



# Americans With Disabilities Act Challenges to Environmental Regulatory Programs

by Robert J. Kinney

**I**n the second half of 1990, President Bush signed into law two enormously significant, if seemingly unrelated, pieces of legislation. The first was the Americans With Disabilities Act (ADA). Pub. L. No.101-336, 104 Stat. 327 (1990) (*codified* at 42 U.S.C. § 12101–12213 (1994)). Described by President Bush in his remarks as an “historic new civil rights act,” the ADA states as its purpose:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, *including the power to enforce the [F]ourteenth [A]mendment* and regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101 (b) (1994) (emphasis added).

Among its many provisions, the ADA prohibits any “public entity” from “exclud[ing] from participation in or den[ying] the benefits of the services, programs, or activities of a public entity” or “subject[ing] to discrimination by any such entity” any “qualified individual with a disability.” 42 U.S.C. § 12132 (1994). “Public entity” is defined at § 12131 (1) to include, *inter alia*, “any State or local government” and “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” “Qualified individual with a disability” is defined to mean “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131 (2) (1994). *See also* 28 C.F.R. § 35.130 (2000). The act expressly provided that:

A State shall not be immune under the [E]leventh 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. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202 (1994).

In November 1990, Bush signed the second measure, the Clean Air Act of 1990 (CAA 1990). Calling the CAA 1990 “the most significant air pollution legislation in our nation’s history,” Remarks on Signing the Clean Air Act of 1990, Nov. 15, 1990, *reproduced at* <http://bushlibrary.tamu.edu/papers/1990/90111501.html>, the President noted that “[t]he result of this new Clean Air Act will be that cancer risk, respiratory disease, heart ailments and reproductive disorders will be reduced,” *id.*, through comprehensive programs designed to address emissions of toxic air pollutants, acid rain, and pollutants that contribute to smog. In addition, the CAA 1990 introduced a far-reaching permit program to control emissions of air pollutants.

The protections offered to persons with disabilities under the ADA and the protections offered to citizens under the CAA came into apparent conflict on September 14, 1990. On that date, Judge Robert Whaley of the U.S. District Court for the Eastern District of Washington issued an order denying defendant State of Washington’s motion to dismiss ADA-based claims brought by the group Save Our Summers (SOS). *See Save Our Summers, et al. v. Washington Dep’t of Ecology*, No. CS-99-269-RHW (E.D. Wash. Sept. 14, 2000) (order denying motion to dismiss and denying motion to reconsider) (*hereinafter* “*Save Our Summers*”). These claims were brought against a state CAA program which issued permits to farmers to allow them to burn off wheat stubble from harvested fields. SOS claimed that Washington’s practice of issuing these permits violated the ADA because the state

failed to make “reasonable modifications” to the program that would avoid discriminating against persons on the basis of a disability. *See* 28 C.F.R. § 35.130 (b)(7) (2000) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making modifications would fundamentally alter the nature of the service, program, or activity.”). SOS also alleged violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (for the purposes of this article, all claims will be referred to as “ADA claims”).<sup>1</sup> In an order issued almost one year earlier, the court had denied SOS’s motion for a temporary restraining order against the program, holding that even though plaintiffs had established the necessary elements for an injunction to issue, the court lacked jurisdiction to hear SOS’s ADA claims because they were “foreclosed by the comprehensive regulatory scheme contained in the Clean Air Act.” *Save Our Summers*, slip. op. at 1. Consequently, the plaintiffs filed a motion for reconsideration, and the state filed a motion to dismiss based upon the court’s findings. It is worth noting that in its motion to dismiss, Washington did not argue that it was immune from lawsuit pursuant to the Eleventh Amendment of the U.S. Constitution.

In response to the competing motions, the court requested that the U.S. Department of Justice prepare an *amicus* brief addressing whether the comprehensive statutory and regulatory scheme of the CAA foreclosed the plaintiffs’ ADA claims and whether the objectives and remedies of the ADA could be reconciled with the CAA’s standards. Relying largely on the opinion of the Justice Department that the two statutes “can be successfully harmonized,” *see* Brief Amicus Curiae of the United States at 13, *Save Our Summers, et al. v. Washington Dep’t of Ecology, et al.*, No. CS-99-269-RHW (on file with author), the court held that “the broad sweep of the CAA does not preclude Plaintiffs from bringing suit under the ADA.” *Save Our Summers*, slip op. at 3. Washington’s motion to dismiss was therefore denied. *Id.*

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On October 11, 2000, slightly less than one month after the District Court issued its opinion, the U.S. Supreme Court heard oral argument in *Board of Trustees of the University of Alabama v. Garrett*, 2001 U.S. LEXIS 1700 (Feb. 21, 2001). This case involved a lawsuit by two state employees for damages pursuant Title I of the ADA, which prohibits the states and private employers from “discriminat[ing] against a qualified individual with a disability because of th[at] disability . . . in regard to . . . terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (1994). Alabama argued that in subjecting the states to such lawsuits Congress violated the Constitution by improperly waiving the Eleventh Amendment immunity of the states. While

implicitly acknowledging that Congress has the authority to abrogate the immunity of the states in order to enforce federal constitutional protections under the Fourteenth Amendment, Alabama argued that, in enacting the abrogation provision, Congress failed to demonstrate that states were violating, or might in the future violate, the constitutional rights of disabled citizens. See Brief for Petitioners at 3, *Board of Trustees of the University of Alabama v. Garrett* (U.S.) (No. 99-1240) (“Save when states have violated the constitutional rights of their citizens in the past or stand prepared to do so in the future, no such remedial authority [to subject states to individual lawsuit in federal court] exists.”) (*hereinafter* “Alabama Brief”). Absent such findings, Congress was without authority to waive the immunity of the states from lawsuits by individuals for ADA-based discrimination claims.

Alabama’s attack on the ADA was broad-based, and implicated Congress’ waiver of state immunity under both Title I and Title II of the ADA. *Id.* at i. Alabama asserted that the ADA’s charge to states that they modify policies, programs or procedures to avoid discriminating against persons with disabilities imposed obligations upon the states that went beyond what the Constitution requires:

[T]he ADA compels States to make “reasonable modifications” in their public services to accommodate the disabled unless they would “fundamentally alter” the nature of the program (citations omitted), while the Constitution contains no such requirement.

*Id.* at 43 (citing *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444 (1985), which held, *inter alia*, that government policies that may burden those with mental retardation are constitutional if they are “rationally related to a legitimate government purpose.” *Id.* at 446.). Responding in part to these arguments, on February 21, 2001, the Supreme Court held that state employees were barred from recovering money damages from states for the states’ failure to comply with Title I of the ADA. *University of Alabama v. Garrett*, 2001 U.S. LEXIS 1700 (Feb. 21, 2000) (*hereinafter Garrett*). The Court agreed with Alabama that Congress had unconstitutionally abrogated the states’ sovereign immunity under the ADA. Noting, however, that “the parties have not favored us with briefing” on the question of whether Title II of the ADA was also available to plaintiffs alleging employment discrimination, 2000 U.S. LEXIS 1700, \*8 n. 1, the Court limited its holding only to Title I. As a result, questions of whether states may be successfully sued under Title II of the ADA, which addresses “services, programs, or activities of a public entity,” remain unresolved. This is significant, because in *Save Our Summers* SOS has sought what Alabama asserted the ADA would unconstitutionally require—modifications to a public program to accommodate persons with disabilities. Indeed, both a Federal District Court in Virginia, see *Robert Bane v. Virginia Department of Corrections*, 110 F. Supp. 2d 469 (W.D. Va. 2000), and the Fourth Circuit Court of Appeals have found, in concert with Alabama’s argument, that the ADA unconstitutionally abrogated the sovereign immunity of the states under Title II of the ADA. See *Willie M. Brown, et al. v. North Carolina*

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*Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for certiorari pending*, \_\_\_ U.S.L.W. \_\_\_ (U.S. Sept. 8, 1999) (No. 99-424). Had *Save Our Summers* been brought in the Fourth Circuit, it might therefore have been given short shrift. In light of the Supreme Court’s narrow holding, however, a closer look at the decision

in *Save Our Summers* is warranted, as it may be a harbinger of the future in regard to ADA Title II-based challenges to environmental regulatory programs.

It is worth noting that the district court initially had denied SOS’s motion for a temporary restraining order enjoining Washington from issuing any subsequent permits allowing wheat stubble burning. It based its decision on the finding that, even though plaintiffs “had established all elements necessary for temporary relief to issue,” the court lacked jurisdiction to order any relief because “[p]laintiffs’ [ADA] . . . claims were foreclosed by the comprehensive regulatory scheme contained in the Clean Air Act.” *Save Our Summers*, slip. op. at 1. The court explained that its initial decision denying injunctive relief was largely based upon *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1, in which the U.S. Supreme Court held that a plaintiff could not bring claims under 42 U.S.C. § 1983 to enforce rights created by the Clean Water Act. 453 U.S. 1, 21 (“We therefore conclude that the existence of these express remedies [statutory enforcement mechanisms and citizen suit provisions] demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983.”). The District Court noted that “the Court previously read *Sea Clammers* broadly for the proposition that the comprehensiveness of a statutory scheme forecloses resort to any remedy outside that scheme,” but then concluded that “such a broad reading is in error.” *Save Our Summers*, slip op. at 2-3.

The court’s asserted error was its failure to read *Sea Clammers* as holding “only that § 1983 cannot be used to enforce rights created by a statutory scheme *that already include[s] comprehensive remedial measures.*” *Id.* (emphasis added). Under this reading:

[T]he broad sweep of the CAA does not preclude Plaintiffs from bringing suit under the ADA; instead, *Sea Clammers* merely prevent[s] Plaintiffs from bringing suit under § 1983 to enforce rights created by the CAA or the ADA (both comprehensive schemes). Such a reading recognizes the fundamental difference between 42 U.S.C. § 1983, which is a Congressional “vessel” intended to enforce the protections of the Fourteenth Amendment generally, and the Americans With Disabilities Act, which provides rights and remedies *distinct from other federal statutes.*”

*Id.* (citations omitted, emphasis added).

Holding as it does that it has jurisdiction to entertain SOS’s ADA-based claims—therefore denying Washington’s motion to dismiss—the court then splits the baby by also denying the plaintiffs’

prayed-for relief. Wholly contradicting its previous order, in which it found that the plaintiffs had established all the elements necessary for temporary relief to issue, including a likelihood of success on the merits, the court “declines to reconsider its denial of Plaintiffs’ motion for a temporary restraining order since it concludes that Plaintiffs *have failed to establish the likelihood of success on the merits.*” *Id.* at 4 (emphasis added).

This failure is not based upon the merits of the Plaintiffs’ ADA-based claims, but on the “broad sweep of the CAA.” Noting that the ADA only requires a state to make reasonable modifications to accommodate persons with disabilities, and not to force “fundamental changes” to existing programs, the court holds that “[a]lthough the comprehensiveness of the CAA may not entirely preclude Plaintiffs’ suit, it does preclude Plaintiffs from obtaining relief under the ADA . . . that would infringe upon subject matter governed by the CAA.” *Id.* Further, “[e]ven if the relief Plaintiffs seek would not work a fundamental change to the existing air pollution control scheme, the relief is still unavailable if it would eliminate entitlements otherwise provided for by the Clean Air Act or infringe upon areas ordinarily regulated under that Act.” *Id.* While a permit to burn is not an “entitlement” under the CAA, it is certainly consistent with the court’s analysis that an ADA-based restriction on the state’s issuance of such permits would “infringe upon areas ordinarily regulated” by the Act. This would, therefore, preclude any challenges to the issuance of a permit outside the provisions already provided for in the CAA.

This determination by the court might appear to put the matter to rest; however, plaintiffs urged the court to reconcile the conflict between the ADA and CAA by finding that the ADA effectively “trumped” the CAA where the two statutes conflicted, or, as the court put it, “the Court would have to conclude that the ADA implicitly repealed the CAA with regard to air pollution affecting disabled persons.” *Id.* at 6. Noting that repeals by implication are “heavily disfavored,” the court rejected plaintiffs’ argument, holding that there was no irreconcilable conflict between the CAA and the ADA that would necessitate repeal of the CAA in favor of ADA-based relief for disabled persons. *Id.* It is clear from this decision that, while a court may find that it has jurisdiction to hear ADA-based challenges to environmental

The Supreme Court’s opinion in *Garrett* does not put these questions to rest. The Court certainly had the opportunity to address the Title II question at issue here. It declined to do so on the narrow grounds that neither party had briefed “the question of whether Title II . . . is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject.” 2001 U.S. LEXIS 1700, \*8 n.1. Clearly, however, the basis of the Court’s constitutional analysis of Title I can be applied by inference to Title II. Citing its prior decision in *Cleburne v. Cleburne Living Center*, 473 U.S. at 423 (1985), which held that legislation addressing a special use permit for a home for the mentally retarded (arguably a “public accommodations” question) was subject only to a rational basis review, the Court held:

Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hard headedly—and perhaps hardheartedly—hold to job qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

2001 U.S. LEXIS 1700, at \*21.

If one were to strike the second sentence from the above-quoted passage, the statements of the Court could easily apply with equal force to a Title II case. Additionally, the Court’s assertion that the petitioners failed to demonstrate a pattern of unconstitutional discrimination in employment by the states could have equal force in a Title II-based lawsuit. The majority pointedly dismisses claims that the evidence presented to Congress during debate on the ADA shows a pattern of unlawful discrimination by states. *Id.* at \*25-26. Tellingly, the Court asserts that “even if it were to be determined that each incident [of alleged state misconduct] upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.” *Id.* at \*25.

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regulatory programs, any relief it might provide could be illusory. While the court allowed plaintiffs’ action to proceed in this case, it is unclear whether plaintiffs can obtain any meaningful relief based upon the ADA. To that end, comprehensive statutes like the CAA, which, as the court noted, “provide[] a mechanism for taking the health needs of citizens into account,” *id.* at 8, n.5, may effectively preclude ADA-based claims solely by their comprehensive remedial nature.

Neither does the Court’s holding in *Garrett* eliminate the possibility of plaintiffs bringing ADA-based claims given the doctrines established in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny. Briefly, the *Ex Parte Young* doctrine provides that, even though a state may be immune from lawsuit pursuant to the Eleventh Amendment, state officials may still be sued for declaratory or injunctive relief in their individual capacities where violations of federal law by such officials are alleged. *Id.*

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at 156–58; see also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270–78 (1996) (discussed *infra*). Alabama pointedly noted in its brief in *Garrett* that it was not challenging the authority of an individual to bring an injunction pursuant to *Ex Parte Young*. See Alabama Brief at 21. Such an action, however, begs the question of the scope of appropriate relief. In *Save Our Summers*, plaintiffs sought, *inter alia*, an order enjoining the Department of Ecology and its director from issuing wheat stubble-burning permits. See Defendant's Memorandum in Support of Motion to Dismiss at 2–3, *Save Our Summers, et al. v.*

*Washington Dep't of Ecology, et al.*, No. CS-99-0269-RHW (on file with author). Plaintiffs further sought unspecified monetary damages, which are not permitted pursuant to *Ex Parte Young*. The court held that “[t]he specific injunctive relief sought by Plaintiffs which would preclude burning or permit issuance appears to be precluded by the CAA,” although it cites no direct authority for this conclusion. *Save Our Summers*, slip. op. at 8. Because the requested relief would conflict with the CAA, “it is unlikely that Plaintiffs will prevail on the merits.” *Id.* In fact, a reasonable argument can be made that ADA-based relief may also be precluded because an order prohibiting issuance of permits would “fundamentally alter the nature of the service, program, or activity.” *Id.* See also 28 C.F.R. § 35.130 (b)(7) (2000).

Further, recent Supreme Court jurisprudence on the application of the *Ex Parte Young* exception would also appear to narrow an ADA plaintiff's options. In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Supreme Court detailed the two types of instances in which *Ex Parte Young* has been applied. “The first is where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law.” 521 U.S. at 269. The second is when “the case calls for the interpretation of federal law.” *Id.* at 274. In the latter case, the Supreme Court made clear that it was unconcerned about federal claims being resolved in state courts “where Eleventh Amendment immunity would be applicable in federal court but for an exception based on *Young*,” *id.* at 275, and noting in particular that where “parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials.” *Id.* at 276.

In *Save Our Summers* the plaintiffs challenged a state administrative program that issued CAA-based permits to farmers. Like Washington, Virginia has a number of environmental permitting programs. See, e.g., Va. Code Ann. § 10.1-1322 (air pollution control permit requirement); § 10.1-1408.1 (sanitary landfill permit requirement); § 10.1-1426 (permit required for storage, transport, disposal of hazardous wastes); § 62.1-44.5 (prohibition of waste discharges to state waters without a permit). Each of these pro-

grams has provisions allowing persons aggrieved by a decision of the permitting authority to challenge that decision. See, e.g., Va. Code Ann. § 10.1-1318 (appeal from decision of Air Pollution Control Board); § 10.1-1457 (judicial review of decision of Board or Director of Virginia Waste Management Board); § 62.1-44.29 (judicial review of decision of State Water Control Board). Applying the reasoning of *Coeur d'Alene* to a challenge to the issuance or non-issuance of a state permit in Virginia, it is arguable whether an *Ex Parte Young* action would prevail. This is because, in Virginia, there are both “a state forum available to vindicate federal interests” and the “strong interest” of the state courts in integration of the federal principles at issue “within their own system for the proper judicial control of state officials.” See 521 U.S. 261, 269–76.

It is, of course, unwise to speculate too broadly about outcomes or impacts of court decisions. Nonetheless, environmental law practitioners would be wise to follow developments in the application of the ADA to the states as well as to private entities. The Supreme Court's *Garrett* decision leaves for another day the question of whether Title II of the ADA is also unavailable to provide a remedy for persons with disabilities. And, even if this were later determined to be so, a rejection of the ADA's abrogation provision still leaves open the possibility, however narrow, of ADA-based challenges to official state action pursuant to *Ex Parte Young*. In either case, based upon the holding in *Save Our Summers*, the comprehensiveness of state environmental remedies may be called into question. ♪

#### Endnotes

- 1 SOS filed a similar lawsuit in the neighboring state of Idaho. See *Save Our Summers, et al. v. Idaho, et al.*, No. CV00-430-N-EJL (D.C. Idaho filed Aug. 7, 2000).



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