

## LEGISLATIVE REFORM

### THE AMERICANS WITH DISABILITIES ACT: REHABILITATING CONGRESSIONAL INTENT

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#### I. INTRODUCTION

Recently, two federal appellate courts have interpreted the Americans with Disabilities Act (ADA) in drastically different ways. The split between the Eleventh and Ninth Circuits has serious implications for individuals with disabilities and their employers. The Eleventh Circuit allows more employees to make discrimination claims under the ADA but fails to effectively protect employers. The Ninth Circuit eliminates ADA protection for a group of public employees but provides more administrative shields for employers. Should the Supreme Court choose to resolve the matter, it may endorse the reasoning of one or the other Circuit, but this would be a mistake. The Eleventh and Ninth Circuits' interpretations of the ADA contravene Congress' intent in enacting the ADA<sup>1</sup> because they both fail to provide a consistent, clear, efficient, and comprehensive statutory and regulatory regime to provide individuals with disabilities critical protection from employment discrimination.<sup>2</sup>

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1. Two of the four purposes Congress outlined for enacting the ADA and the ADA's enforcement provisions include a call for a consistent, clear, efficient, and comprehensive statutory and regulatory regime to protect individuals with disabilities. Congress enacted the ADA 1) "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and 2) "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)-(2) (1994). *See also* 42 U.S.C. § 12117(b) (1994) (coordinating enforcement authority for actions alleging employment discrimination under Title I and another anti-discrimination statute, the Rehabilitation Act of 1973, mandating the responsible administrative agencies to "avoid[ ] duplication of effort and prevent[ ] imposition of inconsistent or conflicting standards.").

2. *See* 42 U.S.C. § 12101(a)(1)-(9) (1994) (detailing Congressional findings stating that "some 43,000,000 Americans have one or more physical or mental disabilities" and these "individuals . . . continually encounter various forms of discrimination" and "are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society. . ."). Additionally:

Under the Eleventh Circuit's interpretation in *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*,<sup>3</sup> one individual with a disability with four different jobs potentially could be covered by four different ADA statutory and regulatory regimes, one for each type of employer.<sup>4</sup> Under *Bledsoe*, an employee's ADA protection differs if she works for 1) a private employer who employs fifteen or more people, 2) a private employer who employs less than fifteen people, 3) a public employer who employs fifteen or more people, or 4) a public employer who employs less than fifteen people.<sup>5</sup> Thus, depending on which employer discriminated against her, two different sets of administrative and substantive regulations<sup>6</sup> enforced by two different agencies might control her ADA claim.<sup>7</sup> The web of regulations resulting from the Eleventh Circuit's *Bledsoe* decision violates Congress' mandate to create a clear, consistent, and efficient statutory and regulatory scheme to enforce the ADA.

The Ninth Circuit in *Zimmerman v. Oregon Dept. of Justice* attempted to resolve this problem.<sup>8</sup> The court mandated that all employment claims must fall under one ADA title, administered by a single agency under a single set of substantive and administrative regulations.<sup>9</sup> Although *Zimmerman* provides a more clear statutory and regulatory scheme, eliminates uncertainty, and streamlines the process, the solution fails because it unnecessarily restricts ADA protection from public employees (like the plaintiff in *Bledsoe*), contravening Congress' intent in the ADA to provide comprehensive protection for individuals with disabilities.

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[C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally. . . . [T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.

*Id.*

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

4. *Id.*

5. Title I defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 12111(5)(A) (1994). See *infra* part I describing coverage under Title I and II of the ADA. Title II can be interpreted to cover employment discrimination by public entities (employers) of all sizes. See *infra* part I for an explanation of Title II's statutory and regulatory regime.

6. The employer's classification determines the controlling substantive regulations such as the definitions of "qualified individual with a disability" and "major life activities" and administrative regulations such as whether the agency will bar her claim if she fails to meet a 180 day statute of limitations or will allow her to proceed directly to court, bypassing all administrative requirements. Part III(A).

7. *Infra* Part III(A)(1) (describing the ADA's statutory and regulatory regime).

8. 170 F.3d 1169 (9th Cir. 1999).

9. *Id.* at 1183.

In this Article, I propose an alternative approach that satisfies Congress' intent and guards the interests of *both* employees and employers. My solution integrates the Eleventh Circuit's more comprehensive protection of individuals with disabilities with the Ninth Circuit's clear, consistent, and efficient approach, providing superior protection for employment discrimination under the ADA. My approach fulfills Congress' intent better than either the Eleventh or Ninth Circuit's solutions because it 1) creates a more consistent statutory and regulatory regime, 2) promotes clearer and more efficient administrative solutions to employment discrimination claims, and 3) ensures more comprehensive protection for *both* individuals with disabilities and small government employers.

In Part I, I describe how the current inconsistencies originated in the statute's initial design and describe the Eleventh and Ninth Circuit split. In Part II, I propose an alternative solution that places all employment claims under Title I, not Title II of the ADA and re-defines "employer" under Title I to include all public employers, even those with fewer than fifteen employees. In Part II, I also outline a plan for the Supreme Court, federal agencies, or Congress to implement the solution. In Part III, I argue that my alternative solution improves both the Eleventh and Ninth Circuits' interpretations by fulfilling Congress' intent to create a consistent, clear, efficient, and comprehensive statutory and regulatory regime.

## II. THE ROAD TO A CIRCUIT SPLIT

### A. *Constructing the ADA*

Congress' construction of the ADA led to the current inconsistencies in agency regulations because it places different federal agencies in charge of Title I and II. Congress divided the ADA into four different sections: employment (Title I), public services (Title II), public accommodations and services (Title III), and miscellaneous provisions (Title IV). Congress constructed the ADA on the foundation of established civil rights legislation. Congress modeled Title I of the ADA on Title VII of the Civil Rights Act of 1964 (CRA),<sup>10</sup> which addresses employment discrimination against women and racial minorities. In contrast, Congress fashioned Title II of the ADA after the Rehabilitation Act of 1973 (Section 504), addressing discrimination in public programs and activities.<sup>11</sup> Section 504 was originally based on Title VI of the CRA.<sup>12</sup> Different agencies administer Title VII of the CRA and Section 504. Congress assigned the same

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10. Civil Rights Act of 1964, § 701-718, 42 U.S.C. §§ 2000e-2000e-17 (1994).

11. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 701-797b (1994).

12. 42 U.S.C. § 2000d-2000d-4a (1994).

two agencies to administer Title I and II of the ADA. The Equal Employment Opportunity Commission (EEOC) oversees employment discrimination claims under Title VII of the CRA and Title I of the ADA while the Department of Justice (DOJ) controls discrimination claims in public services for Section 504 and Title II.

If Title I and II functioned independently, two different agencies could administer the different titles without event. The EEOC could administer all employment claims while the DOJ administers claims of discrimination by public entities in their "services, programs, and activities." Historically, courts interpreted Section 504's language "services, programs, and activities"<sup>13</sup> to include employment (in part because no other employment protection existed at the time).<sup>14</sup> Both courts and the DOJ have applied the same interpretation to the same phrase in Title II.<sup>15</sup> Although the ADA has an independent title for employment discrimination (Title I), the DOJ interpreted the Title II language (modeled after Section 504) to grant the DOJ overlapping jurisdiction with the EEOC for ADA employment claims.<sup>16</sup> Thus, the jurisdiction of the EEOC and DOJ overlap in employment discrimination claims against public employers with fifteen or more employees.

### B. The Circuit Split

The Eleventh and Ninth Circuits disagree over whether Congress intended to create a loophole for public employees to circumvent the detailed administrative exhaustion requirements promulgated by the EEOC under Title I, including a statute of limitations of 180 days after the alleged discriminatory incident to file a claim.<sup>17</sup> The loophole allows any employee of a public entity, such as a

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13. 29 U.S.C. § 794 (1994).

14. See *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632–33 (1984) (citations omitted).

15. Title II prohibits discrimination by public entities in "services, programs, or activities." 42 U.S.C. § 12131 (1995); *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998); 28 C.F.R. § 35.140 (2001) (titled "Employment discrimination prohibited" and placing the DOJ in charge of employment claims by public employees).

16. Title I, enforced by the EEOC, prohibits job discrimination by state and local employers. Department of Justice, Civil Rights Div., *The Americans with Disabilities Act: Title II Technical Assistance Manual* 19 (1993), available at <http://www.usdoj.gov/cit/ada/taman2.html>.

17. See 42 U.S.C. § 12117(a) (1994). Congress mandated the EEOC establish administrative exhaustion requirements modeled after the EEOC requirements under the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e–4–2000e–9 (1994). Under Title I, the EEOC requires that 1) an employee file discrimination charges within 180 days of the alleged discriminatory act, 2) the EEOC investigate the matter and release a Letter of Findings describing the results, and 3a) if discrimination occurred, the EEOC must attempt to resolve the problem through conciliation and obtain full relief for the aggrieved individual; but, if the matter cannot be resolved, the EEOC will consider litigating the case or 3b) if the EEOC does not find a basis for a claim or it decides not to litigate the case, the EEOC will issue a "right to sue letter" and the party has ninety days to file suit against the employer. See U.S. Equal Employment Opportunity Commission, TECHNICAL

state or local government, to file an employment claim under Title II of the ADA without exhausting Title I's administrative requirements.<sup>18</sup> This discrepancy deprives government employers and the EEOC of the opportunity to investigate and resolve claims in a timely manner without litigation, and creates uncertainty for government employers because they may be unaware of pending discrimination claims. In *Bledsoe*, the Eleventh Circuit interpreted Title II's anti-discrimination language "services, programs, or activities" as a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context . . . ." <sup>19</sup> Under *Bledsoe*, many public employees have the option of circumventing the EEOC's administrative requirements by filing employment claims under Title II. The DOJ administers Title II of the ADA and does not require exhaustion of administrative requirements before an individual may take their employer to court.<sup>20</sup>

In *Zimmerman*, the Ninth Circuit closed the loophole, holding that Title II does not apply to employment.<sup>21</sup> The Ninth Circuit's interpretation creates a more consistent, clear, and efficient statutory and regulatory regime for employment discrimination claims. All ADA employment claims fall under Title I and the EEOC's regulations that require administrative exhaustion. Unfortunately, the holding needlessly narrows the protection of individuals with disabilities under the ADA beyond Congress' intent, excluding all employees of state and local governments<sup>22</sup> with fewer than fifteen employees from protec-

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ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, § 10.3 (1992) [hereinafter *TAM: Title I*] available at <http://janweb.icdi.wvu.edu/kinder/pages/tam1.htm>.

18. See *Bledsoe*, 133 F.3d at 824 (holding that the language of Title II's anti-discrimination provision does apply to public entities as employers). But see *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999) (holding that "Title II does *not* apply to employment."). See also *Dominguez v. City of Council Bluffs*, 974 F. Supp. 732, 736 (S.D. Iowa 1997) (citing *Doe v. University of Md. Medical Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995)) (stating that *Doe* "ruled that Title II is applicable to employment actions."). *Dominguez* claims that *Doe* allowed an employment claim under Title II; however, Dr. Doe fell under Title II not as an employee, but as a public program participant. Title II forbids discrimination in the "services, programs, or activities of a public entity." Dr. Doe was a neurosurgical resident in his third year of a "six-year training program," qualifying him for Title II protection from discrimination by a public entity.

19. *Bledsoe*, 133 F.3d at 822. The court's reasoning depended in part on the broad interpretation of the phrase "services, programs, or activities" in "Section 504," the statute after which Congress modeled Title II. *Id.* at 821. See also 42 U.S.C. § 12132 (1994).

20. 42 U.S.C. § 12134(a) (1994); DOJ Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.172(b) (1999) ("At any time, the complainant may file a private suit pursuant to [Title II] of the [ADA], whether or not the designated agency finds a violation.")(emphasis added).

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

22. State and local governments are the nation's second-largest source of employment after the federal government. Jean Fitzpatrick Galanos & Stephen H. Price, Comment, *Title I of the Americans with Disabilities Act of 1990: Concepts & Considerations for State & Local Government*

tion.<sup>23</sup>

The crux of the dispute between the Eleventh and Ninth Circuits lies with the different degrees of deference the Courts afford the DOJ's Title II regulation on employment under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (Chevron)*.<sup>24</sup> The regulation, titled "employment discrimination prohibited," specifically states that if an employment discrimination claim falls under both Title I and II (public employer with fifteen or more employees),<sup>25</sup> then the administrative requirements of Title I apply as promulgated by the EEOC in 29 C.F.R. part 1630. However, if only Title II applies to an employer (public employer with fewer than fifteen employees), then Title II's regulations apply as promulgated by the DOJ in 28 C.F.R. part 41.<sup>26</sup> Under the DOJ regulation, Title II of the ADA clearly covers employment discrimination by a public entity of any size.<sup>27</sup>

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*Employers*, 21 STETSON L. REV. 931, 935 (1992).

23. Title I prohibits any "covered entity" from discriminating against qualified individuals with disabilities in that no covered entity shall discriminate against a qualified individual with a disability "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." 42 U.S.C. § 12112(a) (1994). Title I defines a covered entity as an "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2) (1994). Title I defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 12111(5)(A) (1994). Note also that Title I's definition of "employer" specifically exempts "the United States, a corporation wholly owned by the government of the United States, or an Indian tribe" and "a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26." 42 U.S.C. § 12111(5)(B) (1994).

24. 467 U.S. 837 (1984). Under *Chevron*, the Supreme Court devised a two-step analysis to evaluate an administrative agency's interpretation of a statute that it administers. First, using "traditional tools of statutory construction," the court must determine whether the statute unambiguously expresses Congress' intent. Second, if the court determines that the statute is silent or ambiguous and Congress left a gap for the administrative agency, the court must defer to the agency's regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." A court may not "substitute its own construction of a statutory provision for a reasonable interpretation made by an administrator of an agency." If the court finds that Congress has directly spoken to the precise question at issue, the court must uphold Congress' unambiguously expressed intent and "reject administrative constructions which are contrary to clear congressional intent." *Id.* at 842-44 & n.9.

25. Under Title I, the definition of an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 12111(5) (1994). This comment focuses primarily upon variations in the number of employees causing inconsistencies in the coverage of Title I; however, the same argument applies to public employers that fall out of the definition of employer under Title I because they do not employ fifteen or more people for a long enough period of time in the year.

26. 28 C.F.R. § 35.140(b)(1)-(2) (2001).

27. *Petersen v. Univ. of Wis. Bd. of Regents*, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (citing 56 Fed. Reg. 35707-08 (July 26, 1991)) ("explaining that cross-reference to standards of Title I in 28 C.F.R. § 35.140 was to cover employment practices of all public entities . . .").

In *Bledsoe*, the Eleventh Circuit held that 1) Congress granted the DOJ the authority to write regulations "implementing Title II's prohibition against discrimination" and 2) the DOJ's regulations prohibiting employment discrimination under Title II are a "reasonable construction of [the] statutory language."<sup>28</sup> The court considered a House Judiciary Committee Report stating that because Title II did not specifically "list all the forms of discrimination that the title is intended to prohibit," Congress directly granted the DOJ authority to "issue regulations setting forth the forms of discrimination prohibited."<sup>29</sup> Thus, the court summarily concluded that the DOJ's regulations were not unreasonable.<sup>30</sup>

The Ninth Circuit in *Zimmerman* held that Congress unambiguously intended only to allow employment discrimination claims under Title I.<sup>31</sup> The court ended its *Chevron* analysis at the first step of the test, granting the DOJ's regulation no weight.<sup>32</sup> The court reasoned that other courts had held to the contrary because they 1) assumed without analysis that Title II applies to employment, 2) relied only on the [DOJ]'s regulation and the legislative history of the ADA, without discussion of the statutory text and context, 3) relied on the Rehabilitation Act without analyzing whether Congress intended to incorporate its prohibition against employment discrimination into Title II, or 4) relied solely on the foregoing precedent without independent consideration of the problem.<sup>33</sup>

With *Zimmerman*, the Ninth Circuit closed the loophole that allowed any public employee who also fell under Title I (fifteen or more employees) a private right of action for employment discrimination claims. So, any public employee who also falls under Title I cannot bypass filing a claim within 180 days and all other EEOC, Title I administrative exhaustion requirements.<sup>34</sup> Unfortunately, the Ninth Circuit's decision also narrowed the ADA's coverage by cutting off critical protection to any employee of a public entity that does not have fifteen or more employees and therefore does not fall under the definition of employer under Title I.

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28. *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822-23 (11th Cir. 1998).

29. *Id.* (citing H.R. Rep. 101-485 (III), at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 475).

30. *Id.*

31. *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999).

32. *Id.* at 1173 ("Congress unambiguously expressed its intent for Title II not to apply to employment. That being so, we end our inquiry at the first step of the *Chevron* analysis and accord the Attorney General's regulation no weight.").

33. *Id.* at 1183.

34. See *supra* note 17 (describing Title I administrative exhaustion requirements).

### III. AN ALTERNATIVE SOLUTION

#### A. The Proposal

I propose an alternative solution that, like the Ninth Circuit, allows ADA employment discrimination claims only under Title I. Thus, all employment discrimination claims against both private and public employers would fall under the "Employment" title of the ADA, Title I. Therefore, the EEOC, the same agency that administers the majority of claims of racial, age, and gender employment discrimination,<sup>35</sup> would administer all ADA employment discrimination claims. The DOJ lacks the EEOC's expertise at resolving employment discrimination claims. Even though the DOJ administers Section 504, which covers employment discrimination by federally funded agencies, the DOJ delegates Section 504 enforcement to the twenty-six federal agencies with programs of federal financial assistance.<sup>36</sup> This proposal capitalizes on the EEOC's expertise at resolving discrimination claims<sup>37</sup> and creates a consistent, clear, and efficient statutory and regulatory regime because all employment claims fall under the

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35. EEOC, *EEOC Issues Proposed Rule on Application of the ADA to the Federal Sector Workforce* at <http://www.eeoc.gov/press/3-1-00.html> (last modified Mar. 1, 2000) listing the employment discrimination statutes that the EEOC administers:

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older; sections of the Civil Rights Act of 1991; the Equal Pay Act; and the Rehabilitation Act's prohibitions against disability discrimination in the federal government.

*Id.* EEOC, *EEOC Issues Status Report on Enforcement of Disabilities Act* at <http://www.eeoc.gov/press/7-13-00.html> (last modified July 13, 2000). Describing how from:

[J]uly 1992, when Title I became effective, through . . . (March 31, 2000), the EEOC has obtained over \$300 million on behalf of more than 20,000 individuals through its enforcement efforts, including settlements, conciliation, mediation, and litigation. In addition, the EEOC has obtained non-monetary benefits for over 10,000 individuals, including reasonable accommodation, policy changes, training and education, job referrals, union membership, and the posting of [Equal Opportunity Employment] notices at job sites.

*Id.*

36. Jason Powers, *Employment Discrimination Claims Under ADA Title II: The Case for Uniform Administrative Exhaustion Requirements*, 76 TEX. L. REV. 1457, 1482 (1998); *infra* note 85.

37. See 136 CONG. REC. 11,440 (1990) (statement of Rep. Sensenbrenner) ("Employers and employees have had more than 25 years of experience with the procedures and remedies of Title VII . . . . In enacting Title VII and other employment discrimination statutes, Congress has consistently pursued a policy of encouraging mediation and conciliation in resolving disputes and in avoiding unnecessary litigation."). See *id.* at 11,440 (statement of Rep. Smith) ("Under Title VII with its current remedies, only 6 percent of the charged [sic] filed with the EEOC end up as lawsuits. The rest are disposed of through title VII's mediation and conciliation procedures.").



same title and administrative regulations.

Unlike the Ninth Circuit's solution, however, my solution will change the statutory definition of "employer" under Title I to include all employees of public entities with fewer than fifteen employees that are interdependent enough with a larger government entity that they qualify under the "integrated enterprise" test as a single employer.<sup>38</sup> Thus, smaller *public* employers will continue to be accountable to the anti-discrimination provisions of the ADA while smaller private and public employers that need greater protection from excess liability and risk will continue to be shielded.

My proposal also standardizes the protection and administrative remedies available to public and private employees and employers by not allowing public employees to circumvent the EEOC's administrative exhaustion requirements. In addition, the proposal capitalizes on the EEOC's administrative expertise at preventing and resolving employment discrimination claims,<sup>39</sup> satisfying Congress' intent to promote alternative dispute resolution of employment claims and to protect individuals with disabilities from discrimination.<sup>40</sup>

My proposal also cures the largest problem with the Ninth Circuit's interpretation, the loss of protection for employees of smaller public entities that do not fall within the definition of employer under Title I.<sup>41</sup> Unlike the Ninth Circuit's solution, my approach retains comprehensive coverage and protections for small government employers and their employees. My alternative honors Congress' intent in enacting the ADA to protect individuals with disabilities from employment discrimination by protecting all state and local government employees, regardless of the number of other employees.<sup>42</sup>

## *B. Implementation by the Supreme Court, the DOJ and EEOC, or Congress*

### **1. The Supreme Court**

In order to satisfy Congress' intent and implement my proposal, the Su-

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38. In determining whether two corporations should be considered a single employer for purposes of employment discrimination action, the "integrated enterprise" test considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. *Laird v. Capital Cities/ABC, Inc.* 80 Cal. Rptr. 3d 454, 460 (1998); *Cellini v. Hartcourt Brace & Co.*, 51 F. Supp. 2d 1028, 1034 (S.D. Cal. 1999); *infra* part B(1).

39. *Id.*

40. *Powers*, *supra* note 36, at 1460.

41. 42 U.S.C. 12111(5)(A), *supra* note 4 (defining employer).

42. *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 821 (11th Cir. 1998) (quoting H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.A.N. at 472-73 ("The purpose of [T]itle II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that [T]itle II work in the same manner as Section 504.")).

preme Court must integrate the Ninth Circuit and Eleventh Circuit decisions. To achieve that, the Supreme Court can follow the Ninth Circuit's interpretation in *Zimmerman* and rule that Congress unambiguously intended for all employment claims to fall under Title I and the EEOC's administration. The Court can ensure that the ADA retains the broad coverage of the Eleventh Circuit's *Bledsoe* decision by clarifying how to count the number of employees when a covered entity has a relationship with a larger entity. The regulations promulgated by the agency only restate the statutory requirements about the number of employees required, they do not clarify *how to count*.<sup>43</sup>

In this situation, my proposal calls for the inclusion of all public entities under Title I protection. The majority of public entities, state and local governments, have financial and managerial relationships with larger entities. Courts have applied this reasoning in the public context with the "integrated enterprise test." The test weighs four factors in determining whether the court may treat entities as a single employer for purposes of counting the number of employees under the ADA. The factors are 1) interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership or financial control existing among several entities. The court considers the totality of the circumstances and treats these factors as guideposts rather than as items on a checklist.<sup>44</sup> The Supreme Court could adopt a similar test for courts to determine whether to consider state and local governmental departments as integrated with a larger governmental enterprise when determining whether the employer qualifies under Title I.

## 2. Federal Agencies

The EEOC and DOJ probably will not implement this solution of their own volition because it requires the DOJ to rescind its power over ADA employment discrimination cases and its employment discrimination regulation.<sup>45</sup> In turn, the EEOC would have to promulgate regulations that mandate a method of counting employees of public entities that would include all or most of the various state and local government employers currently excluded because they are classified as having less than fifteen employees. Currently, the regulations promulgated by the EEOC for Title I simply repeat the statutory requirements in the definition of employer. The regulations do not clarify how to count the number of employees, especially when the employer is part of a larger entity.<sup>46</sup> The new EEOC regula-

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43. Compare 42 U.S.C. § 12111 (1994) and 29 C.F.R. § 1630.2(e) (2001).

44. See *Laird*, 80 Cal. Rptr. 3d at 460; see also *Cellini*, 51 F.Supp. 2d at 1034.

45. See *supra* note 26.

46. Interpretive Guidance 29 § 1630.2(a)-(f) (stating that the definitions of words like "employer" are identical to the terms found in Title VII of the Civil Rights Act of 1964. No guidance on how to count in the EEOC Guidance documents, merely restates the rule from the statute like

tions would have to clarify *how to count* the number of employees. The EEOC could mandate that the EEOC use factors from the "integrated enterprise test" to classify public employers as excluded from the Title I definition of employer. This resolution probably will not occur because the DOJ will not likely undermine the power and jurisdiction that it has claimed for itself.

### 3. Congress

Congress classified employers differently based on size because it considered the impact that the size of an employer would have on its ability to comply with the statutory requirements.<sup>47</sup> Congress could amend the definition of employer under the ADA to include *all* state and local employers or could add employers that meet certain criteria derived from the "integrated enterprise test." In 2000, Congress demonstrated its continued commitment to ensure that the ADA provides comprehensive coverage to individuals with disabilities when it extended the coverage of the Title I ADA employment discrimination standard to the federal government.<sup>48</sup> Thus, Congress should also take the initiative to resolve the inconsistency created by the current split among the circuits.

## IV. THE ALTERNATIVE SOLUTION SATISFIES CONGRESSIONAL INTENT UNLIKE EITHER THE ELEVENTH OR NINTH CIRCUITS' SOLUTIONS

This section compares the Eleventh and Ninth Circuits' solutions with my alternative solution according to four indices Congress valued and attempted to include in the ADA statutory scheme: 1) clarity, consistency, and efficiency, 2) level of comprehensive protection against employment discrimination for qualified individuals, 3) promotion of administrative solutions and alternative dispute

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in the EEOC regulations); EEOC: Technical Assistance on Title 7 of ADA, 8 Labor Relations Rep. (BNA) No. 690 at 405:6983 (Jan. 27, 1992).

47. *Supra* note 4 (defining employer):

In part, this analysis requires a determination of whose financial resources should be considered in deciding whether the accommodation is unduly costly. In some cases the financial resources of the employer or other covered entity in its entirety should be considered in determining whether the cost of an accommodation poses an undue hardship. In other cases, consideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will actually be required to provide the accommodation.

Interpretive Guidance 29 C.F.R. § 1630.2(p) app. at 356. *See* H.R. Rep. No. 101-485, pt. 2, at 68-69 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 350-51; *id.*, pt. 3, at 40-41, reprinted in 1990 U.S.C.C.A.N. 267, 462-64; *see also* H.R. Rep. No. 101-485, at 56-57 (1990), reprinted in U.S.C.C.A.N. 267, 565.

48. Federal Sector Equal Employment Opportunity, 65 Fed. Reg. 11019, n.4 (proposed Mar. 1, 2000)(to be codified at 29 C.F.R. pt. 1614) ("Under the 1992 Amendments, the federal sector is subject to all ADA employment discrimination standards through Section 501.").

resolution, and 4) protection of the interests of small employers. My proposition is the only approach that satisfies Congress' intent in each of the four categories.

### A. Creating a Clear and Consistent Statutory and Regulatory Regime

#### 1. The Eleventh Circuit

While promulgating regulations, the DOJ attempted to coordinate coverage of Title II employment claims with Title I claims.<sup>49</sup> Under *Bledsoe*, the Eleventh Circuit deferred to the regulation under a *Chevron* analysis<sup>50</sup> and created a web of regulations with four different categories of employers with drastically different statutory and substantive and administrative regulations that apply.

FIGURE 1: Summary of the statutory and regulatory regime that covers four categories of employers under Title I and Title II of the ADA.

Employer and Number of Employees	Title I "Employment" Coverage?	Title II "Public Services" Coverage?	Agency's Substantive Regulations	Agency's Administrative Regulations
Public ≥ 15	Yes	Yes	EEOC	DOJ or EEOC
Public <15	No	Yes	DOJ	DOJ
Private ≥15	Yes	No	EEOC	EEOC
Private <15	No	No	Not covered	Not covered

If an individual with a disability works for a public or private employer with fifteen or more employees, she can file a claim under Title I, like the majority of people in the workforce. The EEOC's substantive regulations apply to all claims that qualify under Title I and they describe the purpose of the regulations, definitions, unlawful activities, defenses, and specific activities permitted.<sup>51</sup> To have a valid claim as a Title I claimant, she would have to satisfy the

49. *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 56 Fed. Reg. 35694 (July 26, 1991) (codified at 28 C.F.R. § 35.140) (explaining that although the ADA does not specifically require inclusion of employment complaints under "[T]itle II in the coordinating mechanisms required by [T]itle I, Federal investigations of [T]itle II employment complaints will be coordinated on a government-wide basis also."); Department of Justice's Assistance on Title II (1994) 405:51 (explaining if a public entity is subject to Title I and II, then the standards for Title I apply). Note that the statement "the standards of Title I apply" does not stipulate whether the section refers to the substantive or administrative standards of Title I. *Petersen v. Univ. of Wis. Bd. Of Regents*, 818 F. Supp. 1276, 1280 (W.D. Wis. 1993) (holding that in 28 C.F.R. § 35.140 the DOJ only explicitly imposed the substantive requirements of the EEOC's regulations on public employees that fall under both Title I and II).

50. *Supra* Part I(B).

51. EEOC Regulations to Implement the Equal Employment Provisions of the Americans with

administrative requirements of the EEOC, including filing a claim with the EEOC within 180 days of the alleged incident.<sup>52</sup>

Cases like *Bledsoe* have allowed individuals to make employment claims under Title II.<sup>53</sup> Courts have permitted individuals to state a claim under Title II, even when they also qualify under Title I.<sup>54</sup> The DOJ attempted to standardize the process with its employment discrimination regulations; however, the courts have interpreted the DOJ regulation as standardizing only the substantive regulations, not the administrative.<sup>55</sup> Thus, if an individual happens to work for a public employer, instead of a private employer with fifteen or more employees, she still falls under the EEOC's substantive regulations but can opt out of the EEOC's administrative exhaustion requirements. This loophole allows all of the public employees who work for employers with more than fifteen employees (the majority of public employees) the right to avoid filing a claim with the EEOC and exhausting the various administrative remedies.

The loophole creates uncertainty for government employers who, without the EEOC filing requirement, may remain unaware of a problem until long after the incident. In Wisconsin, a federal court allowed a Title II claim up to six years after the incident, well after the EEOC's 180-day limit. The court reasoned that the 180-day limit in the regulation only applied to agency filings, not filings in federal court. Thus, a plaintiff filing under Title II can circumvent the administrative filing deadline and proceed directly to federal court any time within the state's applicable statute of limitations.<sup>56</sup>

The greater the delay between the incident and notice to the employer the more uncertainty and risk is created for public employers. If employers quickly learn about claims, they have an opportunity to solve the problem before injur-

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Disabilities Act, 29 C.F.R. § 1630 (1999).

52. See 42 U.S.C.S. § 12111(5), *supra* note 17.

53. See *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 824 (11th Cir. 1998).

54. *Supra* note 18.

55. *Petersen v. Univ. of Wis. Bd. of Regents*, 818 F. Supp. 1276, 1280 (W.D. Wis. 1993) ("reasoning that it is unlikely that if the [DOJ] had meant the procedural requirements of Title I of the [ADA] to apply to claims of employment discrimination brought under Title II, it would have referred explicitly to only the part of the [EEOC] regulations government substantive requirements imposed on defendants and neglected to refer to the part of the regulations that address procedural requirements imposed on plaintiffs.").

56. See *Doe v. Milwaukee*, 871 F. Supp. 1072, 1076-77 (E.D. Wis. 1995) (holding that the EEOC regulation 28 C.F.R. § 35.170 does not apply to filings in federal court; so, Wisconsin's six-year statute of limitations governing personal injury suits applied). See also TAM Title II, *supra* note 17, at §10-3 ("A charge of discrimination on the basis of disability must be filed with EEOC within 180 days of the alleged discriminatory act. If there is a state or local fair employment practices agency that enforces a law prohibiting the same alleged discriminatory practice, it is possible that charges may be filed with the EEOC up to 300 days after the alleged discriminatory act.").

ing any other individuals. If employers do not learn about claims against them, it increases their exposure to risk of loss from claims and reduces the protections available for individuals with disabilities. Thus, with no valid justification for creating the inconsistency between public and private employers of the same size, the policy promotes inequality and lacks the consistency and clarity called for by Congress.

So far, the hypothetical individual with a disability experienced two different results, depending on whether she worked for a public or private employer with fifteen or more employees. To further complicate matters, if she worked for a private employer with fewer than fifteen employees, she has no employment discrimination claim under any title of the ADA. The final type of employer is the public employer with fewer than fifteen employees. If an individual works for a small public employer, under *Bledsoe*, she has a Title II claim. She does not have to meet any administrative exhaustion requirements and unlike in any of the other three situations, she now falls under substantive regulations that differ significantly from the EEOC's.<sup>57</sup>

The DOJ claims the inconsistencies between the DOJ and EEOC's substantive regulations are not significant; however, the inconsistencies in the two titles' and agency's substantive regulations have led to interpretations by courts and agencies that make the coverage of employment discrimination under Title II broader than under Title I. The differences include: 1) more narrow and employment-specific definitions of "qualified individual with a disability" and "major life activities" under Title I and the EEOC regulations,<sup>58</sup> 2) compensatory and punitive damages with a cap under Title I that are not even available under Title II,<sup>59</sup> and 3) more specific and employment related regulatory lan-

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57. Nondiscrimination, *supra* note 49 ("for the most part identical because [T]itle I of the ADA was based on the requirements set forth in regulations implementing [S]ection 504.").

58. Compare 28 C.F.R. § 35.104 (defining major life activities under Title II as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"), and *id.* (defining a qualified individual with a disability under Title II as "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"), with 29 C.F.R. § 1630.2(j)(2)–(j)(3) (refining the definition used under Title II for "major life activities" by detailing factors to consider when determining whether an individual is substantially limited in the major life activity of working), and 29 C.F.R. § 1630.2(m) (defining a qualified individual with a disability under Title I more specifically and appropriately for employment discrimination as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position").

59. Compare EEOC, TAM *supra* note 17, at § 10–2 ("Remedies for violations of Title I of the ADA include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to

guage and guidance documents under Title I.<sup>60</sup> The Eleventh Circuit's *Bledsoe* decision therefore creates an unclear, inconsistent regulatory regime that changes the anti-discrimination protections granted to an individual employee in four distinct ways, based only on the type of employer for which she happens to work.

## 2. The Ninth Circuit

Unlike the Eleventh Circuit that allows ADA employment claims under two titles and two agencies (resulting in four different classes of employers, four different statutory and regulatory regimes, and sixteen possible enforcement scenarios), the Ninth Circuit's *Zimmerman* decision limits employment claims to Title I of the ADA as administered by the EEOC (one title and one agency). The Ninth Circuit's solution aligns more closely with Congress' intent because the holding promotes clear, strong, consistent, and enforceable standards that capitalize on the EEOC's expertise at resolving employment claims through alternative dispute resolution, not litigation. This protection, however, covers only individuals with disabilities working for public and private entities with fifteen or more employees, contravening Congress' intent to create sweeping protection against discrimination for individuals with disabilities.<sup>61</sup>

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make a good faith effort to provide a reasonable accommodation.") and *id.* § 10-8 ("Damages may be available to compensate for actual monetary losses, for future monetary losses, for mental anguish and inconvenience . . . . The total amount of punitive damages and compensatory damages for future monetary loss and emotional injury for each individual is limited, based upon the size of the employer, using the following schedule:

Number of employees	Damages will not exceed
15-100	\$ 50,000
101-200	\$ 100,000
201-500	\$ 200,000
500 and more	\$ 300,000

with *id.* ("The remedies against a public employer under Title I and II cannot include punitive damages.").

60. See EEOC: Technical Assistance on Title I of ADA, 8 LABOR RELATIONS REP. at 405:7022-26; *id.* at 405:7601 (describing accommodations required in food handling jobs); U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA 74-79 (1998) (listing different types of guidance documents available through the EEOC to help employers comply with Title I of the ADA, including "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities" and "Americans with Disabilities Act Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities."); EEOC: Interpretive Guidance, 29 C.F.R. § 1630.2. (2001).

61. See *supra* note 5 (defining employer under Title I of the ADA) and note 1 (describing Congress' intent in enacting the ADA).

### 3. An Alternative Proposal

Similar to the Ninth Circuit's approach, my solution also creates clear, strong, consistent, and enforceable standards as called for by Congress. Under my solution, all employment discrimination claims fall under Title I, the employment title of the ADA. Therefore, the EEOC's coverage will expand slightly because Title I will then cover claims by public employees working for employers with fewer than fifteen people. Including public employers with less than fifteen people will not significantly expand the EEOC's jurisdiction because it currently administers all the employment discrimination claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, sections of the Civil Rights Act of 1991, and the Equal Pay Act.<sup>62</sup>

My proposal also centralizes employment discrimination claims with the EEOC, allowing the EEOC to administer, investigate, mediate, and/or litigate multiple discrimination claims together. The community of individuals with disabilities includes every race, age, sex, and national origin.<sup>63</sup> If an individual with a disability experiences employment discrimination due to factors other than their disability, under my solution, they can file a claim with the EEOC and consolidate the process.<sup>64</sup> If all employment discrimination claims are filed with the EEOC, instead of other agencies, the investigations will be centralized, hence stream-lining the system.

#### *B. Maintaining Broad Coverage*

##### 1. The Eleventh Circuit

Bledsoe originally filed his claim under Title I, but the Palm Beach County Soil and Water Conservation District ("District") where he worked had no more than five employees at the times relevant to his claim.<sup>65</sup> The District made a motion to dismiss because they did not qualify as an "employer" with fewer than fifteen employees.<sup>66</sup> The trial court allowed Bledsoe to amend the com-

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62. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC Issues Proposed Rule on Application of the ADA to the Federal Sector Workforce*, Mar. 1, 2000, available at <http://www.eeoc.gov/press/3-1-00.html>.

63. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 60, at 11.

64. *See Sank v. City Univ. of New York*, 1995 WL 314696 (S.D.N.Y. May 24, 1995). *See also* EEOC, TAM *supra* note 17, at § 10-4 ("EEOC also enforces other laws that bar employment discrimination based on race, color, religion, national origin, and age (persons 40 years of age and older). An individual with a disability can file a charge of discrimination on more than one basis.").

65. *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 818 & n.1 (11th Cir. 1998).

66. *Id.* at 818 & n.2 (citing 42 U.S.C. § 12111(5)).



plaint to bring a claim under Title II, but granted summary judgment because it ruled that employment discrimination does not fall under Title II.<sup>67</sup>

On appeal, the DOJ, the National Employment Lawyers Association, and the American Civil Liberties Union all filed *amicus* briefs with the Eleventh Circuit advocating the inclusion of employment claims under Title II.<sup>68</sup> The court reasoned that the ADA was implemented "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>69</sup> Specifically, the court found that in enacting the ADA, "Congress hoped to increase employment opportunities for disabled people through prevention of employment discrimination."<sup>70</sup> The Eleventh Circuit reversed the trial court, holding that employment claims can fall under Title II, maintaining a broad protection under the ADA for employees of public entities, regardless of their size.<sup>71</sup>

The ADA represents an attempt by Congress to create a sweeping prohibition of discrimination against the then 43 million individuals in this country with physical or mental disabilities in employment, services, and accommodations by public and private entities.<sup>72</sup> The Eleventh Circuit guarded Congress' intent by allowing Bledsoe's claim under the ADA; however, it did so at the cost of a clear, consistent, and efficient regulatory and statutory regime. The resulting web of regulations, only some of which require administrative exhaustion, are arbitrarily based on an employer's classification and undermine the Eleventh Circuit's attempt to comply with Congress' intent.

## 2. The Ninth Circuit

Under *Zimmerman*, the Ninth Circuit denies protection under the ADA to individuals who work for governmental entities with fewer than fifteen employ-

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67. *Id.* at 818-19.

68. *Id.* at 820 & n.3. The DOJ and National Lawyers Association both stand to profit from allowing claims under Title II instead of Title I. The DOJ has an interest in protecting its jurisdiction over employment claims and defending its regulation 28 C.F.R. § 140.40 that includes employment discrimination under Title II. The National Lawyers Association profits when more employment claims are allowed under the ADA and especially when they are administered by the DOJ because plaintiffs do not have to satisfy administrative exhaustion requirements but have an automatic private right of action.

69. *Id.* at 820 (quoting 42 U.S.C. § 12101(b)(1)).

70. *Id.* at 820 (citing 42 U.S.C. § 12101 (a)(3), (8), and (9)).

71. *Id.* at 824 & n.7.

72. "[T]itle II extends to whatever spheres of authority a state or local government is involved in—including employment, health and service programs, the streets. . . ." Comments from Rep. Hoyer as he discussed the question of remedies against state and local governments. 136 CONG. REC E1916 (daily ed. June 13, 1990). 42 U.S.C. § 12101(a)(1)-(b)(1) (1994 & Supp. V 1999); 42 U.S.C. §§ 12111-12209 (1994 & Supp. V. 1999).

ees.<sup>73</sup> Under *Zimmerman*, Bledsoe's claim would have failed. Congress enacted the ADA to protect individuals with disabilities from discrimination and improve their status in society.<sup>74</sup> From the inception of the ADA, Congress and regulatory agencies have determined that the employment discrimination protection of the ADA should extend to all employees of public entities, regardless of size.<sup>75</sup> The Ninth Circuit disregarded this with the *Zimmerman* decision, cutting back on the protection of the flagship anti-discrimination statute for individuals with disabilities.

### 3. An Alternative Solution

The Ninth Circuit approach eliminates a group of employees from coverage under the statute based on the size of their state or local government employer. The Eleventh Circuit provides more protection because its interpretation covers *all* employees except those who work for 1) private employers who employ fewer than fifteen or 2) entities exempted under Title I's definition.<sup>76</sup> My solution protects the same number of people that are protected by the Eleventh Circuit, while providing a clear, consistent and efficient statutory and regulatory regime to protect individuals with disabilities from employment discrimination, making its coverage more comprehensive.

The solution places the EEOC in charge of all employment discrimination claims under the ADA. The EEOC can use its expertise to investigate claims, litigate or arbitrate claims, and produce guidance documents to help employers

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73. See 42 U.S.C. § 12111(5) (1997 & LEXIS 2001); *supra* note 5 (defining employer under Title I).

74. When enacting the ADA, Congress found that:

the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiable famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependence and non-productivity.

U.S. COMM'N ON CIVIL RIGHTS, *supra* note 60, at 10-11; Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 127 n.16 (1998) (citing *Survey Shows Disabled Adults Still Earn Less*, PORTLAND OREGONIAN, July 21, 1994, at C1) (reporting Louis Harris Survey for the National Organization on Disability) (reporting that fifty-nine percent of the adults with disabilities live in households with earnings of \$25,000 or less, while only forty percent of adults without disabilities live in households in the same income range).

75. TAM: Title I at 1-1. ("State and local governments, regardless of size, are covered by employment non-discrimination requirements under Title II of the ADA . . .").

76. 42 U.S.C. § 12111(5)(A) (defining employer) and 42 U.S.C. § 12111(5)(B) (stating that "[t]he term 'employer' does not include—(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.").

accommodate employees and avoid litigation. The solution capitalizes on one agency's expertise, instead of spreading the responsibility over two agencies, thereby decreasing the chance that statutory and regulatory requirements of the ADA will confuse employers. In fact, the EEOC designed the regulations and guidance documents specifically for the employment context, making them more applicable and helpful to employers. In addition, the EEOC's administrative exhaustion requirements provide some provisions for individuals who would be irreparably harmed if forced to exhaust their administrative remedies.<sup>77</sup> Thus, the EEOC's regulations more thoroughly contemplate and protect *both* employers and employees of all types.

### C. Promoting Administrative Solutions to Employment Claims<sup>78</sup>

#### 1. The Eleventh Circuit

Congress made its intent clear when it mandated the EEOC to administer Title I employment claims using the procedures the EEOC had successfully implemented for Title IV of the Civil Rights Act of 1964.<sup>79</sup> Congress wanted to implement clear, efficient, and proven administrative exhaustion requirements that promote arbitration and alternative dispute resolution. The EEOC is statutorily mandated to conciliate prior to litigation in cases where the agency finds reasonable cause; the agency regularly encourages settlement between parties.<sup>80</sup> Requiring administrative exhaustion for employment claims "increases accuracy, consistency, and public acceptability of administrative decisions; con-

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77. *Mathews v. Eldridge*, 424 U.S. 319, 331-32 (1976) (holding that if petitioner with disability required to exhaust administrative requirements would experience irreparable harm that could damage him in a way no recompensable through retroactive payments). Court decisions in various contexts have emphasized "the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." *Id.* at 331 n.11 ("[T]he core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.").

78. This article does not address arguments against administrative exhaustion because in the context of employment discrimination under the ADA, Congress intended to require administrative exhaustion similar to that required under Title VII of the Civil Rights Act of 1964. In addition, if administrative exhaustion requirements truly are not the best administrative tool for employment claims under the ADA, they are required under Title I, but under *Bledsoe* not under Title II. No sound reason exists for the discrepancy. In fact, requiring public employers to participate in administrative exhaustion might prove more effective than with private employers because public employers do not generally operate for profit and should function as models of non-discrimination in the community.

79. 42 U.S.C. § 12117(a), *supra* note 2; 42 U.S.C. § 2000e-5 (1994 & Supp. V. 1999).

80. Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 445 nn.96-97; 42 U.S.C. § 2000e-5 (1988); 29 C.F.R. § 1601.20 (1995) (directing the EEOC to encourage settlement and establish settlement procedures).

serves judicial resources; discourages forum shopping;" and capitalizes on agency expertise.<sup>81</sup>

The Eleventh Circuit's solution fails to promote administrative resolution of employment claims, contravening Congress' intent. Under *Bledsoe*, public employees may circumvent Title I and the EEOC's administrative exhaustion requirements by filing a claim under Title II. Individuals *may* file a complaint with the DOJ within 180 days from the date of the discrimination;<sup>82</sup> however, it is not required. Employees have an automatic private right of action under Title II.<sup>83</sup> The Eleventh Circuit's decision undermines Congress' intent to promote a clear, efficient, and proven administrative remedy to employment discrimination claims. The decision fails to conserve judicial resources or capitalize on the EEOC's expertise at quickly and effectively investigating and resolving claims.

The DOJ can argue that although it does not require administrative exhaustion, some individuals do file claims and the DOJ investigates and attempts to resolve those claims without litigation. The EEOC, however, has much more expertise in dealing with employment discrimination cases than the DOJ. The DOJ administers Section 504 claims, a large percentage of which are employment claims.<sup>84</sup> The DOJ investigates far fewer employment discrimination claims than the EEOC, because the DOJ does not administer all of the Section 504 claims; they delegate the claims to 26 other federal agencies.<sup>85</sup> In addition, the investigations under Section 504 focus upon whether to cut off federal funding to the programs, not arbitration and mediation as an advocate of the em-

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81. Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 4 (1985).

82. 28 C.F.R. § 35.170 (a),(b) (1999).

83. 28 C.F.R. § 35.172(b) (1999) ("At any time, the complainant may file a private suit pursuant to section 203 of the [ADA], whether or not the designated agency finds a violation." (emphasis added)).

84. Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1106 n.99 (1995).

85. Nondiscrimination on the Basis of Disability in State and Local Government Services; Final Rule, 56 Fed. Reg. 35,694, 35,708 (July 26, 1991) (to be codified at 28 C.F.R. pt. 35):

The [DOJ], together with the other Federal agencies responsible for the enforcement of Federal laws prohibiting employment discrimination on the basis of disability, recognizes the potential for jurisdictional overlap that exists with respect to coverage of public entities and the need to avoid problems related to overlapping coverage. The other Federal agencies include the [EEOC] which is the agency primarily responsible for enforcement of [T]itle I of the ADA, the Department of Labor, which is the agency responsible of enforcement of section 503 of the Rehabilitation Act of 1973, and 26 Federal agencies with programs of Federal financial assistance, which are responsible for enforcing section 504 in those programs.

ployee's individual claim and compensation.<sup>86</sup> Therefore, centralizing all employment claims under the ADA with the EEOC would result in a more clear and efficient statutory and regulatory regime.

## 2. The Ninth Circuit

The Ninth Circuit's solution promotes the clear, efficient, and proven tool of administrative exhaustion to resolve employment claims because all claims fall under Title I, as administered by the EEOC. The only problem with the Ninth Circuit's resolution is the exclusion of all individuals who happen to work with a public employer with fewer than fifteen people. The Ninth Circuit's holding completely excludes them from accessing any remedy under the ADA.

## 3. An Alternative Solution

My solution extends the administrative remedies of the EEOC to all public employees covered under the Eleventh Circuit's holding, as intended by Congress. This alternative solution ensures both employees and employers the protections of consistent, clear, efficient, comprehensive, and proven administrative remedies tailored to employment discrimination claims.

### *D. Protecting the Interests of Small Government Employers*

## 1. The Eleventh Circuit

The Eleventh Circuit's interpretation fails to protect small government employers because it 1) exposes employers to more costs from investigations and litigation because employees have an automatic private right of action;<sup>87</sup> 2) increases the risk of exposure to employers who are unaware of claims that are pending against them, and 3) provides little administrative guidance, especially in the employment context.<sup>88</sup>

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86. *Peterson v. Univ. of Wis. Bd. of Regents*, 818 F.Supp. 1276, 1279 (W.D. Wis. 1993) ("Both the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act provide only for termination of federal funding for violations of their provisions and do not explicitly address private suits. Because private plaintiffs may sue under these statutes only by virtue of private rights of action implied by the courts and because they receive no effective relief through administrative channels, these plaintiffs need not resort to administrative remedies before bringing an action in court.") (citation omitted).

87. Compare TAM: Title I at § 10-3-10-7, *supra* note 17 (outlining the EEOC administrative requirement of filing a complaint within 180 days), with 28 C.F.R. § 35.172 (1999) (providing a private right of action "at any time").

88. Compare EEOC, TAM: Title I, *supra* note 17 (providing many examples of employment situations), with DOJ, Technical Assistance Manual for Title II (1992) (providing few examples of employment situations).

Small employers in particular are not likely to have in-house counsel to litigate private employment claims as they occur. If an employee wants to file a claim with the DOJ for investigation and possible mediation or litigation, the employee must file within 180 days.<sup>89</sup> If a complaint is filed, the agency encourages the use of alternative means of dispute resolution.<sup>90</sup> Under *Bledsoe*, employees are not required to file claims with the DOJ; therefore, not all claims will be investigated or evaluated for their validity by the agency.<sup>91</sup> The lack of a requirement of administrative exhaustion provides little opportunity for alternative dispute resolution or administrative investigation without litigation, increasing the cost to private employers *and* employees.

Requiring administrative exhaustion protects employers by informing them about any claim that may be pending against them within 190 (days of its occurrence).<sup>92</sup> Without an administrative exhaustion requirement, time passes; memories fade; people change jobs; and evidence is lost. One federal district court allowed a claim six years after the discriminatory incident.<sup>93</sup> The delay can lead to an increased cost of the investigation and a reduced chance that viable claims will be resolved due to loss of evidence. In addition, if employers are not made aware of problems quickly, the employer is not given an opportunity to cure the problem before multiple individuals are injured and the employer is exposed to the risk of multiple employment discrimination claims.

Mandating administrative exhaustion also allows the agency an opportunity to rectify its own mistakes. Under Title I, the EEOC will investigate a claim and then release the preliminary findings of the investigation to both parties, describing whether the EEOC believes there is cause to think that discrimination has occurred and the type of relief that may be necessary.<sup>94</sup> Both parties then have the opportunity to submit further information and after reviewing all information, the EEOC sends an official "Letter of Determination" to the charging party and the respondent, stating whether it has or has not found "reasonable cause" to

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89. 28 C.F.R. § 35.170 (1999) (describing that an individual *may* file a complaint not later than 180 days) (emphasis added); 28 C.F.R. § 35.172(a) (1999) (mandating that a "designated" agency shall investigate each complete complaint, attempt informal resolution, and if resolution is not achieved, issue . . . a Letter of Findings . . ."). If the agency finds noncompliance, the agency shall attempt to secure voluntary compliance or refer the matter to the Attorney General with a recommendation for appropriate action. See 28 C.F.R. § 35.172–35.174 (1999).

90. 28 C.F.R. § 35.176 (1999) (encouraging the use of alternative dispute resolution, including "settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials and arbitration").

91. See 28 C.F.R. § 35.170; *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 819 (11th Cir. 1998).

92. TAM: Title I, *supra* note 17, at § 10–5 (stating that (1) an employee must file a claim with the EEOC within 180 days of the incident and (2) within 10 days of receipt of a charge, the EEOC sends written notification of receipt to the respondent and the charging party).

93. *Doe v. Milwaukee*, 871 F. Supp. 1072 (E.D. Wis. 1995).

94. TAM: Title I, *supra* note 17, at § 10–5, 10–6.

believe that discrimination occurred.<sup>95</sup> Administrative exhaustion enhances the efficiency of the system, but it is not required for claims against small employers under *Bledsoe*.

## 2. The Ninth Circuit

Under *Zimmerman*, small public entities are completely protected because their employees are not covered at all against employment discrimination.

## 3. An Alternative Proposal

Small governmental entities do not require and should not receive the same protection against suit as small private business. The ADA's legislative history "seems to indicate that Congress wanted to end discrimination by governmental units, regardless of size--a burden they were not willing to foist onto small businesses."<sup>96</sup> In fact, small governmental units are distinct from small businesses because discrimination lawsuits do not threaten their existence and small governments can raise taxes without losing customers.<sup>97</sup> In addition, larger governmental units (states or departmental bureaucracies) arguably support most small governmental units.<sup>98</sup> The government should also be held to a higher standard and serve as a model against discrimination.

Congress also embedded protection for different size employers in Title I. Thus, although my proposal extends coverage to small public employers like in *Bledsoe*, it grants the added protection of Title I's statutory regime and administrative remedies under the EEOC. The EEOC's regulations and guidance protect smaller government employers by 1) reducing the accommodations required for and penalties available to employees depending on the size of the employer and 2) requiring administrative exhaustion.<sup>99</sup>

Congress and the EEOC accommodated employers of different sizes under the ADA by requiring different levels of compliance and different amounts of damages. The EEOC's Technical Assistance Manual for Title I mandates that the "total amount of punitive damages and compensatory damages for future

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95. *Id.*

96. Jason Powers, Note, *Employment Discrimination Claims Under ADA Title II: The Case for Uniform Administrative Exhaustion Requirements*, 76 TEX. L. REV 1457, 1489 (1998).

97. *Id.*

98. *Id.*

99. Covered entities need not engage in actions that would cause fundamental alteration in their programs or an undue burden. See, e.g. *Alexander v. Choate*, 469 U.S. 287 (1985) (holding federal grantees do not have to make distributive decisions in a way most favorable to persons with disabilities); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (holding that a college's reasonable physical fitness requirements for its nursing program were not barred by Section 504).

monetary loss and emotional injury for each individual is limited, based upon the *size of the employer*.<sup>100</sup> The statute and regulations under Title I protect the small employer because they define discrimination in part as “not making reasonable accommodations . . . [for] an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .”<sup>101</sup> Title I’s statute and regulations define “undue hardship” as “an action requiring significant difficulty or expense” in light of a range of financial and operational factors that impact whether a particular reasonable accommodation would impose an undue hardship on the entity’s operations.<sup>102</sup> The EEOC’s Interpretive Guidance includes legislative history stating:

An employer or other covered entity is not required to provide an accommodation that will impose an undue hardship on the operation of the employer’s or other covered entity’s business. The term “undue hardship” means significant difficulty or expense in, or resulting from, the provision of the accommodation. The “undue hardship” provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. “Undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.<sup>103</sup>

The consideration of an employer’s size does not completely excuse the small employer from complying with the ADA. If an employer can display an undue hardship, it still must show that funding for the accommodation is not available

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100. TAM: Title I, *supra* note 17, at § 10–8 (limiting damages to \$50,000 for employees of entities with up to 100 employee, but granting up to \$300,000 to employees of entities with 500 or more employees) (emphasis added); *supra* note 59.

101. 42 U.S.C. § 12112(b)(5)(A) (1994).

102. 65 Fed. Reg. 11020 (Mar. 1, 2000). To assess undue hardship, courts can consider 1) The nature and net cost of the accommodation, considering the availability of tax credits and deductions and/or outside funding; 2) the overall financial resources of the facility or facilities involved in making the accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; 3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; 4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce, and the geographic separateness and the administrative and fiscal relationship of the facility or facilities in question to the covered entity; and 5) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business. 42 U.S.C. § 12111(10)(B) (1994) and 29 C.F.R. § 1630(p)(2) (1999).

103. Interpretive Guidance, 29 C.F.R. § 1630.2(p)(2)(1999) (citing Senate Report at 35; House Labor Rep. at 67).



from another source like a state vocational rehabilitation agency or tax credits.<sup>104</sup>

The EEOC also protects smaller employers by producing guidance documents that target their specific needs<sup>105</sup> and requiring administrative exhaustion. Administrative exhaustion not only helps smaller entities by granting them notice, beginning a timely investigation, facilitating alternative dispute resolution, and allowing for administrative appeals as described above in Part III(C)(1), but also requires individuals to focus their discrimination claims and limits the claims available in future suits.<sup>106</sup> The scope of disability discrimination complaints is limited to the scope of EEOC investigation that can reasonably be expected to grow out of a charge of discrimination. This limitation on the potential scope of an investigation protects all employers, but especially smaller employers with fewer resources for investigations or to cope with surprise litigation.

## V. CONCLUSION

Congress intended the ADA to function as a flagship anti-discrimination statute.<sup>107</sup> However, protection from employment discrimination under the ADA is sinking into inconsistency and unpredictability.

The Eleventh Circuit's interpretation provides employees with broad statutory coverage and administrative leeway to make a claim, but creates a web of inconsistent regulations and exposes employers to increased risk and uncertainty. The risk and uncertainty in the Eleventh Circuit's solution stems from the loophole it creates that allows all public employees to circumvent Title I's administrative exhaustion requirements, leaving their employer unaware of claims pending against them and unable to resolve problems quickly, without litigation.

The Ninth Circuit decision creates a clear, strong, consistent, and enforce-

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104. No employer need provide an accommodation if it will result in an undue hardship--depends on the size of employer and availability of resources, including outside grants and, if offered, the sharing of accommodation costs by the employee. 28 CFR § 42.511(a)(1993). See Interpretive Guidance, 29 C.F.R. § 1630.2(p); 29 CFR §1630.2(2)(i) (1993) (stating the employee's or applicant's willingness to pay for some or all of the cost of an accommodation, or the availability of funding from some other source outside the employer (such as the state vocational service) also will be considered in determining whether a particular accommodation imposes "undue hardship."). But see *Olmstead v L.C. by Zimring*, 527 U.S. 581, 606 n.6 (1999) (holding that in a Title II case it is not adequate to only consider the resources of a public entity to evaluate undue burden and fundamental alteration).

105. U.S. EEOC, SMALL EMPLOYERS AND REASONABLE ACCOMMODATION, (1999), available at <http://www.eeoc.gov/facts/accommodation.html> (last modified Mar. 1, 1999).

106. An employee cannot bring suit if claim exceeds scope of charges employee filed with EEOC because it 1) ensures notification of the charged parties about alleged violations and 2) allows parties the opportunity to resolve the conflict without resorting to litigation; however, in accord with the remedial purposes of the ADA, courts construe EEOC charges with the utmost liberality. *Carlson v. Northwestern Univ.*, 65 Fair Empl. Prac. Cas. (BNA) 797 (ND Ill. Apr. 14, 1994).

107. *Supra* note 1 (describing Congress' intent in enacting the ADA).

able statutory scheme that capitalizes on the EEOC's expertise at investigating and resolving employment discrimination claims, but revokes protection against employment discrimination from all individuals with disabilities who happen to work for public entities with fewer than fifteen employees.

This article beckons to the Supreme Court, the EEOC and DOJ, or Congress to fulfill Congress' intent under the ADA and extend unprecedented protection to individuals with disabilities by expanding ADA protection to all public employees.<sup>108</sup> My proposal protects *both* employers and employees by promoting administrative solutions to employment claims and protecting smaller employers. My solution integrates the strongest aspects of each Circuit's resolution, creating a consistent, clear, efficient, and comprehensive statutory and regulatory regime that effectively protects individuals with disabilities from employment discrimination, without contravening Congress' intent.

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108. *Id.*