Title II of the Americans with Disabilities Act of 1990 and Its Prohibition of Employment Discrimination

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I. TITLE II OF THE AMERICANS WITH DISABILITIES ACT'S PROHIBITION OF EMPLOYMENT DISCRIMINATION

Coverage gaps in Title I of the Americans with Disabilities Act of 1990 (ADA) have led many disabled individuals to use Title II of the ADA to obtain redress when their employers discriminate against them on the basis of their disabilities. These gaps are found in two instances in Title I.[1] First, Congress generally included governmental employers, but *exempted* the federal government, from Title I's coverage.[2] As defined in Title I, the

1. *See* 42 U.S.C. § 12111(5)(A) (2000).

2. *See* 42 U.S.C. § 12111(5)(A) (2000) ("'[E]mployer' means a person engaged in an industry affecting commerce who has 15 or more employees . . . except that, for two

term "employer" does not include the United States, a corporation wholly owned by the United States, or an Indian tribe.[3] Second, Title I prohibits discrimination against qualified disabled individuals regarding job application procedures, hiring, advancement, or discharge by employers with *fifteen or more* employees.[4] Thus, a disabled individual who works for a federal agency, or an employer employing less than fifteen employees, is prohibited from remedying discrimination under Title I because such an employer is exempt from the coverage of this title.[5]

To a disabled employee claiming employment discrimination, Title II may be an alternative route to redress grievances when Title I is unavailable. Title II of the ADA prohibits discrimination against disabled individuals in the provision of programs, services, or activities by a state or local government, or a department or agency of the state, the United States, or local government, regardless of the entity's size.[6] Title II does not contain the coverage gaps found in Title I: it explicitly applies to the federal government, and it applies to all employers regardless of the number of employees.[7]

The circuits are split on whether Title II of the ADA protects employees from discrimination.[8] The Second, Fourth, Fifth, and Eleventh Circuits have held that Title II does encompass employment discrimination against disabled employees.[9] In doing so, these courts relied on the specific language of the ADA, the expressed intent of Congress, the Department of Justice's "authoritative implementing regulations,"[10] and the weight of judicial authority in favor of this interpretation of Title II.[11] The Ninth Circuit,

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years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees . . . .); 42 U.S.C. § 12111(5)(B) (2000) ("The term 'employer' does not include-- (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . .").

3. 42 U.S.C. § 12111(5)(B).

4. *See* 42 U.S.C. § 12111 (defining the applicability of Title I to various entities); 42 U.S.C. § 12112(a) (2000).

5. *See* 42 U.S.C. § 12111(5)(B).

6. *See* 42 U.S.C. §§ 12131-12134 (2000).

7. *See id.*

8. *See* Holmes v. Tex. A & M Univ., 145 F.3d 681, 684 (5th Cir. 1998); Castellano v. City of N.Y., 142 F.3d 58, 69-70 (2d Cir. 1998); Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 820 (11th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1267 (4th Cir. 1995). *But see* Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1173 (9th Cir. 1999), *reh'g denied*, 183 F.3d 1161 (9th Cir. 1999); Patterson v. Ill. Dep't of Corr. 35 F. Supp. 2d 1103, 1110 (C.D. Ill. 1999); Decker v. Univ. of Houston, 970 F. Supp. 575, 578 (S.D. Tex. 1997), *aff'd*, 159 F.3d 1355 (5th Cir. 1998).

9. *See Holmes*, 145 F.3d at 684; *Castellano*, 142 F.3d at 69-70; *Bledsoe*, 133 F.3d at 820; *Doe*, 50 F.3d at 1267.

10. *See Zimmerman*, 183 F.3d at 1161 (Reinhardt, J., dissenting).

11. *See Zimmerman*, 183 F.3d at 1161, (Reinhardt, J., dissenting) (citing *Castellano*, 142 F.3d 58); *Holmes*, 145 F.3d at 684; *Bledsoe*, 133 F.3d at 820.

however, has held that because Title II explicitly refers to services, programs, and activities provided by a public entity, and because Title I explicitly mentions employment discrimination, Title II does not prohibit employment discrimination against disabled individuals.[12] Thus, an individual's sole remedy for employment discrimination falls under Title I.[13] In the Ninth Circuit, therefore, a disabled employee discriminated against by a federal agency or by an employer employing less than fifteen employees has no remedy. This outcome is inconsistent with the text and purpose of the Americans with Disabilities Act.[14]

This article argues that courts should interpret Title II of the ADA as extending coverage to employment discrimination claims for five reasons. First, the plain textual language of Title II broadly prohibits *all* discrimination by a public entity.[15] Second, the ADA's legislative history indicates that Title II applies to employment discrimination.[16] Third, language relating to employment in Title II specifies that this title incorporates the same duties set forth in the Rehabilitation Act, which prohibits employment discrimination.[17] Similarly, forms of discrimination prohibited in Title II are to be identical to provisions of Titles I and III of the ADA, which prohibit employment discrimination.[18] Fourth, the Department of Justice's regulations, required by Congress in order to implement the ADA,[19] address employment discrimination by public entities and have not been modified as of their enactment.[20] Fifth, the majority of circuits support the proposition that Title II prohibits employment discrimination. [21]

Part II of this article discusses the reasons for the enactment and provisions of the Americans with Disabilities Act,[22] including statutory language, legislative history, background, agency regulations, and courts' interpretations of the ADA's general coverage and application to employment discrimination. Part III describes the Ninth and Eleventh Circuits' holdings and analyses of whether Title II of the ADA includes employment dis-

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12. *See Zimmerman*, 170 F.3d at 1174, 1176-78, 1180.

13. *See* 42 U.S.C. §§ 12111-12117 (2000); *Zimmerman*, 170 F.3d at 1184.

14. *See* 42 U.S.C. § 12101 (2000).

15. *See* 42 U.S.C. §§ 12131-12132 (2000).

16. *See Bledsoe*, 133 F.3d at 821 (citing H.R. REP. NO. 101-485 (III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473; H.R. REP. NO. 101-485 (II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367, 472-73).

17. *See id.*

18. *Id.* (quoting H.R. REP. NO. 101-485 (II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367).

19. *See* 42 U.S.C. § 12134(a) (2000).

20. *See* 28 C.F.R. § 35.140 (2007), *invalidated by* Fluish v. Town of Weston, 266 F. Supp. 2d 322, 331-32 (D. Conn. 2003).

21. *See* Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1183 (9th Cir. 1999).

22. 42 U.S.C. §§ 12101, 12131-12133 (2000).

crimination.[23] Part IV discusses the plain language of § 12132 of Title II,[24] why deference should be given to the Department of Justice's regulations, and coverage of employment discrimination within Titles I and II of the ADA. Ultimately, the analysis in Part IV demonstrates that Congress's intention was to prohibit employment discrimination against disabled individuals in Title II of the ADA.

II. BACKGROUND OF THE AMERICANS WITH DISABILITIES ACT

A. INTRODUCTION TO THE ADA

Congress enacted the Americans with Disabilities Act of 1990 to prohibit discrimination against individuals with disabilities.[25] Congressional findings indicated that historically, society tends to isolate and segregate individuals with disabilities and, although there have been improvements, some forms of discrimination continue to be "serious and pervasive" social problems.[26] Discrimination against individuals with disabilities was prominent in "critical" areas, including housing, public accommodations, employment, education, transportation, communication, institutionalization, recreation, health services, voting, and access to public services.[27] Additionally, Congress found that the United States incurred unreasonable and unnecessary expenses resulting from the dependency and non-productivity of disabled individuals.[28] Such findings thus support the enactment of the ADA.[29]

To cover these broad areas, Congress created five titles within the ADA: Employment (Title I), Public Services (Title II), Public Accommodations and Services Operated by Private Entities (Title III), Telecommunications (Title IV), and Miscellaneous Provisions (Title V).[30] The purposes of the ADA are to provide a national mandate to eliminate discrimination against individuals with disabilities, to provide standards addressing discrimination against these individuals, for the federal government to play a central role in enforcing standards, and for congressional authority to ad-

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23. *Zimmerman*, 170 F.3d 1169; Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998).

24. 42 U.S.C. § 12132 (2000).

25. *See id.*

26. 42 U.S.C. § 12101(a)(2) (2000).

27. 42 U.S.C. § 12101(a)(3).

28. 42 U.S.C. § 12101(a)(9).

29. *See* 42 U.S.C. § 12101(a)(8).

30. Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1172 (9th Cir. 1999) (citing American with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, 327-28 (1990)).

dress the major areas of discrimination faced daily by disabled individuals.[31]

B. TITLE I OF THE ADA

1. Statutory Language

As the headings suggest, Title I of the ADA applies to employment.[32] Title I, modeled on Title VII of the 1964 Civil Rights Act,[33] provides, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[34]

Title I of the ADA defines an "employer" as a "person engaged in an industry affecting commerce" with fifteen or more employees for each working day in each of twenty or more calendar weeks.[35] The entities covered in Title I generally include governmental employers;[36] however, Title I explicitly exempts the federal government, corporations wholly owned by the United States government, and Indian tribes from this title.[37]

2. Purpose and History

In Title I, Congress seeks to increase employment opportunities for disabled people through the prevention of employment discrimination.[38] Title I provides for punitive and compensatory damages in certain circumstances, but exempts municipalities from such awards,[39] and requires exhaustion of administrative remedies.[40]

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31. 42 U.S.C. § 12101(b)(1)-(4).
32. *See* 42 U.S.C. § 12112(a) (2000).
33. *Zimmerman*, 170 F.3d at 1177.
34. 42 U.S.C. § 12112(a).
35. 42 U.S.C. § 12111(5)(A) (2000).
36. *Zimmerman*, 170 F.3d at 1172.
37. *See* 42 U.S.C. § 12111(5)(B).
38. Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 821 (11th Cir. 1998) (citing 42 U.S.C. § 12101(a)(3), (8)-(9) (1994)).
39. Winfrey v. City of Chi., 957 F. Supp. 1014, 1024 (N.D. Ill. 1997) (citing 42 U.S.C. § 1981a(b)(1) (1994)).
40. Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1166 (9th Cir. 1997) (Reinhardt, J., dissenting).

3. *Applicable Agency Regulations*

The Equal Employment Opportunity Commission (EEOC) enacted regulations pursuant to congressional authority within the ADA to implement the regulations of Title I.[41] Title 29, section 1641.1 of the Code of Federal Regulations seeks to "implement procedures for processing and resolving complaints/charges of employment discrimination filed against employers" where the complaints or charges fall within the jurisdiction of both section 503 of the Rehabilitation Act of 1974 and the ADA.[42] Further, the EEOC is authorized to investigate and "attempt to resolve" charges of employment discrimination under the ADA.[43]

4. *Coverage*

Title I prohibits discrimination by a "covered entity" against a qualified individual with a disability in regard to job application, hiring, advancement, or discharge of employees, compensation, and other terms and conditions of employment.[44] A "covered entity" is an employer, employment agency, labor organization, or joint labor-management committee.[45] An "employer" must have fifteen or more employees to be subject to the jurisdiction of Title I.[46]

Title I specifically exempts (i) Indian tribes,[47] (ii) private sector employers with less than fifteen employees,[48] (iii) private sector employees who have failed to timely file a charge with the EEOC,[49] (iv) state and local agencies employing less than fifteen employees,[50] (v) state and local government agency employees who have failed to timely file an EEOC charge,[51] and (vi) federal employees from its coverage.[52]

As the text of Title I specifically prohibits employment discrimination by any "covered entity" addressed within the statute, this article does not address these entities.[53] Because the text of Title II broadly prohibits any discrimination by a public entity, which includes federal, state, or local

41. *See* 42 U.S.C. § 12117 (2000).
42. 29 C.F.R. § 1641.1 (2007).
43. *See* 57 Fed. Reg. 2960, 2960 (Jan. 24, 1992).
44. 42 U.S.C. § 12112(a) (2000).
45. 42 U.S.C. § 12111(2) (2000).
46. *See* 42 U.S.C. § 12111(5)(A).
47. 42 U.S.C. § 12111(5)(B)(i).
48. *See* 42 U.S.C. § 12111(5)(A).
49. *See* 42 U.S.C. § 12117 (2000).
50. *See* 42 U.S.C. § 12111(5)(A).
51. *See* 42 U.S.C. § 12117.
52. 42 U.S.C. § 12111(5)(B)(i).
53. *See* 42 U.S.C. § 12112(a) (2000).

governments, this title arguably applies to exclusions (iv), (v), and (vi) above. Thus, this article addresses the gap in coverage in Title I of the ADA, which specifically exempts local, state, and government agencies with less than fifteen employees, as stated in numbers (iv), (v), and (vi) in the above paragraph.

C. TITLE II OF THE ADA

1. Statutory Language

Title II of the ADA, the "Public Services" title, is modeled on the Rehabilitation Act and Title VI of the 1964 Civil Rights Act.[54] The language of Title II provides that "no otherwise 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."[55] Congress directed the Attorney General to promulgate implementing regulations for Title II.[56]

2. Purpose and History

In Title II, Congress sought to eliminate discrimination which prohibits disabled individuals from participating in or being denied benefits provided in programs, services, and activities of a public entity.[57] Further, Title II seeks to prohibit discrimination by a public entity against any qualified individual with a disability.[58]

3. Applicable Agency Regulations

Pursuant to the ADA, in 28 C.F.R. § 35.140(a), the Attorney General provides: "[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 public entity."[59] These regulations explicitly prohibit employment discrimination under Title II.

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54. Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1166 (9th Cir. 1999) (Reinhardt, J., dissenting).

55. 42 U.S.C. § 12132 (2000).

56. 42 U.S.C. § 12134(a) (2000). *See also* 28 C.F.R. § 35.140(a) (2007), *invalidated by* Fluish v. Town of Weston, 266 F. Supp. 2d 322, 331-32 (D. Conn. 2003) (promulgating regulations to enforce Title II).

57. 42 U.S.C. § 12132.

58. *See id.*

59. 28 C.F.R. § 35.140(a), *invalidated by* Fluish v. Town of Weston, 266 F. Supp. 2d 322, 331-32 (D. Conn. 2003).

The Attorney General's regulations provide that insofar as section 504 of the Rehabilitation Act pertains to employment discrimination, the same prohibitions also apply to employment in "any service, program, or activity conducted by a public entity" in Title II, as long as the public entity is not also subject to the jurisdiction of Title I.[60] Thus, employment discrimination in services, programs, or activities against disabled individuals by public entities that are not subject to the authority of Title I are subject to the jurisdiction of Title II pursuant to these regulations.

4. Coverage

Title II of the ADA defines a "public entity" as a state or local government, department, agency, special purpose district, or other instrumentality of a state or states or local government.[61] Unlike Title I of the ADA, Title II covers entities with any number of employees and covers all public employers and governmental entities, regardless of size or number of employees.[62] Congress further provided that the remedies, procedures, and rights set forth in the Rehabilitation Act of 1973, which addresses employment discrimination,[63] shall be the same remedies, procedures, and rights afforded to any person alleging discrimination under Title II of the ADA.[64]

5. State and Local Government Agencies with less than Fifteen Employees

Section 12111 of Title I of the ADA defines an "employer," as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks."[65] The term "employer" does not include, in particular, the United States or a corporation wholly owned by the government of the United States.[66] Even though Title I prohibits employment discrimination against state and local employers, who could arguably fall within the definitions of "employer, employment agency, labor organization, or joint-labor management com-

60. 28 C.F.R. § 35.140(b)(2) (2007), *invalidated by* Fluish v. Town of Weston, 266 F. Supp. 2d 322, 331-32 (D. Conn. 2003). The Rehabilitation Act prohibits discrimination against a disabled individual under any program or activity that receives federal financial assistance or is conducted by the executive department or the United States Postal Service. 29 U.S.C. § 794(a) (2000).

61. 42 U.S.C. § 12131(1)(A)-(B) (2000).

62. *See* Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1166 (9th Cir. 1999) (Reinhardt, J., dissenting).

63. *See* 29 U.S.C. § 794(a) (2000).

64. 42 U.S.C. § 12133 (2000).

65. 42 U.S.C. § 12111(5)(A) (2000).

66. 42 U.S.C. 12111(5)(B).

mittee," per its language, Title I exempts state and local agencies with less than fifteen employees.[67]

6. *State and Local Government Agencies who have Failed to File a Timely EEOC Charge*

Title I of the ADA requires employees with employment discrimination grievances to timely file a complaint with the EEOC.[68] An employee who fails to file a complaint with the EEOC within the specified time period has lost the opportunity to pursue a cause of action against his or her employer pursuant to Title I.[69] However, employees who have failed to timely file a complaint with the EEOC may have a remedy under Title II of the ADA.

As stated above, Title II prohibits discrimination by a public entity.[70] The title does not require an employee to first file a complaint with the EEOC to pursue a grievance.[71] As Title II does not specifically exempt state and local government employees who have failed to timely file a charge with the EEOC, and prohibits discrimination against a "qualified individual with a disability,"[72] this title arguably applies to these employees as well.

7. *Federal Employees*

The language of Title I explicitly exempts from its coverage the United States or a corporation wholly owned by the government of the United States.[73] Thus, disabled employees who work for the federal government do not have a cause of action against their employer if they are discriminated against by their employer on the basis of disability. As the purpose of the Americans with Disabilities Act is to prohibit discrimination against any disabled individual on the basis of disability,[74] it can be inferred that Congress intends to prohibit the federal government as well, from discriminating against disabled individuals regardless of the context or location of its actions; Congress did not intend to entirely exempt the federal government from the potential negative consequences of its actions. Thus, the federal government arguably falls within the coverage of Title II's prohibition against discrimination, including employment discrimination.

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67. *See* 42 U.S.C. § 12111(2), (5)(A).
68. *See* 42 U.S.C. § 12117(a) (2000).
69. *See id.*
70. *See supra* note 57 and accompanying text.
71. *See* 42 U.S.C. § 12133 (2000).
72. *See supra* note 58 and accompanying text.
73. 42 U.S.C. § 12111(5)(b)(i) (2000).
74. *See supra* notes 25-29 and accompanying text.

D. DEFINITIONS OF THE REHABILITATION ACT AS INCORPORATED WITHIN TITLE II

In addition to the remedies, procedures, and rights of the Rehabilitation Act that Title II incorporates by reference,[75] this title also uses the terms "services, programs, or activities" set forth in the Rehabilitation Act.[76] The Rehabilitation Act defines a disabled individual as someone who has a physical or mental impairment resulting in substantial impairment to employment who can benefit from an employment outcome by the provision of rehabilitation services;[77] and any individual whose impairment substantially limits one or more of his or her major life activities. [78] "[P]rogram or activity," defined in the Rehabilitation Act and incorporated by reference within Title II, includes all operations of a department, agency, or instrumentality of a state or local government; an entity that distributes government assistance; educational institutions; and corporations, partnerships, or private organizations, among others.[79]

The remedies and procedures of the Rehabilitation Act, which are the same as those within the Civil Rights Act of 1964 (titled "Nondiscrimination in Federal Government Employment"),[80] permit the Civil Service Commission to enforce the provisions of the Act by reinstating or hiring employees with or without back pay and also allow an employee to pursue

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75. 42 U.S.C. § 12133 (stating that "[t]he remedies, procedures, and rights set forth in section 794a of title 29 [the Rehabilitation Act] 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"). *See also* 42 U.S.C. § 12134(b) (2000) (providing that Title II should be interpreted consistently with regulations under the Rehabilitation Act); Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1163 (9th Cir. 1999) (Reinhardt J., dissenting) (citing 42 U.S.C. § 12133) (stating that Congress specified that Title II is to be interpreted consistently with the Rehabilitation Act); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44 (2d Cir. 1997) (holding "activity" under Title II has the same meaning as "activity" under the Rehabilitation Act), *abrogated on other grounds by* Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 & n.7 (2d Cir. 2001). Furthermore, the legislative history of the ADA states that "'in the area of employment, title II incorporates' the regulations under the Rehabilitation Act." *Zimmerman*, 183 F.3d at 1167 (Reinhardt, J., dissenting) (quoting H.R. REP. No. 101-485 (III) (1990)).

76. 42 U.S.C. § 12132 (2000). *See* 42 U.S.C. § 12133.

77. 29 U.S.C. § 705(20)(A) (2000).

78. 29 U.S.C. § 705(20)(B). The term "disability" means "a physical or mental impairment that constitutes or results in a substantial impediment to employment" or "a physical or mental impairment that substantially limits one or more major life activities." 29 U.S.C. § 705(9).

79. 29 U.S.C. § 794(b) (2000). *See Innovative Health Sys.*, 117 F.3d at 44 (holding that "activity" under Title II has the same meaning as "activity" under the Rehabilitation Act and includes all operations of the entity).

80. 29 U.S.C. 794a(a)(1) (2000) ("The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) . . . shall be available to any complaint under section 791 of this title . . . .").

a civil action.[81] The remedies, procedures, and rights are available to any person who is the target of discrimination caused by action or inaction of a recipient or provider of federal financial assistance.[82] Thus, the remedies, procedures, and rights of the Rehabilitation Act which prohibit employment discrimination may be available to disabled individuals under Title II as a result of action or inaction (i.e. an adverse employment decision) taken by a public entity who provides or receives federal financial assistance.

E. COURT INTERPRETATIONS OF TITLE II'S RELATIONSHIP TO EMPLOYMENT DISCRIMINATION

Section 12132 of Title II of the ADA contains two clauses: First, "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."[83] Second, "no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity."[84] The Ninth Circuit has interpreted the first clause to require a plaintiff to prove he or she is a "qualified individual with a disability" who must meet the essential eligibility requirements either for the receipt of services or the participation in programs or activities provided by a public entity.[85] Some courts have interpreted the second clause to be entirely distinct from the first such that it prohibits *any* form of discrimination by a public entity.[86] However, other courts have held that the second clause relates back to the same services, programs, or activities of a

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81. 42 U.S.C. § 2000e-16(b)-(c) (2000).

82. 42 U.S.C. § 2000d (2000). The provisions of 42 U.S.C. § 2000d are explicitly incorporated into the Rehabilitation Act. 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . ." (brackets in original)).

83. Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1174 (9th Cir. 1999) (quoting 42 U.S.C. § 12132 (1994)). Congress did not define any of the terms in the first clause except "public entity" and "qualified individual with disability." *Id.* at 1174 (citing 42 U.S.C. § 12131 (1994)).

84. *Id.* (quoting 42 U.S.C. § 12132).

85. Weinreich v. L.A. County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (citing 42 U.S.C. § 12132).

86. *Zimmerman*, 170 F.3d at 1175 (citing Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 822 (11th Cir. 1998); Innovative Health Sys., Inc., v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997), *abrogated on other grounds by* Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 & n.7 (2d Cir. 2001). *See* Alberti v. City & County of S.F. Sheriff's Dep't, 32 F. Supp. 2d 1164, 1169 (N.D. Cal. 1998), *overruled by Zimmerman*, 170 F.3d at 1175; Downs v. Mass. Bay Transp. Auth., 13 F. Supp. 2d 130, 135 (D. Mass. 1998).

public entity covered by the first clause, and does not prohibit *all* forms of discrimination, including discrimination in employment.[87]

The Eleventh Circuit, in *Holbrook v. City of Alpharetta, Georgia*, addressed the question of whether claims brought pursuant to Title II of the ADA which involve events that occurred prior to the effective date of Title I are actionable under the ADA or the Rehabilitation Act of 1973.[88] The Eleventh Circuit determined that Title II incorporates by reference the substantive, detailed regulations which prohibit discrimination against disabled individuals contained in Title I and concluded that a plaintiff's remedy for discrimination under Title II was under the Rehabilitation Act of 1973.[89] Thus, the court "implicitly" determined that Title II was the "'new replacement'" for the Rehabilitation Act and prohibited discrimination against disabled individuals.[90]

The Ninth Circuit also addressed the question of whether a plaintiff suing under the ADA can recover for discrimination without showing that his disability was the sole cause for the adverse employment decision against him.[91] The court acknowledged that Title I of the ADA applies to the private sector and seeks to prohibit disability-related discrimination whereas Title II of the ADA, "which applies to public sector employment," contains a parallel provision.[92] Thus, without directly discussing the issue of whether Title II of the ADA prohibits employment discrimination, the court assumed that Title II covers public employment discrimination.[93] Although the Ninth Circuit assumed that Title II covers discrimination against disabled individuals in employment, it subsequently refused to extend Title II to cover this type of discrimination.[94]

Some employees are unable to bring claims under Title I of the ADA for three reasons. First, state and local employees have no cause of action under the title if they do not file a complaint with the Equal Employment Opportunity Commission (EEOC) within the required time.[95] Second, as federal employers are specifically exempted from the coverage of Title I, a plaintiff would have no cause of action against a federal employer for em-

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

88. Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1525 (11th Cir. 1997). *See also* Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 823 (11th Cir. 1998) (discussing *Holbrook*).

89. *Holbrook*, 112 F.3d at 1529.

90. *Bledsoe*, 133 F.3d at 823.

91. *Id.* (citing McNely v. Oncala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997)).

92. *Id.* (citing *McNely*, 99 F.3d at 1073 (quoting 42 U.S.C. § 12101(b)(1)) (1994)).

93. *Id.*

94. Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999).

95. *Id.* (citing 42 U.S.C. § 12117(a)).

ployment discrimination on the basis of his or her disability.[96] Third, disabled individuals working for a state or local agency that employs less than fifteen employees do not fall within the coverage of Title I and thus have no recourse for employment discrimination under this title.[97] For these reasons, many courts have acknowledged the availability of a Title II claim to disabled employees who are the target of employment discrimination.[98]

III. CIRCUIT SPLIT: WAS TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990 INTENDED TO PROHIBIT EMPLOYMENT DISCRIMINATION?

The circuits are divided on whether Title II of the ADA covers employment discrimination against disabled individuals.[99] The Ninth Circuit interprets the language of Title II regarding services, programs, or activities as "outputs" which are provided by the public entity and not applicable to employment, rather than "inputs," such as employment, which is prohibited by Title I of the Act.[100] However, the Second, Fourth, Fifth, and Eleventh Circuits, by focusing on the specific language of the ADA, Congress's intent, the Department of Justice regulations, and other courts' holdings, have concluded that Title II evinces a broad intent to prohibit employment discrimination and to prevent harmful and unnecessary acts against disabled individuals in the workplace.[101]

A. EXTENDING TITLE II TO PROHIBIT EMPLOYMENT DISCRIMINATION

In accordance with the Eleventh Circuit in *Bledsoe v. Palm Beach County Soil and Water Conservation District*, the Second, Fourth, and Fifth Circuits have extended Title II of the ADA to cover discrimination against disabled individuals in employment.[102] In *Bledsoe*, the Eleventh Circuit was faced with the issue of whether Title II of the ADA applies to discrimi-

96. 42 U.S.C. § 12111(5)(B) (2000).

97. 42 U.S.C. § 12111(5)(A).

98. *See* Holmes v. Tex. A & M Univ., 145 F.3d 681 (5th Cir. 1998); Castellano v. City of N.Y., 142 F.3d 58 (2d Cir. 1998); Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995).

99. *See Zimmerman*, 170 F.3d 1161; *Holmes*, 145 F.3d 681; Norman-Bloodsaw v. Lawrence Berkeley Lab, 135 F.3d 1260 (9th Cir. 1998); *Bledsoe*, 133 F.3d 816; *Castellano*, 142 F.3d 58; *Doe*, 50 F.3d 1261; Patterson v. Ill. Dep't of Corr. 35 F. Supp. 2d 1103 (C.D. Ill. 1999); Decker v. Univ. of Houston, 970 F. Supp. 575 (S.D. Tex. 1997), *aff'd*, 159 F.3d 1355 (5th Cir. 1998); *supra* note 8.

100. *See Zimmerman*, 170 F.3d at 1169; *Patterson*, 35 F. Supp. 2d 1103; *Decker*, 970 F. Supp. 575.

101. *See supra* note 11; *see infra* note 188.

102. *See supra* note 11.

nation in employment.[103] Mark Bledsoe was employed as a resource technician for the conservation district.[104] The job required Bledsoe to spend "a large portion of time walking, surveying, and performing manual labor in the fields."[105] While performing his duties, Bledsoe sustained an injury to his knee and was advised by his doctor to "refrain from excessive walking and walking on uneven terrain."[106] Bledsoe requested some form of accommodation from his employer who responded by offering him a position as resource conservationist, but Bledsoe then rejected the conservation district's offer.[107] Bledsoe was ultimately fired from his job.[108]

Bledsoe sued the district and Palm Beach County, alleging both entities were his "employer" within the meaning of Title I of the ADA and the Rehabilitation Act, and that they violated his rights protected by those Acts.[109] Because the district did not have the requisite number of employees to be subject to the jurisdiction of Title I of the ADA, Mark Bledsoe amended his complaint to bring a claim under Title II.[110] The district court held that "services, programs, or activities" focused on a public entity's "outputs," or provisions provided by an entity, and characterized public employment as an "input" or a service received by the entity, and not protected within Title II of the ADA, and granted the district's motion for summary judgment; Bledsoe appealed. [111] On appeal, the Eleventh Circuit reversed and held that Title II does prohibit discrimination against disabled individuals in employment for three reasons.[112]

First, the court focused on the prohibition in the final clause of section 12132 of Title II which protects qualified individuals with a disability from being subjected to discrimination by "any such entity."[113] The Eleventh

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103. *Bledsoe*, 133 F.3d at 819.

104. *Id.* at 818.

105. *Id.*

106. *Id.*

107. *Id.* The case does not specify why Bledsoe rejected his employer's offer for a different position. *Id.*

108. *Bledsoe*, 133 F.3d at 818.

109. *Id.* Subsequent to the plaintiff's termination, the parties entered into a joint settlement agreement which stated that the employee released, discharged, and surrendered any and all claims against the employer, excepting only future medical pursuant to other provisions in the agreement, or penalties, interest, or attorney's fees which might be due because of failure to pay the order approving the joint petition within thirty days. *Id.*

110. *Bledsoe*, 133 F.3d at 818 n.2 (quoting 42 U.S.C. 12111(5) (1994)) (explaining that the term "employer" in Title I is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year").

111. *Bledsoe*, 133 F.3d at 819, 821 (citing Bledsoe v. Palm Beach Soil and Water Conservation Dist., 942 F. Supp. 1439, 1443-44 (S.D. Fla. 1996)).

112. *Id.*

113. *Bledsoe*, 133 F.3d at 821 (citing 42 U.S.C. § 12132 (1994)).

Circuit, citing the Second Circuit, held that Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the programs, services, or activities, but is rather a "catch-all" phrase that prohibits *all* discrimination by a public entity.[114] Thus, the Eleventh Circuit found employment discrimination clearly prohibited within the language and structure of Title II.[115]

Second, although the statutory language used by Congress is brief, the legislative commentary regarding the applicability of Title II to employment discrimination was so "pervasive as to belie any contention" that Title II does not apply to employment actions.[116] The court stated that the report of the United States House of Representative Judiciary Committee intends for all forms of discrimination prohibited by Title II to be identical to those within the provisions of Titles I and III[117] because Title II seeks to "'break down barriers to the integrated participation of people with disabilities in all aspects of community life.'"[118] The court also found it is important that Congress intends Title II to work in the same way as section 504 of the Rehabilitation Act because section 504 focuses on employment discrimination.[119] The Eleventh Circuit held Title II is intended to work in the same manner as section 504 of the Rehabilitation Act, thus prohibiting employment discrimination.[120]

Third, the court gave deference to the Department of Justice's regulations required by Congress to implement Title II's prohibition against public employment discrimination.[121] Because the regulations were neither

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114. *Id.* at 822 (citing Innovative Health Sys., Inc. v. White Plains, 117 F.3d 37, 44-45 (2d. Cir. 1997)).

115. *Id.* at 822.

116. *Id.* at 821.

117. *Id.* (citing H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367).

118. *Id.* (citing 1990 U.S.C.C.A.N. at 472-73). The first Supreme Court case to consider Section 504 was *Consolidated Rail v. Darrone*, which stated that purposes of the Rehabilitation Act "were to promote and expand employment opportunities in public and private sectors for handicapped individuals and to place such individuals in employment." *Bledsoe*, 133 F.3d at 821 (citing 465 U.S. 624, 626-32, (citing 29 U.S.C. § 701(8)) (1994) "'Section 504 neither refers explicitly to § 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under "*any* program or activity receiving Federal financial assistance.' And it is unquestionable that the section was intended to reach employment discrimination.")

119. *Id.*

120. *Id.* (citing *Cons. Rail*, 465 U.S. 624). In *Consolidated Rail*, the Court stated that Section 504 neither refers explicitly to Section 604 nor contains analogous limiting language but rather that section prohibits discrimination against the handicapped under "'*any* program or activity receiving Federal financial assistance.'" 465 U.S. at 626-32) (emphasis in original).

121. *Bledsoe*, 133 F.3d at 822 (citing 42 U.S.C. § 12134 (1994)). The Attorney General had created a "subpart" in the Code of Federal Regulations addressing employment

"'arbitrary, capricious, [n]or manifestly contrary to the statute,'" the Department of Justice's interpretation was entitled to deference.[122] The Eleventh Circuit concluded that Title II states a cause of action for employment discrimination and reversed the decision of the district court finding in favor of Bledsoe.[123]

The Second, Fourth, Fifth, and Eleventh Circuits have also held that Title II prohibits employment discrimination.[124] In *Castellano v. New York*, the Second Circuit held that Title II applies to employee benefits discrimination claim;[125] in *Holmes v. Texas A & M University*, the Fifth Circuit addressed Title II's statutory language which specifies it is to be interpreted in accordance with the Rehabilitation Act and thus prohibits employment discrimination;[126] and the Fourth Circuit in *Doe v. University of Maryland Medical System Corp.* applied Title II to an employment discrimination claim using the same standards as those under the Rehabilitation Act.[127]

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discrimination by public entities. No modification had been made to the regulations promulgated by the Attorney General, and the Senate unanimously consented to printing the regulations in the Congressional Record of the Board of Directors, Office of Compliance. *Bledsoe*, 133 F.3d at 822 (citing 143 CONG. REC. S30-31 (January 7, 1997)). The court noted however that the regulations do not become effective until they are approved by Congress and published in the Congressional Record. *Id.*

122. *Bledsoe*, 133 F.3d at 822 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). The court noted other circuits that had given deference to the DOJ's regulations. *Id.* (citing *Decker*, 970 F. Supp. 575; Wagner v. Tex. Agric. & Mech. Univ., 939 F. Supp. 1297, 1310 (S.D. Tex. 1996); Hernandez v. Hartford, 959 F. Supp. 258 (S.D.N.Y. 1996); Silk v. Chicago, No. 95 C0143, 1996 WL 312074 (N.D. Ill. June 7, 1996); Iskander v. Rodeo Sanitary Dist., No. C-94-0479-SC, 1995 WL 56578 (N.D. Cal. Feb. 7, 1995), *aff'd*, 121 F.3d 715 (9th Cir. 1997)). *Wagner* noted that Title I addresses primarily the rights of disabled individuals in the workplace while Title II addresses the rights of individuals "*vis-à-vis*" the government and that due to the DOJ's regulatory posture, the court would not "'fill in the gaps in the ADA in an attempt to effectuate a purported Congressional intent that is not entirely evidence,'" giving deference to the regulations. *Id.* (citing *Wagner*, 939 F. Supp. at 1310).

123. *Bledsoe*, 133 F.3d at 825.

124. *See supra* note 11. The First Circuit declined to definitively answer the question of whether Title II encompasses employment discrimination. Currie v. Group Ins. Comm'n, 290 F.3d 1, 6 (1st Cir. 2002). The Sixth Circuit has held it was unlikely the court would permit employment discrimination claim to fall under Title II, however, if Title II did encompass employment claims, the administrative rule requires a claimant to abide by the exhaustion requirements in Title I. Dean v. Bay City, 415 F.Supp.2d 755, 760 (6th Cir. 2006). The Sixth Circuit did not rule definitively on this issue. *Id.* The Eighth Circuit has not addressed the question at issue, but has held that it assumed, but did not decide, that Title II would cover employment discrimination. Jones v. Colombia, 74 Fed.Appx. 683, 685 (8th Cir. 2003). The Third and Tenth Circuits have also declined to answer this question. Lavia v. Pennsylvania, 224 F.3d 190, 195 (3rd Cir. 2000); Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999).

125. 142 F.3d 58 (2d Cir. 1998).

126. 145 F.3d 681, 684 (5th Cir. 1998).

127. 50 F.3d 1261 (4th Cir. 1995).

Furthermore, many district courts addressing this issue have held that Title II of the ADA prohibits employment discrimination.[128] However, contrary to these circuits, in addressing similar precedent, legislative history, and statutory regulations as the Eleventh Circuit in *Bledsoe,* other courts including the Ninth Circuit have refused to extend Title II of the ADA to prohibit discrimination in employment.[129]

B. RESTRICTING COVERAGE OF EMPLOYMENT DISCRIMINATION TO TITLE I

In *Zimmerman v. Oregon Department of Justice*, the Ninth Circuit refused to extend Title II of the ADA to cover employment discrimination.[130] Scot Zimmerman was hired on a trial basis as a child support agent for the Department of Justice.[131] Zimmerman had an eye condition which caused him to be visually impaired.[132] Zimmerman asked the Department to accommodate his disability, but the department refused; the department then fired Zimmerman.[133] Zimmerman filed an action against the Department alleging violation of Titles I and II of the ADA and a similar state anti-discrimination statute.[134] The district court relied on "contextual clues" and found that Zimmerman's interpretation of Title II was inconsistent with the structure of the ADA. [135] The court dismissed all three claims, including his Title I claim because Zimmerman failed to file a timely charge with the EEOC.[136] Scot Zimmerman challenged the court's dismissal of his Title II claim.[137]

On appeal, the Ninth Circuit affirmed the district court's dismissal and held that Title II does not specifically prohibit employment discrimination

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128. *See Zimmerman*, 183 F.3d at 1161 n.1 (Reinhardt, J., dissenting).

129. *See Zimmerman*, 170 F.3d 1169; *Patterson*, 35 F.Supp.2d at 1123 (refusing to defer to 28 C.F.R. § 35.140(a) because "Congress clearly intended for employment disputes, whether arising from public or private employment, to be brought only under Title I of the ADA"); *Decker*, 970 F. Supp. at 578 (refusing to defer to 28 C.F.R. § 35.140(a)).

130. *Zimmerman*, 170 F.3d 1169.

131. *Id.* at 1171.

132. *Id.*

133. *Id.*

134. *Zimmerman*, 170 F.3d at 1171.

135. *Id.* at 1171. The district court held that in Title I, Congress created a "comprehensive statutory scheme prohibiting employment discrimination. In Title II, headed "Public Service," Congress prohibited governments from discriminating against disabled persons in providing *services* such as transportation or parks. Allowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees." Zimmerman v. St. of Or. Dep't of Justice, 983 F. Supp. 1327, 1329-30 (D. Or. 1997) (emphasis added).

136. *Id.* at 1171.

137. *Id.* at 1172.

for four reasons.[138] First, the court acknowledged the statutory language and heading of Title I.[139] The court noted that the heading explicitly refers to employment, its language mentions significant employment-related provisions, and Congress omitted any mention of employment in Title II.[140] Thus, the court found that Congress did not intend for Title II to encompass employment discrimination.[141] Therefore, the Ninth Circuit held that because Congress expressly chose to include governmental employers in Title I, but exempted the *federal* government from that title, the Oregon Department of Justice, as an employer, was subject to Title I, rather than Title II of the ADA.[142]

The Ninth Circuit addressed the wording of Title II which provides in pertinent part, "no qualified individual with a disability shall . . . 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.[143] The court held that the first clause of this sentence applies only to "'outputs" of a public agency, not to "inputs" such as employment.'"[144] The court emphasized that employment by a public entity is not ordinarily thought of as a service, activity, or program.[145] Further, the court noted that the "action" words in the sentence assume that the public entity provides an "output" which the disabled individual seeks to participate in or to benefit from.[146] Thus, the language and wording of the first clause of Title II do not suggest that Congress intended to cover employment discrimination.[147]

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138. *Zimmerman*, 170 F.3d 1169.

139. *Id.* at 1172 (quoting 42 U.S.C. § 12112(a) (1994) (stating "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment")).

140. *Id.* at 1174. Title I requires the EEOC to issue regulations interpreting the title and Title II requires the Attorney General to act in the same manner. *Id.* at 1177. *Russello v. United States*, 464 U.S. 16, 23 (1983), held that the court must give effect to the different wording and focus of the two provisions (stating "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

141. *Zimmerman*, 170 F.3d at 1174.

142. *Id.* at 1172 (quoting 42 U.S.C § 12111(5)(B) (1994) ("The term 'employer' does not include . . . the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . .").

143. *Id.* at 1173-74 (citing 42 U.S.C. § 12132).

144. *Id.* at 1174 (citing *Decker*, 970 F. Supp. at 578).

145. *Id.*

146. *Zimmerman*, 170 F.3d at 1174.

147. *Id.*

In addressing the second clause, the Ninth Circuit acknowledged statutory language requiring a plaintiff to "'meet the essential eligibility requirements' of a government service, program, or activity" and held this clause *must* relate to a government service, program, or activity, for the plaintiff to bring a claim under Title II.[148] Further, the court held that to obtain or retain a job is not to *receive* services, and employment is not a program or activity; therefore, Title II only prohibits discrimination in a public entity's outputs.[149]

Second, the Ninth Circuit addressed what deference, if any, that should be given to the Department of Justice's regulations.[150] Zimmerman and the Attorney General, as *amicus*, both argued that Title II is ambiguous and requires deference to the Attorney General's regulations.[151] However, the court concluded that Congress unambiguously expressed its intent for Title II *not* to apply to employment, and thus accorded the Attorney General's regulations no deference.[152]

Third, *Zimmerman* addressed the structure of the ADA and held that the statute as a whole unambiguously demonstrated that Congress did not intend for Title II to encompass employment discrimination.[153] The court held that to prohibit employment discrimination under Title II would make Title I unnecessary, and rid it of its procedural requirements.[154] Moreover, because Title I and Title II delegate the responsibility to promulgate implementing regulations to different agencies, [155] if both titles applied to dis-

148. *Id.* at 1174-75 (citing 42 U.S.C. § 12132(2) (1994) (the clause specifically provides "[t]he term 'qualified individual with a disability means' an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.").

149. *Zimmerman*, 170 F.3d at 1176.

150. *Id.* at 1172-73 (quoting *Chevron*, 467 U.S. at 842-44) "*Chevron* holds that if the intent of Congress is clear, the court as well as the agency must give effect to the 'unambiguously expressed intent of Congress.'" *Id.* If the first step is not satisfied, and Congress left a gap for the administrative agency to fill, the court then proceeds to step two which requires it to uphold the administrative regulations unless it is "'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.*

151. *Id.* at 1173.

152. *Id.* at 1173 (citing *Chevron*, 467 U.S. at 842-44).

153. *Zimmerman*, 170 F.3d at 1176.

154. *Id.* The procedural requirements of Title I require an employee to first file a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC) or with a state or local agency to grant relief from the unlawful employment practice. 42 U.S.C. § 12117(a) (adopting Title VII's filing requirements set forth in 42 U.S.C. § 2000e-5(e)(1)).

155. *Zimmerman*, 170 F.3d at 1178.

ability discrimination in employment, then state and local governments could be subjected to conflicting regulations.[156]

Fourth, although Title II incorporates part of the Rehabilitation Act, it does so only with regard to procedural, not substantive rights, for three reasons.[157] First, the Ninth Circuit stated that Congress did not textually borrow the wording of section 504 of the Rehabilitation Act when it drafted Title II (although the phrasing of the two statutes is similar).[158] Contextually, the court found that no section of Title II relates to employment where the surrounding sections of the Rehabilitation Act explicitly relate to employment.[159] Third, the Ninth Circuit stated that Congress's purpose of prohibiting employment discrimination is carried out in Title I, not Title II; the Rehabilitation Act is linked to Title I.[160] The Ninth Circuit held that although most courts have found Title II to cover employment discrimination, this assumption has been made without full analysis, discussion of the statute's language or context, or consideration of whether Congress intended to extend the Rehabilitation Act's prohibitions to Title II.[161] The court ultimately affirmed the decision of the district court and stated that it must defer to the unambiguously expressed intent of Congress to not address employment discrimination claims within Title II of the Act.[162]

The Ninth Circuit has also stated that because Congress has spoken clearly on the subject, the Attorney General's regulation violates the provisions of the statute.[163] The Central District of Illinois refused to defer to the Attorney General's regulations because "Congress clearly intended for employment disputes, whether arising from public or private employment, to be brought only under Title I of the ADA."[164] The Southern District of Texas came to a similar conclusion after it analyzed the text of Title II and

156. *Id.*

157. *Id.* at 1179 (citing 29 U.S.C. § 794 (a)).

158. *Zimmerman*, 170 F.3d at 1180.

159. *Id.*

160. *Id.* at 1181.

161. *Id.* at 1183 (citing Holmes v. Tex. A&M Univ., 145 F.3d 681, 683-84 (5th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-65 n.9 (4th Cir. 1995); Motto v. Union City, No. 95-5678, 1997 WL 815609, at *8 (D.N.J. Aug. 27, 1997); Davoll v. Webb, 943 F. Supp. 1289, 1297 (D. Colo. 1996)). *Zimmerman* found courts' reliance on the Attorney General's regulations and the legislative history of the ADA insufficient to conclude Title II covers employment discrimination. 170 F.3d at 1183.

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

163. *See Zimmerman*, 170 F.3d at 1173 (citing Sierra Club v. U.S. Envtl. Prot. Agency, 118 F.3d 1324, 1327 (9th Cir. 1997)).

164. Patterson v. Ill. Dep't of Corr., 35 F. Supp. 2d 1103, 1110 (C.D. Ill. 1999). *See also Zimmerman*, 170 F.3d at 1173.

held that because the text was clear within Title II, it would not defer to the Attorney General's regulations.[165]

IV. ANALYSIS OF TITLE II: CONGRESS'S INTENT TO PROHIBIT EMPLOYMENT DISCRIMINATION WITHIN TITLE II OF THE ADA

Deferring to precedent within the Ninth Circuit, *Zimmerman* explicitly held that deference to the Attorney General's regulations and to the legislative history of the ADA was unfounded and insufficient because Congress's intent was clear from the language of the statute.[166] The court realized its decision created an "inter-circuit" split of authority, and was hesitant to do so, but believed it necessary to restrict employment discrimination claims to Title I.[167] In doing so, the Ninth Circuit relied primarily on the text and structure of the ADA and considered, but did not find controlling, the legislative history, and Attorney General's regulations.[168] Such refusal to give deference to ambiguous text and language in Title II was erroneous. As many of the circuits have demonstrated, the text of Title II of the ADA encompasses employment discrimination against disabled individuals.[169] Prohibition of employment discrimination is demonstrated within Title II by five reasons: (1) the plain language of section 12132 of Title II, (2) legislative history, (3) the similarity between forms of discrimination prohibited in Title II and Titles I and III, (4) the Department of Justice's implementing regulations, and (5) the majority of circuits, all of which support the position that Title II covers employment discrimination.

A. THE "PLAIN" LANGUAGE OF TITLE II

Section 12132 provides that no disabled individual "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."[170] These words are "self-evidently

165. Decker v. Univ. of Houston, 970 F. Supp. 575, 578 (S.D. Tex. 1997), *aff'd*, 159 F.3d 1355 (5th Cir. 1998). *See also Zimmerman*, 170 F.3d at 1173.

166. *Zimmerman*, 170 F.3d at 1173.

167. *See id.* at 1184.

168. *Id.*

169. *See* Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161 (9th Cir. 1999); Castellano v. New York, 142 F.3d 58 (2d Cir. 1998); Holmes v. Tex. A&M, 145 F.3d 681 (5th Cir. 1998); Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995).

170. 42 U.S.C. § 12132 (2000).

broad and inclusive."[171] Many courts have divided this phrase into two clauses, as demonstrated previously.[172]

1. *The First Clause of Section 12132*

The first clause states 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."[173] This clause relates to activities of a public entity and does not exclude hiring or employing workers for three reasons.[174] First, putting people to work is the "chief activity" of municipalities.[175] Second, Congress specified that Title II is to be interpreted in accordance with section 794 of the Rehabilitation Act[176] which defines "program or activity" as "'all of the operations . . . of the governmental entity.'"[177] Third, in *Consolidated Rail v. Darrone,* the Supreme Court has interpreted the Rehabilitation Act's definitions of these terms to include employment and thus to bar employment discrimination.[178]

As various circuits have interpreted Title II of the ADA to bar employment discrimination, the Supreme Court has interpreted the Rehabilitation Act to promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.[179] The Court found that even though section 504 of the Rehabilitation Act does not contain language pertaining to employment discrimination, it was unquestionable that section 504 prohibits discrimination against the handicapped under "'*any* program or activity receiving Federal financial assistance.'"[180] The Court concluded that section 504 of the Rehabilitation Act should not be limited to programs that receive federal aid

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171. Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1163 (9th Cir. 1999) (Reinhardt, J., dissenting).

172. 29 U.S.C. § 794(b)(1)(B) (2000).

173. 42 U.S.C. § 12132 (2000).

174. *See Zimmerman*, 183 F.3d at 1163 (Reinhardt, J., dissenting).

175. *Id.*

176. 42 U.S.C. § 12133 (2000).

177. 29 U.S.C. § 794(b)(1)(B) (2000). *See also Zimmerman*, 183 F.3d at 1163 (Reinhardt, J., dissenting).

178. Consol. Rail Corp. v. Darrone, Admin'x of Estate of LeStrange, 465 U.S. 624, 631-34 (1984). *See also Zimmerman*, 183 F.3d at 1163 (Reinhardt, J., dissenting) (Judge Reinhardt noted that the language in Title II is "unquestionably" broader than that in *Consolidated Rail* because Title II contains an independent discrimination clause banning all discrimination).

179. *Consol. Rail*, 465 U.S. at 626 (citing 29 U.S.C. § 701(8) (1973) (current version at 29 U.S.C. § 701 (2000)).

180. *Id.* at 632 (emphasis in original) (citing 29 U.S.C. § 701(8) (1973)).

because the primary purpose of the Act was to prohibit employment discrimination.[181]

The Fourth Circuit, relying on the Court's holding in *Consolidated Rail*, has held that the language of the Rehabilitation Act and Title II is substantially identical.[182] The ADA contains a provision stating that nothing within the ADA "shall be construed to apply a lesser standard than [those] applied under [T]itle V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to [the title]."[183] Section 12134 of the ADA commands that Title II is to be interpreted consistently with section 794 of the Rehabilitation Act.[184] This section prohibits excluding a disabled individual from participation in, denying the benefits of, or subjecting the individual to discrimination under any program or activity which receives financial assistance or is conducted by an executive agency, or the post office.[185]

The Fifth, Sixth, and Eighth Circuits have held that federal employees or applicants for federal employment may pursue remedies for disability discrimination under sections 791 and 794 of the Rehabilitation Act.[186] The Southern District of New York held that section 794 provides the exclusive remedy for purposes of a federal employee alleging disability discrimination.[187] As these circuits have explicitly held, section 794 of the Rehabilitation Act permits a cause of action for a disabled individual against his or her employer, and because Title II is to be interpreted consistently with this section of the Rehabilitation Act, Title II guarantees protection for federal employees.

"The distinction between inputs and outputs finds no support whatever in the statutory language [administrative or legislative history]."[188] This approach was first created by a district court in Florida in a decision that was reversed by the Eleventh Circuit in *Bledsoe* which held that Title II does cover employment discrimination.[189] The same approach was adopted

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181. *Consol. Rail*, 465 U.S. at 632-33.

182. Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264 n.9 (4th Cir. 1995).

183. 42 U.S.C. § 12201(a) (2000). Title V of the Rehabilitation Act was replaced by P.L. 93-112, Title V §500.

184. *See* 42 U.S.C. § 12134 (2000); *see also* Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161, 1163 (9th Cir. 1999) (Reinhardt, J., dissenting).

185. 29 U.S.C. § 794(a) (2000).

186. *See* Morgan v. U.S. Postal Serv., 798 F.2d 1162 (8th Cir. 1986); Smith v. U.S. Postal Serv., 742 F.2d 257 (6th Cir. 1984); Prewitt v. U.S. Postal Serv., 662 F.2d 292 (5th Cir. 1981).

187. DiPompo v. West Point Military Acad., 708 F. Supp. 540 (S.D.N.Y. 1989).

188. *Zimmerman*, 183 F.3d at 1164 (Reinhardt, J., dissenting).

189. Bledsoe v. Palm Beach Soil & Water Conservation Dist., 942 F. Supp. 1439, 1443 (S.D. Fla. 1996), *rev'd*, 133 F.3d 816 (11th Cir. 1998). *See also Zimmerman*, 183 F.3d at 1164 (Reinhardt, J., dissenting).

by a district court in the Fifth Circuit and subsequently overruled in *Holmes v. Texas A & M University.*[190] Thus, in *Zimmerman,* the Ninth Circuit's reliance on inputs and outputs from the statutory text, subsequently overruled by other circuits, is unfounded as it refused to give deference to the legislative history of the Act and the Attorney General's regulations.

Moreover, the Ninth Circuit has also held that "[r]ather than determining whether each function of a city [or public entity] can be characterized as a service, program, or activity for purposes of Title II," the court would construe "'the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does.'"[191] By addressing the language of the first clause of the statute and its incorporation of the Rehabilitation Act's prohibitions, Title II was intended to prohibit employment discrimination.

2. *The Second Clause of Section 12132*

The second clause of section 12132 states: "no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity."[192] This clause prohibits covered entities from engaging in any type of discrimination.[193] The Eleventh Circuit, citing the Second Circuit, has held that "the language of Title II's antidiscrimination provision does not limit the ADA's coverage to conduct" occurring in services, programs, or activities but is rather a "catch-all" phrase prohibiting "*all* discrimination by a public entity, regardless of the context."[194] Although courts have held that the prohibition is limited to discrimination which occurs in programs, services, or activities, both Congress and the Supreme Court have confirmed that the text directs interpretation in accordance with the Rehabilitation Act, which prohibits employment discrimination against disabled individuals.[195] Thus, the second clause of section 12132 of Title II prohibits employment discrimination.

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190. Decker v. Univ. of Houston, 970 F. Supp. 575 (S.D. Tex. 1997); Holmes v. Tex. A&M Univ., 145 F.3d 681, 684 (5th Cir. 1998). *See also Zimmerman*, 183 F.3d at 1164.

191. Barden v. Sacramento, 292 F.3d 1073, 1076 (citing Lee v. Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001)).

192. 42 U.S.C. § 12132(a) (2000).

193. *See Zimmerman*, 183 F.3d at 1165 (Reinhardt, J., dissenting).

194. Bledsoe, 133 F.3d at 821 (quoting Innovative Health Sys., Inc. v. White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997) (emphasis added)).

195. *Zimmerman*, 183 F.3d at 1165 (Reinhardt, J., dissenting) (citing Bay Area Addiction Research and Treatment, Inc. v. Antioch, 179 F.3d 725, 730 (9th Cir. 1999)).

B. DEFERENCE TO THE DEPARTMENT OF JUSTICE'S REGULATIONS

1. There is no Textual Ambiguity in the Department of Justice's Regulations

The Code of Federal Regulations section 35.140, titled "Employment Discrimination Prohibited" provides in subsection (a): "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."[196] Pursuant to the Administrative Procedure Act, section 706 (2)(A), the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[197] The Second, Fourth, Fifth, Ninth, and Eleventh Circuits have either directly or indirectly held the Attorney General's regulations to be reasonable, not arbitrary, capricious, or manifestly contrary to the intention of Congress.[198] Therefore, courts should give deference to the Attorney General's regulations and protect disabled individuals who are discriminated in employment under Title II of the ADA.

2. The Department of Justice's Regulations are Entitled to Deference

The principle of deferring to an agency's reasonable interpretation of an Act by Congress was established by meeting the test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[199] Under *Chevron*, the Supreme Court found that when it reviews an agency's construction of the statute which it administers, the Court is confronted with two questions.[200] The first question asks whether the intent of Congress is clear within the Act.[201] If congressional intent is clear, the court and the agency "must give effect to the unambiguously expressed [objective] of Congress."[202] If the court determines the statute is silent or ambiguous as to congressional intent with respect to the specific issue, it then decides "whether the agency's answer is based on a permissible construction of the

196. 28 C.F.R. § 35.140(a) (2007).
197. 5 U.S.C. § 706(2)(A) (2000).
198. *See Zimmerman*, 183 F.3d 1161; Castellano v. New York, 142 F.3d 58 (2d Cir. 1998); Holmes v. Tex. A&M, 145 F.3d 681 (5th Cir. 1998); Bledsoe v. Palm Beach County. Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995).
199. 467 U.S. 837, 842-43 (1984).
200. *Id.* at 842.
201. *Id.*
202. *Id.* at 842-43.

statute."[203] The Court additionally stated that if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to that agency to create a specific provision of the statute by the agency's regulation. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."[204]

The Eleventh Circuit addressed the standard for deference to agency regulations set forth in *Chevron*.[205] The court noted that Congress specifically provides in the ADA for the Department of Justice to write regulations implementing Title II's prohibition against discrimination.[206] The House Judiciary Committee Report provides that because Title II does not list all the forms of discrimination it is intends to prohibit, the Attorney General was to issue regulations setting forth the forms of discrimination prohibited in the title.[207] The regulations promulgated by the Attorney General state:

> 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. [T]he requirements of section 504 of the Rehabilitation Act of 1973 . . . as those requirements pertain to employment, *apply to employment* in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of [T]itle I.[208]

These regulations "straightforwardly" apply Title II to employment discrimination and state that Title II of the ADA applies to all activities of public entities, including their employment practices. [209] If it is unclear, as some courts have held, whether Congress intended Title II to apply to pub-

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203. *Id.* at 843 n.1. Footnote 1 states that:
> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

204. *Id.* at 844.

205. Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 823 (11th Cir. 1998) (citing *Chevron*, 467 U.S. at 844).

206. *See id.* (citing 42 U.S.C. § 12134 (2000)).

207. H.R. REP. NO. 101-485(III), at 52 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 475. *See also Bledsoe*, 133 F.3d at 822.

208. 28 C.F.R. § 35.140 (2007) (emphasis added). The Attorney General promulgated regulations to implement Section 12134(a) of Title II have also "interpreted the ADA to allow public employees to bring private suits against their employers without exhausting [their] administrative remedies." Decker v. Univ. of Houston, 970 F. Supp. 575, 578 (S.D. Tex. 1997) (citing 28 C.F.R. § 35.172 (2007)).

209. *See Zimmerman*, 183 F.3d at 1168 (Reinhardt, J., dissenting) (citing 28 C.F.R. pt. 35, App. A (2007)).

lic employment discrimination, the Department of Justice was authorized to fill in the gaps.[210]

In *Wagner v. Texas A & M University*, the district court for the Southern District of Texas held that although the language used in Title II was not definite, given the Department of Justice's regulations prohibiting employment discrimination, the court would not fill in the gaps to effectuate a purported congressional intent that is not entirely clear.[211] Thus, deference was given to the agency's regulations and an employment discrimination claim was permitted under Title II.[212] The Second, Fourth, Fifth, Ninth, and Eleventh Circuits have also concluded that deference should be given to the Department of Justice's regulations.[213] Although courts are divided about the meaning of two phrases within section 12132 of Title II, this leads to the conclusion that Congress's intent is unclear and deference should therefore be given to the Department of Justice's regulations.

3. *Because Congress has not Modified a Long-standing Administrative Interpretation, Courts Should Assume that the Interpretation is Consistent with Congressional Intent*

Additionally, because Congress has not modified the regulations and the Senate unanimously consented to printing the regulations, the Attorney General's interpretation of Title II was adopted without controversy.[214] Thus, under *Chevron*, the regulations adopted by the Attorney General "are neither arbitrary, capricious, [n]or manifestly contrary to the statute," and courts must defer to the agency's reasonable construction of the statute which prohibit employment discrimination within Title II.[215]

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210. *Id.*

211. 939 F. Supp. 1297, 1310 (S.D. Tex. 1996).

212. *Id.*

213. *See Zimmerman*, 183 F.3d 1161; Castellano v. New York, 142 F.3d 58 (2d Cir. 1998); Holmes v. Tex. A&M Univ., 145 F.3d 681 (5th Cir. 1998); Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995); *see also* Dertz v. Chicago, 912 F. Supp. 319, 323-24 (N.D. Ill. 1995) (applying Title II to employment discrimination claim brought against public entity); Peterson v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993).

214. *Bledsoe*, 133 F.3d 816, 822 (citing 143 CONG. REC. 30-31 (daily ed. January 7, 1997)).

215. *Id.* at 823 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

C. COVERAGE OF EMPLOYMENT DISCRIMINATION WITHIN TITLES I AND II OF THE ADA

There are distinctions between Titles I and II of the ADA: the two titles cover different scopes employment discrimination; the titles evolved from different civil rights acts; and provide different forms of relief.[216]

Although the titles are not all-encompassing, Congress's decision to provide two separate methods to remedy discrimination has caused some courts to inquire into the purpose and wisdom of its policy and rationale for the ADA.[217]

1. The Unlimited Language in and Policies within the ADA Prohibit all Types of Discrimination against Disabled Individuals

Judge Reinhardt, dissenting in *Zimmerman*, stated that although the statute contains overlapping titles, no "policy or objective of the ADA argues for limiting any of its provisions, including Title II . . . to exclude employment discrimination."[218] Nonetheless, the policies and objectives of the ADA sought to eradicate *all* discrimination against disabled individuals in every area, including the area of employment discrimination.[219] Thus, because Title II has been interpreted to cover employment discrimination and no language within the Act restricts the prohibition of employment discrimination to specific titles, this prohibition is encompassed within Title II.

2. Titles I and II of the ADA Encompass Different Types of Employers

In *Cormier v. Meriden*, the district court held that the difference in the size of the employers subject to Titles I and II of the ADA indicates an area in which the two provisions are not redundant, so that Title II may be interpreted to cover employment related claims.[220] Title I requires compliance only by employers with fifteen or more employees, while Title II covers all municipal entities regardless of size.[221] Thus, assuming Congress intended no redundancy, Title II could cover only individuals employed by public

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216. *See Zimmerman*, 183 F.3d at 1165 (Reinhardt, J., dissenting); *see also* 42 U.S.C. § 12101(b)(1)-(4) (2000); 42 U.S.C. § 12132 (2000). Title I covers employers with fifteen or more employees. Title II covers all public employers, regardless of their size.

217. *See Zimmerman*, 183 F.3d at 1166 (Reinhardt, J., dissenting).

218. *Id.*

219. *Id.*

220. Cormier v. Meriden, No. 3:03cv1819, 2004 U.S. Dist. LEXIS 21104, at *27 (D. Conn. 2004).

221. 42 U.S.C. § 12131(1) (2007). *See also Cormier*, 2004 U.S. Dist. LEXIS 21104 at *27.

entities with fewer than fifteen employees, and all other employees are required to pursue redress under Title I.[222] This theory would be consistent with legislative history of the ADA.[223]

Further, while the Equal Employment Opportunity Commission has jurisdiction over claims brought against public entities with fifteen or more employees, the Department of Justice's regulations, promulgated under the Rehabilitation Act, govern discrimination claims by employees of public entities with fewer than fifteen employees.[224] Thus, although two different agencies govern or regulate pursuant to Titles I and II of the ADA, this does not render the prohibition of employment discrimination within both titles redundant.

3. *The Legislative History of the ADA Sought to Eradicate Employment Discrimination Caused by Public Entities*

Cormier also relied on the House of Representatives Report which states that Congress intends the ADA to be "broadly remedial," and to import all the provisions of section 504 of the Rehabilitation Act which do not exempt smaller state or municipal agencies from its employment discrimination provisions into the ADA.[225] Although this theory might exempt employees of municipalities employing fewer than fifteen individuals from exhausting their administrative remedies, it can be inferred from the language of the statute that, at a minimum, Congress intended for Title II to cover public entities employing fewer than fifteen individuals.[226] Thus, the legislative history of the ADA indicates Title II is intended to prohibit employment discrimination against disabled individuals who work for public entities with fewer than fifteen employees.

4. *Title I is not the Only Recourse for Employment Discrimination*

The First Circuit has held that "[w]hile Title I's language clearly covers employment discrimination, and public employers are not exempted from the definition of a covered entity, Title I says nothing about it being

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222. *See Cormier*, 2004 U.S. Dist. LEXIS 21104 at *27.

223. *See id.*

224. *See* Beth Collins, *The Americans with Disabilities Act: Rehabilitating Congressional Intent*, 28 J. LEGIS. 213, 218 (2002).

225. *See Cormier*, 2004 U.S. Dist. LEXIS 21104 at *27 (citing H.R. REP. NO. 101-485(II), *as reprinted in* 1990 U.S.C.C.A.N. 367; 29 U.S.C. §794 (2000)).

226. *Id.* The court stated that such employees of smaller public entities that receive federal grant money may seek relief via the Rehabilitation Act. *Id.* at *27-28.

[the] exclusive remedy or avenue for suit."[227] Also, it is not uncommon for individuals to have intersecting rights even within one act.[228]

The two titles create substantively different rights, "[t]he words "services, programs, or activities" do not necessarily exclude employment, and the "subjected to discrimination" clause may broaden the scope of coverage [even] further."[229] Further, the damages available under each title as punitive damages are available under Title I, but not under Title II.[230]

As Congress directed the Department of Justice to promulgate regulations in accordance with the ADA, to the extent that the intent of the statute is unclear and the regulations are not arbitrary, capricious, or manifestly contrary to the intent of the statute, deference should be accorded to the implementing regulations.[231] Deference to an agency's interpretation of regulations, due to ambiguous language within a statute, is explicitly required in the Supreme Court's opinion in *Chevron U.S.A., Inc.*

V. CONCLUSION

As demonstrated by the above analysis, unless an disabled individual is permitted to bring an employment discrimination claim against a public entity employing less than fifteen workers under Title II of ADA, the employee's claim and remedy might be forgone because Title I, the other alternative, covers employers with no less than fifteen workers. As a result of this common situation, many disabled individuals are denied recourse in circuits that do not recognize a cause of action for employment discrimination in Title II of the ADA.

It is explicit in the legislative history of the Americans with Disabilities Act of 1990 that Congress intends to prohibit discrimination against disabled individuals in every day life. It is also clear from the broad statutory language in Title II that Congress seeks to rid discrimination in programs, services, activities, and employment settings. As the courts are in conflict as to the meaning of the language within section 12132 of Title II, deference should be given to the Attorney General's regulations, which were required by Congress to implement the purpose of Title II of the ADA. To not permit a disabled individual who works for a state, local or federal agency that employs less than fifteen employees adequate resource for a valid employment discrimination claim, the purpose of the ADA will be defeated.

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227. Currie v. Group Ins. Comm'n, 290 F.3d 1, 6 (1st Cir. 2002).
228. *Id.*
229. *Id.* at 6-7 (quoting 42 U.S.C. § 12132 (2000)).
230. Winfrey v. City of Chic., 957 F. Supp. 1014, 1024 (N.D. Ill. 1997).
231. *See Currie*, 290 F.3d at 6.

Many courts have held that Congress intends Title II of the ADA to encompass employment discrimination against disabled individuals. [232] This proposition, supported by the plain language of the statute, the expressed intent of Congress, and the Department of Justice's implementing regulations, furthers the purpose of the ADA's broad prohibition of discrimination, including employment discrimination, within Title II of the ADA.

232. *See* Zimmerman v. Or. Dep't of Justice, 183 F.3d 1161 (9th Cir. 1999); Castellano v. New York, 142 F.3d 58 (2d Cir. 1998); Holmes v. Tex. A&M Univ., 145 F.3d 681 (5th Cir. 1998); Bledsoe v. Palm Beach Cty. Soil & Water Conserv. Dist., 133 F.3d 816 (11th Cir. 1998); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995).