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The Application of Title II of the Americans with Disabilities Act to Employment Discrimination: Why the Circuits Have Gotten It Wrong

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THE APPLICATION OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT TO EMPLOYMENT DISCRIMINATION: WHY THE CIRCUITS HAVE GOTTEN IT WRONG

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I. INTRODUCTION

Title I of the Americans with Disabilities Act (hereinafter "ADA") prohibits employment discrimination.[1] Title II bars state and local governments from discriminating against individuals with disabilities.[2] Following the passage of the ADA, courts struggled with the issue of whether a litigant may file an employment discrimination claim against a state or local government pursuant to Title II or whether the ADA limits an aggrieved individual's remedy to Title I only. This issue is significant because the statute of limitations period is appreciably shorter for Title I claims than it is for causes of action filed pursuant to Title II.[3]

Initially, federal district courts tended to hold that Title II served as a remedy for employment discrimination by state or local governments.[4] However, courts then shifted direction and now generally hold that a litigant may file an employment discrimination claim against a state or local government pursuant to Title I only.[5] Courts have generally examined the statutory language of Title II in comparison to Title I and have found that Congress unambiguously

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[1] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 121111-12117 (2018)).

[2] *Id.* (codified as amended at 42 U.S.C. §§ 12132-12134 (2018)). Title II prohibits discrimination by public entities, which include state and local governments. 42 U.S.C. § 12131(1)(A) (2018).

[3] *See infra* notes 12, 18 and accompanying text.

[4] *See infra* notes 23-33 and accompanying text.

[5] *See infra* notes 34-64 and accompanying text.

made clear that it did not intend for Title II claims to cover discrimination.[6]

This article will address the issue of whether the ADA authorizes a disabled litigant to file an employment discrimination claim against a state or local government pursuant to Title II as to avoid the shorter limitations period of Title I. It will first review the history of litigation on the issue. This article will detail why resolution of this question requires an application of administrative law jurisprudence. The Attorney General, to whom Congress delegated authority to implement Title II, has concluded that Title II covers employment. This article will argue that because the Attorney General has promulgated a reasonable interpretation of Title II, the interpretation is entitled to deference.

In concluding that the Attorney General is entitled to deference, this article will further detail that the rationale courts set forth to conclude—that Congress clearly intended for only Title I to cover employment—is not supportable. Moreover, the legislative history of Title II is clear: Congress intended for Title II to cover employment discrimination. Accordingly, more than enough support exists for the Attorney General's conclusion that Title II covers employment discrimination.

On the other hand, the Attorney General has also promulgated regulations that can be interpreted to require a Title II litigant to exhaust administrative remedies even if he files a claim pursuant to Title II. This article will explain why this regulation promulgated by the Attorney General is not entitled to deference. Congress spoke unambiguously on this issue: it wanted the remedies governing Section 504 of the Rehabilitation Act to govern Title II claims and the remedies governing Section 504 do not require exhaustion of administrative remedies.

II. THE STRUCTURES OF TITLES I AND II AND THE ADMINISTRATIVE REGULATIONS GOVERNING THE IMPLEMENTATION OF THESE PROVISIONS

In passing Title I, Congress established a detailed statutory scheme to remedy employment discrimination against disabled individuals. Congress modeled Title I on Title VII of the Civil Rights

[6] *See infra* notes 40-52 and accompanying text.

Act of 1964.[7] The statute prohibits discrimination against a qualified individual with a disability in connection with the hiring process, advancement or discharge, compensation, job training, and other terms, conditions and privileges of employment.[8] The statute defines a "qualified individual" as one who with or without a reasonable accommodation can perform the essential functions of the employment position that the person holds or desires.[9] Under Title I, discrimination includes, but is not limited to, classifying a job applicant in ways that adversely affect job opportunities, utilizing standards and criteria that have the effect of discrimination on the basis of disability, not making reasonable accommodation to the limitations of otherwise qualified individuals unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer, and using qualification standards, employment tests or other selection criteria that screen out or tend to screen out individuals with a disability unless the standard, test or other selection criteria is job-related and consistent with business necessity.[10] The remedial provisions of Title I are the same as those that govern 42 U.S.C. § 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9.[11] As a result, a Title I litigant must exhaust administrative remedies, which includes filing a timely complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC"), as 42 U.S.C. § 2000e-5 requires exhaustion of administrative remedies.[12]

Title II is a far less detailed statutory scheme than Title I. Title II prohibits public entities from discriminating against a qualified individual with a disability. Public entities include state and local governments.[13] Title II defines "qualified individual with a disability" as someone with a disability, who, with or without modifications to rules, policies or practices, meets the essential eligibility requirements

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[7] *See* Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 342 F. Supp. 2d 160, 174 (S.D.N.Y. 2004).

[8] 42 U.S.C. § 12112(a) (2018).

[9] *Id.* § 12111(8).

[10] *Id.* § 12112(b).

[11] *Id.* § 12117(a).

[12] *See, e.g.*, *Transp. Workers Union of Am.*, 342 F. Supp. 2d at 171. The statute requires a litigant to file a charge with the EEOC within one hundred and eighty days of the alleged unlawful employment practice, except when an aggrieved individual institutes an administrative charge with a state or local agency that has been authorized to seek relief. In this situation, a litigant may file an administrative charge within three hundred days. 42 U.S.C. § 2000e-5(e)(1).

[13] 42 U.S.C. § 12131(1)(A).

for the receipt of services, or the participation in programs or activities provided by a public entity.[14] In prohibiting discrimination, Congress provided that no public entity shall exclude a qualified individual with a disability from participation in, or deny the individual the benefits of services, programs or activities of the public entity or otherwise subject the individual to discrimination.

In crafting the enforcement mechanisms for Title II, Congress directed that the remedies, procedures, and rights of Section 504 of the Rehabilitation Act serve as the remedies, procedures, and rights that are to be encompassed within Title II of the ADA.[15] Congress next delegated enforcement authority for Title II to the Attorney General directing that "the Attorney General shall promulgate regulations in an accessible format that implement [Title II]."[16] Congress directed that "[e]xcept for 'program accessibility, existing facilities', and 'communications,'" the regulations governing Title II "shall" be consistent with the regulations under 28 C.F.R. Part 41, the regulations that apply to 29 U.S.C. § 794.[17] These regulations do not require exhaustion of administrative remedies.[18] The residual limitations period for personal injury actions in each state where a litigant is located serves as the limitations period for Title II.[19]

The regulations that the Attorney General promulgated first provide, *inter alia*, that "[n]o qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a

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[14] *Id.* § 12132(2).

[15] *Id.* § 12133.

[16] *Id.* § 12134(a).

[17] *Id.* § 12134(b).

[18] The enforcement provisions governing Section 504 of the Rehabilitation Act provide that the enforcement and hearing procedures governing Title VI of the Civil Rights Act of 1964 shall govern the enforcement of Section 504. The Supreme Court, when it held that Title IX does not require exhaustion of administrative remedies, recognized that the enforcement mechanisms of Title IX and Title VI are the same. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 708 n.41 (1979). Accordingly, courts examining the issue have concluded that Section 504 does not require the exhaustion of administrative remedies. *See* Transp. Workers Union of Am., Local 100, AFL-CIO, v. N.Y.C. Transit Auth., 342 F. Supp. 2d 160, 171 (S.D.N.Y. 2004); Peterson v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278-79 (W.D. Wis. 1993).

[19] *Compare* McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007) (holding that Title II requires a filing of administrative charge within 180 days), *with* McCormick v. Miami Univ., 693 F.3d 654, 663-64 (6th Cir. 2012) (holding that Title II is subject to the state's personal injury limitations period of two years); Hunt v. Ga. Dep't of Cmty. Affairs, 490 F. App'x 196, 198 (11th Cir. 2012) (same); Frame v. City of Arlington, 616 F.3d 476, 489 (5th Cir. 2010) (same).

public entity."[20] The regulations further provide that if a public entity is subject to the jurisdiction of Title I, the regulations of the EEOC set forth in 29 C.F.R. Part 1630 apply to employment in any service, program, or activity conducted by the public entity.[21] The regulations further provide that if the public entity is not subject to the jurisdiction of Title I, the regulations governing Section 504 of the Rehabilitation Act as set forth in 28 C.F.R. Part 41 govern the employment provided by the public entity.[22]

III. AN OVERVIEW OF LITIGATION ON THE ISSUE

When district courts initially addressed the question of whether or not Title II authorized claims for employment discrimination, they tended to find that Title II authorized such claims.[23] Courts relied on different rationale to support their holdings.

First, courts recognized that the Attorney General's regulations, which are entitled to deference, authorized such suits.[24] Courts also concluded that the legislative history of Title II details that Congress intended that Title II apply in the same manner as Section 504 of the Rehabilitation Act and, as noted, Section 504 applied to employment discrimination.[25] In addition, the term "services, programs and activities" encompasses employment.[26] Finally, Title II and Section 504 of the Rehabilitation Act contain very similar language and the Supreme Court in *Consolidated Rail Corp. v. Darrone*[27] interpreted Section 504 to cover employment discrimination.[28]

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[20] 28 C.F.R. § 35.140(a) (2018).

[21] *Id.* § 35.140(b).

[22] *Id.*

[23] *See Transp. Workers Union of Am.*, 342 F. Supp. 2d at 171-75; Downs v. Mass. Bay Transp. Auth., 131 F. Supp. 3d 130, 135 (D. Mass. 1998); Saylor v. Ridge, 989 F. Supp. 680, 688 (E.D. Pa. 1998); Dominguez v. City of Council Bluffs, 974 F. Supp. 732, 736-37 (S.D. Iowa 1997); Bracciale v. City of Philadelphia, No. CIV.A. 97-2464, 1997 WL 672263, at *7 (E.D. Pa. Oct. 29, 1997); Wagner v. Tex. A & M Univ., 939 F. Supp. 1297, 1310 (S.D. Tex. 1996); *Peterson*, 818 F. Supp. at 1278.

[24] *Transp. Workers Union of Am.*, 342 F. Supp. 2d at 174-75; *Downs*, 131 F. Supp. 3d at 135; *Dominguez*, 974 F. Supp. at 736-37; *Bracciale*, 1997 WL 672263, at *7; *Wagner*, 939 F. Supp. at 1310; *Peterson*, 818 F. Supp. at 1278.

[25] *Transp. Workers Union of Am.*, 342 F. Supp. 2d at 174-75.

[26] *Dominguez*, 974 F. Supp. at 736.

[27] 465 U.S. 624 (1984).

[28] *Id.* at 625.

Consistent with many of the early district court decisions that found that Title II covers discrimination, the Eleventh Circuit in *Bledsoe v. Palm Beach County Soil and Water Conservation District*[29] reached the same result. The court first relied on the legislative history of Title II, which detailed that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act.[30] Next, the court relied on the plain language of Title II. Regardless of whether the terms "services, programs or activities" encompassed discrimination, the last prong of the statute, which protects disabled individuals from being "subjected to discrimination" covers employment.[31] This term "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context."[32] Finally, as some district courts found, the Attorney General's regulations were entitled to deference.[33]

One year after the Eleventh Circuit decided *Bledsoe*, the Ninth Circuit in *Zimmerman v. Oregon Department of Justice*[34] issued a contrary opinion, holding that Title II does not cover employment practices by public entities. The decision contained numerous reasons to support its contention that Congress did not intend for Title II to cover employment discrimination claims, which served as a blue-print for those courts that subsequently followed suit.[35] Subsequently, in *Mary Jo C. v. New York State and Local Retirement System*,[36] *Elwell v. Oklahoma ex rel. Board of Regents of the University of Oklahoma*,[37] *Brumfeld v. City of Chicago*,[38] and *Reyazudding v. Montgomery*

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[29] 133 F.3d 816 (11th Cir. 1998).

[30] *Id.* at 821.

[31] *Id.* at 821-22.

[32] *Id.* at 822 (quoting Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997)).

[33] *Id.* at 822-23.

[34] 170 F.3d 1169 (9th Cir. 1999).

[35] *See* Sánchez-Arroyo v. Dep't of Educ. of P.R., 842 F. Supp. 2d 416 (D.P.R. 2012); Trickey v. Selig, No. 4:12-cv-285-DPM, 2012 WL 3245956 (E.D. Ark. Aug. 8, 2012); Maxwell v. S. Bend Work Release Ctr., 787 F. Supp. 2d 819, 825-26 (N.D. Ind. 2011); Scherman v. N.Y. State Banking Dep't, No. 09 Civ. 2476, 2010 U.S. Dist. LEXIS 26288, at *32 (S.D.N.Y. Mar. 19, 2010); Fleming v. State Univ. of N.Y., 502 F. Supp. 2d 324, 333 (E.D.N.Y. 2007); McSherry v. Dep't of Labor & Indus., No. Civ.A. 1:04-CV-132, 2006 WL 463157 (M.D. Pa. Feb. 23, 2006); Brettler v. Purdue Univ., 408 F. Supp. 2d 640 (N.D. Ind. 2006); Decker v. Univ. of Houston, 970 F. Supp. 575 (S.D. Tex. 1997).

[36] 707 F.3d 144 (2d Cir. 2013)

[37] 693 F.3d 1303 (10th Cir. 2012).

[38] 735 F.3d 619 (7th Cir. 2013).

County,[39] the Second, Tenth, Seventh and Fourth Circuits, relying on similar rationale, solidified the trend that Title II does not cover employment. In reaching their conclusions, these circuit courts, and district courts in circuits that have not conclusively resolved the issue, employed numerous modes of statutory construction to reach their conclusion.

First, courts initially looked to the language of a statute.[40] The language of Title II limiting the scope of coverage to "services, programs or activities" of a public entity references "outputs" of a public entity, not to "inputs" such as employment, as employment is not generally thought of as a service, program or activity.[41] The subsequent clause within Title II, "or be subject to discrimination" clause, cannot be read as distinct from the "services, programs or activities" clause. This is because to prevail on a Title II claim, a plaintiff must establish that he is "otherwise qualified." And Congress defined "otherwise qualified individual with a disability" to mean a person who is able to meet the essential eligibility requirements for the receipt of services or the participation in programs or activities by a public entity.[42] Since the receipt of services does not encompass the retaining of a job and employment is not a program or activity, the definition of a qualified individual with a disability does not relate to someone in the context of employment, but to only the provision of services, programs or activities.[43]

Next, these courts have concluded that even if the wording of Title II was ambiguous, the structure of the ADA clearly demonstrates that Congress did not intend for Title II to apply to discrimination. Congress placed employment specific provisions in Title I, which it labeled "employment," whereas Congress failed to place employment

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[39] 789 F.3d 407 (4th Cir. 2015).

[40] *Id.* at 419; *Brumfeld*, 735 F.3d at 626; *Elwell*, 693 F.3d at 1306; *Zimmerman*, 170 F.3d at 1173.

[41] *Brumfeld*, 735 F.3d at 627-28; *Elwell*, 693 F.3d at 1306; *Zimmerman*, 170 F.3d at 1174; Sánchez-Arroyo v. Dep't of Educ. of P.R., 842 F. Supp. 2d 416, 433 (D.P.R. 2012); Maxwell v. S. Bend Work Release Ctr., 787 F. Supp. 2d 819, 824-25 (N.D. Ind. 2011); McSherry v. Dep't of Labor & Indus., No. Civ.A. 1:04-CV-132, 2006 WL 463157, at *8 (M.D. Pa. Feb. 23, 2006); Decker v. Univ. of Houston, 970 F. Supp. 575, 578 (S.D. Tex. 1997).

[42] *Reyazuddin*, 789 F.3d at 420; *Brumfeld*, 735 F.3d at 627; Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 169 (2d Cir. 2013); *Elwell*, 693 F.3d at 1308; *Zimmerman*, 170 F.3d at 1175; Scherman v. N.Y. State Banking Dep't, No. 09 Civ. 2476, 2010 U.S. Dist. LEXIS 26288, at * 29-30 (S.D.N.Y. Mar. 19, 2010); *McSherry*, 2006 WL 463157, at *10;

[43] *Brumfeld*, 735 F.3d at 628; *Elwell*, 693 F.3d at 1308; *Zimmerman*, 170 F.3d at 1175-76; *Maxwell*, 787 F. Supp. 2d at 825-26; *Brettler*, 408 F. Supp. 2d at 655.

related provisions in Title II.[44] In this vein, the Supreme Court in *Board of Trustees of University of Alabama v. Garrett*[45] suggested in *dicta* that Title I expressly deals with employment while Title II deals with services, programs or activities of a public entity.[46]

Similarly, under Title I, a qualified individual with a disability is a person who is able to work, whereas in Title II Congress defined a "qualified individual with a disability" as one who is eligible to receive services or participate in a program provided by the public entity.[47] Similarly, the concept of "reasonable accommodations" within Title I relates specifically to employment such as restructuring of jobs and making existing facilities accessible to employees with disabilities.[48] On the other hand, Congress failed to reference employment in any way in Title II. Where Congress includes particular language in one part of a statute, but excludes it in another section of the statute, it is generally presumed that Congress acted intentionally when including and excluding the particular words.[49]

Courts also recognize that they must give full effect to each provision of a statute. The Ninth Circuit in *Zimmerman* concluded that "Congress consciously and expressly chose to include the employment practices of state and local governments in Title I. To hold that Title II also governs employment practices would render Congress's special effort to ensure their inclusion in Title I superfluous"[50] or redundant.[51] Courts similarly recognized that not only would permitting Title II employment claims render Title I redundant as to public employees, but such a holding would also eviscerate the procedural requirements of Title I applicable to public employees.[52]

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[44] *Mary Jo C.*, 707 F.3d at 169.

[45] 531 U.S. 356 (2001).

[46] *Id.* at 360.

[47] *Zimmerman*, 170 F.3d at 1176-77.

[48] *Id.* at 1177.

[49] Brumfeld v. City of Chicago, 735 F.3d 619, 628-29 (7th Cir. 2013) (discussing that specific language within Title I governing employment situations that Congress omitted in Title II confirms that Congress wanted to address employment discrimination in Title I only); *Mary Jo C.*, 707 F.3d at 169; *Zimmerman*, 170 F.3d at 1177; Maxwell v. S. Bend Work Release Ctr., 787 F. Supp. 2d 819, 825 (N.D. Ind. 2011).

[50] *Zimmerman*, 170 F.3d at 1177; *see also Mary Jo C.*, 707 F.3d at 170, 171; Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1309 (10th Cir. 2012).

[51] Scherman v. N.Y. State Banking Dep't, No. 09 Civ. 2476, 2010 U.S. Dist. LEXIS 26288, at *32 (S.D.N.Y. Mar. 19, 2010); Brettler v. Purdue Univ., 408 F. Supp. 2d 640, 657 (N.D. Ind. 2006); Decker v. Univ. of Houston, 970 F. Supp. 575, 579 (S.D. Tex. 1997).

[52] *Mary Jo C.*, 707 F.3d at 171; *Elwell*, 693 F.3d at 1310; McSherry v. Dep't of Labor & Indus., No. Civ.A. 1:04-CV-132, 2006 WL 463157, at *11 (M.D. Pa. Feb. 23, 2006).

Courts further concluded that Congress's delegation of regulatory authority also suggests that Congress intended to limit employment claims to Title I only. Congress gave regulatory authority for Title I to the EEOC, but gave the Attorney General regulatory authority for Title II.[53] This is significant because providing regulatory authority to two different executive agencies could result in state and local governments being subject to conflicting regulations.[54] Thus, courts have concluded that Congress's failure to direct the EEOC and the Attorney General to coordinate regulations suggests that Congress did not intend for Title II to cover employment.[55] This is because Congress was aware of how conflicting regulations could create problems. Having given regulatory authority over Title I to the EEOC and Section 504 of the Rehabilitation Act to the Attorney General, Congress directed the EEOC and the Attorney General to develop procedures that avoided duplication of effort *viz-a-viz* enforcement of the statutory provisions. That Congress failed to take steps to avoid duplication of effort *viz-a-viz* enforcement of Title I and Title II suggests Congress never intended for Title II to relate to employment.[56]

Two circuits concluded that congressional action after passage of the ADA supports the conclusion that Congress believed only Title I governed employment claims. In 1992, two years after the passage of the ADA, Congress incorporated Title I standards into the Rehabilitation Act. This constitutes further evidence that Congress believed that employment related provisions were set forth in Title I and not Title II.[57] The Tenth Circuit similarly found it "bizarre" to believe Title II covers employment on the ground that Section 504 covers employment when Section 504 ties its employment cause of action to Title I.[58]

Courts have also found that the different sources of procedural remedies further warrant the conclusion that Title II does not govern employment claims. Titles I and II incorporate their procedural

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[53] *Zimmerman*, 170 F.3d at 1178.

[54] *Mary Jo C.*, 707 F.3d at 170; *Zimmerman*, 170 F.3d at 1178; *Maxwell*, 787 F. Supp. 2d at 826; *Scherman*, 2010 U.S. Dist. LEXIS 26288, at *33; *Brettler*, 408 F. Supp. 2d at 660.

[55] *Zimmerman*, 170 F.3d at 1178; *Maxwell*, 787 F. Supp. 2d at 826; *Brettler*, 408 F. Supp. 2d at 660.

[56] *Zimmerman*, 170 F.3d at 1178; *Maxwell*, 787 F. Supp. 2d at 826.

[57] Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1312 (10th Cir. 2012); *Zimmerman*,170 F.3d at 1180-81.

[58] *Elwell*, 693 F.3d at 1312.

remedies from different statutes: Title I derives its remedial procedures from Title VII while Section 504 of the Rehabilitation Act provides the remedies for Title II violations. Accordingly, a Title I litigant must exhaust administrative remedies while a Title II litigant need not exhaust them. Permitting a public employee to file a Title II employment discrimination claim would permit public employees to bypass the congressionally-intended requirement that such claims first exhaust administrative remedies.[59]

The Ninth Circuit also rejected the argument that because the Rehabilitation Act served as a model for Title II, Congress sought to incorporate the employment provisions of the Rehabilitation Act into Title II. First, Congress did not incorporate the language of the Rehabilitation Act verbatim; it only used similar language. In the Rehabilitation Act, Congress sought to cover "any" program or activity receiving federal financial assistance. The scope of coverage in Section 504 is broader than the coverage of Title II, in which Congress eliminated "any" as the guidepost for the scope of coverage that Congress limited to "services, programs or activities" of a public entity.[60]

Courts have also concluded that the surrounding sections of the Rehabilitation Act relate explicitly to employment whereas no section of Title II does. While ambiguity may have previously existed about the scope of coverage of the Rehabilitation Act, in 1988 Congress amended the Rehabilitation Act to cover all of the activities of entities subject to the Rehabilitation Act. Congress's decision to use a narrower phrase within Title II indicates its intent that Title II was not to be coextensive with the Rehabilitation Act.[61]

Furthermore, several provisions of the Rehabilitation Act specifically contain employment related provisions. Such textual clues demonstrate that Congress intended that the Rehabilitation Act specifically cover employment even in the express absence of the specific mention of employment itself in the statute.[62]

Having gleaned congressional intent through the language, structure and context of the ADA, courts concluded because Congress spoke clearly on the subject, resort to legislative history of the ADA

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[59] *Elwell*, 693 F.3d at 1310; *Zimmerman*, 170 F.3d at 1177-78; *Scherman*, 2010 U.S. Dist. LEXIS 26288, at *32; *Brettler*, 408 F. Supp. 2d at 559.

[60] *Zimmerman*, 170 F.3d at 1181.

[61] *Id.*

[62] *Id.* at 1182.

was not appropriate.[63] For the same reasons, courts determined that they should accord no weight to the Attorney General's regulations.[64]

IV. DEFERENCE TO THE ATTORNEY GENERAL'S INTERPRETATION OF § 12132 IS WARRANTED

The Attorney General has interpreted Title II of the ADA to specifically outlaw employment discrimination by state and local governments. Specifically, the Attorney General has promulgated the following regulation:

> No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.[65]

Well-settled administrative law jurisprudence of *Chevron* deference provides that when Congress passes a statute that contains ambiguity and grants authority to an administrative agency to implement the statute, it is "understood that the ambiguity would be resolved, first and foremost by the agency, and [Congress] desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[66]

Deference to an agency interpretation of a statute is warranted "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[67]

When statutory language gives an agency broad power to enforce all provisions of a statute, a delegation of authority is clear.[68]

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[63] Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 171 (2d Cir. 2013); *Zimmerman*, 170 F.3d at 1181; Fleming v. State Univ. of N.Y., 502 F. Supp. 2d 324, 333 (E.D.N.Y. 2007).

[64] *Mary Jo C.*, 707 F.3d at 171-72; *Elwell*, 693 F.3d at 1313; *Zimmerman*, 170 F.3d at 1173; 1178; *Fleming*, 502 F. Supp. 2d at 333; Scherman, 2010 U.S. Dist. LEXIS 26288, at *33; Maxwell v. S. Bend Work Release Ctr., 787 F. Supp. 2d 819, 826 (N.D. Ind. 2011); *Brettler*, 408 F. Supp. 2d at 660.

[65] 28 C.F.R. § 35.140(a) (2018).

[66] City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 296 (2013) (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996)); *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

[67] Gonzalez v. Oregon, 546 U.S. 243, 255-56 (2006) (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

[68] *Id.* at 258.

For example, language stating that an agency "shall issue regulations . . . to carry out this subchapter" amounts to a congressional delegation of authority to the agency to implement particular statutory subchapter.[69]

Congress clearly gave the Attorney General authority to interpret Title II of the ADA: "Not later than 1 year after [July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle."[70] Accordingly, Congress delegated to the Attorney General the authority to interpret what is encompassed by the antidiscrimination provisions of Title II as set forth in 42 U.S.C. § 12132,[71] as this authorization to implement governing regulations was specifically limited to Title II.[72]

On the other hand, deference to an administrative agency is not warranted when Congress has clearly spoken on the matter at hand.[73] A determination that Congress has spoken clearly on the matter at hand requires that "the legislative history or the purpose and structure of the statute *clearly* reveal a contrary intent on the part of Congress."[74]

However, if Congress has not spoken to the "precise" question at issue, the question for a reviewing court is whether the agency's statutory interpretation "is based on a permissible construction of the statute."[75] A court must give controlling weight to agency regulations unless they are arbitrary, capricious or manifestly contrary to the statute that has directed the agency to fill the legislative gap.[76] If the agency interpretation of a statute is reasonable, a court is to give the interpretation controlling weight even if the court would have interpreted the statute differently.[77]

As detailed below, persuasive authority exists to conclude that Congress intended that Title II cover employment claims. Accordingly, more than enough support exists for the Attorney

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[69] *Id.* at 263 (alteration in original) (quoting 42 U.S.C. § 12116).

[70] 42 U.S.C. § 12134(a) (2018).

[71] *See supra* notes 15-16 and accompanying text.

[72] *See Gonzalez*, 546 U.S. at 263 (limiting authority of agency to only specific provisions within the subchapter that Congress authorized agency to implement).

[73] *See, e.g.*, Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 479 n.14 (1997).

[74] Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 126 (1985) (emphasis added).

[75] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842, 843 (1984).

[76] *Id.* at 842, 843-44.

[77] Region Hosp. v. Shalala, 522 U.S. 448, 457 (1998); United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999).

General's interpretation that Title II protects against employment discrimination.

Accordingly, notwithstanding what courts have said about clearly expressed congressional intent to limit employment discrimination claims to Title I only,[78] Congress has not spoken clearly. Rather, any determination that Congress expressed a clear statutory intent to exclude employment discrimination claims from the protections of Title II is not supportable.

Conclusions that Congress intended to limit employment discrimination claims to Title I have resulted from inferences courts have drawn from the text of Titles I and II.[79] At no time did Congress set forth a clear expression to limit employment claims to Title I, such as "[c]laims of employment discrimination shall be limited to Title I." The absence of such clear statutory language can be contrasted with clearly expressed intent to subject Title II litigants to the remedial provisions of Section 504.[80]

However, by drawing inferences the way they did, courts failed to examine what evidence or other contrary inferences suggested that Congress intended to include employment discrimination claims within Title II. More significantly, the equating of conclusions drawn from inferences as a clear expression of congressional intent resulted in courts justifying their refusal to examine legislative history to help decipher legislative intent.[81] Particularly because a court does not know what one will find when it refuses to look, a court should refuse to examine legislative history only when statutory text is so clear that it can be said that contrary legislative history would amount to a misrepresentation of legislative intent. Particularly, when one examines inferences that can be drawn to support the conclusion that Congress intended that Title II cover employment discrimination claims,[82] courts' failure to examine legislative history was particularly unwarranted.

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[78] *See supra* notes 40-62 and accompanying text.
[79] *See supra* notes 40-56 and accompanying text.
[80] *See supra* notes 15-16 and accompanying text.
[81] *See supra* note 63 and accompanying text.
[82] *See supra* notes 25-32 and accompanying text.

A. The Structure of the ADA Supports the Conclusion That Congress Intended for Title II to Cover Employment Discrimination Claims

The passage of the ADA amounted to a continuation of congressional efforts that began in 1988 to extend existing civil rights coverage to people with disabilities. In so doing, Congress simply developed the structure of the ADA from existing anti-discrimination laws to provide coverage consistent with existing civil rights laws. In 1988, Congress passed the Fair Housing Amendments Act (hereinafter "FHAA") for the purpose of applying to people with disabilities the protections of Title VIII of the Civil Rights Act, which prohibited discrimination in housing. In passing FHAA, Congress drew upon the Rehabilitation Act to serve, in part, as a model.[83]

Two years later, Congress passed the ADA. Title I can be seen as Congress incorporating relevant provisions of both Title VII and the Rehabilitation Act to protect people with disabilities in employment, which strongly suggests that these statutes served as a frame of reference for the scope of Title I.[84] Indeed, Congress's use of Title VII as a reference point for Title I can be seen when Congress explicitly indicated that it did not want to incorporate *en masse* the provisions of Title I.[85] Similarly, Title III of the ADA can be seen as an extension to people with disabilities of the public accommodations provisions of Title II of the Civil Rights Act of 1964.[86]

The framework for Title II of the ADA first developed when Congress passed Title IX of the Civil Rights Act. In passing Title IX, Congress provided that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity

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[83] H.R. REP. NO. 100-711, at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2189.

[84] H.R. REP. NO. 101-485(II), at 54-58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 336-37 (drawing from Section 504 and Title VII in defining terms within Title I of ADA); 42 U.S.C. § 12117 (2018) (applying remedial provisions of Title VII to Title I).

[85] *See* H.R. REP. NO. 101-485(II), at 68 (detailing that it did not want to incorporate into Title I Supreme Court interpretation of Title VII as set forth in in TWA v. Hardison, 432 U.S. 63 (1977), in which the Court held that an employer need not accommodate an employee's religious beliefs if accommodation would require more than a de minimis cost for employer).

[86] *See* 42 U.S.C. § 12188 (applying remedies of Title II of the Civil Rights Act of 1964 to public accommodations provisions of ADA); Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 86 (2d Cir. 2004) (remedies available under Title III of ADA are those that are available under Title II of Civil Rights Act of 1964).

receiving Federal financial assistance."[87] Although Congress passed Title IX for the purpose of prohibiting discrimination in educational institutions, the Supreme Court in *North Haven Board of Education v. Bell*,[88] interpreted "persons" to encompass employees of educational institutions, and not just students.[89]

In so holding, the Court took a position that can be reasonably characterized as erring on the side of expanding the scope of statutory protection. The Court decided to interpret Title IX in a manner consistent with the way other civil rights laws had been interpreted: broadly.[90] It relied in part on legislative history, which revealed that Congress intended for Title IX to cover employment. The Senate version of the bill covered employment; the House version did not. The Conference Committee expressly chose the Senate version, explicitly stating that "[t]he House recedes."[91]

The next part of the relevant statutory history is that Title IX later served as the model for Section 504 of the Rehabilitation Act, which provides as follows:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[92]

Section 504 was critical when Congress drafted the ADA because not only did both promote the similar goal of extending statutory protection to disability status, but Congress used Section 504 as the framework for Title II of the ADA.[93] When Congress passed the ADA, a unanimous Supreme Court in *Consolidated Rail Corp. v. Darrone*[94] had interpreted Section 504 to prohibit all employment discrimination

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87 20 U.S.C. § 1681(a) (2018).

88 456 U.S. 512 (1982).

89 *Id.* at 521, 530.

90 The Court began its analysis by stating that "[t]here is no doubt that 'if we are to give [Title IX] the scope its origins dictate, we must accord it a sweep as broad as its language.'" *Id.* at 521 (second alteration in original) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

91 *Id.* at 528 (quoting S. CONF. REP. NO. 92-798, at 221 (1972); H.R. CONF. REP. NO. 92-1085, at 221 (1972)).

92 29 U.S.C. § 794(a) (2018).

93 *See infra* notes 99-100 and accompanying text.

94 465 U.S. 624 (1984).

by recipients of federal funds.[95] At that time, little questions existed that Section 504 covered employment discrimination as the primary purpose of federal assistance to promote employment. However, the Court in *Darrone* went out of its way to interpret Section 504 to include all discrimination by recipients of federal financial assistance because this broad approach furthered the Rehabilitation Act's remedial purpose of promoting and expanding employment opportunities.[96] The Court further relied on the regulations that enforced Section 504, which prohibited employment by all recipients of federal financial assistance, regardless of the primary purpose of the assistance.[97] Significantly, at no time did the Supreme Court parse the language of Section 504 to decipher the meaning of particular clauses of the statute to interpret the meaning of either "program or activity" or "be subjected to discrimination."[98]

The pertinent language of the ADA's Title II is almost verbatim to Section 504:

> [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 subjected to discrimination by any such entity.[99]

The legislative history of Title II clearly details that Section 504 of the Rehabilitation Act served as the framework for Title II: "Section 202 of the [ADA] legislation extends the nondiscrimination policy in section 504 of the Rehabilitation Act of 1973 to cover all State and local governmental entities."[100]

Those courts that concluded that Title II does not cover employment have relied, at least in part, on rules of statutory construction to support their holding.[101] This reliance is misplaced

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[95] *Id.* at 632.

[96] *Id.* at 634.

[97] *Id.*

[98] *Id.* at 631-37.

[99] 42 U.S.C. § 12132 (2018).

[100] H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367; *see also* S. REP. NO. 101-116, at 42 (1989).

[101] *See, e.g.*, Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 171 (2d Cir. 2013) ("[W]e are required to disfavor interpretations of statutes that render language superfluous." (alteration in original) (quoting Conn. *ex rel.* Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 88 (2d Cir. 2000)); Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1307 (10th Cir. 2012) ("[T]he commonsense can of *noscitur a sociis* . . . counsels

when considering Title II. Rules of statutory construction are, no doubt, logical, commonsense inferences that make sense when a legislative body drafts legislation from scratch. However, in passing the ADA, Congress did not do so.

Rather, the ADA is the kind of statute that one Congressman accused Title IX of the Civil Rights Act as being: a "cut and paste job" from earlier civil rights legislation.[102] When this is understood, the commonsense logic behind the statutory construction rules used by courts to support their interpretation that Title II does not cover employment are no longer as persuasive as they would otherwise be.[103] Rather, rules for construing "cut and paste" statutes, *i.e.*, statutes taken from other statutes, become the operative rules of construction.[104]

Rules of statutory construction provide that the incorporation of virtually identical language for Section 504 into Title II evinced a congressional intent to incorporate the contents of Section 504 as interpreted by *Consolidated Rail Corp.*:

> When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.[105]

Likewise, the "meaning and applicability" of a statute that serves as a framework for another statute is taken as "useful guides" in construing

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that a word is given more precise content by the neighboring words with which it is associated." (alteration in original) (quoting Freeman v. Quicken Loans, Inc., 566 U.S. 624, 634 (2012)); Zimmerman v. Or. Dep't of Just., 170 F.3d 1169, 1177 (9th Cir. 1999) ("[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 of exclusion." (alteration in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

[102] N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 528 (1982); *see also supra* notes 75-90 and accompanying text.

[103] *See infra* notes 108-116 and accompanying text.

[104] Accordingly, the failure of courts to examine legislative history, which would enable courts to place the structure and language of the ADA in its proper context have resulted in courts examining the structure and language of Title II as if Congress drafted the statute from scratch. *See infra* notes 108-16 and accompanying text.

[105] Bragdon v. Abbott, 524 U.S. 624, 645 (1998); *see also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 590 (2010) (copying of same statutory language into another statute supports inference that Congress understood the meaning of law as it had been interpreted); Evans v. United States, 504 U.S. 255, 260 n.3 (1992) (discussing that words transplanted from another statute contains same meaning unless direction to the contrary exists).

the newer statute, at least when the "language and history" of the newer statute suggest an interpretation that is not contrary.[106] Indeed, when particular words in one statute have been interpreted in a particular manner and are then used in a second statute, they "become a term of art" that takes on a particular meaning.[107]

B. The Legislative History of the ADA Also Supports the Attorney General's Interpretation of Title II

In addition to rules of construction for similar statutes, the legislative history further establishes that Congress intended that Title II cover employment. Indeed, as detailed below, resort to legislative history is appropriate when analyzing the scope of the ADA in general and Title II in particular, and whether the Attorney General's interpretation of Title II is reasonable.

Legislative history reveals that Congress first intended to incorporate *in toto* the protections of Section 504 into Title II:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination", as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to *all actions* of state and local governments.[108]

That Congress emphasized that it intended to apply the antidiscrimination protections of Section 504, which included protection against employment discrimination, to all actions of state and local governments, without qualifying this statement in any way, constitutes highly persuasive evidence that Congress sought to incorporate protection against employment discrimination into Title II.

Other parts of Title II's legislative history provide further support for concluding that Congress intended that Title II cover employment. Congress created one significant substantive difference between Section 504 and Title II. Section 504 prohibits discrimination

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[106] *N. Haven*, 456 U.S. at 529.

[107] *See* Sullivan v. Stroop, 496 U.S. 478, 483 (1990) ("[W]here a phrase in a statute appears to have become a term of art, . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning.").

[108] H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 (emphasis added).

solely on the basis of one's disability.[109] Title II prohibits discrimination *by reason* of disability.[110] When making this change, both the House and Senate ensured that individuals interpreting Title II would understand this distinction by explaining why Congress changed "solely" to "by reason of."[111] It is likely that if Congress made a concerted effort to ensure that those interpreting the ADA would understand the significance of the change from "solely" to "by reason of," if Congress also intended the change of the significance of "under any program or activity" in Section 504 to "services, programs or activities" in Title II, Congress would have explained the significance of the change in language.

Next, when Congress attempted to explain how the replacement of "solely" with "by reason of" would impact on what actions would constitute discrimination under Title II, Congress used a hypothetical situation to illustrate how the change of wording would operate on discrimination analysis. Out of a virtually limitless set of hypothetical factual scenarios from which Congress could choose, it chose a case of employment discrimination.[112] This is a strong indication that Congress envisioned Title II covering employment.

When determining whether an agency has reasonably interpreted congressional intent, the Supreme Court has not hesitated to turn to legislative history to decipher legislative intent.[113] In the

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[109] 29 U.S.C. § 794(a) (2018).

[110] 42 U.S.C. § 12132 (2018).

[111] H.R. REP. NO. 101-485(II), at 85-86; *see also* S. REP. NO. 101-116, at 42 (1989).

[112] H.R. REP. NO. 101-485(II), at 85.

[113] *See, e.g.*, Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998); NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO, 484 U.S. 112, 124-25 (1987); Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 126 (1987). Ironically, the Supreme Court's recent criticism of legislative history as a means to decipher congressional intent can just as easily serve as a basis to criticize the failure of courts to use legislative history to decipher congressional intent. The Supreme Court has equated resort to legislative history as "an exercise in 'looking over a crowd and picking out your friends.'" Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S 546, 568 (2005) (quoting Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)). However, resort to the very many rules of statutory construction, the application of which may, as the issue at hand illustrates, yields different results, is itself like picking out your friends in a crowd. If a court is going to attempt to decipher congressional intent, then it may not choose only some modes of analysis, but all modes of statutory interpretation that may help decipher congressional intent. The failure of courts to rely on legislative history has resulted in courts failing to understand the context of the language within Title II. As a result, courts have not applied rules of statutory construction that are most applicable when deciphering the meaning of statutes that have been taken from other statutes. The result has been an interpretation of Title II that is at odds with congressional purpose.

present case, Supreme Court warnings against relying upon legislative history to decipher legislative intent lack applicability.[114] This is because this is not a case in which the legislative history is "murky, ambiguous and contradictory" as to preclude legislative history from becoming a useful tool.[115] Rather, a reading of the entire legislative history of the ADA reveals that there is nothing that calls into question what amounts to clearly expressed intent that Congress wanted to incorporate all the protections of Section 504 into Title II and not limit employment discrimination claims to Title I only.[116]

C. In Light of the Structure of the ADA and its Legislative History, Courts' Conclusions that Congress has Clearly Expressed an Intent to Exclude Employment Discrimination Claims for Title II are Particularly Lacking in Merit

Decisions of the courts that have found that Congress clearly expressed an intent to limit employment discrimination claims to Title I, which justifies a rejection of the Attorney General's regulations, cannot withstand scrutiny. As noted, courts first found that the text, language and structure of the ADA evinced a congressional intent for only Title I to cover employment discrimination.[117]

When analyzing the text and structure, the Second Circuit reasoned that a statute's titles and headings can serve as a tool of statutory intent.[118] Title I directly covers "Employment" whereas Title II covers "Public Services."[119] The *dicta* in *Board of Trustees of the University of Alabama v. Garrett*[120] buttresses the Second Circuit's conclusion that the respective titles serve as a reliable tool of statutory intent: "'Title I of the ADA expressly deals with th[e] subject' of

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114 *See Exxon Mobil Corp.*, 545 U.S. at 567-69.

115 *Id.* at 568.

116 *See generally* H.R. REP. NO. 101-485(II); S. REP. NO. 101-116.

117 The issue of whether Congress clearly expressed an intent to limit employment actions to Title I has been relevant not only to the issue of whether the regulations of the Attorney General are entitled to deference but also whether congressional intent is so clear as to warrant a refusal to examine legislative history to decipher congressional intent. *See* Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 168-69 (2d Cir. 2013); Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1307 (10th Cir. 2012); Zimmerman v. Or. Dep't of Just., 170 F.3d 1169, 1173-74 (9th Cir. 1999).

118 *Mary Jo C.*, 707 F.3d at 169.

119 *Id.*

120 531 U.S. 356 (2001).

employment discrimination, whereas Title II 'deal[s] with the "services, programs or activities of a public entity."'"[121] This suggests that Congress did not intend for Title II to cover employment discrimination because where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress intentionally omitted the disparate inclusion or exclusion.[122]

This rationale lacks merit. First, at no time did any of the parties in *Garrett* brief the issue of whether Title II covers employment discrimination and the Supreme Court did not come remotely close to addressing this question.[123] Accordingly, to say that Title I directly deals with discrimination while Title II deals with services, programs or activities of a public entity is to both state the obvious while begging the questions of what constitutes "activities" and what is the scope of the clause that provides that no qualified individual shall "be subjected to discrimination."

To find clearly expressed congressional intent to limit employment to Title I only, courts have reasoned that Congress defined a "qualified individual" in Title I in terms of employment while it defined "qualified individual" in Title II as someone who meets the essential eligibility requirements for receipt of services or participation in programs or activities provided by a public entity.[124] This does not justify limiting employment cases to Title I only because "activities" encompass employment, as the Supreme Court expressly recognized in *North Haven*, and implicitly recognized in *Consolidated Rail Corp.* Hence, courts should define "qualified individual" in Title II consistent with this interpretation. Indeed, doing so harmonizes the definition of "qualified individual" in Title II and Title I.

Nor can the specific language in the ADA support a conclusion that Congress expressly intended that only Title I cover employment. First, nowhere in Title I, Title II, or any place else in the ADA did

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[121] *Mary Jo C.*, 707 F.3d at 169 (alteration in original) (quoting *Garrett*, 531 U.S. at 360 n.1).

[122] *Id.*; *Elwell*, 693 F.3d at 1309-10.

[123] *See generally Garrett*, 531 U.S at 356; Brief for Petitioners, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2000) (No. 99-1240), 2000 WL 821035; Brief for the Respondents Patricia Garrett and Milton Ash, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2000) (No. 99-1240), 2000 WL 1593420.

[124] *Mary Jo C.*, 707 F.3d at 169; *Elwell*, 693 F.3d at 1308; Zimmerman v. Or. Dep't of Just., 170 F.3d 1169, 1175 (9th Cir. 1999); Scherman v. N.Y. State Banking Dep't, No. 09 Civ. 2476, 2010 U.S. Dist. LEXIS 26288, at *29-30 (S.D.N.Y. Mar. 19, 2010); McSherry v. Dep't of Lab. & Indus., 2006 WL 463157, at *10 (M.D. Pa. Feb. 23, 2006).

Congress use words such as "only" or "exclusively" in reference to the coverage of employment in Title I. Accordingly, those courts that have found the language of the ADA to support its conclusion that only Title I covers employment have had to draw inferences from the language of Title II; inferences that are also not supportable when examined closely.

To illustrate, in finding "services," "programs," and "activities" are normally considered "outputs," the Ninth Circuit posited the following questions that someone might ask a Parks Department employee: what are the services, programs and activities of the Parks Department? Likewise, the employee might ask a citizen inquiring about department activities, what are the services, programs or activities of the Parks Department in which you want to participate?[125] The court reasoned that an individual might answer "I want to participate in the Wednesday night basketball league."[126] However, activities are necessarily considered "outputs" only when viewed from the perspective of an outsider: one who seeks the benefits that result from the provision of services and programs that the government offers to the public at large. An equally valid hypothetical question that the Ninth Circuit could have posed might have been from the assistant to the Parks Department supervisor who asked his boss the following: "what are you doing today?" A typical response might be "I'm interviewing some people who want to be hired as referees for the Wednesday night basketball league" or "I'm meeting with the union representative."

The Ninth Circuit also rejected the applicability of *Consolidated Rail Corp.* on the ground that the language of Section 504 is broader than the language in Title II. The court reasoned that Section 504 prohibits discrimination "*under any program or activity receiving Federal financial assistance*," whereas Title II prohibits discrimination "in . . . the services, programs or activities of a public entity."[127] The court's attempt to justify this distinction does not stand up.

The court emphasized that by prohibiting discrimination in *any* program or activity, Congress sought to provide the same broad coverage in Section 504 that it provided in Title IX. However, in passing Title II, Congress limited the prohibition against

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[125] *Zimmerman*, 170 F.3d at 1174.

[126] *Id.*

[127] *Id.* at 1181 (alteration in original).

discrimination by public entities to services, programs and activities, which the court concluded was an "outward-looking focus."[128] However, if services, programs and activities are outward-looking in nature, why doesn't the clause "any program or activity" in Section 504 have the same outward-looking focus? Does the word "any" change the content of what is encompassed by "program or activity" in Section 504? The answer is, more likely than not, "no." More importantly, it can be said beyond doubt that the answer is not so clear as to justify not examining legislative history or simply recognizing that the Attorney General's interpretation of Title II is reasonable.

Likewise, the Tenth Circuit's attempt in *Elwell* to rely on the language of Title II to conclude that it does not cover employment is also subject to second-guessing. The court concluded if "activities" encompassed outputs such as employment, then such an interpretation would eat up the words "services" and "programs" and render them superfluous. The court reasoned that an interpretation of "activities" contravenes the principle of statutory construction that courts should not construe words as to render them superfluous.[129]

Numerous reasons exist why the Tenth Circuit's analysis can be subject to criticism. First, the Tenth Circuit failed to recognize that when confronted with the meaning of "program or activity" within Title IX, the Supreme Court interpreted both words in tandem to encompass employment.[130] Moreover, no one can seriously dispute that in passing Title II (and Section 504 of the Rehabilitation Act), Congress wanted to subject services, programs *and* activities to the constraints of Title II.[131] That Congress provided that Title II (as well as Section 504 of the Rehabilitation Act) prohibits public entities from excluding from participation or denying the benefits of "services, programs or activities"[132] suggests that Congress attempted to ensure broad coverage by adopting language that incorporated overlapping, if not interchangeable, concepts. This would enable courts to understand that Title II, having incorporated the protections of Section 504, which

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[128] *Id.*

[129] *Elwell*, 693 F.3d at 1307.

[130] *See supra* note 89 and accompanying text.

[131] S*ee, e.g.*, H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 (stating that Title II "simply extends the anti-discrimination prohibition embodied in section 504 to *all* actions of state and local governments" (emphasis added)).

[132] 42 U.S.C. § 12132 (2018).

in turn, incorporated the protections of Title IX, would cover any and all actions by a covered entity.

Nor does the requirement that a Title I litigant must exhaust administrative remedies necessarily support the inference that Congress could not have intended for Title II to cover employment because it permitted Title II litigants to avoid exhausting administrative remedies.[133] This rationale assumes that Congress imposed the exhaustion requirement to limit prompt access to the courts or otherwise impose a procedural hurdle for litigants raising employment claims. When Congress passed Title VII, this was not the case. Rather, Congress enacted the enforcement mechanisms of Title VII to strengthen the ability of the EEOC to reduce discrimination in the workplace.[134] A comparatively brief statute of limitations period for any employment claim enhances the ability of the EEOC to investigate and remedy claims of discrimination. The short limitations period prevents evidence from becoming stale or otherwise difficult to gather; a necessity for any agency charged with remedying discrimination nationwide.

On the other hand, the brief limitations period significantly weakens one purpose of the ADA: to provide a clear and comprehensive mandate to eliminate discrimination.[135] The shorter limitations period will enable state and local governments to escape liability when a plaintiff fails to meet the shorter limitations, which in turn weakens the deterrent aspect of an otherwise available damages remedy.[136]

Nor does the conclusion that interpreting Title II to authorize employment would render provisions of Title I superfluous or redundant[137] serve as persuasive authority for the conclusion that Congress did not intend for Title II to cover employment discrimination. The Supreme Court "has [repeatedly] recognized that Congress has provided a variety of remedies, at times overlapping, to

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[133] *Elwell*, 693 F.3d at 1310; *Zimmerman*, 170 F.3d at 1177-78; Scherman v. N.Y. State Banking Dep't, No. 09 Civ. 2476, 2010 U.S. Dist. LEXIS 26288, at *32 (S.D.N.Y. Mar. 19, 2010); Brettler v. Purdue Univ., 408 F. Supp. 2d 640, 659 (N.D. Ind. 2006).

[134] H.R. REP. NO. 92-238, at 3 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2138.

[135] 42 U.S.C. § 12101(b) (2018).

[136] *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 651 (1980).

[137] *Zimmerman*, 170 F.3d at 1177 (emphasis added); *see also Mary Jo C.*, 707 F.3d at 171; *Elwell*, 693 F.3d at 1309; *Scherman*, 2010 U.S. Dist. LEXIS 26288, at *32; *Brettler*, 408 F. Supp. 2d at 657; Decker v. Univ. of Houston, 970 F. Supp. 575, 579 (S.D. Tex. 1997).

eradicate employment discrimination."[138] The rule of statutory construction that a court should interpret statutes to avoid redundancies and superfluous provisions is built on the assumption that it is illogical for a legislative body to create duplicate measures in a statute. Recognizing that Congress has in the past provided overlapping remedies to combat employment discrimination refutes this assumption. It is not illogical for Congress to err on the side of overlapping provisions in order to ensure that some individuals that Congress seeks to protect do not fall through unforeseen legislative cracks. Or, as is likely the case with the ADA, Congress need not take the time to fine tune a statute when it can accomplish its goals through broad legislative strokes that are overlapping, specifically incorporating significant portions of Title VII and Section 504 into the ADA.

Finally, courts have relied on Congress, two years after passage of the ADA, incorporating the standards of Title I into the Rehabilitation Act.[139] Under these circumstances, courts have deemed it is "bizarre" to find an employment discrimination cause of action in Title II on the ground that Title II is tied to the Rehabilitation Act when the Rehabilitation Act ties itself to Title I.[140] It is not bizarre at all.

As noted, Congress adopted Section 504 from Title IX; both statutes contained broad language but without detailed standards.[141] As Congress wanted to make Section 504 less amorphous by adding standards to govern judicial decision-making, the one statute covering disability discrimination that contained standards was the only logical choice for Congress to draw upon. It does not mean that a different Congress could not have intended to incorporate the provisions of Section 504 into Title II. Subsequent congressional action cannot justify refusing to examine legislative history.

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[138] N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 n.26 (1982).

[139] Reyazuddin v. Montgomery Cty., 789 F.3d 407, 421 (4th Cir. 2015); *Elwell*, 693 F.3d at 1312; *Zimmerman*, 170 F.3d at 1178.

[140] *Elwell*, 693 F.3d at 1312; *Zimmerman*, 170 F.3d at 1183.

[141] *See supra* notes 88-98 and accompanying text.

D. Employment Discrimination Claims Under Title II are not Subject to the Exhaustion of Remedies Requirement

Depending on how one interprets a relevant regulation, 28 C.F.R. § 35.130(b), granting deference to the Attorney General's regulations governing employment discrimination under Title II, has the potential for creating a pyrrhic victory only for litigants. This regulation provides that if a public entity is subject to the jurisdiction of Title I, the regulations of the EEOC set forth in 29 C.F.R. Part 1630 "apply to employment in any service, program, or activity conducted by a public entity."[142] As detailed below, it is unclear whether this regulation requires exhaustion of administrative remedies.

The provisions within 29 C.F.R. Part 1630 implement Title I of the ADA. Part 1630 contains provisions relating to the rights and remedies provision of Title I as set forth in 42 U.S.C. § 12117. However, the regulations contain substantive content only. Specifically, Part 1630 contains provisions relating to (1) the definition of "disability,"[143] (2) the exclusion from coverage of individuals "currently engaged in the illegal use of drugs,"[144] (3) what constitutes discrimination and other prohibited activity under the ADA,[145] (4) defenses available to entities subject to Title I,[146] and (5) conduct specifically permitted under Title I.[147]

One can argue that since Part 1630 implements Title I of the ADA, its incorporation into Title II pursuant to 28 C.F.R. § 35.140(b) incorporates the exhaustion of remedies requirement of Title I.[148] On the other hand, one can also argue that since the regulations relate to the substantive contents of Title I only, the incorporation of these regulations into Title II pursuant to 28 C.F.R. § 35.140(b) results in the incorporation of these specific provisions, which relate to issues of liability. These regulations do not directly address remedial provisions of which the exhaustion of remedies requirement is a part.

Ultimately, this is a moot point because an interpretation of section 35.140(b) requiring the exhaustion of administrative remedies

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142 28 C.F.R. § 35.140(b) (2018).

143 29 C.F.R. § 1630.2 (2018).

144 *Id.* § 1630.3.

145 *Id.* §§ 1630.4-1630.13.

146 *Id.* § 1630.15.

147 *Id.* §§ 1630.14, 1630.16.

148 *See supra* note 12 and accompanying text.

expressly contravenes 42 U.S.C. § 12133. As noted, an agency is entitled to deference only when legislative gaps create statutory ambiguity.[149] On the other hand, "when a statute speaks clearly to the issue at hand" a court "must give effect to the unambiguously expressed intent of Congress."[150]

In section 12133, Congress clearly provided that litigants raising claims of discrimination pursuant to Title II shall be subject to the administrative procedures governing Section 504 of the Rehabilitation Act: "[t]he remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."[151] Accordingly, section 12133 speaks to the "precise question at issue."[152] Hence, the ADA precludes interpreting 28 C.F.R. § 35.140(b) as requiring litigants to exhaust administrative remedies.[153] Such a reading contravenes congressional intent. Accordingly, while the ambiguous nature of section 12132 requires deference to the Attorney General, the unambiguous nature of section 12133 warrants a refusal to defer to the Attorney General if the Attorney General's regulations are interpreted to require the exhausting of remedies.[154]

V. CONCLUSION

Courts that have concluded that a litigant may not bring an employment discrimination claim against a public entity under Title II of the ADA have erred because they have failed to give deference to

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[149] *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[150] Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (quoting *Chevron*, 467 U.S. at 843); *see also* Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (same).

[151] 42 U.S.C. § 12133 (2018).

[152] *Chevron*, 467 U.S. at 842; *see also* Gen. Dynamics Land Sys., Inc., v. Cline, 540 U.S. 581, 600 (2004) (explaining that *Chevron* deference to agency statutory interpretation is warranted "only when devices of judicial construction have been tried and found to yield no clear sense of congressional intent").

[153] *See also supra* note 18 and accompanying text; 28 C.F.R. § 41.5 (2018) (adopting enforcement procedures of Title VI of the Civil Rights Act of 1964). Title VI does not require the exhaustion of administrative remedies. *See* Freed v. Consol. Rail Corp., 201 F.3d 188, 191 (3d Cir. 2000).

[154] *See Chevron*, 467 U.S. at 843 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

the Attorney General's regulations that authorize such under Title II. These courts have inappropriately applied rules of statutory construction to improperly conclude that Congress expressly intended to limit employment discrimination claims to Title I. Congress did not so intend as a proper application of statutory construction rules and the ADA's legislative history strongly suggest that Congress intended to incorporate the contents of Section 504 into Title II. More significantly, Title II is an ambiguous statute as to which Congress authorized the Attorney General to promulgate administrative regulations governing its implementation. For this reason, and consistent with *Chevron* and its progeny, the Attorney General's regulation extending Title II protection to employment discrimination claims is entitled to deference. The Attorney General's interpretation of Title II is more than reasonable. A reading of the legislative history of Title II and rules for statutory construction applicable to Title II establishes that if the Supreme Court was to address this issue *de novo*, a conclusion that Congress intended to subject employment discrimination by state and local governments to Title II is more warranted than a finding that Congress did not.

In properly formulating this remedial avenue, it is important to recognize that any employment discrimination claim pursuant to Title II is not subject to an exhaustion of remedies requirement. Congress clearly intended that Title II litigants need not exhaust administrative remedies. Accordingly, any regulation that may require exhaustion is not entitled to deference and is not valid. Hence, if interpreted correctly, Title II should enable public employees whom the ADA protects to benefit from the longer limitations period of Title II.