

TA QUESTION OF THE MONTH

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Q. In its February 2001 *Garrett* decision, the Supreme Court chose not to decide whether Congress had the authority to abrogate states' Eleventh Amendment immunity to suits brought under Title II of the ADA. How have the circuit courts dealt with the Title II abrogation issue post-*Garrett*?

A. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity to suits brought under Title I of the ADA. In order to enact valid Section 5 legislation that goes beyond the guarantees of the Fourteenth Amendment itself, the Court ruled, Congress must act pursuant to a record of unconstitutional conduct, and the legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." See also *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

In *Garrett*, the Court opted not to decide whether Congress validly abrogated states' Eleventh Amendment immunity to suits brought under Title II of the ADA. See *Garrett*, 531 U.S. at 360 n.1. Thus, at least for now, it has been left to the circuit courts to determine this important question. Since *Garrett*, six of the 12 appellate courts have issued decisions squarely deciding the Title II abrogation question, but no consensus has emerged from these courts on the issue. Instead, as discussed in more detail below, to date the appellate courts have provided three different answers to the question of whether Title II validly abrogates a state's immunity: Yes, No, and Sometimes.

A. YES – Congress validly abrogated states' Eleventh Amendment immunity to suits brought under Title II.

1. *Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002)

The only post-*Garrett* appellate court case holding unequivocally that Congress validly abrogated states' immunity when it enacted Title II is the Ninth Circuit's decision in *Hason v. Medical Board of California*. In reaching this conclusion, however, the Ninth Circuit did not engage in any analysis of the abrogation issue in light of the Supreme Court's discussion in *Garrett*. Instead, the court said only that 1) the Ninth Circuit had twice decided pre-*Garrett* that states' immunity had been abrogated by the enactment of Title II; see *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), and *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997); 2) the Supreme Court made clear in *Garrett* that it was not deciding the Title II abrogation question; and 3) "[w]e therefore conclude that *Garrett* does not overrule either *Clark* or *Dare* and that the Eleventh Amendment

does not bar Dr. Hason’s Title II claims.” *Hason*, 279 F.3d at 1170-71. Given this cursory handling of the abrogation question, the persuasive value of *Hason* outside of the Ninth Circuit is questionable.

B. NO – Congress did not validly abrogate states’ Eleventh Amendment immunity to suits brought under Title II.

Both the Fifth Circuit and the Tenth Circuit have held that Congress did not validly abrogate states’ immunity when it enacted Title II of the ADA.

1. *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001)

In *Reickenbacker*, the Fifth Circuit – in contrast to the Ninth Circuit – re-analyzed the abrogation issue despite a prior decision holding that Title II did validly abrogate Eleventh Amendment immunity (*Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998)). The court noted that *Garrett* and *Kimel* represented a tightening of the law related to abrogation and held that, in light of those more recent decisions *Coolbaugh* was no longer good law.

According to the Fifth Circuit, Title II fails both parts of the *Boerne/Kimel/Garrett* abrogation test. First, the court held that Congress failed to make “the requisite findings of state discrimination” against persons with disabilities. *Reickenbacker*, 274 F.3d at 982. The court stated that most of the Title II legislative history referred to discrimination by local entities rather than state government and that, in any event, “many of the findings to which we are referred by the plaintiffs describe facially neutral state policies that are unlikely to represent unconstitutional discrimination.” *Id.* Interestingly, the court argued that the appendix to Justice Breyer’s dissent in *Garrett*, which was offered to show an extensive record of discrimination by the states, is more helpful to states than to plaintiffs with disabilities.

The word “inaccessible,” without more, in this context, is synonymous with “constitutional” as it implies a facially neutral state policy without evidence of discriminatory intent. “Inaccessible” appears over 250 times in Justice Breyer’s list of “roughly 300 examples of discrimination by state governments.” The plaintiffs cite to this list as providing life to their claim that there are sufficient Congressional findings of discrimination in public accommodation. In fact, this list is fatal to the plaintiffs’ case, because it catalogs presumptively constitutional state action.

Id. at 982 n.62 (citation omitted).

Second, the Fifth Circuit held that Title II fails the “proportional and congruent” test imposed by the Supreme Court. “Title II indisputably embodies more than merely a prohibition on unconstitutional conduct against the disabled” and instead “create[s] an affirmative accommodation obligation on the part of public entities that far exceeds the constitutional boundaries.” *Id.* at 983.

**2. *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001),
cert. denied, 122 S. Ct. 1960 (2002)**

In *Thompson*, the 10th Circuit joined the Fifth Circuit in holding that Title II does not validly abrogate a state’s Eleventh Amendment immunity. The court applied the test prescribed by the Supreme Court and had little difficulty finding that plaintiffs could not meet the appropriate standards for abrogation.

This court cannot conclude that Congress “identified a history and pattern” of unconstitutional discrimination by the states against the disabled. <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2001172281&Reference> <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2001172281&Reference> Nor can this court find in the caselaw “extensive litigation and discussion of the constitutional violations.” <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2001172281&Reference> <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2001172281&Reference> Without this foundation, Title II cannot be considered preventive or remedial legislation that is congruent and proportional to any constitutional violation. Based on the “minimal evidence of unconstitutional state discrimination” against the disabled, Title II’s accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination.

Thompson, 278 F.3d at 1034 (citations omitted).

**C. SOMETIMES – Congress validly abrogated states’
Eleventh Amendment immunity to suits brought
under Title II, but only under certain circumstances**

The most intriguing Title II abrogation decisions post-*Garrett* are those from the First, Second, and Sixth Circuits, which have held that Title II validly abrogates a state's Eleventh Amendment immunity, but only under certain circumstances.

1. *Garcia v. SUNY Health Services Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001)

In *Garcia*, the Second Circuit at first provided a standard analysis of the abrogation issue that resembled discussions by the Fifth and Tenth Circuits (as discussed above). The Court then took an interesting turn:

Although we find that Title II in its entirety exceeds Congress's authority under §5, this conclusion does not end our inquiry as to whether Title II validly abrogates state sovereign immunity. This is because Title II need only comport with Congress's §5 authority to the extent that the title allows private damage suits against states for violations.

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The question, therefore, is how Title II monetary claims against the states can be limited so as to comport with Congress's §5 authority. *The answer, we believe, is to require plaintiffs bringing such suits to establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability.*

Garcia, 280 F.3d at 110, 111 (emphasis added). The court then acknowledged that direct proof of such animus or ill will "will often be lacking: smoking guns are rarely left in plain view." *Id.* at 112. To address this problem, the court held that a plaintiff could make his/her Title II case using the burden-shifting technique or motivating factor analysis most commonly used in employment discrimination cases. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Thus, in the Second Circuit, while Title II does not abrogate a state's immunity in many situations, a person with a disability may sue a state for damages under Title II when that person can establish that the violation was motivated by either discriminatory animus or ill will due to disability.

2. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*), petitions for cert. filed, 70 U.S.L.W. 3656 (April 8 & April 10, 2002)

In *Popovich*, the Sixth Circuit, in a 7-6 *en banc* decision, became the first appellate court to hold that whether Title II validly abrogates a state's immunity depends on what part of the Fourteenth Amendment is implicated by plaintiff's claim. Plaintiff, a person with a hearing impairment, alleged that a trial court had violated Title II by failing to provide him with appropriate auxiliary aids and services so that he could meaningfully participate in a child custody case.

We conclude that the plaintiffs' action is barred by the Eleventh Amendment in so far as the action relies on congressional enforcement of the Equal Protection Clause, but it is not barred in so far as the action relies on congressional enforcement of the Due Process Clause. As applied to the plaintiff's cause of action, Title II is "appropriate legislation" under section 5 and the Due Process Clause of section 1 of the Fourteenth Amendment.

Popovich, 276 F.3d at 811.

The court reasoned that a finding of no abrogation was not compelled by *Garrett* since that was an employment case that dealt with Congress' ability to enforce the Equal Protection Clause. "Title II, unlike Title I, encompasses various due process-type claims with varying standards of liability and is not limited to equal protection claims." *Id.* at 813.

As applied to the case before us, the "participation" requirement of Title II serves to protect Popovich's due process rights to a meaningful hearing. In child custody cases involving hearing-impaired parents, Congress is well within its express authority under Section 5 to require states to accommodate parental disability and to refrain from retaliation, for Congress is "enforcing" the due process right rather than "expanding" it ... The congressional "exclude from participation" standard, as applied here, certainly does not prohibit a "broader swath of [state judicial] conduct" than the Supreme Court suggests is within the congressional power under Section 5.

Id. at 815-16.

Thus, under the Sixth Circuit's analysis, Title II could validly abrogate a state's Eleventh Amendment immunity when the claim at issue implicates due process rights, but usually will not when the claim implicates equal protection rights (the court does not discuss whether a claim grounded in equal protection could survive if, for example, it involved a fundamental right and therefore strict scrutiny rather than the rational basis test was used). The particular outcome will, of course, depend on the specific facts of the case being considered. While it remains uncertain whether courts outside of the Sixth

Circuit will adopt this analysis, advocates should consider framing Title II claims that seek damages against a state so that the connection to due process rights is clear. Such connections could be drawn in cases dealing with interactions with the courts (as in *Popovich*), other necessary government functions, parental and family rights, and voting.

**3. *Kiman v. New Hampshire Department of Corrections*,
2002 WL 1880377 (1st Cir. Aug. 20, 2002)**

The First Circuit is the appellate court that has most recently addressed the abrogation issue. In *Kiman*, in which a prisoner with Lou Gehrig's Disease alleged mistreatment by corrections officers, the court reviewed the abrogation decisions from the other circuit courts and chose what it described as the "middle path" closest to *Garcia* and *Popovich*. *Kiman* at *5.

The First Circuit determined that it would not reach the question of whether Title II as a whole does or does not validly abrogate a state's immunity. Instead, the court decided it need only decide the abrogation question as applied to the specific case before it:

The case presents the question of whether New Hampshire may assert its Eleventh Amendment immunity against a suit under Title II alleging conduct by the state's agents that, if it occurred and was not adequately justified, violated the Constitution, based on the argument that Title II also subjects the state to private suit for conduct not required by the Constitution, and arguably not within Congress's section five power.

Kiman at *6 (footnote omitted). The court declined to reach New Hampshire's argument that Title II does not ever validly abrogate a state's immunity given that, according to the state, Title II purports to subject a state to suit for conduct that is clearly outside of Congress's section 5 power. Instead, the First Circuit held that, without deciding whether Title II sometimes goes too far, the statute still may validly abrogate a state's immunity at least in limited circumstances.

[W]e hold that Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, *at least as that Title is applied to cases in which a court identifies a constitutional violation by the state*. We do not need to reach the question of whether Congress acted within its power in subjecting states to private suit under the full scope of Title II. We also do not need to reach the different question of whether, as the Second Circuit concluded in *Garcia*, Congress's power might have extended to some of Title II's nonconstitutional rules but not to others.

Kiman at *10 (footnote omitted) (emphasis added). Therefore, since *Kiman*'s complaint alleged facts that, if true, showed a violation of the Eighth Amendment's prohibition of cruel and unusual punishment, Eleventh Amendment immunity did not apply.

B. Conclusion

Given that the six appellate courts to decide the Title II abrogation question post-*Garrett* have taken five different approaches to the issue, no clear resolution is likely to emerge until and unless the Supreme Court considers the matter. The key question still to be decided, in the words of the First Circuit, is "whether the Eleventh Amendment, with its associated principle of state sovereign immunity, is among the constitutional doctrines that necessarily require a particular congressional enactment to be either wholly constitutional or wholly unconstitutional." *Kiman* at *6 (footnote omitted). At least two circuits – the Tenth in *Thompson* and the Ninth in *Dare* (a pre-*Garrett* case) – have expressed some skepticism about such a "piecemeal analysis" of the immunity question. Thus, absent a Supreme Court Title II abrogation decision, advocates considering damage claims against states and state entities in those circuits permitting such suits must be careful to craft their complaints to meet the narrow, acceptable circumstances articulated by the courts.