

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD McDONALD,)
)
 Plaintiff)
)
 v.) Civil Action No. 02:09-cv-442
)
 PENNSYLVANIA STATE)
 POLICE, *et al.*,)
)
 Defendants.)
)

INTERVENOR UNITED STATES' MEMORANDUM OF LAW

The United States files this memorandum as intervenor, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of 42 U.S.C. 12202, which abrogates States' Eleventh Amendment immunity for the claims of private plaintiffs filed under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*

INTRODUCTION AND STATEMENT OF THE CASE

1. Congress enacted the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327, to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Part of that national mandate is Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.

2. Plaintiff Richard McDonald sought certification as a police officer from Pennsylvania's Municipal Police Officer Education and Training Commission (the Commission). Mem. Op. and Order of Ct., Doc. No. 61, at 3-4 (Apr. 1, 2011) (Opinion). Commission certification is required for employment at a wide variety of public agencies for any position in the State involving "criminal or traffic law enforcement duties." See 53 Pa. Cons. Stat. § 2162; see also 53 Pa. Cons. Stat. § 2167(b) (making any person "ineligible to receive any salary, compensation or other consideration for the performance of duties as a police officer unless the person has met all of the requirements as established by the commission and has been duly certified as having met those requirements by the commission"). The Commission denied his application because McDonald takes the drug Avinza to relieve chronic pain caused by a 2002 back injury. Opinion 7.

3. McDonald sued the Pennsylvania State Police (PSP), the commissioner of the PSP (who is also the chairman of the Commission), and the executive director of the Commission under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, and the Due Process Clause. He seeks compensatory damages, injunctive relief (including an order that he be certified as a police officer) and attorney's fees and costs. Opinion 8.

4. This Court granted summary judgment to the defendants and dismissed the case. With respect to the due process claim, it dismissed for largely the reasons the defendants proffered. Opinion 13-15. With respect to the Title II and Rehabilitation Act claims, however, it dismissed *sua sponte* on the ground that the Commission is not a "covered entity" under the ADA and therefore "is not subject to the ADA [or Rehabilitation Act] discrimination provisions." Opinion 12.

5. The Third Circuit affirmed this Court's decision with respect to the due process claim but reversed and remanded with respect to the Title II and Rehabilitation Act claims. See *McDonald v. Pennsylvania State Police*, No. 11-1867, 2012 WL 2366015 (3d Cir. June 22, 2012). After finding that McDonald was not required to prove the Commission is a "covered entity" to make out a Title II claim, the appellate court remanded for this Court to consider "the defendants' other defenses to McDonald's disability discrimination claims." *Id.* at *3. Among those defenses is the defendants' contention that Title II is not valid legislation pursuant to Section Five of the Fourteenth Amendment and thus does not validly abrogate the States' sovereign immunity. The Third Circuit agreed with the United States, which had intervened to defend the constitutionality of Title II's abrogation of sovereign immunity, that "it is inappropriate to reach this constitutional issue unless and until it is decided that McDonald has made out a distinct Title II claim." *Id.* at *3 n.1 (citing *United States v. Georgia*, 546 U.S. 151, 159 (2006)).

6. On remand, the defendants filed a supplemental brief arguing principally that Title II does not validly abrogate sovereign immunity in cases involving professional licenses. See Defs.' Suppl. Br. in Supp. of Mot. for Summ. J., Doc. No. 69, at 4-12 (State Br.). The defendants also argue that McDonald is not "disabled" within the meaning of Title II and the Rehabilitation Act. See *id.* at 12-16.

In his supplemental brief, the plaintiff disclaimed any intention to seek damages on his Title II claim, and argued that the abrogation of sovereign immunity question was therefore immaterial. See Pl.'s Suppl. Br. in Opp'n to Defs.' Mot. for Summ. J., Doc. No. 70, at 7 (Pl.'s Br.). The United States intervened again to defend the validity of Title II as Section Five legislation that properly abrogates the States' sovereign immunity.

SUMMARY OF ARGUMENT

1. As the Third Circuit specifically instructed, this Court should not unnecessarily reach the question of whether Title II validly abrogates sovereign immunity under the circumstances of this case. Since the plaintiff seeks no relief pursuant to Title II that implicates sovereign immunity, the abrogation question is entirely academic and should not be reached. Even if anything turned on that constitutional question, this Court still should not reach it before deciding whether (1) plaintiff's Title II claim fails because plaintiff was not "regarded as" having a disability; and (2) whether defendants received federal funding such that they have waived sovereign immunity for his substantively identical claim under Section 504 of the Rehabilitation Act.

2. In the unlikely event that this Court reaches the abrogation question, it should find that Title II validly abrogates the States' sovereign immunity in cases involving licensing. Since this Court is unlikely to reach the question, the United States will not burden it with extensive briefing on the question. A fuller statement of the United States position can be found in the United States' brief to the Third Circuit in this case regarding abrogation of sovereign immunity, attached to this memorandum.

ARGUMENT

I

THIS COURT SHOULD NOT RULE ON THE VALIDITY OF TITLE II'S ABROGATION OF SOVEREIGN IMMUNITY

This Court has no need to rule on the constitutional validity of Title II's abrogation of sovereign immunity under the circumstances of this case. The plaintiff's recent clarification that he does not seek damages on his Title II claim makes the question entirely academic, because plaintiff can obtain all the relief he seeks regardless of whether Title II validly abrogates

sovereign immunity. Additionally, even if the question could be relevant in this case, this Court still should not reach it before addressing two preliminary questions, the answer to which could make it unnecessary for this Court to adjudicate the abrogation issue.

1. It is well settled in this circuit and elsewhere that sovereign immunity does not bar an ADA suit against a state official for purely prospective relief pursuant to the *Ex Parte Young* doctrine. See *Koslow v. Pennsylvania*, 302 F.3d 161, 178-179 (3d Cir. 2002); accord *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002); *Gibson v. Arkansas Dep't of Corr.*, 265 F.3d 718, 720 (8th Cir. 2001); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233-1234 (10th Cir. 2001). On his Title II claim, plaintiff seeks only declaratory and injunctive relief directing a state official to certify him as a police officer. See Pl.'s Br. 7. Accordingly, there is no reason to reach the abrogation question in this case.

2. Even if the plaintiff were seeking compensatory damages, it would be “inappropriate” for this Court to determine the constitutionality of Title II’s abrogation of sovereign immunity “unless and until it is decided that McDonald has made out a distinct Title II claim.” *McDonald v. Pennsylvania State Police*, No. 11-1867, 2012 WL 2366015, at *3 n.1 (3d Cir. June 22, 2012) (citing *United States v. Georgia*, 546 U.S. 151, 159 (2006)). *Georgia* set forth a three-step process for how Eleventh Amendment immunity challenges in Title II cases should proceed. A court must first determine “which aspects of the State’s alleged conduct violated Title II.” *Georgia*, 546 U.S. at 159. If plaintiff has made out a Title II violation, a court next should determine “to what extent such misconduct also violated the Fourteenth Amendment.” *Ibid.* Finally, and only if a court finds that a State’s “misconduct violated Title II but did not violate the Fourteenth Amendment,” it should reach the question “whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.” *Ibid.*

Accordingly, the Third Circuit has correctly held that *Georgia* requires a court, before deciding the abrogation question, to determine “if any aspect of the [state defendant’s] alleged conduct forms the basis for a Title II claim.” *Bowers v. NCAA*, 475 F.3d 524, 553 (3d Cir. 2007), amended on reh’g (Mar. 8, 2007). Only after deciding that question in the affirmative – and ascertaining that the plaintiff’s claim did not also state a constitutional violation – did *Bowers* move on to decide that Title II was a proportionate and congruent response to the history of constitutional violations in the education context against individuals with disabilities and so validly abrogated sovereign immunity in that context. *Id.* at 553-555.

Under *Georgia* and *Bowers* – as well as the Third Circuit’s instruction in this very case – this Court may not decide the validity of Title II’s abrogation of sovereign immunity in this context unless and until it finds that defendants’ conduct “forms the basis for a Title II claim,” *Bowers*, 475 F.3d at 553. This rule is in keeping with the “fundamental and longstanding principle of judicial restraint” that “courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988). Moreover, this constitutional avoidance principle is at its apex when courts address the constitutionality of an Act of Congress, “the gravest and most delicate duty” that courts are “called upon to perform.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted); accord *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009).

3. Additionally, before reaching the abrogation question, this Court should determine whether defendants receive federal funding such that they are subject to suit under Section 504 of the Rehabilitation Act of 1973. Section 504 imposes upon recipients of federal funds the same substantive obligations that Title II imposes upon all public entities and requires States that

receive federal funding to waive their sovereign immunity for claims that they failed to meet those obligations. See, e.g., *Disabled in Action of Pa. v. SEPTA*, 635 F.3d 87, 91 & n.5 (3d Cir. 2011); *McDonald v. Pennsylvania*, 62 F.3d 92, 94-95 (3d Cir. 1995). Accordingly, should this Court find the defendants subject to suit under Section 504, it would have no reason to determine whether Title II validly abrogates sovereign immunity. See *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005) (declining to reach Title II abrogation question after finding that defendants had waived immunity for substantively identical Section 504 claim), cert. denied, 547 U.S. 1098 (2006).

II

TITLE II VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY WITH RESPECT TO CLAIMS INVOLVING LICENSING

Should this Court nonetheless reach the question, it should hold that Title II of the Americans with Disabilities Act validly abrogates the States' sovereign immunity with respect to claims involving licensing. Given the unlikelihood that this Court will reach the question, the United States will not burden it with lengthy briefing in this memorandum. A fuller statement of the United States' position can be found in the United States' brief to the Third Circuit in this case. That brief is attached to this memorandum.

As the Supreme Court held in *Tennessee v. Lane*, 541 U.S. 509, 524 (2004), Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." That history authorized Congress to enact prophylactic legislation, pursuant to Section Five of the Fourteenth Amendment, to protect the rights of people with disabilities to receive on an equal footing all "public services," see *id.* at 528-529, including but not limited to public licensing. As the attached brief details, individuals with disabilities have faced a long history of discrimination in

licensing determinations, including in occupational licensing. Moreover, in this context, Title II's requirements are carefully tailored to protect against the proven risk of unconstitutional discrimination in the provision of social services, while respecting the States' legitimate interests. Accordingly, as applied to licensing decisions, Title II's requirements represent a congruent and proportional response to that record of official discrimination. Title II represents a good-faith effort to make the guarantees of the Fourteenth Amendment meaningful. It is not an illicit attempt to rewrite them.

The State's primary argument – that Title II is valid Section Five legislation only in those contexts for which Congress compiled a record of official discrimination, see State Br. 4, 10-11 – runs contrary to precedent of the Supreme Court and the Third Circuit. The long and broad history of official discrimination suffered by individuals with disabilities authorized Congress to exercise its Section Five authority to protect their constitutional rights with respect to *all* public services and programs. *Lane*, 541 U.S. at 524; accord *Bowers v. NCAA*, 475 F.3d 524, 554 & n.35 (3d Cir. 2007). Accordingly, the State's argument is squarely foreclosed by controlling law.

CONCLUSION

This Court should find that plaintiff can obtain all the relief he seeks pursuant to Title II of the ADA regardless of whether that law validly abrogates state sovereign immunity, and so there is no need to determine the validity of that abrogation. Should it reach the question, this Court should find that Title II abrogates sovereign immunity in cases involving licensing.

Dated: September 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I electronically filed the foregoing INTERVENOR UNITED STATES' MEMORANDUM OF LAW with the Clerk of the Court for the United States District Court for the Western District of Pennsylvania by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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