UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

TRACY MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 6:98-cv-109-JEG
	)	
JAMES E. DONALD, *et al.*,	)	
	)	
Defendants.	)	
_____	)	

UNITED STATES' MEMORANDUM OF LAW AS INTERVENOR AND AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

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UNITED STATES' MEMORANDUM OF LAW AS INTERVENOR AND AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

The relevant factual and procedural history in this case is presented in the plaintiff's and defendants' papers regarding the defendants' motions for summary judgment and for judgment on the pleadings. The United States previously intervened in this case to defend the constitutionality of the federal statutory provisions that abrogate States' sovereign immunity against claims pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* We now continue as an intervenor in defense of the constitutionality of the abrogation of sovereign immunity effected by the ADA's retaliation provision, 42 U.S.C. 12203. Additionally, the United States previously submitted a brief as *amicus curiae* addressing interpretation of the ADA and its implementing regulations. In that capacity, we now respond to defendants' argument that plaintiff has no cause of action under Title II of the ADA to remedy violations of regulations promulgated to implement that title.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT LIMIT PLAINTIFF'S CLAIM FOR RELIEF

A. This Court Should Not Reach The Question Whether The ADA's Retaliation Provision Validly Abrogates Sovereign Immunity

As an initial matter, this Court should not decide whether the ADA's retaliation provision validly abrogates the defendants' sovereign immunity. Nothing turns on that question in this case, because plaintiff can recover the same relief pursuant to his substantively identical claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

Just as the ADA bans retaliation against those who avail themselves of their ADA rights, Section 504 bans retaliation against an individual who complains of a failure to comply with the Rehabilitation Act's requirements. See, *e.g.*, *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 48 (1st Cir. 2000); see also *Hiler* v. *Brown*, 177 F.3d 542, 545 (6th Cir. 1999) (Rehabilitation Act "incorporates by reference" the ADA's retaliation ban), cited with approval by *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1174 n.20 (11th Cir. 2003). The standards for retaliation claims under the ADA and the Rehabilitation Act are identical. See, *e.g.*, *Reinhardt* v. *Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010); *Regional Econ. Cmty. Action Program* v. *City of Middletown*, 294 F.3d 35, 54 (2d Cir. 2002). And while the ADA permits retaliation suits against a wider range of defendants, here plaintiff seeks damages only from recipients of federal funds. By accepting federal funding, those defendants have waived their sovereign immunity against claims for damages under the Rehabilitation Act. See 42 U.S.C. 2000d-7; *Garrett* v. *University of Ala. at Birmingham Bd. of Trustees*, 507 F.3d 1306, 1310 (11th Cir. 2007).

Because plaintiff thus can recover from the defendants pursuant to his substantively identical Rehabilitation Act claims, it is immaterial whether he additionally can recover damages

under the ADA. See, *e.g.*, *Konikov* v. *Orange County*, 410 F.3d 1317, 1319 n.1 (11th Cir. 2005) (per curiam) (declining to reach plaintiff's constitutional claims after determining that plaintiff was entitled to "full relief" on statutory claim). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). This Court should decline to decide whether the ADA's retaliation provision validly abrogates the States' sovereign immunity, because the plaintiff can obtain his full measure of relief regardless of the outcome of that question.

B. The ADA's Retaliation Provision Validly Abrogates The States' Sovereign Immunity In The Prison Context

In any event, the ADA's retaliation provision is a proper exercise of Congress's Fourteenth Amendment power and so validly abrogates the States' sovereign immunity in the prison context, for two reasons. First, the ADA's prohibition on retaliation for the exercise of ADA rights helps enforce the substantive requirements of Title II, which in turn validly enforces the protections of the Fourteenth Amendment in the prison context.[1] The ADA, like other civil rights laws, prohibits retaliation to ensure that the rights it promises are, in fact, realized in practice. As the Supreme Court has recognized, without a ban on retaliation, a civil rights law's "enforcement scheme would unravel * * * and the underlying discrimination would go unremedied." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 180-181 (2005); accord *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (the "primary purpose of antiretaliation provisions" is ensuring "unfettered access to statutory remedial mechanisms"). Indeed, so close is the connection between

[1] The United States recognizes that this Court has held that Title II is not valid Fourteenth Amendment legislation in this context. This argument therefore is made for the purpose of preserving it on appeal.

discrimination itself and retaliating against someone who complains about discrimination that the Supreme Court has consistently read civil rights statutes that explicitly bar only the former to ban the latter as well. See, *e.g.*, *Gomez-Perez* v. *Potter*, 553 U.S. 474, 128 S. Ct. 1931, 1943 (2008).

Accordingly, in drafting the ADA, Congress reasonably determined that, in order to ensure the effectiveness of its prohibitions against disability discrimination, it must also prohibit retaliation that interferes with the enforcement of those rights. Since Congress had the Fourteenth Amendment power to prohibit discrimination on the basis of disability in the prison context in Title II, it also had the power to make that prohibition meaningful by prohibiting retaliation that interferes with those rights. *Cf. Maher* v. *Gagne*, 448 U.S. 122, 133 (1980) (providing for attorney's fees for successful civil rights plaintiffs is "an appropriate means of enforcing substantive rights under the Fourteenth Amendment").

Second, regardless of whether it had the Fourteenth Amendment authority to prohibit discrimination on the basis of disability, Congress had the authority to prohibit retaliation against those who oppose such discrimination. In the prison context, the ADA's ban on retaliation prohibits conduct that violates the First Amendment, as incorporated against the States by the Fourteenth Amendment. Congress may, pursuant to its Fourteenth Amendment authority, prohibit conduct that violates the First Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). Accordingly, to the extent that the ADA remedies constitutional violations, it necessarily is valid Fourteenth Amendment legislation. *United States* v. *Georgia*, 546 U.S. 151, 158-159 (2006). Defendants do not appear to take issue with this settled law. But they assume, incorrectly, that the ADA's retaliation provision does not remedy constitutional violations. See Docket No. 449-1, at 17-19.

The First Amendment "forbids prison officials from retaliating against prisoners for

exercising the right of free speech." *Farrow* v. *West*, 320 F.3d 1235, 1248 (11th Cir. 2003). In particular, it bars prison officials from retaliating against prisoners for complaining about the conditions of their confinement, regardless of whether those conditions constitute an independent constitutional violation. *Ibid.*; accord *Smith* v. *Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008). Additionally, retaliating against a prisoner for filing a complaint violates that prisoner's right of access to the courts. See, *e.g.*, *Wildberger* v. *Bracknell*, 869 F.2d 1467, 1468 (11th Cir. 1989) (per curiam); *Wright* v. *Newsome*, 795 F.2d 964, 968 (11th Cir. 1986).

The elements of a First Amendment retaliation claim and an ADA retaliation claim are, in this context, essentially identical. To make out a First Amendment retaliation claim, a prisoner must show that (1) he or she engaged in protected speech (such as complaining about conditions of confinement), (2) the defendant took retaliatory action as a result, and (3) the retaliatory action "would likely deter a person of ordinary firmness from engaging in such speech." *Smith*, 532 F.3d at 1276. Similarly, the ADA's retaliation provision bars a prison official (or anyone else) from discriminating against an individual (1) "because such individual has opposed any act or practice made unlawful by [the ADA]"; or (2) "because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. 12203(a). Thus, both claims require the same causal relationship between protected activity and retaliatory action. Cf. *Mize* v. *Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (applying same analysis with respect to First Amendment and Rehabilitation Act retaliation claims).

Additionally, while the ADA's retaliation provision does not by its terms require the defendant's action to cause any particular injury, a plaintiff claiming retaliation in the provision of public services must demonstrate an "adverse action" that rises to the same "threshold level of

substantiality" as is required to prevail on other retaliation claims in that context. See *Higdon* v. *Jackson*, 393 F.3d 1211, 1219-1220 (11th Cir. 2004); see also *Stewart* v. *Happy Herman's Cheshire Bridge*, 117 F.3d 1278, 1287 (11th Cir. 1997) (in employment context, plaintiff must show same adverse employment action as would be required for Title VII retaliation claim). Accordingly, an ADA retaliation claim, like any other retaliation claim, requires a showing that the retaliatory action would have dissuaded a reasonable person "from making or supporting a charge of discrimination." *Luna* v. *Walgreen Co.*, 347 F. App'x 469, 472 (11th Cir. 2008) (quoting *Burlington Northern and Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006)).

Thus, where a plaintiff's complaining of ADA violations is activity protected by both the First Amendment and the ADA (as is the case here), the ADA retaliation provision does little more than provide a statutory remedy for violations of the First Amendment. To the extent that it prohibits the same conduct as does the First Amendment, the ADA's retaliation provision is valid Fourteenth Amendment legislation that abrogates a State's sovereign immunity. *Roberts* v. *Pennsylvania Dep't of Pub. Welfare*, 199 F. Supp. 2d 249, 254 (E.D. Pa. 2002).[2]

Moreover, even if the retaliation provision's requirements extended beyond those of the First Amendment, it would still be permissible Fourteenth Amendment legislation. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."

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[2] In a pre-*Georgia* case, the Ninth Circuit found that the ADA's retaliation provision failed to abrogate the States' sovereign immunity because Congress had failed to compile a record of such retaliation. *Demshki* v. *Monteith*, 255 F.3d 986, 988-989 (9th Cir. 2001). *Georgia*, however, has made clear that the ADA validly abrogates sovereign immunity to redress actual constitutional violations, without regard to legislative findings. See *Georgia*, 546 U.S. at 158. Such legislative findings only are material to the extent that Congress attempts to pass "prophylactic" legislation that goes beyond the requirements of the Fourteenth Amendment itself.

Tennessee v. *Lane*, 541 U.S. 509, 520 n.4 (2004) (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). Such legislation is a valid exercise of Fourteenth Amendment authority so long as it "exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 520 (quoting *City of Boerne*, 521 U.S. at 520).

In the prison context, the ADA's retaliation provision, like other bans on retaliation for a prisoner's exercise of legal rights, directly protects an inmate's right of access to the courts. See *Wildberger*, 869 F.2d at 1468 (First Amendment retaliation claim protects this right); *Wright*, 795 F.2d at 968 (same). As the Supreme Court found in *Tennessee* v. *Lane*, Congress compiled an extensive record of official discrimination that effectively excluded individuals with disabilities from exercising this right. 541 U.S. at 527. Accordingly, Congress was entitled to pass that much of Title II that protects the fundamental right of access to the courts by imposing an "affirmative obligation to accommodate persons with disabilities in the administration of justice." *Id.* at 533. The ADA's retaliation provision protects the same right, and its requirements are congruent and proportional to the constitutional injuries it remedies. It is therefore proper Fourteenth Amendment legislation that validly abrogates the States' sovereign immunity.

II. TITLE II'S PRIVATE RIGHT OF ACTION ENCOMPASSES ACTIONS TO REMEDY VIOLATIONS OF TITLE II'S IMPLEMENTING REGULATIONS

The defendants err in asserting that plaintiff may not bring a private right of action under Title II of the ADA to enforce the regulations implementing Title II. It is settled law that, where regulations authoritatively construe a statutory provision that is enforceable through a private right of action, those regulations are enforceable in the same manner. *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001). The regulations implementing Title II authoritatively construe the statute —

indeed, they were specifically contemplated by Title II itself — and thus a violation of those regulations can be remedied in the same manner as a violation of the statute.

A. A Private Right Of Action To Enforce A Statute Includes The Right To Enforce Regulations That Authoritatively Construe That Statute

When a statute contains a private right of action to enforce its requirements — as Title II does, see 42 U.S.C. 12133 — regulations validly interpreting those requirements are as enforceable as the statutory language itself. *Sandoval*, 532 U.S. at 284. Indeed, because such regulations "authoritatively construe" the statute, it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Ibid.* There can be no independent analysis of the enforceability of the regulations, because "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.*

Pursuant to *Sandoval*, the regulations implementing Title II of the ADA are enforceable through Title II's private right of action. Title II broadly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. It confers a private right of action to enforce its requirements, by conferring upon any person alleging a violation of Title II the "remedies, procedures, and rights" of the Rehabilitation Act of 1973. 42 U.S.C. 12133.[3] And it instructs the Attorney General to implement Title II by promulgating regulations that set forth public entities' specific duties pursuant to Title II's broad mandate. 42 U.S.C. 12134(a).

[3] The Rehabilitation Act, in turn, incorporates the rights and remedies of Title VI of the Civil Rights Act. 29 U.S.C. 794a(a)(2). Private parties may sue to enforce the requirements of Title VI, and thus by extension the requirements of Title II. *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

The regulations at issue here were promulgated pursuant to that authority, and so are as enforceable through a private right of action as the language of Title II itself. That is because the regulations authoritatively construe what it means to exclude those with disabilities from participation, deny them benefits, or discriminate against them. To violate the regulations is to violate the statute itself. See *American Ass'n of People with Disabilities* v. *Harris*, 605 F.3d 1124, 1134 (11th Cir. 2010), petition for rehearing pending, No. 07-15004 (filed June 1, 2010) (implementing regulations "interpret and define the scope of the ADA" itself).

For example, one Title II regulation construes the statute's broad ban on "discrimination" to require the placement of individuals with mental disabilities in the "most integrated setting appropriate." 28 C.F.R. 35.130(d). Accordingly, a violation of that regulation is a violation of Title II itself, and can be enforced through Title II's right of action. See *Olmstead* v. *L C. by Zimring*, 527 U.S. 581, 596-97 (1999). Another regulation provides that a service must be "readily accessible." 28 C.F.R. 35.150. A violation of that standard therefore constitutes a Title II violation. *Shotz* v. *Cates*, 256 F.3d 1077, 1080-1081 (11th Cir. 2001).

Defendants misread *Sandoval*, which holds that a regulation cannot, by itself, confer a private right of action not found in the statutory provision it interprets. 532 U.S. at 291. However, where the underlying statute *does* contain a private right of action, *Sandoval* makes clear that the statutory right of action includes the right to enforce those implementing regulations that authoritatively construe the statute. *Id.* at 284.

The Eleventh Circuit's recent decision in *Harris* does not change this analysis. In *Harris*, the district court had found the defendants in violation only of an implementing regulation, 28 C.F.R. 35.151, and not in violation of Title II itself. See *Harris*, 605 F.3d at 1131. *Harris* reversed, in part based on its conclusion that the defendants' conduct did not violate that

regulation. *Id.* at 1136-1137. It also held that the district court erred in entering judgment for the plaintiffs based on a violation of the regulations alone. The court reasoned that, while regulations can "interpret and define the scope of the ADA," they cannot, "themselves, create a private right of action and a remedy." *Id.* at 1135. *Harris* did not hold that it is impermissible to achieve the same result by suing under the ADA itself, as construed by the regulations; nor could it, consistent with *Sandoval* and *Shotz* v. *Cates*. Rather, it noted that, at an earlier point in that long-running case, plaintiffs' statutory claims had been dismissed in a ruling that had not been appealed. *Id.* at 1137. *Harris* thus stands only for the proposition that a plaintiff must plead, and a district court must find, a violation of Title II as construed by its implementing regulations, not just a violation of the regulations.

This distinction Harris draws — between a cause of action under Title II as construed by the regulations and a cause of action under the regulations themselves — conflicts with *Sandoval*, which states that it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." 532 U.S. at 284. Accordingly, the United States has filed a brief in support of the plaintiffs' petition for rehearing, which is currently pending. But even if such a distinction could be maintained, here the plaintiff is suing under the ADA, not the regulations, and so *Harris* does not bar his claim.

B. The Regulations Implementing Title II Authoritatively Construe Its Requirements

Defendants also err in contending that the regulations they are alleged to have violated do not authoritatively construe Title II. Defendants argue that, simply because Title II does not by its terms impose the specific requirements found in its implementing regulations, "*Sandoval* forecloses reliance on the ADA Title II cause of action to enforce the regulations." See Docket No. 486, at 12. They also argue that the Justice Department exceeded the authority delegated to it

by the ADA in promulgating regulations requiring "reasonable modifications." Docket No. 455-1, at 51. But as every appellate court to consider the question has held, the regulations at issue here reasonably interpret, and so authoritatively construe, the broad language of Title II. Indeed, Congress specifically instructed that such regulations be promulgated.

The Attorney General promulgated Title II's implementing regulations in accordance with Congress's mandate to construe and give specific content to Title II's broad requirement of non-discrimination and broad guarantee of access to "the services, programs, or activities of a public entity." 42 U.S.C. 12132. As the Eleventh Circuit has observed, "Congress expressly authorized the Attorney General to make rules with the force of law interpreting and implementing the ADA provisions generally applicable to public services." *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003). The implementing regulations are more detailed and specific than the broad statutory language, precisely in the manner that Congress intended. Accordingly, the regulations reasonably and authoritatively construe Title II's requirements. See *ibid.*; *Shotz* v. *Cates*, 256 F.3d at 1080 n.2.

Moreover, Congress specifically provided that Title II's implementing regulations be consistent with those implementing the similarly worded Section 504 of the Rehabilitation Act. 42 U.S.C. 12134(a), (b). For that reason, as defendants observe, the statutes' implementing regulations are materially identical. Docket No. 486, at 13.

Thus, not only is the text of the implementing regulations consistent with Title II's broad guarantees, but Congress specifically instructed the Attorney General to promulgate such regulations to implement Title II. While the "reasonable modifications" requirement and other regulatory standards may not appear explicitly in the general language of Title II, Congress's mandate that such standards be promulgated to implement Title II's general language gives those

standards the force of law, just as if Congress had written them into the statute. See *Helen L.* v. *DiDario*, 46 F.3d 325, 332 (3d Cir.) (regulations implementing Title II's integration mandate have "the force of law" because Congress "voiced its approval of" Rehabilitation Act regulations and ordered the Attorney General to write regulations consistent with them), cert. denied, 516 U.S. 813 (1995); accord *Shotz*, 344 F.3d at 1179. The regulations also align with Congress's intent that the ADA remedy "the discriminatory effects of architectural, transportation, and communication barriers," including the "failure to make modifications to existing facilities and practices." 42 U.S.C. 12101(a)(5); see *Tennessee* v. *Lane*, 541 U.S. at 531 ("Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility."). In providing specific standards to accomplish precisely that, the regulations do not exceed the Attorney General's statutory authority. For these reasons, every circuit to consider the question, including the Eleventh Circuit, has permitted plaintiffs suing under Title II's private right of action to enforce the substantive requirements of the implementing regulations, including the building requirements of 28 C.F.R. 35.150 and 28 C.F.R. 35.151. See *Shotz* v. *Cates*, 256 F.3d at 1079-1080 (28 C.F.R. 35.150); *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004) (28 C.F.R. 35.151); *Chaffin* v. *Kansas State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003) (28 C.F.R. 35.151).

Defendants' attempt to distinguish the controlling case of *Shotz* v. *Cates* is unconvincing. See Docket No. 486, at 14. As defendants acknowledge, in that case the Eleventh Circuit found a Title II violation because the services at issue were not "readily accessible." *Shotz* v. *Cates*, 256 F.3d at 1080. That standard does not appear in Title II itself, but rather in an implementing regulation, 28 C.F.R. 35.150(a). Thus, *Shotz* v. *Cates* makes clear that violation of that implementing regulation can give rise to private enforcement under Title II. Defendants state

that, in *Shotz* v. *Cates*, the court did not "find liability premised solely upon a technical violation of ADAAG [the ADA Accessibility Guidelines]." Docket No. 486 at 14. But neither is this court asked to do so. It is not the case, as defendants suggest, that any failure to comply with the ADAAG, no matter how inconsequential, constitutes a violation of the implementing regulations. Rather, the defendants may either comply with the ADAAG *or* provide "equivalent access to the facility or part of the facility" through "other methods." 28 C.F.R. 35.151(c).

Some courts have declined to permit private enforcement of certain *procedural* requirements in the regulations, such as the requirement in 28 C.F.R. 35.150(d) that public entities create a transition plan by a certain date. See *Lonberg* v. *City of Riverside*, 571 F.3d 846, 851-852 (9th Cir. 2009), petition for cert. pending, No. 09-1259 (filed Apr. 15, 2010); *Ability Ctr. of Greater Toledo*, 385 F.3d at 914. They have reasoned that such procedural requirements do not guarantee the substantive rights that Title II confers on individuals. See *Lonberg*, 571 F.3d at 852. Similarly, certain Rehabilitation Act regulations that require a percentage of housing project units to be accessible have been held unenforceable by an individual, since they do not confer upon any particular individual the right to an accessible unit. *Three Rivers Ctr. for Indep. Living, Inc.* v. *Housing Auth.*, 382 F.3d 412, 430 (3d Cir. 2004). These cases do not support the defendants' argument that the substantive requirements of the Title II regulations at issue here — regulations that must be followed with respect to *all* individuals — similarly are unenforceable. Indeed, the care with which these cases analyze the enforceability of specific regulations is flatly inconsistent with the defendants' broad-brush argument that none of Title II's implementations can be privately enforced through the Title II cause of action.

CONCLUSION

The defendants' motions for summary judgment and for judgment on the pleadings should be denied to the extent that they ask this Court to hold that: (1) the ADA's retaliation provision does not validly abrogate the States' sovereign immunity; and (2) plaintiff may not allege a violation of Title II of the ADA that is premised on violation of Title II's implementing regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 21, 2010, the foregoing "United States' Memorandum of Law as Intervenor and as Amicus Curiae in Support of Plaintiff" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/ Sasha Samberg-Champion
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