

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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TIMOTHY W. KILROY,

Plaintiff-Appellant

v.

STATE OF MAINE, *et al.*,

Defendants-Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

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BRIEF FOR THE UNITED STATES AS INTERVENOR

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THOMAS E. PEREZ  
Assistant Attorney General

JESSICA DUNSAY SILVER  
DIRK C. PHILLIPS  
Attorneys  
U.S. Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 305-4876

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No. 10-1326

TIMOTHY W. KILROY,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

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BRIEF FOR THE UNITED STATES AS INTERVENOR

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**ISSUE PRESENTED<sup>1</sup>**

Whether the district court correctly determined that it need not reach the Eleventh Amendment issue following its conclusion that plaintiff failed to state a claim under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

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<sup>1</sup> The United States addresses only the Eleventh Amendment issue and takes no position on the merits of the case.

## STATEMENT OF THE CASE

The pro se plaintiff in this case has quadriplegia. *Kilroy v. Maine*, No. 1:09-cv-00324-JAW, 2010 WL 145294, at \*1 (D. Me. Jan. 8, 2010).<sup>2</sup> He resides at home and receives 86 hours per week of in-home care at state expense. *Ibid.* The complaint asserts, *inter alia*, claims for violation of the Rehabilitation Act and the ADA against the State of Maine, the Commissioner of the Maine Department of Health and Human Services, and the state attorney general. *Ibid.* The main thrust of the complaint is that the state garnishes plaintiff's Social Security and other income to such an extent that he cannot afford to function outside of an institutional setting.

The State moved to dismiss the complaint, and the district court granted the motion. *United States v. Georgia*, 546 U.S. 151 (2006), sets forth a three-step process for addressing Eleventh Amendment challenges to Title II of the ADA. In ruling on the motion to dismiss, the district court did not expressly recognize or

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<sup>2</sup> The district judge in this case entered an Order Affirming The Recommended Decision Of The Magistrate Judge. See *Kilroy v. Maine*, No. CV-09-324-B-W, 2010 WL 672881 (D. Me. Feb. 22, 2010). That order indicated that “[t]he Court concurs with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision.” *Ibid.* Specifically, it ordered that (1) the Recommended Decision be affirmed, (2) defendants’ motion to dismiss be granted, and (3) plaintiff’s complaint be dismissed for failure to state a claim. *Ibid.* Because the rationale for the district court’s decision comes from the opinion of the magistrate judge, the United States, throughout this brief, cites the magistrate judge’s opinion (2010 WL 145294) as if it is the opinion of the district court.

apply the three-step process set out in *Georgia*. As a practical matter, however, the court nevertheless substantially complied with the requirements of *Georgia* in that it realized that it need not reach the Eleventh Amendment issue in light of its determination that plaintiff failed to state a claim. See *Kilroy*, 2010 WL 145294, at \*5 & n.8. Specifically, the court, after discussing some of the complexities associated with an Eleventh Amendment analysis, noted that “[t]he defendants have indicated that they are amenable to having their motion addressed through the failure to state a claim prism and I think this is a preferable approach, all things considered.” *Ibid.*

### **SUMMARY OF ARGUMENT**

The district court resolved this case based solely on its conclusion that plaintiff failed to state a claim. It did not reach the Eleventh Amendment issue. If this Court determines that plaintiff failed to state a claim, then, consistent with *United States v. Georgia*, 546 U.S. 151 (2006), it should affirm on that ground without reaching the Eleventh Amendment issue. If, on the other hand, this Court determines that plaintiff did state a claim, then it should remand the matter so the district court may address the Eleventh Amendment issue in the first instance.

## ARGUMENT

### **CONSISTENT WITH THE APPROACH TAKEN IN *UNITED STATES V. GEORGIA*, THIS COURT SHOULD NOT REACH THE ELEVENTH AMENDMENT ISSUE IN THIS APPEAL**

In *United States v. Georgia*, 546 U.S. 151 (2006), the Supreme Court set forth a three-step process for addressing Eleventh Amendment challenges to Title II of the ADA. Specifically, *Georgia* holds that lower courts must “determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State’s alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress’s purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.” *Id.* at 159. See also *Buchanan v. Maine*, 469 F.3d 158, 172-173 (1st Cir. 2006).

As noted above, the district court did not expressly recognize or apply the three-step process set out in *Georgia*. Instead, based in part on defendants’ indication that they were “amenable to having their motion addressed through the failure to state a claim prism,” *Kilroy*, 2010 WL 145294, at \*5 n.8, the district court dismissed the complaint for failure to state a claim.

As a practical matter, this approach substantially complies with the requirements of *Georgia* in that the court realized that it need not reach the Eleventh Amendment issue in light of its determination that plaintiff failed to state

a claim. See *Kilroy*, 2010 WL 145294, at \*5 & n.8. It also is consistent with this Court's approach in *Buchanan*. See 469 F.3d at 172-173.

## CONCLUSION

If this Court concludes that the district court correctly determined that plaintiff failed to state a claim under Title II, then, under *Georgia*, this Court should affirm on that basis and should not reach the Eleventh Amendment issue. If this Court determines that plaintiff did state a Title II claim, then it should remand the matter to the district court so that it may address the Eleventh Amendment issue in the first instance.<sup>3</sup>

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<sup>3</sup> *Toledo v. Sanchez*, 454 F.3d 24, 31 n.2 (1st Cir. 2006), cert. denied, 549 U.S. 1301 (2007) – in which this Court determined that it would resolve the question whether plaintiff stated a claim under Title II without remand – is not to the contrary. The Supreme Court handed down the *Georgia* decision while *Toledo* was pending in this Court, and the panel based its decision to address the issue in part on the fact that “a remand would further prolong the lengthy course of th[e] litigation.” *Ibid.* Rather, the more appropriate First Circuit precedent is *Kiman v. New Hampshire Department of Corrections*, 451 F.3d 274 (1st Cir. 2006), which also was pending before this Court at the time *Georgia* was decided. In *Kiman*, the panel reversed the district court's determination that the plaintiff failed to state a claim under Title II and remanded the matter so the district court could address, *inter alia*, the Eleventh Amendment issue. See 451 F.3d at 276, 291.

With regard to plaintiff's claim under Section 504 of the Rehabilitation Act, the district court noted that it is identical to the ADA claim, and therefore declined to address the Eleventh Amendment issue with respect to the Section 504 claim as well. See *Kilroy*, 2010 WL 145294, at \*5 & n.8. If this Court reverses and remands with respect to the district court's conclusion that plaintiff failed to state a claim under Title II, it would have to do so with respect to the Section 504 claim as well, and the district court on remand would need to address waiver of Eleventh

(continued...)



Respectfully submitted,

THOMAS E. PEREZ  
Assistant Attorney General

s/ Dirk C. Phillips  
JESSICA DUNSAY SILVER  
DIRK C. PHILLIPS  
Attorneys  
U.S. Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 305-4876

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(continued...)

Amendment immunity under Section 504 in addition to abrogation of Eleventh Amendment immunity under the ADA.

If this Court concludes for some reason that it needs to reach the Eleventh Amendment issue on appeal, the United States requests the opportunity to file a supplemental brief addressing the merits of that issue with respect to the ADA and Section 504 of the Rehabilitation Act.

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 1,233 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Dirk C. Phillips  
Attorney

Date: October 13, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR with the Clerk of the Court using the CM/ECF system.

I also certify that on October 13, 2010, a copy of the foregoing will be served via the CM/ECF system on the following:

Ronald W. Lupton  
ME Attorney General's Office  
6 State House Station  
Augusta, ME 04333-0006

I further certify that on October 13, 2010, a copy of the foregoing will be served by First Class Mail on the following:

Timothy W. Kilroy  
23 Longmeadow Drive  
Brewer, ME 04412

s/ Dirk C. Phillips

Dirk C. Phillips

Attorney