply to employment, it is difficult to understand how the Attorney General would do a better job making this decision than the very experienced EEOC.¹²¹

C. Allowing Employment Claims Under Title II Would Make Title I Redundant and Allow Public Employees to Escape Administrative Requirements

"It is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."¹²² However, allowing public employees to bypass the administrative guidelines would render Title I redundant. Congress specifically decided to include state

119. 42 U.S.C. § 12111(9).

120. See 42 U.S.C. § 12114.

121. See *Patterson v. Illinois Dept. of Corrections*, 35 F. Supp. 2d 1103, 1109 (C.D. Ill. 1999).

122. *Kungys v. United States*, 485 U.S. 759, 778 (1988).

and local government employees within the proviso of Title I.¹²³ The only employees exempted were federal.¹²⁴ Without having to file a charge or follow the procedural guidelines of Title I, the provisions become superfluous for public employees, who will likely choose to pursue their claims under Title II.¹²⁵ Congress expressly included public employees in Title I by not excluding them; thus, allowing Title II to include employment discrimination claims would make Congress' statutory language in Title I "entirely redundant."¹²⁶

D. A Different Regulatory Authority Governs Title I Than Title II

The EEOC was created pursuant to Title VII in an effort to create an agency that would expertly pursue employment discrimination claims.¹²⁷ The EEOC regulates Title I. In contrast, Title II is regulated by the Attorney General. Thus, if public employees are allowed to bring employment claims under Title II, public employers will be subjected to conflicting regulations.

Congress planned for the overlap between Title I (regulated by the EEOC) and the Rehabilitation Act (regulated by the Attorney General), but did not plan for any overlap between Title I and Title II.¹²⁸ In 42 U.S.C. § 12117(b), Congress requires both agencies to "develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements. . . ."¹²⁹ No similar rule was developed to prevent overlap or conflicting regulations between Title I and Title II, which are also governed by two different regulatory authorities. By not addressing the issue, we can speculate that Congress did not foresee the problem because it did not expect employment claims to be brought under Title II.

Additionally, important regulatory decisions about employment are left to the Attorney General under Title II, while they are detailed for the EEOC in Title I.¹³⁰ Congress likely did not leave these decisions to the Attorney General because it did not intend for employment to be included in Title II.

123. 42 U.S.C. § 12111(5)(A).

124. 42 U.S.C. § 12111(5)(B)(i).

125. See *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1177-78 (9th Cir. 1999).

126. *Kungys*, 485 U.S. at 778.

127. See 42 U.S.C. § 2000e-4.

128. 42 U.S.C. § 12117(b).

129. *Id.*

130. See discussion *supra* Part V.B.

E. Congress Linked the Employment Provisions of the Rehabilitation Act to Title I Not Title II

As discussed in Section IV of this Note, the Rehabilitation Act sections dealing with employment were amended in 1992 to specifically apply to Title I of the ADA.¹³¹ The *Zimmerman* court's strongest argument is that when Congress subsequently linked Title I to the Rehabilitation Act, it expressed its clear intent regarding the relationship between the two statutes.¹³² Therefore, when a court states that Title II must also encompass employment because Title II is modeled on the Rehabilitation Act, its argument is circular because Congress has already stated that any and all employment discrimination is part of Title I. Congress would not have bothered to link the Rehabilitation Act to Title I if employment actions could also be brought under Title II. Otherwise, Congress quite easily could have linked the Rehabilitation Act to Title II as well.

VI. CONCLUSION: "GOOD NIGHT SWEET PRINCE, AND FLIGHTS OF ANGELS SING THEE TO THY REST"¹³³

As the curtain falls upon Mr. Zimmerman, the Ninth Circuit's ruling should remain unchanged. In a world where the courts are already overcrowded with a variety of discrimination claims, the ADA stands out as a model statute for efficiently evaluating complex disability discrimination claims. An employment discrimination claim simply falls under Title I, whereas a denial of access to a public service or program falls under Title II. Congress made this clear with its unambiguous drafting of the ADA, and the Ninth Circuit correctly interpreted this unambiguous language. Although Mr. Zimmerman is denied his day in court, he had a viable and accessible solution (filing a claim with the EEOC), which he did not utilize within the statutorily prescribed time period. That mistake unfortunately cost Mr. Zimmerman his remedy, but a crafty reading of Title II is not his antidote.

131. See 29 U.S.C. § 794(d).

132. 170 F.3d 1169, 1178 (9th Cir. 1999).

133. WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 2.