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Comments: Project Life, Inc. v. Glendening: Seeking Sanctuary for Women Recovering from Substance Abuse Problems

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PROJECT LIFE, INC. V. GLENDENING:[1] SEEKING SANCTUARY FOR WOMEN RECOVERING FROM SUBSTANCE ABUSE PROBLEMS

I. INTRODUCTION

Discrimination against people with disabilities is widespread throughout America.[2] From the simple failure of businesses and schools to provide easy access for users of wheelchairs, to the more deeply ingrained and insidious personal prejudices held by Americans from all walks of life,[3] Americans with disabilities have long faced discrimination in varied forms.

Congress has attempted to address the problem of discrimination against the disabled with such initiatives as the Americans with Disabilities Act (ADA)[4] and the Fair Housing Act (FHA).[5] The ADA provides redress for discrimination against the disabled in the areas of employment, services and facilities, and public accommodations.[6] Similarly, the FHA protects the disabled from discrimination in the purchase

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1. 139 F. Supp. 2d 703 (D. Md. 2001).
2. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 391-424 (2001) (Breyer, J., dissenting) (cataloging submissions to the Task Force on Rights and Empowerment of Americans with Disabilities describing specific instances of discrimination against people with disabilities).
3. *See, e.g.*, *In re* Marriage of Carney, 598 P.2d 36 (Cal. 1979). Despite a record replete with expert testimony that a quadriplegic custodial father was a fit parent and fully capable of providing a healthy family environment for his children, the trial judge ordered a change of custody to the mother based solely on his prediction that the father's disability would render him unable to have a "normal relationship" with his children. *Id.* at 40-41. The Supreme Court of California reversed, holding that the trial judge erred in ordering a change of custody when the evidence failed to establish that the father's disability would have an adverse effect on the best interests of the children. *Id.* at 44-45.

   The U.S. House of Representatives recognized that much of the discrimination faced by the disabled in America results not from any evil intent, but rather from simple carelessness:

   > Discrimination against people with disabilities results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers or the adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect.

   H.R. REP. No. 101-485 (II), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310-11.
4. 42 U.S.C. §§ 12101-12213 (2001).
5. *Id.* §§ 3601-3631.
6. *Id.* §§ 12112, 12118.

and rental of dwellings and in the provision of services and facilities in connection with dwellings.[7]

Discrimination against disabled Americans, however, often takes subtler forms than the failure of businesses to employ the disabled or to provide necessary services or facilities to the disabled.[8] In *Project Life, Inc. v. Glendening*, a jury and the United States District Court for the District of Maryland took important steps toward leveling the playing field for people with disabilities by extending the protections of the ADA and the FHA to the potential clientele of a non-profit organization—women recovering from substance abuse problems.[9] The court held that the Maryland Port Authority's delay in leasing a berth at the Baltimore Harbor to Project Life, to serve as a docking place for the U.S.S. Sanctuary—a decommissioned naval hospital ship that Project Life had planned to use as a residential rehabilitation center for women recovering from substance abuse—violated both the ADA[10] and the FHA.[11] In so holding, the court also refused to allow the State of Maryland to avoid liability for these ADA and FHA violations by invoking its Eleventh Amendment sovereign immunity.[12]

The *Project Life* decision has immense positive implications for the plight of people recovering from substance abuse in Maryland and, potentially, throughout the country. In 1999, an estimated 59,000 substance abusers lived in Baltimore City alone.[13] The *Project Life* decision sends two clear messages: First, the refusal to provide access to

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7. *Id.* § 3604.
8. *See supra* note 3.
9. 139 F. Supp. 2d 703, 705, 711 (D. Md. 2001). For several years, courts have upheld claims of discrimination brought by recovering substance abusers, or organizations that serve recovering substance abusers, under the ADA and the FHA. *See, e.g.*, MX Group, Inc. v. Covington, 293 F.3d 326, 328 (6th Cir. 2002) (affirming the lower court's finding that a city zoning ordinance excluding methadone clinics constituted discrimination against recovering substance abusers in violation of the ADA); United States v. S. Mgmt. Corp., 955 F.2d 914, 916 (4th Cir. 1992) (affirming an injunction issued against an apartment management group that refused to lease apartments to a community drug- and alcohol-abuse rehabilitation program because of animus toward the program's clients in violation of the FHA); Hispanic Counseling Ctr., Inc. v. Hempstead, 237 F. Supp. 2d 284, 287, 293 (E.D.N.Y. 2002) (granting a preliminary injunction on a claim that a zoning amendment preventing a non-profit substance abuse treatment center from relocating to a new building constituted discrimination against the treatment center's clients in violation of the ADA); Smith-Berch, Inc. v. Baltimore County, 68 F. Supp. 2d 602, 606 (D. Md. 1999) (denying a defendant-county's motion for summary judgment on a plaintiff-methadone clinic's ADA claim that the county discriminated against the plaintiff's opiate-addicted clients by denying permits for the construction of a methadone treatment facility).
10. *Project Life, Inc.*, 139 F. Supp. 2d at 706-07.
11. *See id.* at 711.
12. *See id.* at 707 n.5.
13. Baltimore City Health Dept., Baltimore City 1999 Health Status Report, *available at* http://www.ci.baltimore.md.us/government/health/1999statusreport/abuse.html.

services and facilities to groups seeking to help this segment of the population, simply because of negative public sentiment against such people, violates the ADA and the FHA; and second, such discrimination can find redress under those statutes.

Part II of this Comment discusses the history and applicable provisions of the ADA and the FHA; the states' immunity under the Eleventh Amendment; Congress's abrogation of that immunity under the ADA; the ongoing dispute over the validity of that abrogation in the wake of the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*;[14] and the injunctive relief that remains available in the absence of monetary damages. Part III analyzes the decision in *Project Life, Inc. v. Glendening* and concludes that the court correctly found violations of both the ADA and the FHA in the actions of the Maryland Port Authority and extended the relief provided by those statutes to Project Life. Additionally, Part III asserts that the Fourth Circuit has taken a misguided position on the validity of Congress's abrogation of the states' Eleventh Amendment immunity and that the Supreme Court should step in and clarify the applicability of its holding in *Garrett*. Finally, Part IV concludes that, whatever the Supreme Court's ultimate decision on the applicability of *Garrett* to Title II of the ADA, the *Project Life* decision exemplifies the injunctive relief available to plaintiffs for state-sanctioned violations of the ADA and the FHA.

II. BACKGROUND

A. *The ADA*

1. History

Congress enacted the ADA in 1990 as a response to the established and growing problem of discrimination against individuals with disabilities.[15] After hearing testimony from countless organizations and individuals concerning the problem of discrimination against the disabled in America, Congress found "a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications."[16] Section 12101 of the ADA sets out nine congressional findings that precipitated the passage of the Act.[17] Specifically, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities,"[18] and that these disabled Americans are

14. 531 U.S. 356 (2001).
15. *See* 42 U.S.C. § 12101(a) (2001).
16. H.R. REP. No. 101-485(II), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.
17. 42 U.S.C. § 12101(a).
18. *Id.* § 12101(a)(1).

historically isolated from society and face discrimination in myriad areas.[19] In addition, Congress found that, "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age," disabled individuals often lack "legal recourse to redress such discrimination."[20] Congress further found that discrimination against disabled Americans takes many different forms,[21] and that such discrimination "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[22]

Based on its findings concerning discrimination against disabled Americans, Congress enacted the ADA with several concrete purposes in mind, each serving the overarching goal of eliminating discrimination against disabled individuals.[23] According to the ADA, the purposes of the act include: Providing a "national mandate" for eradicating the problem of discrimination against the disabled;[24] establishing specific standards for addressing discrimination against people with disabilities;[25] and securing the participation of the federal government in the enforcement of ADA standards.[26] Significantly, Congress's fourth and final avowed purpose behind the ADA is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment" to help remedy the problem of discrimination against people with disabilities.[27]

2. Individuals with Substance Abuse Problems are Disabled Within the Meaning of the ADA

Congress's intent that the ADA have a far-reaching scope manifests itself in the very broad definition of the term "disability" provided by the Act.[28] For purposes of the rights and remedies provided by the

19. *Id.* § 12101(a)(2)-(3). Significant areas in which Congress found widespread discrimination to exist include "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3).
20. *Id.* § 12101(a)(4).
21. *See id.* § 12101(a)(5). According to Congress, discrimination against disabled individuals can take widely different forms, from "outright intentional exclusion" to "relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.*
22. *Id.* § 12101(a)(9).
23. *See generally id.* § 12101(b).
24. *Id.* § 12101(b)(1).
25. *See id.* § 12101(b)(2).
26. *See id.* § 12101(b)(3).
27. *Id.* § 12101(b)(4). Indeed, Congress's power to enforce the Fourteenth Amendment plays a central role in its subsequent abrogation of the state's Eleventh Amendment sovereign immunity. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
28. *See generally* 42 U.S.C. § 12102(2). That Congress intended the ADA to have a wide scope is also evidenced by language describing the purpose of the

ADA, the Act defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[29]

The ADA itself does not provide an exhaustive list, or any list at all, of specific kinds of physical or mental impairments that qualify as "disabilities" for purposes of the Act.[30] Individuals recovering from substance abuse problems, however, do fit within the broad definition of individuals with disabilities provided by the ADA.[31]

The text of the ADA provides some guidance on whether or not drug addiction constitutes a disability within the meaning of the ADA.[32] A person who *currently* uses drugs is not considered an individual with a disability under the ADA and, thus, is not protected from discrimination.[33] *Recovering* substance abusers, however, are considered individuals with disabilities under the ADA.[34] Courts have also

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act as providing "a clear and comprehensive national mandate" for eliminating discrimination against disabled individuals. *Id.* § 12101(b)(1).

29. *Id.* § 12102(2)(A). The group of individuals protected by the ADA is further expanded by the additional definitions of the term "disability" as a record of a physical or mental impairment that substantially limits one or more of the major life activities of such an individual or "being regarded as having such an impairment." *Id.* § 12102(2)(B)-(C).
30. *See infra* note 34.
31. In its memorandum opinion on the *Project Life* defendants' initial motion to dismiss, the court stated: "there is no dispute that . . . an individual recovering from substance abuse is an individual with a disability under the ADA." Project Life, Inc. v. Glendening, No. WMN-98-2163, 1998 WL 1119864, at *2 (D. Md. Nov. 30, 1998).
32. *See generally* 42 U.S.C. § 12210.
33. *See id.* § 12210(a) ("For purposes of this chapter, the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use."). The Code of Federal Regulations defines "current use of illegal drugs" as use that "occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing drug use is a real and ongoing problem." 28 C.F.R. § 35.104 (2003). Thus, some courts have held that certain plaintiffs were not entitled to protection under the ADA because their drug use presented a "real and ongoing problem," even though they had taken steps to address their drug problems. *See* 1 Americans with Disabilities: Practice and Compliance Manual § 2:5 (2003) (citing Wormley v. Arkla, Inc., 871 F. Supp. 1079 (E.D. Ark. 1994) (denying a plaintiff's claim that his termination constituted disability discrimination in violation of the ADA where the evidence showed that he had violated the terms of a reinstatement agreement by relapsing in his drug use, despite the fact that he was drug-free and had just completed a rehabilitation program at the time of his termination); Colo. State Bd. of Med. Exam'rs v. Davis, 893 P.2d 1365 (Colo. Ct. App. 1995) (denying a drug-addicted doctor's claim that the revocation of his medical license violated the ADA because of evidence of frequent relapses, despite his past and present participation in rehabilitation programs)).
34. *See* 42 U.S.C. § 12210(b). The ADA provides that while a current drug user is not considered an "individual with a disability for the purposes of the ADA, a person who "has successfully completed a supervised drug rehabilitation program," has "otherwise been rehabilitated successfully," or "is par-

consistently recognized that individuals recovering from substance abuse are disabled within the meaning of the ADA.[35]

3. Title II of the ADA: Protections of the Disabled Against Discrimination in the Provision of Services by a Public Entity

In addition to the protections provided by the ADA in the areas of employment and public accommodations, Title II of the ADA prohibits discrimination against the disabled in the provision of services by a public entity.[36] Title II 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."[37]

To guide the application of the pertinent anti-discrimination provisions of Title II, the ADA defines more than the term "disability."[38] According to the Act, the term "public entity," as used in Title II, re-

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ticipating in a supervised rehabilitation program," and who no longer engages in illegal drug use, is *not* excluded from the definition of "individual with a disability" for purposes of the ADA. *See id.* § 12210(b).

While the text of the ADA itself does not provide a list of specific conditions or handicaps that qualify as disabilities within the meaning of the Act, the Code of Federal Regulations does provide such a list. *See generally* 28 C.F.R. § 35.104. According to the Code of Federal Regulations, drug addiction and alcoholism can both constitute a "physical or mental impairment" within the meaning of the ADA. *Id.* The list of qualifying "physical or mental impairments" in the Code of Federal Regulations, which includes, among many other conditions, physiological disorders, cosmetic disfigurement, mental retardation, learning disabilities, HIV, cancer, and speech, hearing, and vision impairments, further evidences the broad reach of the ADA. *Id.* Despite the provisions in the ADA itself and in the Code of Federal Regulations for recovering substance abusers as individuals with disabilities, recovering substance abusers still need to show that their addictions "substantially limit one or more of their major life activities" in order to sustain a challenge under the ADA. *See* 42 U.S.C. § 12102(2)(B)-(C). *See also supra* note 33.

35. *See* MX Group, Inc. v. Covington, 293 F.3d 326, 336 (6th Cir. 2002) (observing that potential clients of methadone clinic were disabled within the meaning of the ADA); Regional Econ. Cmty. Action Program, Inc. v. Middletown, 294 F.3d 35, 46 (2d Cir. 2002) (recognizing that recovering drug addicts and alcoholics—prospective participants in halfway house treatment programs—were disabled within the meaning of the ADA); Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002) (holding that "drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA"); Buckley v. Consol. Edison Co., 155 F.3d 150, 154 (2d Cir. 1998) (recognizing that a person who has completed a drug rehabilitation program and is no longer using drugs may be considered disabled within the meaning of the ADA).

36. *See generally* 42 U.S.C. § 12132.

37. *Id.*

38. *See generally id.* § 12131.

fers generally to any state or local government, or to any division of a state or local government.[39]

Title II similarly defines a "qualified individual with a disability" in broad terms.[40] For the purposes of Title II, the ADA protects any disabled individual who "meets the essential eligibility requirements" for anyone seeking to receive the services of, or participate in programs offered by, a public entity.[41] Most importantly, a disabled individual who "meets the essential eligibility requirements" of a public entity is protected by the ADA *whether or not* the public entity would be required to: (1) make "reasonable modifications to [its] rules, policies, or practices"; (2) remove "architectural, communication, or transportation barriers"; or (3) provide "auxiliary aids and services" in order to provide its services to the disabled individual or facilitate the participation of the disabled individual in its programs or activities.[42] The application of the broad definitions of "qualified individual with a disability" and "public entity" to the language of § 12132 of Title II, therefore, makes it unlawful for a state or local government, in any of its varied capacities, to discriminate against the disabled in the provision of its services.[43]

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39. *Id.* § 12131(1). More specifically, the term "public entity," as used in Title II of the ADA, refers to "any department, agency, special purpose district or other instrumentality of a State or States or local government," as well as "the National Railroad Passenger Corporation, and any commuter authority." *Id.* § 12131(1)(B)-(C).

40. *See generally id.* § 12131(2).

41. *Id.*

42. *Id.*

43. *See id. See also id.* § 12132. For cases demonstrating the broad sweep of Title II of the ADA, see generally *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002) (holding that parole proceedings were an activity of a public entity and that "a broad rule categorically excluding parole decisions from the scope of Title II is not the law"); *Hispanic Counseling Ctr., Inc. v. Hempstead*, 237 F. Supp. 2d 284 (E.D.N.Y. 2002) (granting a preliminary injunction barring a municipality from preventing a nonprofit substance abuse treatment center from relocating because the treatment center had demonstrated a likelihood of success on the merits of a claim that the zoning ordinance prohibiting treatment centers in districts zoned for business violated Title II); *Calloway v. Glassboro Dep't of Police*, 89 F. Supp. 2d 543 (D.N.J. 2000) (holding that investigative questioning of a suspect by police constituted the services or activities of a public entity and that discrimination against deaf suspects during such questioning violated Title II); *Soto v. Newark*, 72 F. Supp. 2d 489 (D.N.J. 1999) (holding that a municipal wedding ceremony was a service of a public entity under the ADA and that the city's failure to provide an interpreter to a profoundly deaf couple at their wedding ceremony denied the couple the benefit of the services of a public entity and thus violated Title II); *Tyler v. Manhattan*, 857 F. Supp. 800 (D. Kan. 1994) (holding that a city's failure to postpone meetings of a city commission in order to repair a elevator so that a wheelchair-bound citizen could access meeting denied the citizen the benefit of activities of a public entity in violation of Title II).

4. Remedies Under the ADA

Section 12133 sets out the enforcement provisions of Title II.[44] According to that section, disabled people who experience discrimination in the provision of services of a public entity may seek the same kinds of remedies available under the Rehabilitation Act of 1973.[45] The enforcement provisions of the Rehabilitation Act, in turn, provide that the remedies available under that legislation are the same as those provided by the Civil Rights Act of 1964 for violations of its anti-discrimination provisions.[46]

Section 2000e-16 of the Civil Rights Act of 1964 prohibits discrimination "based on race, color, religion, sex, or national origin" in the employment practices of the federal government, and provides for the enforcement of that prohibition through "appropriate remedies, including reinstatement or hiring of employees with or without back pay."[47] Section 2000e-5 sets out the enforcement provisions for the sections of the Civil Rights Act of 1964 that generally prohibit employment discrimination by any employer, not simply the federal government.[48] That section authorizes, upon a finding of intentional discrimination in employment practices, injunctive relief and

> [S]uch affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may

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44. *See generally* 42 U.S.C. § 12133.
45. *See id. See also* Rehabilitation Act of 1973, 29 U.S.C. § 794a (2003). Section 12133 of the ADA does not specifically refer to the Rehabilitation Act of 1973, but simply cites the corresponding code section. 42 U.S.C. § 12133. Congress enacted the Rehabilitation Act of 1973 in order to "provide a statutory basis for the Rehabilitation Services Administration" and "authorize programs to . . . develop and implement comprehensive and continuing state plans for providing vocational rehabilitation services to handicapped individuals," and to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.
46. *See* 29 U.S.C. § 794a.
47. Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (2001).
48. *See id.* § 2000e-5. The enforcement provisions of section 2000e-5 of the Civil Rights Act of 1964 apply to employment discrimination prohibited by sections 2000e-2 and 2000e-3 of the Civil Rights Act of 1964. *See id.* Section 2000e-2 prohibits discrimination on the basis of race, color, religion, sex, or national origin by any employer, employment agency, labor organization, or training program (and specifically allows employment discrimination against members of the Communist Party or others deemed to pose a national security threat). *See id.* § 2000e-2. Section 2000e-3 of the Civil Rights Act of 1964 prohibits employment discrimination against people who have publicly opposed an employer's unlawful practices and prohibits employers from posting advertisements or notices that indicate a hiring "preference, limitation, specification or discrimination" on the basis of any race, color, religion, sex, or national origin. *Id.* § 2000e-3.

be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.[49]

Neither the ADA, the Rehabilitation Act of 1973, nor the Civil Rights Act of 1964 explicitly provides for damages as a remedy for violations of anti-discrimination provisions,[50] but courts have held that violations of Title II are properly redressed by damages of certain kinds. According to the relevant case law, compensatory damages are available to redress violations of Title II when a plaintiff makes a showing of intentional discrimination.[51] Compensatory damages, however, are not available under Title II of the ADA to redress "mental anguish and humiliation" alleged to have resulted from a defendant's discriminatory conduct.[52] Finally, punitive damages are not available to redress claims of discriminatory treatment under Title II.[53]

B. The FHA

1. History

In 1968, Congress enacted the FHA in an attempt to address the pervasive problems of discrimination on the basis of race and national origin in the sale and rental of housing.[54] In its original form, however, the FHA did not prohibit discrimination against the disabled in the sale or rental of housing. Based upon its finding that handicapped individuals, like the originally protected classes, "have been denied housing because of misperceptions, ignorance, and outright prejudice,"[55] Congress amended the FHA in 1988 to prohibit discrimi-

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49. *Id.* § 2000e-5(g)(1).
50. *See supra* notes 44-49 and accompanying text.
51. *See, e.g.*, Matthews v. Jefferson, 29 F. Supp. 2d 525, 535-36 (W.D. Ark. 1998) (observing that because the enforcement provisions of Title II of the ADA encompass those of the Rehabilitation Act of 1973 and the Civil Rights Act of 1964, the "full spectrum of remedies" is available under Title II of the ADA).
52. *See* Tyler v. Manhattan, 857 F. Supp. 800, 819 (D. Kan. 1994).
53. *See* Barnes v. Gorman, 536 U.S. 181, 189 (2002) ("Because punitive damages may not be awarded in private suits brought under . . . the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under . . . the ADA and . . . the Rehabilitation Act."). *See also* Harrelson v. Elmore County, 859 F. Supp. 1465, 1469 (M.D. Ala. 1994).
54. United States v. Plaza Mobile Estates, 273 F. Supp. 2d 1084, 1090 (C.D. Cal. 2003). *Shelley v. Kraemer* provides a clear example of the type of discrimination in housing prevalent at the time of the enactment of the FHA. 334 U.S. 1 (1948). In that case, the Kraemers, white property owners, sought to enforce against the Shelleys, their African-American neighbors, a restrictive covenant providing that the Shelleys' land could only be occupied by whites. *Id.* at 6-7. The Supreme Court held that judicial enforcement of such a restrictive covenant constituted state action in violation of the Shelleys' rights under the Fourteenth Amendment Equal Protection Clause. *Id.* at 21.
55. H.R. REP. No. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N 2173, 2179.

nation in housing not only on the basis of race and national origin, but also on the basis of handicap.[56]

2. People Recovering from Substance Abuse Problems are Considered People with a Handicap Under the FHA

The FHA protects individuals from discrimination in the sale or rental of housing on the basis of "race, color, religion, sex, familial status, or national origin."[57] In addition to these familiar protections, however, the FHA also prohibits discrimination in housing on the basis of "handicap."[58] The FHA defines "handicap" in precisely the same broad terms as the ADA defines "disability"—"a physical or mental impairment which substantially limits one or more of such person's major life activities, . . . a record of having such an impairment, or . . . being regarded as having such an impairment."[59]

Like its definition of "disability" under the ADA, Congress specifically excluded "current, illegal use of or addiction to a controlled substance" from its definition of "handicap" under the FHA.[60] The use of the word "current" to describe the kind of controlled substance use that the FHA excludes from the definition of "handicap" seems to indicate that people who are *recovering from* substance abuse are considered people with a handicap under the FHA, as courts have consistently held.[61] People who are recovering from substance abuse

56. *Id.* The 1988 amendment added the current subsection (f) to § 3604 of the FHA, which includes prohibitions against discrimination in the sale or rental of dwellings and in the provision of services and facilities in connection with dwellings on the basis of handicap, as well as the current requirements for handicapped-accessible construction and design of multifamily housing. *See id.* The 1988 amendment also added the current subsection (h) to section 3602 of the FHA, which defines "handicap" for the purposes of the act and excludes current users of illegal drugs from that definition. *See id. See also infra* note 59.

57. *See generally* 42 U.S.C. § 3604 (2001).

58. *See id.*

59. *Id.* § 3602(h)(1)-(3); *Id.* § 12102(2)(A), (C) (referring to the ADA description of "individual with a disability").

60. *Id.* § 3602(h)(3).

61. *See* Reg'l Econ. Cmty. Action Program, Inc. v. Middletown, 294 F.3d 35, 46 (2d Cir. 2002) (observing that recovering drug addicts and alcoholics were handicapped within the meaning of the FHA); United States v. S. Mgmt. Corp., 955 F.2d 914, 917-19 (4th Cir. 1992) (observing that recovering drug addicts and alcoholics were handicapped within the meaning of the FHA); Conn. Hosp. v. New London, 129 F. Supp. 2d 123, 125 (D. Conn. 2001) (recognizing that recovering substance abusers and alcoholics participating in halfway house treatment programs were handicapped within the meaning of the FHA); Oxford House, Inc. v. Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993) ("It is well established that individuals recovering from drug or alcohol addiction are handicapped under the FHA."); Oxford House, Inc. v. Cherry Hill, 799 F. Supp. 450, 459 (D.N.J. 1992) ("It is clear that Congress contemplated alcoholism and drug addiction as being among the kinds of 'impairments' covered under [the] definition [of handicap in the FHA].").

are ostensibly no longer "current" users of controlled substances, although there may be some dispute in the medical field as to whether people recovering from substance abuse are "currently" addicted to whatever substance they previously abused and remain addicted to that substance throughout their lives.[62] Read literally, the FHA seems to permit discrimination in housing against current users of controlled substances and to prohibit discrimination in housing against recovering substance abusers.[63]

3. Protections of the Disabled Under the FHA

The FHA provides several specific protections to people with handicaps from discrimination in the sale or rental of housing on the basis of handicap (as well as on the basis of race, color, religion, sex, familial status, and national origin).[64] Specifically, the Act makes it unlawful to publish any advertisement regarding the "sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . handicap."[65] The Act also prohibits the misrepresentation about a dwelling's availability to an individual based on the individual's handicap.[66] Additionally, under the FHA it is unlawful to make representations "regarding the entry or prospective entry into the neighborhood of a person or persons of a particular . . . handicap" in an effort to convince that person to sell or rent a dwelling.[67] Discrimination on the basis of handicap in the sale or rental of a dwelling is prohibited, regardless of whether that discrimination takes place on the basis of the handicap of the prospective buyer or renter, a person who intends to live in the dwelling after its sale or rental, or "any person associated with [the] buyer or renter."[68]

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62. The FHA directs readers to 21 U.S.C. § 802 (2000) for definitions of the terminology to exclude current controlled substance users from the definition of the term "handicap." 42 U.S.C. § 3602(h). That section defines the term "addict" as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802. People recovering from substance abuse do not seem to qualify as "addicts" as described under this definition; they no longer habitually use narcotic drugs, and they are engaged in the active exercise of "self-control with reference to [their] addictions." *See id.*
63. The FHA specifically exempts religious organizations and nonprofit organizations "operated, supervised or controlled by or in conjunction with" religious organizations from all anti-discrimination provisions under the FHA except those relating to race, color, or national origin. *See* 42 U.S.C. § 3607(a). The FHA also permits private clubs to restrict the rental of its lodgings to its members or to give preference to its members in such rental. *See id.*
64. *See generally id.* § 3604-3606.
65. *Id.* § 3604(c).
66. *See id.* § 3604(d).
67. *Id.* § 3604(e).
68. *Id.* § 3604(f)(1)(A)-(C).

The *Project Life* decision utilizes the broadest protection of the disabled against discrimination in housing provided by the FHA, prohibiting discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap."[69] The FHA delineates certain types of conduct that constitutes discrimination for the purposes of § 3604; among those types of conduct is the "refusal to make reasonable accommodations in rules, policies, practices, or services" in order to facilitate a handicapped individual's use and enjoyment of a particular dwelling.[70] Furthermore, the anti-discrimination provisions of the FHA are applicable to dwellings owned or operated by the federal government.[71]

4. Remedies Under the FHA

Section 3613 of the FHA explicitly provides the remedies available to private persons seeking redress for housing discrimination prohibited by the FHA.[72] The FHA provides that a court may grant "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in [a discriminatory housing practice] or ordering such affirmative action as may be appropriate)" to redress discriminatory housing practices under the FHA.[73] Unlike the enforcement provisions of the ADA, however, the FHA specifically provides that courts hearing housing discrimination claims under the FHA may award actual *and* puni-

69. *Id.* § 3604(f)(2). Again, such discrimination is prohibited on the basis of a handicap of the person seeking to buy or rent, a person "residing in or intending to reside in that dwelling" after sale or rental, or any person associated with the person seeking to buy or rent. *Id.* § 3604(f)(2)(A)-(C). For cases demonstrating the broad sweep of the FHA, see generally *Dadian v. Wilmette*, 269 F.3d 831 (7th Cir. 2001) (affirming a jury verdict that a village's denial of a hardship permit to build a garage on the front of a home to plaintiffs suffering from asthma and orthopedic problems constituted discrimination on the basis of handicap in violation of the FHA); *Conn. Hosp. v. New London*, 129 F. Supp. 2d 123 (D. Conn. 2001) (granting preliminary injunction barring municipality from closing a halfway house for recovering substance abusers on zoning grounds because of a likelihood that the municipality's refusal to accommodate the halfway house discriminated against its members in violation of the FHA); *United States v. Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993) (holding that a city's refusal to allow substitution of a side yard for a zoning ordinance requiring a back yard at a building intended for use as a home for homeless suffering from mental illness or recovering from substance abuse violated the FHA); *Horizon House Developmental Servs., Inc. v. Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992) (holding that a zoning ordinance requiring that group homes for the mentally retarded be spaced at least 1,000 feet apart constituted discrimination on the basis of handicap and thus violated the FHA).

70. 42 U.S.C. § 3604(f)(3)(B).

71. *See id.* § 3603.

72. *See generally id.* § 3613.

73. *Id.* § 3613(c)(1).

tive damages.[74] Furthermore, compensatory damages for emotional distress are recoverable in actions under the FHA.[75]

C. *The Eleventh Amendment and the* Garrett *Decision*

1. Eleventh Amendment Sovereign Immunity and Congress's Power to Abrogate it

Despite the wide scope of protections provided by the ADA and the FHA against discrimination on the basis of disability, the U.S. Constitution and other acts of Congress can, of course, affect the ways in which those protections function. The Eleventh Amendment provides the states with sovereign immunity—a private citizen cannot sue a state in law or equity in federal court.[76] As an additional consequence of the Eleventh Amendment, Congress may not provide a private cause of action for money damages against the states in federal or state court.[77]

The Supreme Court has held, however, that Congress may abrogate the states' Eleventh Amendment immunity "when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"[78] While the Court has held that Congress may not abrogate the states' sovereign immunity pursuant to its Article I powers,[79] it has also held that Congress may abrogate the states' sovereign immunity pursuant to the enforcement clause of the Fourteenth Amendment.[80] Section 5 of the Fourteenth Amendment grants Congress the power to enforce the provisions of the Fourteenth Amendment through "appropriate legislation."[81]

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74. *Id.*
75. *See, e.g.*, Szwast v. Carlton Apartments, 102 F. Supp. 2d 777, 783 (E.D. Mich. 2000) (sustaining a jury's award of $3,000 in compensatory damages to a plaintiff who was denied apartment housing because she had children and observing that the plaintiff's testimony that she felt "crushed, embarrassed, and ashamed from the rejection" was sufficient evidence of her emotional distress).
76. *See* U.S. CONST. amend. XI. The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." *Id.* The Eleventh Amendment applies not only to suits by a citizen of one state against another state, but also to suits by a citizen against his or her own state. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001).
77. *See* U.S. CONST. amend. XI.
78. *See Garrett*, 531 U.S. at 363 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)).
79. *See id.* at 364. *See also Kimel*, 528 U.S. at 80 (stating that "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).
80. *See Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 80. *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
81. U.S. CONST. amend. XIV, § 5.

In order for an act of Congress to constitute "appropriate" remedial legislation under § 5 of the Fourteenth Amendment, it must demonstrate "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[82] Furthermore, a pattern of Fourteenth Amendment violations *by the states* themselves must emerge in order for a remedial measure such as the abrogation of Eleventh Amendment immunity to constitute a valid exercise of Congress's § 5 enforcement powers.[83]

2. Congress Abrogated the States' Eleventh Amendment Immunity Under the ADA

Section 12202 of the ADA provides that "a State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."[84] Congress, therefore, abrogated the states' Eleventh Amendment immunity from suits by private citizens under the ADA.[85]

3. *Board of Trustees of the University of Alabama v. Garrett*

In its recent decision in *Board of Trustees of the University of Alabama v. Garrett*[86]—a case that promises to have significant implications for all future claims brought under the ADA—the Supreme Court held that Congress's abrogation of the states' Eleventh Amendment immunity under Title I of the ADA (which prohibits discrimination in employment on the basis of disability) was invalid.[87] Applying the "congruence and proportionality" test from *City of Boerne v. Flores*,[88] the Court held that evidence of states' employment discrimination against the disabled was insufficient to warrant the extreme remedial measure of abrogating the states' sovereign immunity.[89] It further held that Congress's action in doing so under Title I of the ADA was thus an invalid exercise of its Fourteenth Amendment enforcement powers.[90]

The *Garrett* case arose when "Patricia Garrett, a registered nurse . . . employed [by] the University of Alabama in Birmingham Hospital," and "Milton Ash[,] . . . a security officer [employed by] the Alabama Department of Youth Services," filed suit against their employers seek-

82. *See Garrett*, 531 U.S. at 365 (quoting Boerne v. Flores, 521 U.S. 507, 520 (1997)).
83. *See id.* at 368 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions.").
84. 42 U.S.C. § 12202 (2001).
85. *Id.*
86. 531 U.S. 356.
87. *See id.* at 374.
88. 521 U.S. 507, 520 (1997).
89. *See Garrett*, 531 U.S. at 374.
90. *Id.* at 374, 374 n.9.

ing monetary relief for violations of Title I.[91] The Court had previously addressed the constitutionality of other acts of Congress that abrogated the states' Eleventh Amendment immunity,[92] but it had not yet addressed the question of whether the ADA validly abrogated that immunity.

The Court found that the first requirement for a valid abrogation of the states' sovereign immunity—that Congress "unequivocally intend to do so"—was undisputedly met because of the clear language of section 12202 of the ADA.[93] The Court then determined that the second requirement for a valid abrogation of the states' Eleventh Amendment immunity—that Congress undertake such abrogation pursuant to a "valid grant of constitutional authority"[94]—was not met because abrogation of the states' sovereign immunity in the ADA was not a valid exercise of Congress's § 5 enforcement power.[95] Even though the enforcement clause of the Fourteenth Amendment grants Congress the power to abrogate the states' Eleventh Amendment immunity,[96] the Court reasoned that remedial action under the ADA lacked congruence and proportionality to the injuries at issue,[97] holding "[t]he legislative record of the ADA . . . fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[98]

The Court found that the legislative history surrounding the ADA, although it describes many general incidences of discrimination against the disabled, does not provide sufficient evidence of unconstitutional discrimination by the states themselves to render Congress's abrogation of the states' Eleventh Amendment immunity a valid exercise of its § 5 enforcement power.[99] Furthermore, even though the

91. *Id.* at 362. Title I of the ADA prohibits "discriminat[ion] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2001). Garrett claimed that her employer discriminated against her when they required her to give up her position as Director of Nursing and accept a lower-paying position after she was diagnosed with breast cancer, therefore, taking "substantial" leave from work to undergo treatment. *Garrett*, 531 U.S. at 362. Ash claimed that he faced discrimination by his employer when they failed to grant requests to modify his duties and schedule to accommodate his chronic asthma and sleep apnea. *Id.*

92. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that "in the [Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623,] Congress did not validly abrogate the States' sovereign immunity to suits by private individuals").

93. *Garrett*, 531 U.S. at 363-64.

94. *Garrett*, 531 U.S. at 373.

95. *See id.* at 374.

96. *Id.* at 364.

97. *Id.* at 374.

98. *Id.* at 368.

99. *See id.* at 369.

specific instances of employment discrimination did involve state action, the action may not have violated the Fourteenth Amendment.[100] The Court also expressed concern that the remedial provisions of the ADA lacked congruence and proportionality to the injuries they were intended to address because the provisions require the states to make accommodations for the disabled that are not required by the Fourteenth Amendment.[101] Because the legislative history of the ADA does not identify a pattern of unconstitutional discrimination in employment by the states against disabled individuals and because the remedies created under Title I of the ADA were incongruent to any violations by the states, the *Garrett* court held that Congress's abrogation of the states' Eleventh Amendment immunity in Title I is invalid.[102]

4. Does the Rationale of *Garrett* Apply to Title II?

The *Garrett* decision narrowly held that Title I did not validly abrogate the states' Eleventh Amendment sovereign immunity.[103] The Court specifically declined to decide the issue of whether Title II of the ADA properly abrogated the states' sovereign immunity.[104] The

100. *Id.* at 370. The Court emphasized that the states' treatment of disabled individuals in the context of employment was subject only to rational-basis review. *Id.* at 367 (stating that the "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational"). *See also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (stating that "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"). Thus, the *Garrett* Court observed that whether the few specific instances of state discrimination against the disabled reflected in the legislative record of the ADA would prove unconstitutional if subjected to rational-basis review was "debatable." *See Garrett*, 531 U.S. at 370.

101. *See Garrett*, 531 U.S. at 372. The ADA, the Court observes, requires state employers to "make existing facilities used by employees readily accessible to and usable by individuals with disabilities." *Id.* (quoting 42 U.S.C. §§ 12112(5)(b), 12111(9)). Moreover, a state employer could constitutionally "conserve scarce financial resources by hiring employees who are able to use existing facilities." *Id.* at 372.

102. *Id.* at 374.

103. *Id.* at 374 n.9.

104. *Id.* at 360 n.1. The Court observed that "no party . . . briefed the question whether Title II of the ADA . . . is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject" and that Title II "has somewhat different remedial provisions from Title I." *Id.*

lower federal courts are split on the issue,[105] and the Supreme Court has not yet decided it.[106]

Many lower federal courts that have addressed the issue seem to agree that the rationale of *Garrett* applies not only to Title I, but also to Title II.[107] Most significantly, the Fourth Circuit, in *Wessel v. Glendening*, held after the *Project Life* decision that "Congress did not validly abrogate the sovereign immunity of the states when it enacted Part A of Title II of the ADA."[108]

Applying essentially the same analysis as that applied by the Supreme Court in *Garrett*,[109] the *Wessel* majority first inquired as to whether Congress had "adequately expressed" its intent to abrogate the states' Eleventh Amendment immunity in Title II.[110] Concluding that Congress had "adequately expressed" such an intent,[111] the court then applied the "congruence and proportionality" test to determine whether Congress's abrogation of the states' immunity constituted a valid exercise of the enforcement powers granted to it in § 5 of the Fourteenth Amendment.[112] This test is applied in three steps: First, the court must identify the scope of the constitutional right at issue; second, the court must conclude that Congress has demonstrated history and a pattern of unconstitutional discrimination by the states; and lastly, if history and a pattern exist, the court must determine whether the law is congruent and proportional to the wrong.[113] The majority identified the scope of the constitutional right at issue as the right of disabled people "not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the

105. *See infra* notes 107-125 and accompanying text. The Fourth Circuit was not required to decide the issue of Eleventh Amendment immunity in the context of *Project Life, Inc. v. Glendening* because Project Life released its claim for damages on appeal. 46 Fed. Appx. 147, 150 n.4, 2002 WL 2012545, at *2 n.4 (4th Cir. Sept. 4, 2002).

106. *See supra* Part C.1-3.

107. *See, e.g.*, Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ., 178 F. Supp. 2d 1291, 1294 (S.D. Fla. 2001) (holding that the "Eleventh Amendment bars suit in federal court by an individual against a state under Title II of the ADA"). This case contains an exhaustive list of decisions with similar holdings. *Id.* at 1293-94. *See also* Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 866 (10th Cir. 2003) ("We agree . . . that Title II of the ADA was not a valid abrogation of the States' Eleventh Amendment immunity."); Doe v. Div. of Youth and Family Serv., 148 F. Supp. 2d 462, 489 (D.N.J. 2001).

108. 306 F.3d 203, 215 (4th Cir. 2002).

109. *See supra* notes 86-102 and accompanying text.

110. *Wessel*, 306 F.3d at 208.

111. *Id.* (finding the ADA's explicit provision in 42 U.S.C. § 12202 which declares that the states "shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court" for violations of the ADA "unequivocally expresses [Congress's] intent to abrogate").

112. *Id.* at 208-09.

113. *Id.* at 209 (quoting *Garrett*, 531 U.S. at 365, 368, 372).

state."[114] Additionally, the majority found, as did the *Garrett* majority, that Congress's abrogation of the states' Eleventh Amendment immunity lacked the requisite "congruence and proportionality" because Congress had failed to identify a pattern of unconstitutional conduct by the states against the disabled and because the remedies provided by Title II were disproportionate to the conduct.[115]

Judge King, however, based his convincing dissent on two primary objections:[116] (1) the majority's "refusal to give proper credit to specific record evidence of discrimination by state entities in public programs";[117] and (2) the majority's "denial to Congress of the deference due when our elected representatives make general findings of fact in support of legislation."[118] The dissent insisted that the legislative record supporting Congress's abrogation of the states' immunity in Title II is much stronger than the sparse legislative record surrounding Title I, which led to the *Garrett* Court's conclusion that Congress had based its abrogation of the states' immunity on an inadequate record of state discrimination.[119]

In addition to its disagreement with the majority over the adequacy of the legislative record surrounding Title II, the dissent also attached significant weight to the fact that the *Garrett* Court specifically reserved the issue of the validity of the abrogation of states' immunity under Title II.[120] Furthermore, the dissent stressed the fact that the *Garrett* majority itself stated that "[t]he overwhelming majority of [accounts of state discrimination] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA."[121] Finally, the dissent emphasized the fact that whereas the legislative record of the ADA fails to explicitly state any conclusion by Congress that it had found a pattern of discrimination in public employment, the legislative record does state that persistent discrimination exists in the area of public services—the area governed by Title II.[122] Thus, the dissent argued, Congress "did indeed identify a pattern of unconstitutional state action that justified abrogation of state sovereign immunity with respect to Title II of the ADA."[123]

Other lower federal courts have held, as Judge King would have held, that Title II does constitute a valid abrogation of the states' Elev-

114. *Id.* at 210.
115. *Id.* at 210-15.
116. *See id.* at 215 (King, J., dissenting).
117. *Id.*
118. *Id.*
119. *See id.* at 216.
120. *Id.*
121. *Id.* (quoting *Garrett*, 531 U.S. at 370 n.7).
122. *Id.* at 217-18; *see also supra* note 16 and accompanying text.
123. *Wessel*, 306 F.3d at 218 (King, J., dissenting).

enth Amendment immunity.[124] The U.S. Court of Appeals for the Ninth Circuit has staunchly adhered to its pre-*Garrett* opinions holding that Congress validly abrogated the states' Eleventh Amendment immunity.[125] Until the Supreme Court issues a definitive ruling on the issue, lower courts will continue to disagree over whether or not the states are immune from suits for monetary damages under Title II.

5. The Doctrine of *Ex Parte Young*: Injunctive Relief Remains Available Notwithstanding Eleventh Amendment Immunity

Even if Eleventh Amendment sovereign immunity prevents a plaintiff from suing the state for damages under Title II, plaintiffs can still obtain injunctive relief as a remedy for wrongful discrimination by officials of the state.[126] The well-established doctrine of *Ex parte Young* provides that "an individual seeking only prospective injunctive relief for ongoing violations of federal law may bring suit against state officials in federal court."[127]

Application of the doctrine of *Ex parte Young* generally proceeds under a four-part inquiry.[128] First, the court must determine whether the action is against a state official or against the state itself; only in the former case is injunctive relief available.[129] Second, the court must examine "whether the alleged conduct of state officials constitutes a violation of federal law."[130] Third, the relief sought must be prospective injunctive relief, or the equivalent of a "retroactive award of damages impacting the state treasury."[131] Finally, the suit for in-

124. *See* Garcia v. S.U.N.Y. Health Servs. Ctr. of Brooklyn, 280 F.3d 98, 111-12 (2d Cir. 2001) (restricting the validity of Congress's abrogation of the states' Eleventh Amendment immunity from monetary suits under Title II of the ADA to situations in which the plaintiff could establish that the violation at issue was motivated by "either discriminatory animus or ill will due to disability"); Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 178 F.3d 212 (4th Cir. 1999) (*vacated* Dec. 28, 1999).

125. Miranda B. v. Kitzhaber, 328 F.3d 1181, 1185 (9th Cir. 2003). The Ninth Circuit first upheld Congress's abrogation of the states' Eleventh Amendment immunity in *Clark v. Cal.*, 123 F.3d 1267 (9th Cir. 1997). In that case, inmates of a state correctional facility alleged that they had suffered discrimination in violation of Title II. *Id.* at 1269. The Ninth Circuit affirmed the district court's denial of the state's motion to dismiss on the grounds of Eleventh Amendment immunity. *Id.* at 1271. The court reaffirmed its holding two years later in *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999). In so doing, the court specifically noted Congress's "extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face" and indicated that it would defer to Congress's determination of how best to remedy that discrimination. *Id.*

126. Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 866 (10th Cir. 2003) (interpreting *Ex parte* Young, 209 U.S. 123 (1908)).

127. *Id.*

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.*

junctive relief must not implicate "special sovereignty interests."[132] Thus, where the Eleventh Amendment would otherwise bar a suit against the state for monetary damages, a plaintiff can still obtain injunctive relief against a state official under the circumstances set out above.

III. ANALYSIS

A. Project Life, Inc. v. Glendening

Project Life, Inc. v. Glendening arose as a result of the unsuccessful efforts of Project Life, Inc. to find a berth in which to dock the U.S.S. Sanctuary.[133] Project Life is a non-profit organization that planned to use the Sanctuary—a decommissioned U.S. navy ship—as a temporary residential facility for women recovering from substance abuse.[134]

In 1994, Project Life began negotiating with the Maryland Port Authority to find a place to dock the Sanctuary in the Baltimore Harbor.[135] While the port authority offered several possible berth locations to Project Life, the port authority subsequently withdrew those offers as a result of community opposition to Project Life's presence in the neighborhood.[136]

Project Life, along with three women hoping to participate in the residential program[137] on the Sanctuary, brought suit against Parris N. Glendening (the Governor of Maryland), the Director of the Maryland Port Authority, and several other defendants.[138] They claimed violations of the ADA, the FHA, and the Maryland Discrimination in Housing Act.[139]

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132. *Id.* at 866-67 (citing ANR Pipeline Co. v. Lafaver, 150 F.3d 1178 (10th Cir. 1998) (holding that the state's interest in its tax collection system was a special sovereignty interest)).

133. 139 F. Supp. 2d 703, 705 (D. Md. 2001).

134. *See id.* Project Life plans to provide "rehabilitation services, including life skills and job training, for up to 300 women at a time, for rotations of 30 to 90 days." Project Life, Inc. v. Glendening, 46 Fed. Appx. 147, 149, 2002 WL 2012545, *1 (4th Cir. Sept. 4, 2002).

135. Project Life, Inc. v. Glendening, No. WMN-98-2163, 1998 WL 1119864, at *1 (D. Md. Nov. 30, 1998) (mem.).

136. *See id.*

137. *Id.* The women, Angela Marie Adams, Vanessa Trudy Barlow, and Barbara Nevette Williams, brought the suit as a class action on behalf of themselves and other women similarly situated. *See id.*

138. *Id.* The original defendants to the action included Parris Glendening, (Governor of Maryland), David Winstead (the Maryland Secretary of Transportation), Tay Yoshitani (former director of the Maryland Port Authority), and the Alcohol and Drug Abuse Administration. *See id.* James White (the current executive director of the Maryland Port Authority) was later substituted for Tay Yoshitani upon the authorization of the U.S. District Court for the District of Maryland. *See id.* at *3 n.5.

139. *See Project Life, Inc.*, 1998 WL 1119864, at *1. Project Life withdrew its claim under the Maryland Discrimination in Housing Act on March 12, 2001.

B. Project Life's Claim Under the ADA

In the suit against the Maryland Port Authority and other state agencies and officials, Project Life and the class of plaintiffs claimed that the port authority's delay in leasing a berth to Project Life was the result of unlawful discrimination against the Sanctuary's intended residents—women recovering from substance abuse—and, thus, a violation of Title II.[140] Project Life claimed that it was being denied "the benefits of the services, programs or activities of a public entity" because of the disability of the population it intended to serve in violation of § 12132 of the ADA.[141]

The *Project Life* court correctly upheld the jury's verdict that the Maryland Port Authority had violated the ADA by delaying its lease of a berth to Project Life.[142] The services of the Maryland Port Authority are the services of a public entity; Project Life's suit, therefore, was properly brought under § 12132 of the ADA.[143] Project Life's proposed clientele are individuals with disabilities under the ADA;[144] therefore, the Act prohibits discrimination against Project Life on the basis of those disabilities.[145]

Project Life presented evidence that local elected officials exerted pressure on the port authority not to enter into a lease with Project Life for a berth.[146] In the defendant's initial motion to dismiss, they argued that the delay in leasing a berth to Project Life was not the result of negative community sentiment or pressure, but rather the result of the port authority's judgment that the residential nature of the Sanctuary's programs "would be inconsistent with the existing activities of a busy commercial port."[147] Convincing evidence to the contrary exists, however, in the fact that the port authority imposed an unusual condition on Project Life—before it could be given a berth for the Sanctuary, Project Life had to obtain "community support" for its presence in the neighborhood.[148] Given the imposition of the "community support" requirement on Project Life, and given the evi-

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Project Life, Inc. v. Glendening, 139 F. Supp. 2d 703, 705 n.2 (D. Md. 2001).

140. *See Project Life, Inc.*, 1998 WL 1119864, at *1; *see also Project Life, Inc.*, 139 F. Supp. at 705.

141. *See Project Life, Inc.*, 1998 WL 1119864, at *1-*2.

142. *See Project Life, Inc.*, 139 F. Supp. 2d at 705. The court further stated that "if it were to make its own factual determination, it too would find that Plaintiff was discriminated against on the basis of the population it intends to serve." *Id.* at 707.

143. *See Project Life, Inc.*, 1998 WL 1119864 at *2. *See also supra* note 36 and accompanying text.

144. *See Project Life, Inc.*, 1998 WL 1119864, at *1, *2.

145. *See id.* at *1, *2 (citing 42 U.S.C. § 12132); *see also supra* notes 28-31 and accompanying text.

146. *See Project Life, Inc.*, 139 F. Supp. 2d at 708.

147. *Project Life, Inc.*, 1998 WL 1119864, at *1.

148. *Id.*

dence that local officials attempted to prevent the leasing of a berth to Project Life by exerting pressure on the port authority,[149] the U.S. District Court for the District of Maryland had ample support for its finding that "the real reason . . . for the State's refusal to enter into the lease was the desire of [the] elected officials that the Sanctuary's programs not be located 'in their backyard.'"[150] The port authority's and other defendants' "illegal acquiescence" to such negative community sentiment constituted unlawful discrimination under the ADA.[151] Under § 12133 of the ADA, the court properly found that Project Life was entitled to an injunction requiring the Maryland Port Authority to enter into a lease providing a berth for the Sanctuary.[152]

C. Project Life's Claim Under the FHA

In addition to its ADA claim, Project Life also claimed that the Maryland Port Authority's and other defendants' delay in leasing a berth for the U.S.S. Sanctuary violated the FHA.[153] The U.S. district court, in its memorandum opinion on the defendants' initial motion to dismiss, characterized Project Life's claim under the FHA as "unique."[154] Nonetheless, the court correctly found that the defendant's delay constituted a violation of the FHA.[155]

The FHA prohibits discrimination "in the provision of services or facilities in connection with [a] dwelling, because of a handicap."[156] The Sanctuary, although not yet a dwelling, would become a dwelling if made operational; therefore, the court correctly recognized that Project Life's claim was properly brought under the FHA.[157] Another reason that the claim was correctly brought under the FHA is because Project Life is seeking access to "parking and utilities" for the operation of the Sanctuary, both of which are services and facilities of a public entity.[158]

Finally, the court correctly found that the same conduct that was at issue under Project Life's ADA claim violated the FHA.[159] In failing to provide a berth and its "services and facilities," the Maryland Port Authority, and the other defendants, yielded to negative community sentiment and pressure based on prejudice toward substance abusers.[160]

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149. *Id.*
150. *Project Life, Inc.*, 139 F. Supp. 2d at 708.
151. *See id.*
152. *See* 42 U.S.C. § 12133 (2001); *see also supra* notes 44-49 and accompanying text.
153. *See Project Life, Inc.*, 139 F. Supp. 2d at 705.
154. *Project Life, Inc.*, 1998 WL 1119864, at *2.
155. *See Project Life, Inc.*, 139 F. Supp. 2d at 711.
156. *See Project Life, Inc.*, 1998 WL 1119864, at *2.
157. *See id.*
158. *Id.*
159. *Project Life, Inc.*, 139 F. Supp. 2d at 710-11.
160. *Id.* at 711.

That "acquiescence" constituted discrimination and a violation of the FHA.[161] Under § 3613 of the FHA, therefore, the court properly granted an injunction requiring the state to provide a berth for the Sanctuary.[162]

D. Eleventh Amendment

The *Project Life* court declined to apply the holding of *Garrett*[163] to Title II of the ADA and, thus, allowed the jury's nominal award of twelve dollars to stand.[164] The court noted "the split among the circuits as to" the issue of Congress's abrogation of the states' sovereign immunity in Title II, but it chose to follow the Fourth Circuit's reasoning in a subsequently vacated case that provides no primary authority.[165] *Amos v. Maryland Department of Public Safety and Correctional Services*[166] was the only occasion on which the Fourth Circuit had, at the time *Project Life* was decided, addressed the issue of the validity of the abrogation of the states' immunity in Title II.[167] That case, in a laconic analysis of whether thirteen Maryland prison inmates' Title II claim against various state departments and officials was subject to the defense of sovereign immunity, held that Maryland's sovereign immunity had been validly abrogated under Title II and that Maryland was subject to suit in the case.[168] The *Project Life* court recognized that *Amos* was subsequently vacated,[169] but based its decision of the sovereign immunity issue on that case because it found the reasoning in *Amos* "compelling."[170]

Unfortunately for future plaintiffs in Project Life's position, the Fourth Circuit's subsequent decision in *Wessel* forecloses the possibility

161. *Id.* The court also noted: "[A] decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Id.* (quoting Innovative Health Sys. v. White Plains, 117 F.3d 37, 49 (2d Cir. 1997)).

162. *See* 42 U.S.C. § 3613. *See also supra* notes 72-75 and accompanying text.

163. *Garrett* held that Title I of the ADA did not validly abrogate the states' Eleventh Amendment immunity. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

164. *See Project Life, Inc.*, 139 F. Supp. 2d at 707 n.5.

165. *Id.* Also supporting its decision not to apply the holding of *Garrett* to Title II of the ADA was the fact that the *Garrett* Court had specifically declined to decide the issue of whether the abrogation of the states' sovereign immunity in Title II was valid. *Id.*

166. 178 F.3d 212 (4th Cir. 1999).

167. *Project Life, Inc.*, 139 F. Supp. 2d at 707 n.5.

168. *Amos*, 178 F.3d at 223. The court found that Title II was a valid abrogation of the states' sovereign immunity because Congress "unequivocally expressed its intent to abrogate the States' sovereign immunity" and because "the ADA is a valid exercise of [Congress's] power under the Fourteenth Amendment." *Id.*

169. *See Amos*, 205 F.3d 687.

170. *See Project Life, Inc.*, 139 F. Supp. 2d at 707 n.5.

of recovering damages from any state in the Fourth Circuit for violations of Title II.[171] A strong argument exists, however, that *Wessel* was wrongly decided, that the rationale of *Garrett* is limited to Title I of the ADA, and that Congress's abrogation of the states' Eleventh Amendment immunity remains valid with respect to Title II. This argument is exemplified in the opinions of other federal jurisdictions that have allowed individuals to sue the state for damages under Title II even after *Garrett*,[172] as well as in Judge King's dissenting opinion in *Wessel*.[173]

Although *Wessel* must control in Maryland, the Supreme Court has recently taken the opportunity to definitively decide whether Congress validly abrogated the states' Eleventh Amendment immunity under Title II.[174] The question should be decided in the affirmative. Because Congress explicitly found that a pattern of state discrimination in public services against the disabled, its abrogation of the states' Eleventh Amendment immunity with respect to Title II is an appropriate exercise of its Fourteenth Amendment enforcement powers and should be allowed to stand.[175]

Regardless of whether the Eleventh Amendment barred the plaintiffs' suit for damages, *Project Life* remains a valid decision. As the district court observed, a jury made a finding of liability, and despite the nominal award of twelve dollars in damages, the heart of the relief granted to Project Life is the detailed injunction ordering the Maryland Port Authority to provide a berth for the U.S.S. Sanctuary.[176] Under the doctrine of *Ex parte Young*, private individuals can sue state officials for injunctive relief, even though the Eleventh Amendment prevents them from suing the states for money damages.[177] Even the *Garrett* Court noted that its holding only affected suits against the states for money damages, and that injunctive relief was still available to aggrieved individuals.[178] The district court, then, acted properly even if the Eleventh Amendment barred the nominal damages awarded to Project Life.[179]

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171. *See supra* notes 107-115 and accompanying text.

172. *See supra* notes 124-125 and accompanying text.

173. *See supra* notes 116-123 and accompanying text.

174. On January 13, 2004, the Supreme Court heard oral arguments in the case of *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003), *cert. granted* 123 S. Ct. 2622 (2003). *See* Tennessee v. Lane, No. 02-1667, 2004 WL136390 (U.S. Jan. 13, 2004).

175. *Id.*

176. *See Project Life, Inc.*, 139 F. Supp. 2d at 706, 711.

177. *See supra* notes 126-132 and accompanying text.

178. *See Garrett*, 531 U.S. at 374 n.9.

179. Indeed, the Fourth Circuit, in its unpublished per curiam opinion on the state's appeal, rejected the state's claim that Project Life's release of the damage award voided the jury's finding of liability. *See* Project Life, Inc. v. Glendening, 146 Fed. Appx. 147, 150, 2002 WL 2012545, at *2 n.4 (4th Cir.

IV. CONCLUSION

It is hoped that the Supreme Court will in the future provide guidance on whether Congress validly abrogated the states' Eleventh Amendment immunity in Title II of the ADA and, thus, whether plaintiffs can institute monetary damages against the state for violations of that statute. Whatever the outcome of that dispute, however, recovering substance abusers can rest assured that they can still obtain some protection from state violations of the ADA in the form of injunctive relief. The decision of the U.S. District Court for the District of Maryland in *Project Life v. Glendening* embodies this protection. By holding that a denial of the services and facilities of a public entity as a result of acquiescence to community animus toward substance abusers constitutes unlawful discrimination in violation of the ADA and the FHA, the court reaffirmed its commitment to the underlying purposes of those acts—the elimination of discrimination against the disabled.

Sarah D. Bruce

Sept. 4, 2002). The Fourth Circuit affirmed the District Court's decision. *Id.* at 151, 2002 WL 2012545, at *3.