

No. 17-15092-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES SILBERMAN,

Plaintiff-Appellant

v.

MIAMI-DADE TRANSIT AGENCY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF
NEITHER PARTY URGING THE COURT TO VACATE THE DISMISSAL
ORDER AND REMAND

JOHN M. GORE
Acting Assistant Attorney General

THOMAS E. CHANDLER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – RFK 3726
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

Charles Silberman v. Miami-Dade Transit Agency, No. 17-15092-JJ

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus certifies that, in addition to those listed in the certificate filed by plaintiff-appellant in his opening brief docketed on March 28, 2018, the following persons may have an interest in the outcome of this case:

1. Chandler, Thomas E., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Gore, John M., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Kwong, Teresa, U.S. Department of Justice, Civil Rights Division, counsel for the United States.

s/ Teresa Kwong
TERESA KWONG
Attorney

Date: April 4, 2018

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STATEMENT OF INTEREST

The United States files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a). This case presents questions regarding the proper application of Eleventh Amendment immunity to Title II of the Americans with Disability Act of 1990 (Title II), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, in the context of access to public transportation. The United States often participates in Eleventh Amendment cases

as intervenor under 28 U.S.C. 2403(a) to defend the constitutionality of federal statutes. Here, we are proceeding as amicus because the district court failed to consider whether this case could be decided on non-constitutional grounds and, in any event, did not address the merits of whether Congress had constitutional authority under the Americans with Disabilities Act (ADA) to abrogate Eleventh Amendment immunity. The United States has an interest in the proper application of the Eleventh Amendment to federal statutes, including by ensuring that courts first consider non-constitutional grounds, and therefore has a substantial interest in the resolution of this appeal.

STATEMENT OF THE ISSUE

The United States addresses the following issue:

Whether the district court erred in dismissing plaintiff's Title II claim on the basis of Eleventh Amendment immunity.

STATEMENT OF THE CASE

1. Plaintiff-appellant Charles Silberman is an individual with disabilities who requires the aid of a service animal. Doc. 1, at 2, 4.¹ Appearing pro se, he alleges that defendant Miami-Dade Transit (MDT) discriminated against him based on his disability when MDT bus drivers either prevented him from boarding a

¹ "Doc. __, at __" refers to the docket entry number and relevant page number(s) of documents filed in district court.

MDT bus, or intentionally passed him at a bus stop, because he had a service dog. Doc. 1, at 5-8. Silberman asserts that MDT failed to train its bus drivers properly and denied him transportation services based on his disability in violation of Title II and Section 504. Doc. 1, at 8-11. Silberman seeks declaratory relief and compensatory damages (but not injunctive relief). Doc. 1, at 9, 11.

MDT moved to dismiss, arguing that it was not a proper defendant because it does not have the capacity to be sued under state law. Doc. 11. Rather, MDT argued that Miami-Dade County (County) is the proper defendant. Doc. 11, at 6-7. MDT also argued that the Title II claim is barred by sovereign immunity under Florida law. Doc. 11, at 7-9.²

In his response, Silberman agreed that he sued the wrong defendant and that the County is the correct defendant. Doc. 14, at 5. Silberman also responded that, because he was suing under federal law, sovereign immunity under state law is irrelevant; rather, the question is whether Congress, in enacting the ADA, validly abrogated States' Eleventh Amendment immunity. Doc. 14, at 2. MDT replied, in

² MDT further argued that both Silberman's claims fail because his allegations do not connect MDT with any wrongdoing. Doc. 11, at 4-6. With respect to the Section 504 claim, MDT argued that: (1) Silberman failed to allege the specific program in which he participated that received federal funds; (2) Silberman is not entitled to damages because he failed to adequately allege intentional discrimination; and (3) Silberman lacks standing to seek declaratory relief because the service animal named in the complaint died, and he makes no allegation of discrimination involving his current service animal. Doc. 11, at 5-6, 9-11. This brief does not address these issues.

part, that it had no objection to the court substituting the County as defendant. Doc. 17, at 3.

2. Without conducting a hearing, the magistrate judge recommended denying in part and granting in part MDT's motion to dismiss. Doc. 24.

First, the magistrate judge determined that the County, not MDT, is the proper defendant. Doc. 24, at 9-10. He therefore recommended dismissal of the case without prejudice to permit Silberman to file an amended complaint naming the County as the defendant. Doc. 24, at 10.

Second, the magistrate judge rejected MDT's argument that Silberman's claims were barred under Florida's sovereign immunity doctrine, explaining that Silberman brought his claims under federal law, not state law, and therefore "the analysis of whether MDT is immune from this action is based on the Eleventh Amendment to the United States Constitution." Doc. 24, at 11.

Third, turning to that issue, the magistrate judge recognized that the Eleventh Amendment applies "only to the state itself" and entities that act as an arm of the State. Doc. 24, at 12 (citation omitted). But the magistrate judge did not further address whether the County—which agreed it was the proper defendant—was an arm of the State. Rather, the magistrate judge concluded that the Eleventh Amendment barred Silberman's ADA claim because the Eleventh Amendment is an absolute bar to suit by an individual against a State or its

agencies in federal court absent waiver or valid abrogation by Congress. Doc. 24, at 12-14. The magistrate judge further reasoned that Congress's power to abrogate States' Eleventh Amendment immunity from Title II claims extends only to conduct that violates the Fourteenth Amendment. Doc. 24, at 13 n.5. Accordingly, the magistrate judge concluded that, because the complaint does not allege constitutional violations, he would "not address this exception to Eleventh Amendment immunity." Doc. 24, at 13 n.5.

The magistrate judge then addressed whether Silberman's Title II claim fell within the *Ex parte Young* doctrine, which allows courts to issue injunctive relief against state officials to conform their future conduct to federal law. Doc. 24, at 13. He concluded that it did not because, in part, Silberman seeks only retrospective relief, *i.e.*, compensatory damages. Doc. 24, at 13-14. Accordingly, the magistrate judge recommended that the district court dismiss Silberman's ADA claim with prejudice. Doc. 24, at 15. Because the magistrate judge found that sovereign immunity barred the ADA claim, he did not address whether the complaint stated a claim under Title II. Doc. 24, at 15 n.8.

Fourth, the magistrate judge concluded that the Eleventh Amendment did not bar Silberman's Section 504 claim because the complaint adequately alleged that MDT receives federal funding, and Congress conditioned acceptance of federal funding on a waiver of sovereign immunity to suit under Section 504. Doc.

24, at 15-16. Nevertheless, the magistrate judge recommended that the court dismiss the Section 504 claim without prejudice because Silberman did not adequately allege intentional discrimination, a prerequisite for compensatory damages under Section 504. The magistrate judge recommended, however, that the court allow Silberman to file an amended complaint seeking damages on his Section 504 claim. Doc. 24, at 19-20.

Finally, the magistrate judge concluded that Silberman lacked standing to seek equitable relief because the service dog named in the complaint died, thereby eliminating the possibility that Silberman would be denied bus transportation for traveling with that dog. Doc. 24, at 18-19.

3. The district court adopted the magistrate judge's recommendations without elaboration. Doc. 28. The court: (1) dismissed the complaint because MDT is not a proper defendant, with leave to amend; (2) dismissed the Title II claim with prejudice as barred by the Eleventh Amendment; (3) dismissed the Section 504 claim, with leave to amend to include more specific allegations of intentional discrimination to support a claim for compensatory damages; and (4) dismissed Silberman's claims for equitable relief with prejudice for lack of standing. Doc. 28, at 2.

Instead of amending his complaint, Silberman filed a motion for reconsideration. Doc. 29. The court denied the motion and closed the case, stating

that Silberman failed to show either newly-discovered evidence or manifest errors of law or fact. Doc. 35.

4. On November 14, 2017, Silberman filed a notice of appeal from the order denying his motion for reconsideration. Doc. 36. Because he did not amend his complaint in the district court to substitute the County as defendant, he filed a motion asking this Court to do so. This Court ordered that the motion be “carried with the case.” Silberman continues pro se on appeal.

SUMMARY OF ARGUMENT

The district court erred in dismissing Silberman’s Title II claim on the basis of Eleventh Amendment immunity without first determining whether that issue could be avoided on non-constitutional grounds. Under the doctrine of constitutional avoidance, the district court should have addressed at least two threshold issues before reaching the constitutional question: (1) whether the County is an arm of the State that may invoke Eleventh Amendment immunity in the first place; and (2) whether the County received federal financial assistance and therefore is subject to liability under Section 504 in any event. Resolution of either of these issues might have obviated the need to address the constitutional question. If the County is not an arm of the State, Eleventh Amendment immunity does not bar Silberman’s lawsuit. If the County received federal financial assistance, the case can be resolved under Section 504.

The district court resolved this case at the motion to dismiss phase, without addressing, or even receiving briefing, on whether Title II is valid enforcement legislation within Congress's power under Section 5 of the Fourteenth Amendment in the context of access to public transportation. Accordingly, the Court should vacate the judgment and remand the case to allow the district court to address the threshold issues, and the Court should not address the question of Title II's abrogation of Eleventh Amendment immunity in the first instance.

If, after properly applying the doctrine of constitutional avoidance and addressing the threshold issues, the district court determines that it must address the constitutional question, it must apply the correct legal standard to do so. The district court's suggestion that Title II can abrogate Eleventh Amendment immunity only with respect to conduct that violates the Constitution is legally erroneous. The district court should instead apply the governing decisions of this Court and the Supreme Court if it reaches that question on remand.

ARGUMENT

THIS COURT SHOULD VACATE THE DISMISSAL OF THE TITLE II CLAIM AND REMAND FOR THE DISTRICT COURT TO CONSIDER NON-CONSTITUTIONAL GROUNDS FOR AVOIDING THE QUESTION OF ELEVENTH AMENDMENT IMMUNITY

The district court's dismissal of Silberman's Title II claim rests on a premature and incorrect analysis of Congress's power to abrogate States' Eleventh Amendment sovereign immunity. But this Court should not address the abrogation

issue in the first instance. The magistrate judge (and district court) did not address whether Title II is valid enforcement legislation within Congress's power under Section 5 of the Fourteenth Amendment in the context of access to public transportation, and the parties did not brief this issue below. Rather, the Court should vacate and remand for the district court to consider non-constitutional grounds upon which to avoid the County's assertion of Eleventh Amendment immunity before addressing the constitutional question of abrogation.³

A. *The District Court Erred In Considering Whether Title II Is A Legitimate Exercise Of Congress's Power To Abrogate States' Eleventh Amendment Immunity Without First Determining Whether The Case Could Be Resolved On Non-Constitutional Grounds*

The doctrine of constitutional avoidance directs that "prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). This is because "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

³ We note that we addressed the proper analysis of Eleventh Amendment immunity claims in the context of Title II in *Freyre v. Gee*, No. 17-11231, which is currently pending before this Court. See U.S. Br. as Intervenor, *Freyre v. Gee*, No. 17-11231 (filed Oct. 13, 2017).

The district court failed to adhere to this well-established rule here. At a minimum, the district court should have considered two threshold issues, each of which may have obviated the need to address the constitutional question of Title II's abrogation of Eleventh Amendment immunity: (1) whether the County is an arm of the State; and (2) whether the County received federal financial assistance and therefore is subject to liability under Section 504. Because this appeal arises in the context of a motion to dismiss, and the district court did not address these possible grounds for avoiding the constitutional issues, the Court should vacate the judgment and remand the case to allow the district court to address these grounds in the first instance.

1. The district court should not reach the constitutional question unless it first determines that the County is an arm of the State entitled to invoke Eleventh Amendment immunity. It is well-settled that Eleventh Amendment immunity from suit is available only to States and arms of the State, including state agents and instrumentalities. As the Supreme Court has explained, the Eleventh Amendment bars suits in federal court in which a "State or one of its agencies or departments is named as the defendant." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); see also *Black v. Wigington*, 811 F.3d 1259, 1269 (11th Cir. 2016); *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc), cert. denied, 540 U.S. 1107 (2004).

Although the magistrate judge recognized this rule, neither the magistrate judge nor the district court ever addressed whether the County is an arm of the State. See Doc. 24, at 12. This question may be dispositive of the County's assertion of Eleventh Amendment immunity: as a general matter, political subdivisions of a State, including counties, are not States or agencies or departments of a State entitled to that immunity. See, e.g., *Pennhurst State Sch. & Hosp.*, 465 U.S. at 123 n.34. Although it is conceivable that some counties are unique and may be considered an arm of the State, the County here has not asserted that it is an arm of the State. And this Court has repeatedly held that Eleventh Amendment immunity "does not * * * extend to counties, municipal corporations, or similar political subdivisions of the state." *Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 768 (11th Cir. 2014); *Stewart v. Baldwin Cty. Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990) (same). Thus, in *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298, 1314 (11th Cir. 2005), for example, the Court held that the Eleventh Amendment did not bar the plaintiff's federal claims against a Florida county because "controlling law makes it abundantly clear that the County enjoys neither Eleventh Amendment nor state law sovereign immunity" from federal-law claims.

In order to determine whether a county acts as an arm of the State, federal courts, including this one, have looked to the following four factors: (1) how state

law defines the entity; (2) the degree of control the State maintains over the entity; (3) the source of the entity's funds; and (4) who bears responsibility for judgments against the entity. See *Manders*, 338 F.3d at 1309 (setting forth four-part test); see also *Stanley v. Israel*, 843 F.3d 920, 924 (11th Cir. 2016). If the district court concludes that the County is not an arm of the State under the *Manders* test, the County cannot invoke Eleventh Amendment immunity against Silberman's Title II claim, and that ends the matter. See also *Alden v. Maine*, 527 U.S. 706, 756 (1999).

2. The district court also should not consider the constitutional question if it concludes, as Silberman alleges in his complaint, that the County received federal financial assistance and therefore is subject to liability under Section 504 of the Rehabilitation Act. In *Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003), this Court confirmed that a public entity that receives federal financial assistance waives its immunity from private suits under Section 504 because the statute unambiguously conditions the receipt of such assistance on a State's waiver of immunity. See 42 U.S.C. 2000d-7(a)(1). The accessibility mandates of Section 504 are coextensive with those provided by Title II. See, e.g., *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 379 (5th Cir. 2016), cert. denied, 137 S. Ct. 2198 (2017). Thus, if the County received federal financial assistance, the district court can resolve this case on Section 504 grounds

and avoid the constitutional question of the validity of Title II's abrogation of sovereign immunity. *Ibid.* (declining to reach Title II abrogation issue given Section 504 claim and defendant's acknowledgement that it receives federal funding).

B. The District Court Should Apply The Correct Legal Standard In Addressing Any Eleventh Amendment Immunity Question Properly Before It

For the reasons explained above, the Court should vacate the judgment and remand the case to allow the district court to apply the doctrine of constitutional avoidance and address the threshold issues, and the Court should not address the question of Title II's abrogation of Eleventh Amendment immunity in the first instance. See pp. 9-13, *supra*. If—after properly applying the doctrine of constitutional avoidance and resolving threshold issues—the district court ultimately concludes that it must address the Eleventh Amendment question, it must apply the appropriate legal standard to do so. At least one aspect of the district court's analysis suggests that it misunderstood the governing law on abrogation of Eleventh Amendment immunity, so we set out that law below.

In particular, the district court suggested that the Eleventh Amendment barred Silberman's Title II claim because he failed to allege conduct that violated the Fourteenth Amendment. See Doc. 24, at 13 n.5. This suggestion that Congress can abrogate States' Eleventh Amendment immunity *only* for Title II violations that also constitute an independent violation of the Fourteenth Amendment is

simply incorrect. It therefore underscores that vacatur and remand are appropriate here.

Congress may abrogate a State's Eleventh Amendment immunity when it makes its intent to do so unmistakably clear in the language of the statute, and acts under an express grant of constitutional authority. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). There is no dispute that Congress unequivocally expressed its intent to abrogate States' sovereign immunity in the ADA. 42 U.S.C. 12202; see also *United States v. Georgia*, 546 U.S. 151, 154 (2006). Thus, the only question is whether Congress's abrogation of Eleventh Amendment immunity, when applied to Silberman's Title II claim for access to public transportation, is a constitutional exercise of an express grant of constitutional authority. See *Hibbs*, 538 U.S. at 726.

Section 5 of the Fourteenth Amendment expressly grants Congress the authority to enforce the Amendment's substantive guarantees through "appropriate legislation." See *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Any such legislation must be remedial rather than "make a substantive change in the governing law." *Id.* at 519. To be sure, Congress may exercise its Section 5 grant of authority to provide statutory remedies for constitutional violations. See *ibid.*; see also *Georgia*, 546 U.S. at 158 ("[N]o one doubts that § 5 grants Congress the power to enforce the provisions of the [Fourteenth] Amendment by creating private

remedies against the States for actual violations of those provisions.”) (internal quotation marks, ellipsis, and emphasis omitted).

But Congress also has the authority to go further, and to remedy and deter violations of Fourteenth Amendment rights “by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Hibbs*, 538 U.S. at 727 (quoting *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001)). In other words, Section 5 enables Congress to pass “prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” *Id.* at 727-728; accord *Tennessee v. Lane*, 541 U.S. 509, 518 (2004).

Moreover, in the context of Title II, the validity of Congress’s abrogation of Eleventh Amendment immunity “depend[s] upon the nature of the ADA claim.” *Babcock v. Michigan*, 812 F.3d 531, 534 (6th Cir. 2016). Thus, to guide lower courts in determining whether a Title II claim falls within one of the “limited circumstances” of a valid abrogation, *ibid.*, the Supreme Court set forth a three-part test. A court must determine on a claim-by-claim basis: (1) “which aspects of the State’s alleged conduct violated Title II”; (2) “to what extent such misconduct also violated the Fourteenth Amendment”; and (3) “insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s

purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.” *Georgia*, 546 U.S. at 159.

By its terms, the *Georgia* test contemplates that Title II is a valid exercise of Congress’s authority not only to provide a remedy for Fourteenth Amendment violations, but also to enact prophylactic legislation providing redress for a broader category of conduct. See *Georgia*, 546 U.S. at 158-159; see also *Hibbs*, 538 U.S. at 727-728. Indeed, the First, Third, and Tenth Circuits have squarely recognized that, in appropriate circumstances, Congress may validly abrogate a State’s Eleventh Amendment immunity under Title II even where a plaintiff has not alleged conduct that violates the Constitution. *Guttman v. Khalsa*, 669 F.3d 1101, 1116 (10th Cir. 2012); see also *Bowers v. NCAA*, 475 F.3d 524, 554-556 (3d Cir. 2007); *Toledo v. Sánchez*, 454 F.3d 24, 34 (1st Cir. 2006), cert. denied, 549 U.S. 1301 (2007).

The district court concluded that Silberman has not alleged conduct that violates the Constitution. See Doc. 24, at 13 n.5. The district court then concluded that, because Silberman had not alleged any such conduct, his suit was not eligible for “this exception to Eleventh Amendment immunity.” Doc. 24, at 13 n.5. That conclusion was legal error because Title II’s abrogation of Eleventh Amendment immunity extends beyond conduct that violates the Constitution. Rather, the district court should have proceeded to the third step of the *Georgia* test and

determined “whether Congress’s purported abrogation of sovereign immunity as to” the access to public transportation that Silberman seeks “is nevertheless valid.” *Georgia*, 546 U.S. at 159.

That determination is guided by the three-part test established in *Boerne*. See, e.g., *Association for Disabled Ams., Inc. v. Florida Int’l Univ.*, 405 F.3d 954, 957 (11th Cir. 2005) (applying *Boerne* and holding that Title II, as applied to access to public education, constitutes a valid exercise of Congress’s enforcement power under the Fourteenth Amendment). Under *Boerne*, a court must (1) “identify the constitutional right or rights that Congress sought to enforce when it enacted Title II,” *Lane*, 541 U.S. at 522; (2) “examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled,” *Garrett*, 531 U.S. at 368; and (3) determine “whether Title II is an appropriate response to this history and pattern of unequal treatment,” *Lane*, 541 U.S. at 530; see also *Association for Disabled Ams.*, 405 F.3d at 957.

Ultimately, Title II is valid Section 5 legislation, as applied to a particular class of cases, if it exhibits “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Boerne*, 521 U.S. at 520.

In sum, this Court should not reach the merits of the constitutional question. Instead, the Court should vacate the dismissal order and remand for the district

court to determine whether Silberman's Title II claims can be resolved without addressing whether Congress validly abrogated States' Eleventh Amendment immunity in the context of this case.

CONCLUSION

This Court should vacate the district court's dismissal of the Title II claim based on Eleventh Amendment immunity and remand to the district court.

Respectfully submitted,

JOHN M. GORE

Acting Assistant Attorney General

s/ Teresa Kwong

THOMAS E. CHANDLER

TERESA KWONG

Attorneys

Department of Justice

Civil Rights Division

Appellate Section – RFK 3726

Ben Franklin Station

P.O. Box 14403

Washington, D.C. 20044-4403

(202) 514-2195

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF NEITHER PARTY URGING THE COURT TO VACATE THE DISMISSAL ORDER AND REMAND:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3909 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Date: April 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF NEITHER PARTY URGING THE COURT TO VACATE THE DISMISSAL ORDER AND REMAND with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that the following participant in this case will be served by certified First-Class mail:

Charles Silberman
100 Lincoln Road, Apt. 734
Miami Beach, FL 33139

All other participants are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that seven paper copies will be mailed to the Clerk of the Court by certified First-Class mail.

s/ Teresa Kwong
TERESA KWONG
Attorney