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A Call for Uniform Application of the Americans with Disabilities Act: Does Title II Support a Claim for Employment Discrimination?

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I. INTRODUCTION

In what has been referred to as the most far-reaching social legislation since the Civil Rights Act of 1964, the federal Americans with Disabilities Act ("ADA") unveiled a directive for the elimination of discrimination against individuals with disabilities.[1] Modeled after legislation remedying discrimination toward racial and ethnic minorities, the ADA covers the third largest minority in the United States: disabled individuals.[2] To effectuate this remedy, the ADA reveals a "paradigm shift" behind programs serving people with disabilities.[3] The ADA diverges from the paternalistic mindset of preceding federal laws and programs and endeavors

1. David L. Ryan, *Americans with Disabilities: The Legal Revolution*, 60 J. KAN. BAR ASS'N 13, 13 (Nov. 1991). In fact, the definitions and rules found within the ADA are nearly identical to those used in the Civil Rights Act. Dawn V. Martin, *Symposium: The Americans with Disabilities Act—Introductory Comments*, 8 J.L. & HEALTH 1, 6 (1994).

2. *See supra* note 1; *see* also Jack McNeil, *Americans with Disabilities: 1997*, Current Population Reports, Series P70-73 (2001), *available at* www.census.gov/prod/2001pubs/p70-73.pdf *and* http://www.census.gov/population/www/pop-profile/files/1999/chap16.pdf.

3. Robert L. Mullen, *The Americans with Disabilities Act: an Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 177-78 (1994).

instead to provide access to "opportunities, independence, self-sufficiency, and prevention of injury."[4]

Despite the ADA's noble goals, individuals seeking recourse under the Act are at times left without remedy. The circuit courts of appeals are markedly split over whether Congress intended Title I to offer the sole means to address employment discrimination under the ADA, or instead, for both Titles I and II to cover employment.[5] This has led to confusion: under which Title should an individual bring a claim for employment discrimination? When courts have concluded that an individual incorrectly brought a claim under Title II, the individual loses valuable time,[6] assuming that the individual is not time barred at that juncture from bringing a claim under Title I.[7] Accordingly, the resolution of this issue is of great import.

II. BACKGROUND: THE AMERICANS WITH DISABILITIES ACT

The ADA addresses the three major areas in which disabled persons face discrimination.[8] "Title I concerns employment discrimination with respect to non-federal employees."[9] Title II deals with services and practices of state and local governments.[10] Title

4. *Id.*; Martin, *supra* note 1, at 2.

5. *See* Univ. of Ala. v. Garrett, 531 U.S. 356, 360 n.1 (2001); *see also* Fleming v. State Univ. of N.Y., 502 F. Supp. 2d 324, 330 (E.D.N.Y. 2007); Canfield v. Isaacs, 523 F. Supp. 2d 885, 886 (N.D. Ind. 2007).

6. *See, e.g.*, Zimmerman v. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999) (upholding dismissal of plaintiff's Title II claim); Ayantola v. Comm. Technical Colls. of Conn., No. 3:05CV957, 2007 WL 963178, at *2 (D. Conn. Mar. 30, 2007) (granting dismissal of plaintiff's Title II claim with prejudice); Syken v. N.Y. Exec. Dep't, No. 02 Civ. 4673, 2003 WL 1787250, at *11 (S.D.N.Y. Apr. 2, 2003) (same); Sworn v. W. N.Y. Children's Psychiatric Ctr., 269 F. Supp. 2d 152, 157-58 (W.D.N.Y. 2003) (same); *Canfield*, 523 F. Supp. 2d at 886 (same).

7. Since the ADA fails to provide a statute of limitations and the general federal statute of limitations, 28 U.S.C. § 1658, does not apply, district courts are to apply the statute of limitations governing state causes of action most closely analogous to the ADA claim. *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987); most courts apply the two-year statute of limitations applicable to personal injury actions. Everett v. Cobb County Sch. Dist., 138 F.3d 1407, 1409 (11th Cir. 1998); *but see* Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137 (9th Cir. 2002) (applying California's one year statute of limitations for personal injury actions).

8. Ryan, *supra* note 1, at 13; *see also* Mullen, *supra* note 3, at 181.

9. *See* 42 U.S.C. § 12112 (1991); *see also* Mullen, *supra* note 3, at 181; *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1172 (9th Cir. 1999) ("The term 'employer' does not include . . . the United States, a corporation wholly owned by the government of the United States, or an Indian Tribe
. . . .") (quoting § 12111(5)(B)))

10. *See* § 12132; *see also* Mullen, *supra* note 3, at 181.

III imposes requirements on businesses for public accommodations.[11] This comment is concerned solely with Titles I and II.

The definitions of certain terms within the ADA vary depending upon which Title of the Act is applicable.[12] The definition of disability, however, is steadfast throughout the entire Act.[13] Under the ADA, a person with a disability is "one who has a physical or mental impairment that substantially limits a major life activity, has a history of such an impairment, or is regarded as having such an impairment."[14]

A. Title I

Title I provides that "[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."[15] This Title essentially requires an employer to make all employment decisions without regard to the disabilities of any individual.[16] To be covered under this Title, the person must be "qualified" for the position in question.[17] A "qualified" individual is one who is able to perform the "essential functions" of the job with or without "reasonable accommodations."[18]

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11. *See* § 12182; *see also* Mullen, *supra* note 3, at 181.
12. *Id.* at 182.
13. *Id.*
14. 42 U.S.C. § 12102(2) (1991). This definition was taken from the Rehabilitation Act of 1973 by all agencies charged with implementing the ADA. Mullen, *supra* note 3, at 182; *see* 29 U.S.C. §§ 701-96 (1991). The Americans with Disabilities Act Amendments Act of 2008 (ADAAA), effective January 2009, amends the definition of "disability" in the ADA. ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 1-7, 122 Stat. 3533, 3533-3559 (2009). The ADAAA retains the basic definition of "disability," but it reverses many United States Supreme Court rulings interpreting this definition. Michael Newman, *The Americans with Disabilities Amendments Act of 2008*, 55-DEC FED. LAW. 12, 12 (2008). Specifically, the ADAAA, *inter alia*, (1) "directs the EEOC to revise its regulations defining the phrase 'substantially limits[;]'" (2) "expands the definition of 'major life activities[;]'" (3) "provides that individuals covered only under the 'regarded as' prong are not entitled to reasonable accomondation[;]" and (4) "emphasizes that the definition of 'disability' should be interpreted broadly." Notice Concerning the Americans with Disabilaities Act (ADA) Amendments of 2008, http://www.eeoc.gov/ada/amendments_notice.html.
15. 42 U.S.C. § 12112. Covered entity means an "employer, employment agency, labor organization, or joint labor management committee." § 12111. The prohibition under this Act, however, extends only to those employers with 25 or more employees. § 12111.
16. Mullen, *supra* note 3, at 186.
17. Martin, *supra* note 1, at 5; *see also* 42 U.S.C. § 12111.
18. Martin, *supra* note 1, at 5; *see also* § 12111.

Congress chose the Equal Employment Opportunity Commission ("EEOC") to implement and enforce Title I and authorized it to prescribe any necessary rules and regulations.[19] Title I also absorbed the remedies and procedures of Title VII of the Civil Rights Act of 1964, as amended.[20] Thus, Title I of the ADA includes the Civil Rights Act's charge requirement, which calls for the claimant to exhaust all administrative remedies before filing a cause of action in federal court.[21]

B. Title II

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."[22] A "public entity" under this Title includes: (1) "state and local governments[;]" (2) "any agency or instrumentality thereof[;]" and (3) "The National Railroad Passenger Corp[oration]."[23]

Similar to Title I, Congress assigned the administration of Title II to governmental agencies.[24] For Title II, however, the legislature charged the Transportation Barriers Compliance Board, the Department of Justice ("DOJ"), and the Department of Transportation with the promulgation and enforcement of the standards under this Title.[25] Also, unlike Title I, the enforcement procedures of Title II are identical to the procedures found in section 505 of the Rehabilitation Act of 1973.[26]

The enforcement procedures of the Rehabilitation Act do not require non-federal employees to exhaust available administrative remedies.[27] An individual making a claim under Title II, therefore, could proceed directly to court with his or her discrimination claim.[28]

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19. § 12116.
20. Martin, *supra* note 1, at 6
21. Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1178 (9th Cir. 1999) (citing Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990)).
22. 42 U.S.C. § 12132.
23. Ryan, *supra* note 1, at 17.
24. *Id.*
25. *Id.*
26. *Id.*; *see also* William Christian, *Normalization as a Goal: the Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 433 (1994).
27. Ryan, *supra* note 1, at 16.
28. Ethridge v. Alabama, 847 F. Supp. 903, 907 (M.D. Ala. 1993); "Most courts that have considered the issue have generally concluded that Title II does not have an exhaus-

III. THE DISAGREEMENT: DOES TITLE II COVER EMPLOYMENT?

Despite the seemingly distinct objectives of Titles I and II, a marked split exists between the courts over whether the scopes of the two Titles are mutually exclusive. Specifically, contrary authority exists throughout the United States as to whether Title II of the ADA applies to employment discrimination. In *University of Alabama v. Garrett*,[29] the United States Supreme Court, without resolving the question, acknowledged the split among the circuits over "whether Title II . . . is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject."[30] The Second Circuit has similarly acknowledged the inconsistent treatment of Title II.[31]

As previously mentioned, the ADA covers a large portion of the United States' population. Accordingly, it would behoove the Court to resolve this issue. This author believes that the inclusion of the word "employment" in Title I and exclusion of the word from Title II, along with the structure of the ADA, indicate the congressional intent to combat employment discrimination through Title I alone. If the question is presented to the Court, it should determine that Title II does not cover claims of employment discrimination.[32]

A. *Courts Interpreting Title II to Cover Employment*

Some courts have explicitly stated that Title II applies to public employment discrimination,[33] while other courts have done so im-

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tion requirement." Canfield, 523 F. Supp. 2d at 888 (N.D. Ind. 2007) (citing Bogovich v. Sandoval, 189 F.3d 999, 1002 (9th Cir. 1999)); Davoll v. Webb, 194 F.3d 116, 1124 (10th Cir. 1999); Staats v. County of Sawyer, 220 F.3d 511, 518 (7th Cir. 2000)).

29. 531 U.S. 356 (2001).

30. *Garrett*, 531 U.S. at 360 n.1.

31. *See* Perry v. State Ins. Fund, 83 Fed. App'x. 351, 354 n.1 (2d Cir. 2003) ("There remain questions regarding . . . whether Title II ADA violations can be based on employment discrimination . . . ."); Mullen v. Rieckhoff, 189 F.3d 461, 461 (2d Cir. 1999) ("Plaintiff rightfully points to a split of authority over whether an employment discrimination plaintiff may avoid the ADA's requirement of an EEOC charge by filing under Title II of that Act.").

32. The Court insinuated in *Garrett* that it would interpret Title II to not include claims for employment. *Fleming*, 502 F. Supp. 2d at 334 ("As the Supreme Court pointed out . . . '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Garrett*, 531 U.S. at 360 n.1)).

33. *See, e.g.*, Holbrook v. Alpharetta, 112 F.3d 1522, 1528-29 (11th Cir. 1997) (finding that the DOJ's regulations permit a narcotic detective's Title II claim against his employer, the City of Alpharetta Police Department, after his duties were adjusted due to his failing eyesight); *see also* McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1073 (11th Cir. 1996)

plicitly. For example, in *Holmes v. Texas A&M University*,[34] the court dismissed an employment discrimination claim filed under Title II because the statute of limitations had run, thereby, implicitly indicating that such a claim is possible if it is timely filed.[35] Likewise, *Doe v. University of Maryland Medical System Corp.*[36] seems to permit an employment discrimination claim under Title II. In *University of Maryland*, the court upheld the dismissal of the plaintiff's Title II claim against his employer because he was not an "otherwise qualified" individual with a disability, not because Title II does not support such a claim.[37] While the plaintiffs in *Holmes* and *University of Maryland* were ultimately unable to recover under Title II, the courts in neither case dismissed the claims because Title II did not support the claimants' causes of action.[38]

The court in *Bledsoe v. Palm Beach County Soil & Water Conservation District*[39] offered a detailed analysis of why Title II applies to employment. The claimant in *Bledsoe* filed an employment discrimination claim under Title I of the ADA and the Reha-

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(stating in dicta that "Title II of the ADA . . . applies to public sector employment . . . ."), *cert. denied*, 520 U.S. 1228 (1997); Davol v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999) ("[W]e expressly decline to decide whether Title II covers employment discrimination. Instead, we assume that it does and turn to the issues properly on appeal."); Hernandez v. Hartford, 959 F. Supp. 125 (D. Conn. 1997) (holding that the regulations promulgated by the DOJ sustain a City administrative assistant's claim for employment discrimination under Title II when the city allegedly denied her request to work at home while she suffered from preterm labor) (citing Petersen v. Univ. of Wisc. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993))).

34. 145 F.3d 681 (5th Cir. 1998).

35. *See Holmes*, 145 F.3d at 683-86. In *Holmes*, Dr. Ronald E. Holmes suffered a severe stroke and developed aphasia ("a loss of the ability to process language") while he was a tenured professor at Texas A&M University. *Id.* at 682-83. Three years later, the University terminated him and revoked his tenure for "professional incompetence." *Id.* at 683. After his termination was affirmed by the Texas A&M Board of Regents, Holmes filed suit against the University, alleging that his termination was based upon his disability in violation of Title II of the ADA. *Id.*

36. 50 F.3d 1261 (4th Cir. 1995).

37. *See Univ. of Md. Med. Sys., Corp.*, 50 F.3d at 1264-67. In this case, Dr. Doe was a neurosurgical resident who contracted HIV while working at University of Maryland Medical System, Corp. (UMMSC). *Id.* at 1262-63. Subsequently, UMMSC permanently suspended Dr. Doe from surgery and offered him alternative residencies in non-surgical fields. *Id.* UMMSC then fired Dr. Doe from the residency program after he refused the alternative residencies. *Id.* at 1262-63. Dr. Doe brought suit against the UMMSC under Title II of the ADA and section 504 of the Rehabilitation Act. *Id.* at 1263. The court held that Dr. Doe's condition posed "a significant risk to the health or safety of their patients that cannot be eliminated by reasonable accommodation, and therefore [he is] not otherwise qualified within the meaning of . . . the ADA." *Id.* at 1267.

38. *See Holmes*, 145 F.3d at 683-86; *Univ. of Md. Med. Sys., Corp.*, 50 F.3d at 1264-67.

39. 133 F.3d 816, 820-25 (11th Cir. 1998).

bilitation Act.[40] Bledsoe's employer, however, did not have the requisite number of employees to qualify as an "employer" as defined in Title I, and thereby, was not a "covered entity" to which that Title applied.[41] The claimant subsequently amended his complaint to bring his claim under Title II instead.[42]

The lower court dismissed his claim, determining that Title II did not support his claim.[43] The claimant appealed this decision, and the Eleventh Circuit addressed, *inter alia*, the issue of whether Title II of the ADA applies to discrimination in employment.[44] In its analysis, the court relied upon the language of Title II, the DOJ's regulations, and precedent.[45]

The court concluded that Title II applies to employment discrimination.[46] The majority emphasized that Congress intended Title II to mimic section 504 of the Rehabilitation Act.[47] The court reasoned that because the focus of section 504 was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment," Title II was intended to reach employment discrimination.[48]

The court also disagreed with the lower court's limited reading of Title II's language.[49] The majority interpreted the final clause of Title II's discrimination provision as a catch-all provision that prohibits all discrimination by a public entity in all contexts.[50] The court buttressed this analysis with the DOJ regulations per-

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40. *Bledsoe*, 133 F.3d at 818. The claimant, Mark Bledsoe, was employed by the Conservation District to perform land surveys and perform manual labor. *Id.* Bledsoe requested that the District alter his responsibilities after he sustained a knee injury while working. *Id.* The District fired Bledsoe after he refused the alternate position offered to him. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 819.

44. *Id.*

45. *Bledsoe*, 133 F.3d at 820-25.

46. *Id.* at 821 (stating that the legislative commentary to that effect "is so pervasive as to belie any contention that Title II does not apply to employment actions.").

47. *Id.*

48. *Id.* (citing 29 U.S.C. § 701(8) (1998)).

49. *Id.*

50. *Bledsoe*, 133 F.3d at 821-22. Title II provides that "no qualified individual with a disability shall, by reasons 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 (emphasis added). The Second Circuit has also found a catch-all provision but in a different clause. *See* Innovative Health Systems, Inc. v. White Plains, 117 F.3d 37, 45 (2d Cir. 1997) (holding that "programs, services, or activities" is a catch-all phrase that prohibits all discrimination by a public entity) (citing § 12132)).

taining to this Title.[51] As previously mentioned, the ADA authorizes the DOJ to write the regulations implementing Title II.[52] Pursuant to this authority, the Attorney General added to the Code of Federal Regulations the following provision:

> (b)(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of Title I.[53]

The court went on to avow that, pursuant to the *Chevron* principle,[54] it could not ignore the DOJ's reasonable construction of statutory language: Title II applies to employment.[55]

The court also cited cases offering precedential support for the conclusion that Title II covers employment discrimination claims.[56] The court discussed *Wagner v. Texas A&M University*,[57] which acknowledged the incongruity with permitting employment discrimination claims under Titles I and II but requiring the exhaustion of administrative remedies only with a Title I claim.[58] The court in *Wagner* noted that this inconsistency is undesirable; however, it refused to deviate from the DOJ's regulations and give the ADA a meaning that it did not feel was entirely evident.[59]

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51. *Bledsoe*, 133 F.3d at 822.

52. *See supra* note 25 and accompanying text.

53. *Bledsoe*, 133 F.3d at 822 (citing 28 C.F.R. § 25.140 (1997)).

54. The *Chevron* principle is that "considerable weight should be accorded to an executive department's construction of a statutory scheme, unless the regulations are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

55. *Bledsoe*, 133 F.3d at 822-23.

56. *Id.* at 823.

57. 939 F. Supp. 1297 (S.D. Tex. 1996).

58. *Bledsoe*, 133 F.3d at 824 (citing *Wagner*, 939 F. Supp. at 1310). In *Wagner*, the claimant, Dr. Jackson Wagner, brought a Title II claim against his employer, alleging that because he suffered from depression and post-traumatic stress disorder, the University: (1) "failed to reassign him to teach the courses he traditionally taught," (2) "jobs and benefits were denied to his acquaintances," and (3) "he was subjected to public ridicule." *Wagner*, 939 F. Supp. at 1308.

59. *Wagner*, 939 F. Supp. at 1310; *accord* Silk v. Chicago, No. 95 C0143, 1996 WL 312074 (N.D. Ill. Jun. 7, 1996) (noting that while the administrative procedures of Titles I and Title II are different, the regulations "adopted by the [DOJ] establish that Title II's prohibitions against discrimination by public entities include employment discrimination.").

Justice Hill wrote a concurring opinion in *Bledsoe*.[60] Hill stated that the precedent weighed too heavily in favor of Title II supporting an employment discrimination claim to hold otherwise; yet, he expressed reluctance in doing so.[61] He found the actual reasoning behind the interpretation to be troublesome and sounding in judicial activism.[62] Hill is not alone in feeling restrained by precedent despite reasoning to the contrary.

In *Clifton v. Georgia Merit System*,[63] the District Court for the Northern District of Georgia held that Title II of the ADA sustained an individual's claim against a public employer for employment discrimination.[64] The majority, however, spent the greater part of its analysis writing how all reason supported an outcome to the contrary.[65]

The court noted first that interpreting Title II to cover employment discrimination would render Title I redundant, thereby disobeying a cardinal canon of statutory interpretation: courts should not interpret statutes so as to leave superfluous other provisions of the same statute.[66] Justice Pannell, writing for the majority, acknowledged that such an interpretation did not render Title I wholly redundant; yet, it did to the extent that an individual who works for or applies for a position with a public employer can bring a discrimination claim under either Title.[67]

The court also emphasized another statutory interpretation principle: "where language is used in one part of a statute but omitted in another, it is presumed that such omission is intentional."[68] The court observed that Title I includes the word "employment," while Title II is titled "Public Services" and excludes any reference to "employee," "employer," or "employment."[69] Additionally, the court pointed to Title I's limitation to certain sized

60. *Bledsoe*, 133 F.3d at 825 (Hill, J., concurring).

61. *Id.*

62. *Id.* ("With a tip of the hat to the district judge, I reluctantly conclude that the flow of precedent is too strong for him or for us to swim upstream.").

63. 478 F. Supp. 2d 1356 (N.D. Ga. 2007).

64. *Clifton*, 478 F. Supp. 2d at 1366. Wagan Clifton, Jr. filed a claim under Title II against Georgia Merit System (GMS), alleging that that GMS failed to provide reasonable accommodations for his blindness during a certification exam. *Id.* at 1360.

65. *See Id.* at 1363-66.

66. *Id.* at 1365. (citing Clark v. Chicago, No. 97-C-4820, 2000 WL 875422, at *5-6 (N.D. Ill. Jun. 28, 2000) *and* Dep't of Pub. Welfare v. Davenport, 495 U.S. 522, 562 (1990)).

67. *Clifton*, 478 F. Supp. 2d at 1365.

68. *Id.* at 1365 (citing Richards v. United States, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act . . . .")).

69. *Id.*

"employers" and prohibition of punitive damages against municipal employers.[70] The lack of such limitations in Title II reinforces the supposition that Title I was meant to singularly address employment discrimination.[71] Pannell asserted that a finding to the contrary would nullify much of Title I.[72]

The majority also found it of great concern that permitting an individual to bring an employment claim under Title II would offer a loophole to avoid "the administrative exhaustion requirements of Title I."[73] This loophole would cause problems in practice because it forfeits the administrative agency's opportunity to investigate, mediate, and take remedial action, as well as the employer's ability to settle through conference and conciliation.[74] Despite these points, the court felt bound by precedent, specifically *Bledsoe*, and therefore permitted the plaintiff's claim under Title II for employment discrimination.[75]

B. Courts Interpreting Title II to Not Cover Employment

Other courts have raised the same concerns found in *Clifton* but did not feel restrained by *Bledsoe*. The Ninth Circuit was the first court to fully address this question and find that Title II does not extend to employment discrimination claims.[76] In *Zimmerman v. Department of Justice*,[77] the court arrived at this conclusion after analyzing the language and the structure of the ADA and refuting arguments to the contrary.[78]

The court in *Zimmerman* observed that the ADA consists of five titles, and only Title I refers to employment in any capacity.[79] The majority then addressed the *Chevron* principle.[80] The court explained that the *Chevron* principle engages a two-part inquiry: (1) "apply the 'traditional rules of statutory construction' to determine whether Congress has expressed its intent unambiguously[;]" and

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70. *Id.* (citing 42 U.S.C. §§ 1981(b)(1), (3) (1991)).
71. *Id.*
72. *Clifton*, 478 F. Supp. 2d at 1365-66.
73. *Id.* at 1365-66.
74. *Id.* at 1366 (citing Shah v. Dep't of Civil Serv., 168 F.3d 610, 614 (2d Cir. 1999)); *see also* Patterson v. Dep't of Corr., 35 F. Supp. 2d 1103, 1109-10 (C.D. Ill. 1999)).
75. *Clifton*, 478 F. Supp. 2d at 1366.
76. *See* Zimmerman v. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999).
77. 170 F.3d 1169.
78. *See Zimmerman*, 170 F.3d 1169. The plaintiff in *Zimmerman* was visually impaired. *Id.* at 1171. He filed a claim under Titles I and II against his employer, claiming that his employer failed to accommodate his disability. *Id.*
79. *Id.* at 1172. Albeit, Title I is limited to non-federal employment. *Id.*
80. *Id.* at 1173.

(2) if "Congress left a gap for an administrative agency to fill[,]" the court "must uphold the administrative regulation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'"[81]

Justice Graber, writing for the majority, asserted that the *Chevron* analysis ended at the first step; Congress has "unambiguously expressed its intent for Title II not to apply to employment."[82] The court arrived at this conclusion after examining the language of section 12132 in Title II and the ADA's organization as a whole.[83]

The majority acknowledged that the ADA did not define the phrase "services, programs, and activities" found in the definition of a "qualified individual with a disability" in terms of Title II, and therefore those terms must be interpreted by employing their "ordinary, contemporary, and common meanings."[84] The court reasoned that the phrase "services, programs, and activities[,]" aligns more closely with "outputs of a governmental agency, and not inputs, such as employment."[85] Moreover, the court considered it to be a stretch to consider employment a "service, program, or activity" of a public entity.[86]

The court also addressed whether the second clause of section 12132 constituted a catch-all provision.[87] In addition to the court finding that interpreting the second clause as a catch-all provision conflicted with Ninth Circuit precedent, Graber also reasoned that interpreting the second clause as such took it out of context.[88]

The court pointed out that the clause was plainly under Title II's heading of "Public Services" and that inclusion of the second clause in a single sentence in section 12132 intimated that the second clause pertains to "services, programs, or activities."[89] Graber recognized that this reasoning alone would not place this

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81. *Id.* at 1173 (citing *Chevron*, 467 U.S. at 843-44).

82. *Id.*

83. *Zimmerman*, 170 F.3d at 1173-74. Section 12132 provides: "[N]o 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 subject to discrimination by any such entity." 42 U.S.C. § 12132.

84. *Id.* at 1174 (citing U.S. v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998)).

85. *Id.* (quoting § 12131(2))

86. *Id.*

87. *Id.* at 1175. *See, e.g.*, *Bledsoe*, 133 F.3d at 822; *Innovative Health Sys.*, 117 F.3d at 44-45; Alberti v. Sheriff's Dep't, 32 F. Supp. 2d 1164, 1169 (N.D. Cal. 1998); Downs v. Mass. Bay Transp. Auth., 13 F. Supp. 2d 130, 135 (D. Mass. 1998). The first clause of section 12132 is "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 . . . ." *See* § 12132. Whereas, the second clause of section 12132 is: "*or be subject to discrimination by any such entity.*" *See* § 12132 (emphasis added).

88. *Zimmerman*, 170 F.3d at 1175.

89. *Id.* at 1175.

interpretation beyond contention; therefore, he supported his argument by noting that regardless of whether section 12132 is broken up into separate clauses, a claimant under Title II must still be a "qualified individual with a disability" within the meaning of that Title.[90] A "qualified individual" under Title II is

> *an individual 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.*[91]

Accordingly, the court concluded that the second clause must relate to a "service, program, or activity" offered by a public entity because otherwise an individual would not be "qualified" within the meaning of Title II.[92] The court also stated that the placement of the disjunction "or" between the two clauses simply demonstrates the congressional intent to prohibit intentional discrimination as well as disparate treatment.[93]

The majority then analyzed the structure of the ADA.[94] Graber asserted that the structure is demonstrative of the congressional intent for Title I to offer the singular relief for employment discrimination.[95] The court stated that (1) employment-specific provisions are included only in Title I, whereas any reference to employment is absent from Title II; (2) a "qualified individual with a disability" in Title I is defined as one who can work, while the same is defined in Title II as one who is "eligible to receive services or participate in programs[;]" (3) Title I has procedural requirements that would be eviscerated if Title II covered employment claims; (4) Congress selected different regulatory authorities for each Title; and (5) Title I, and not Title II, is linked to the employment provisions of the Rehabilitation Act.[96]

The majority specifically addressed the contention that Title II incorporates the employment provisions of the Rehabilitation Act.[97] The court acknowledged that Congress modeled Title II af-

90. *Id.*
91. 42 U.S.C. § 12131(2) (emphasis added).
92. *Zimmerman*, 170 F.3d at 1175-76.
93. *Id.* at 1176 (citing Crowder v. Kitagawa, 81 F.3d 1480, 1483-84 (9th Cir. 1996)).
94. *Id.*
95. *Id.*
96. *Id.* at 1177-82.
97. *Zimmerman*, 170 F.3d at 1179.

ter the Rehabilitation Act but stated that Title II is different in very important respects.[98] Title II applies to public entities only, unlike the Rehabilitation Act, which applies to public entities and private entities that receive public assistance.[99] Graber interpreted this distinction to mean that Congress desired to limit the reach of Title II.[100] Moreover, while Title II borrows language from the Rehabilitation Act, Congress did not import any of the language referring to employment.[101] Also, unlike the Rehabilitation Act, the ADA has a Title specifically dealing with employment: Title I.[102] For these reasons, the court found no support for the contention that an employment discrimination claim can be brought under Title II.[103]

More recently, the District Court of the Eastern District of New York addressed this issue in *Fleming v. State University of New York*.[104] In *Fleming*, the plaintiff brought a claim for employment discrimination under both Titles I and II.[105] The majority noted that the Second Circuit had failed to approach this question consistently.[106] In resolving the question within the Second Circuit, the court found the reasoning in *Zimmerman* especially persuasive.[107] The majority followed the analysis in *Zimmerman* and determined that the language of the ADA is clear and unambigu-

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98. *Id.*
99. *Id.* at 1180.
100. *Id.* at 1180-81.
101. *Id.* at 1181-82
102. *Zimmerman*, 170 F.3d at 1181-82.
103. *Id.*
104. 502 F. Supp. 2d 324 (E.D.N.Y. 2007).
105. *Fleming*, 502 F. Supp. 2d at 326-28. Dr. Lester Fleming brought a Title II claim against his employer, State University of New York. *Id.* at 326. Fleming alleged that the State University improperly disclosed the fact that he has sickle cell anemia to a prospective employer, effectively losing his offer for employment. *Id.* at 326-37.
106. *Fleming*, 502 F. Supp. 2d at 330; *compare* Olson v. State, 04-CV-0419, 2005 U.S. Dist. LEXIS 44929, at *13 (E.D.N.Y. Mar. 9, 2005) (holding that Title II covers employment discrimination); Transp. Workers Union, 342 F. Supp. 2d 160, 160 (same); Bloom v. Bd. of Educ., 00 Civ. 2728, 2003 U.S. Dist. LEXIS 5290, at *33 (S.D.N.Y. Mar. 31 2003) (same); Winokur v. Office of Court Admin., 190 F. Supp. 2d 444, 449 (same); Magee v. Nassau County Med. Ctr., 27 F. Supp. 2d 154, 159 (E.D.N.Y. 1998) (same); *with* Ayantola v. Comm. Technical Colls. of Conn., No. 3:05CV957, 2007 WL 963178, at *2 (D. Conn. Mar. 30, 2007) (holding that Title II does not cover employment discrimination); Cormier v. Meriden, No. 3:03CV1819, 2004 WL 2377079, at *8 (D. Conn. Sept. 30 2004) (same); Filush v. Weston, 266 F. Supp. 2d 322, 327 (D. Conn. 2003) (same); Syken v. N.Y. Exec. Dep't, No. 02 Civ. 4673, 2003 WL 1787250, at *11 (S.D.N.Y. Apr. 2, 2003) (same); Sworn v. W. N.Y. Children's Psychiatric Ctr., 269 F. Supp. 2d 152, 157-58 (W.D.N.Y. 2003).
107. *Fleming*, 502 F. Supp. 2d at 330-334.

ous.[108] Accordingly, the court held that Title II did not apply to claims of employment discrimination.[109]

One month later in *Canfield v. Isaacs*,[110] the District Court of the Northern District of Indiana also held that Title II does not cover employment claims. The court considered the inclusion of employment language in Title I and the absence of that language in Title II evidence of the congressional intent to have Title I serve as the sole remedy for employment discrimination under the ADA.[111] Quoting *Zimmerman*, the majority also found that the second clause of section 12132 could not serve as a "general" or catch-all provision because of Title II's discrete definition of a "qualified" individual.[112] Additionally, the court noted the undesirability of the redundancy created by interpreting Title II to cover employment.[113] Finally, the court raised the novel point concerning the absence of a provision requiring coordination between the agencies charged with enforcing Titles I and II.[114] The majority noted that Congress feared conflicts between the EEOC's enforcement of Title I and the DOJ's enforcement of the Rehabilitation Act, and therefore, included a provision requiring the coordination between the two.[115] The court considered the absence of an analogous coordination provision between the EEOC and the DOJ with respect to Titles I and II as additional evidence of the congressional intent to regulate employment discrimination under Title I alone.[116]

The District Court of the Western District of Pennsylvania provided a similar reasoning when addressing this issue recently in

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108. *Id.* at 333-334.

109. *Id.* at 334.

110. 523 F. Supp. 2d 885, 886 (N.D. Ind. 2007). Rick Canfield, a deputy sheriff, sustained various work-related injuries and brought a claim under Title II against the sheriff, the county, and its board of commissioners alleging, *inter alia*, a failure to reasonably accommodate his disabilities. *Canfield*, 523 F. Supp. 2d at 886. His claim was dismissed because the court found that Title II did not support his cause of action. *Id.*

111. *Canfield*, 52 F. Supp. 2d at 891.

112. *Id.* (quoting *Zimmerman*, 170 F.3d at 1176).

113. *Id.* "[I]t violates the interpretive canon presuming that no statutory provision is mere surplusage." *Id.* (quoting *Commodity* Trend Servi., Inc. v. Commodity Futures Trading Comm'n, 223 F.3d 981, 989 (7th Cir. 2000)).

114. *Id.*

115. *Id.* (citing § 12117(b)). "The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act . . . are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards . . . ." § 12117(b).

116. *Canfield*, 523 F. Supp. 2d at 891.

Hemby-Grubb v. Indiana University of Pennsylvania.[117] The court found *Zimmerman* particularly persuasive and concluded that Congress did not intend for Title II to cover employment discrimination after considering the "the structure of the ADA[ ] and the ordinary meanings of the words 'services,' 'programs,' and 'activities' . . . ."[118] The majority also echoed the *Chevron* analysis of the *Zimmerman* court, finding that reliance on the regulations provided by the DOJ was unjustified.[119] Consequently, the court held that Title II does not support a claim for employment discrimination.[120]

IV. ANALYSIS

Both sides of this argument offer noteworthy points supported by plentiful precedent, seemingly with *Bledsoe* and *Zimmerman* operating as the polarizing cases. The courts finding that Title II applies to employment, however, fall short in their ability to refute the opposing viewpoint's contentions. *Zimmerman* and its progeny acknowledge the arguments made by the opposing courts, and those opinions set forth why the opposing viewpoint is incorrect. True persuasiveness exists when a court's examination can proclaim not only why its particular viewpoint is correct but also point to where the opposing viewpoint falters.

As previously stated, while the ADA authorized the DOJ to enact regulations pertaining to Title II, the *Chevron* principle does not obligate the courts to dogmatically follow every regulation the DOJ creates.[121] Indeed, the court must first determine whether the statutory text is ambiguous as to the congressional intent.[122] The courts relying upon the DOJ's regulations to find that Title II applies to employment read section 12132 alone and fail to ana-

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117. 2:06cv1307, 2008 WL 4372937, at *6-7 (W.D. Pa. Sept. 22, 2008). Dr. Hemby-Grubb brought suit against her employer, Indiana University of Pennsylvania, claiming, *inter alia*, that under Title II her employer should have provided reasonable accommodations. *Hebby-Grubb*, 2008 WL 4372937, at *5. The court dismissed Hemby-Grubb's claim because Title II did not support it. *Id.*

118. *Hebby-Grubb*, 2008 WL 4372937, at *6-7.

119. *Id.* at *7. "[A]gency regulations such as these are only entitled to deference when Congress has not spoken directly to the precise question at issue and the agency's regulation is based upon a reasonable interpretation of the statute. In *Zimmerman*, the court held 'Congress unambiguously expressed its intent for Title II not to apply to employment. Adopting this reasoning effectively ends the inquiry.'" *Id.* (citations omitted).

120. *Id.*

121. *See Chevron, U.S.A., Inc.*, 467 U.S. at 844.

122. *Id.* at 844.

lyze the whole statutory text in its context.[123] This reliance demonstrates not only a deficiency in the analysis of the statute but also a frustration of the *Chevron* principle, thereby severely injuring the credibility and persuasiveness of those courts' opinions.

These concerns are echoed when the courts interpret any clause of Title II to be a catch-all provision.[124] It should not go unnoticed that the courts reading the whole statutory text arrive at the contrary conclusion; none of the courts that analyze the entire ADA and each clause's context determine that Title II includes a catch-all provision.[125]

Additionally, while it is indisputable that the ADA was modeled after aspects of the Rehabilitation Act, the courts finding that Title II covers employment also fail to explore the differences between the ADA and the Rehabilitation Act.[126] As discussed in *Zimmerman*, these differences suggest that Title II was not intended to include the aspects of the Rehabilitation Act that deal with employment.[127] The Rehabilitation Act addresses many forms of discrimination, and Title II, while lifting some of the Act's language, did not import any language that deals with employment.[128] Indeed, unlike the Rehabilitation Act, the ADA has a Title specifically dealing with employment discrimination.[129]

It is worth noting that restricting employment claims to Title I does not impair the rights of disabled individuals or frustrate the object of the ADA. Title I generally requires employers to make employment decisions without regard to an individual's disability and offers a means to remedy an instance in which this require-

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123. *See, e.g.*, Hernandez v. Hartford, 959 F. Supp. 125, 133 (D. Conn. 1997) ("On its face, Title II prohibits discrimination in 'public services.' A plain reading of the section does not reveal whether Title II covers employment discrimination addressed more specifically in Title I. The regulations under and the legislative history of ADA Title II make it clear, however, that § 12132 prohibits employment discrimination by public entities on the basis of disability.") (citations omitted)); *Wagner*, 939 F. Supp. at 1309 ("Although it is not apparent from the plain language of § 12132, the regulations issued by the [DOJ] make it clear that the prohibition against discrimination by public entities includes employment discrimination."); *see also* Winfrey v. Chicago, 957 F. Supp. 1014, 1023 n.7 (N.D. Ill. 1997) (similar); *Silk*, 1996 WL 312074, at *10 (similar); Benedum v. Franklin Twp. Recycling Cntr., No. 95-1343, 1996 WL 679402, at *5 (W.D. Pa. Sept. 12, 1996) (similar); Petersen v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (similar).

124. *See, e.g.*, *Bledsoe*, 133 F.3d at 822; *Innovative Health Sys.*, 117 F.3d at 44-45; *Alberti*, 32 F. Supp. 2d at 1169; *Downs*, 13 F. Supp at 135.

125. *See Zimmerman*, 170 F.3d at 1175-76.

126. *See, e.g.*, *Bledsoe*, 133 F.3d at 821; *Alberti*, 32 F. Supp 2d at 1169-70; *Downs*, 13 F. Supp. 2d at 135; *Ethridge*, 847 F. Supp at 906.

127. *See Zimmerman*, 170 F.3d at 1180-82.

128. *See id.* at 1181-82.

129. *See id.* at 1181-82.

ment is violated. Permitting employment claims under Title II, however, would frustrate the provisions and procedures set forth in Title I.

V. CONCLUSION

Undoubtedly, the question of whether Title II covers employment should be submitted to the United States Supreme Court. This issue affects the third largest minority in the United States and lies in a realm that is central to the independence of disabled individuals: employment. Moreover, the courts' disunited approach to this issue leaves lawyers guessing under which Title to file a claim, often delaying or denying a remedy to disabled individuals, thereby injuring the very purpose of the ADA. When considering the superior persuasiveness of the courts which have found that Title II does not cover employment, if the Supreme Court does choose to address this question, not only is the Court likely to answer in the negative, this answer is the correct conclusion.

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