UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SACRED HEART REHABILITATION CENTER INC.,	)	
Plaintiff,	)	No. 2: 08-cv-12110
	)	THE HON. MARIANNE O. BATTANI UNITED STATES DISTRICT JUDGE
v.	)	VIRGINIA M. MORGAN Magistrate Judge
RICHMOND TOWNSHIP AND RICHMOND TOWNSHIP PLANNING COMMISSION,	)	
Defendants.	)	

UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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BRIEF STATEMENT OF THE ISSUES PRESENTED

1. Whether the Americans with Disabilities Act, the Rehabilitation Act or the Fair Housing Amendments Act requires a plaintiff to exhaust state administrative remedies prior to filing suit in federal court because Plaintiff is seeking damages;

2. Whether Plaintiff's claims are barred by the *Rooker-Feldman* doctrine; and

3. Whether Plaintiff's claims are barred by the *Colorado River* and *Younger* abstention doctrines?

BRIEF LIST OF CONTROLLING AUTHORITIES

Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976)

DLX, Inc. v Ky., 381 F.3d 511, 516 (6th Cir. 2004), *cert. denied* 544 U.S. 961 (2005)

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005)

Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206 (1998)

Romine v. Compuserve Corp., 160 F.3d 337 (6th Cir. 1998)

Younger v. Harris, 401 U.S. 37 (1971)

29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973)

42 U.S.C. § 12101, *et seq.* (The Americans With Disabilities Act of 1990)

42.U.S.C. § 2000d (Civil Rights Act of 1964)

42 U.S.C. § 3601 *et seq*. (Fair Housing Amendments Act of 1988)

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I. INTRODUCTION

Plaintiff brings this action seeking injunctive relief and monetary damages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.* ("FHAA")[1] based on Defendants' denial of Sacred Heart Rehabilitation Center Inc.'s ("Sacred Heart") request for a special land use permit that restricted Sacred Heart's ability to use its facility to treat individuals with addictive disorders and to support those associated with such individuals.

On November 18, 2009, Defendants filed a Motion to Dismiss. Defendants attack Plaintiff's complaint on three separate theories. First, Defendants claim that Plaintiff's damage claim, which they attempt to classify as a temporary taking, is barred from federal court review because it is not ripe. Second, Defendants maintain that Plaintiff's claims are barred by the *Rooker-Feldman* doctrine. Third, Defendants contend that Plaintiff's lawsuit is barred by the *Colorado River* and *Younger* abstention doctrines. Defendants' arguments are without merit and their Motion to Dismiss should be denied by this Court. Moreover, these

[1] The Complaint also alleges exclusionary zoning, denial of Sacred Heart's patients' equal protection and substantive due process rights under the State and Federal Constitutions, violation of the Michigan Persons With Disabilities Civil Rights Act, MCL § 37.1301, and a violation of 42 U.S.C. § 1983. On October 21, 2009, the Court granted Sacred Heart's Motion to File a First Amended Complaint which added an alleged violation of the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq*. Defendants' Answer, filed on November 5, 2009, denied the allegations, but failed to raise any new defenses under the FHAA. Although the Attorney General is authorized to enforce the FHAA to ensure that individuals with disabilities have the right to live in the community in a residence of their choice by prohibiting local governments from applying land use regulations in a discriminatory manner, the United States will focus its arguments on the ADA and Rehabilitation Act in order to respond to Defendants' arguments.

arguments, which attempt to camouflage the important civil rights issues at stake in Plaintiff's Complaint, run contrary to the statutes' legislative history, the Department of Justice regulations interpreting the statutes, and the prevailing case law.

II. STATEMENT OF FACTS

A. Background

Sacred Heart Rehabilitation Center, Inc. is a nondenominational charitable services organization that was founded in 1967 to serve indigent individuals with alcoholism. Amended Complaint ¶ 11. In 1976, Sacred Heart acquired 126 acres and began to operate its primary residential rehabilitation treatment facility – the Richmond Facility – on 15 of those acres located at 400 Stoddard Road, Memphis, Michigan 48041. For more than thirty years, Sacred Heart has offered treatment to individuals with addictive disorders and those associated with them throughout southeastern Michigan. Amended Complaint ¶¶ 11, 13. Specifically, Sacred Heart specializes in medically managed detoxification, residential rehabilitation, women's residential rehabilitation, supported independent living, and intensive outpatient services. Amended Complaint ¶ 12. The Richmond Facility includes a 24-bed physician directed sub-acute detoxification unit with nursing and laboratory support and offers two levels of residential treatment in a 136-bed facility. Exh. 1 (Wilkinson Dep. 22:5-7, July 10, 2009).

B. Sacred Heart's Proposed Reconfiguration, Renovation, and Construction Projects

In 2007, Sacred Heart sought to renovate, reconfigure, and expand its Richmond Facility in order to make it more efficient, more attractive, and to further its useful life by approximately 25-30 years. Amended Complaint ¶¶ 15-16. Specifically, Sacred Heart

proposed to (1) renovate the interior and exterior of the existing facility; (2) reconfigure its admissions wing by adding a 5,000 square foot addition in order to centralize admission functions; and (3) erect a single-story 14,000 square foot building, the Clearview Specialty Women and Children Program, in order to relocate the women's program from Port Huron to the Richmond Facility to provide specialized rehabilitative residential care for women, some who need to bring their children with them into treatment as well as some who are pregnant and addicted to opiates and need to be on methadone. Amended Complaint ¶¶ 16, 17, Exh. 1 (Wilkinson Dep. 36:10-19, July 10, 2009). The proposed Clearview Specialty Women and Children Program would add 30 additional beds to Sacred Heart's existing Richmond Facility.

Sacred Heart also intended to install an elevator and lifts to improve accessibility and to comply with current codes and design standards. Amended Complaint ¶ 16. Additionally, Sacred Heart planned to improve its nursing service areas, to develop new group rooms, to upgrade the heating, cooling, and waste water treatment systems, and to extend air conditioning throughout the building. Amended Complaint ¶ 16. Sacred Heart's proposed renovation, reconfiguration, and building addition would not change the current use of the Richmond Facility, and its proposed uses would meet current design standards and would be ADA compliant. Amended Complaint ¶ 18.

The rehabilitation center at the Richmond Facility operated for more than 30 years as a permitted use by right without any special use or variance approval from the Richmond Township Planning Commission ("Planning Commission"). Amended Complaint ¶ 19. During this entire time, Richmond Township ("Township") never received any complaints about Sacred Heart or the clients who resided at its Richmond Facility. Exh. 2 (Fuerstenau

Dep. 24:6-10, Sept. 4, 2009). The Richmond Facility is currently zoned A-1, Agricultural Residential, under the Township zoning ordinance. Amended Complaint ¶ 20. Indeed, Sacred Heart's use as a primary residential treatment facility predated the current zoning ordinance classification. Amended Complaint ¶ 20.

The current zoning ordinance does not provide for a primary resident treatment facility such as the Sacred Heart Rehabilitation Center in any zoning district located within the Township, either as a principal permitted use or a special land use. Amended Complaint ¶ 21. Permitted uses as of right in the A-1 zoning district include agribusiness, stables, family day care, neighborhood public parks, and public schools. Amended Complaint ¶ 22. A-1 zoning also allows for special land uses including airports, churches, commercial animal feed lots, group day care, landfills, public libraries and museums or "any use similar." Amended Complaint ¶ 23.

Because Sacred Heart's use of the property is not expressly permitted by right in the A-1 district, the Township required Sacred Heart to submit a "special land use application" for approval of the proposed projects. Amended Complaint ¶ 26. The Township required the application despite the fact that Sacred Heart has been using the property as a rehabilitation center for more than 30 years, during which time the Township never required Sacred Heart to obtain approval of its "special use." Amended Complaint ¶¶ 19, 26. Instead, the Township has effectively treated Sacred Heart's use of the property as a permitted use. Nonetheless, Sacred Heart complied with the Township's request, and submitted a special land use application on May 21, 2007. Amended Complaint ¶¶ 26, 28.

C. Sacred Heart's Special Land Use Permit Process

Article 12 § 12.00(A) of the Township's Zoning Ordinance sets forth eight (8) standards that are required to be met for the Planning Commission to approve a special land use request. Amended Complaint ¶ 27. The Planning Commission held three public hearings relative to Sacred Heart's special land use permit request on July 18, 2007, August 22, 2007, and September 19, 2007 respectively. At the first meeting held on July 18, 2007, Sacred Heart addressed the Planning Commission's special land use criteria as set forth at Article 12, § 12.00 of the Zoning Ordinance, and presented evidence in support of approval. Amended Complaint ¶¶¶ 31, 33, 34. During the meeting, the Planning Commission did not address the merits of Sacred Heart's special land use application, but rather, heard lengthy comments and complaints from community members who objected to the special land use application based on myths, unfounded fears, and stereotypes as expressed in comments about the type of individuals who are treated at Sacred Heart. Amended Complaint ¶ 32. The public comments include the following:

- In referring to Sacred Heart patients, a resident said "[h]is wife called him all panicked that there was a large black walking up their hill from the river." *See* Exh. 3 at 14, (Richmond Township Planning Commission's July 18, 2007 Meeting Minutes).

- Another resident when referring to Sacred Heart clients stated "he doesn't want any drug addicts walking up to his grand kids." *Id.* at 15.

- One resident explained that she and her husband "have guns in their hands so to protect themselves, because they don't know what is going to happen here." In describing the proposed Women and Children's Center, she stated "[t]hat looks like, I am sorry, a damn prison." *Id.*

- Another resident in describing Sacred Heart clients stated "[t]hey are like stray dogs they don't know where to go. They go down the road and bother everybody." She was afraid to allow her kids to go out and play. *Id.*

- In referring to Sacred Heart clients, one resident said "[h]e worries about the guy that is screwed up on crack and grabs his wife in the kitchen." *Id.* at 17.

- In describing Sacred Heart clients, another resident said he just found out "there are sex offenders in there and they parade up and down the road. These people are swearing at my kids." *Id.* at 23.

The Planning Commission requested that Sacred Heart address the concerns raised, and then voted to table the special land use permit request until its September meeting. Amended Complaint ¶ 32. At its second public hearing on August 22, 2007, Sacred Heart presented the Planning Commission with its revised plans and evidence that it had addressed each of the concerns raised at the previous meeting. The residents again expressed their disapproval of the entire Sacred Heart facility and submitted two letters expressing this sentiment along with a petition with 175 signatures opposing any special land use permit for Sacred Heart. Amended Complaint ¶ 33, Exh. 4, (Richmond Township Planning Commission's August 22, 2007 Meeting Minutes at p. 5). Some of the myths, unfounded fears, and stereotypes expressed in the comments about the disabilities of Sacred Heart's clients at the August 22, 2007 meeting include:

- One resident, in describing the residents at Sacred Heart, stated she was "[c]oncerned about the elderly people who live in the area that have to contend with the alcoholics/drug addicts that wonder [sic] in this area." *See*, Exh. 4 at p. 7, (Richmond Township Planning Commission's August 22, 2007 Meeting Minutes).

- Another resident stated "a drug addict is a criminal, they do give them the option to go there instead of jail." *Id.* at p. 8.

The Planning Commission again advised Sacred Heart to address the issues raised by the residents and the Township at that meeting and again voted to table the Sacred Heart special land use request until its September meeting. Amended Complaint ¶ 33.

D. Richmond Township Decision Denying Special Land Use Permit

On September 19, 2007, the Planning Commission held its third and final public hearing relative to Sacred Heart's special land use request to permit the proposed use of the Property as a special use. Amended Complaint ¶ 34. At this meeting, the residents again verbally made their opposition to the Sacred Heart Richmond Facility known to all. Amended Complaint ¶ 35. Some of the myths, unfounded fears, and stereotypes expressed in comments from this particular meeting include:

- One resident commented in referring to Sacred Heart clients, "they are not in there legally, that is what they worry about." *See*, Exh. 5 at 15, (Richmond Township Planning Commission's September 19, 2007 Meeting Minutes).

- Another resident said in responding to safety and welfare concerns about Sacred Heart clients, "[h]e would guarantee that they are some type of vagrant or some type of criminal, in essence." *Id.* at p. 15.

Sacred Heart responded to all the questions and concerns that were raised at the previous meetings. In response to concerns raised by the Township, Sacred Heart also agreed to contribute financially to the pavement of Stoddard Road and to change its discharge policy. Exh. 5 at p. 13. However, despite Sacred Heart's efforts to appease the Planning Commission and the Township's residents, the Planning Commission voted at this meeting, by a vote of seven to zero, to deny Sacred Heart's proposed and intended use of the Richmond Facility in its entirety. Amended Complaint ¶ 37.

According to the Planning Commission, Sacred Heart's proposed structure did not meet the factors required under Article 12, § 12.00 of the Zoning Ordinance and it was a non-conforming use that should not be allowed to expand. Exh. 5 at p. 22. This vote also rejected the recommendation of Richmond's own planning professional to approve the 5,000 square

foot addition. Amended Complaint ¶¶ 36, 37.

E. State Court Proceedings in Macomb Circuit Court

On October 31, 3007, Plaintiff filed an appeal to the Macomb County Circuit Court seeking review of the Township's decision to deny the permit as required by state judicial procedures. This state court appeal only sought to address the issue of whether the Township's denial of Sacred Heart's special land use permit was proper pursuant to Mich. Const. art. 6, § 28. Exh. 6 *(*Plaintiff's Brief on Appeal at v.). On August 4, 2008, Macomb Circuit Judge Maceroni issued an opinion and order denying Plaintiff's appeal of the denial of its special land use application. Judge Maceroni noted "[t]his *Opinion* and *Order* resolves the last pending claim in this matter and closes the case." Exh. 7 at p. 5. On August 25, 2008, Plaintiff filed an application for leave to appeal to the Michigan Court of Appeals, which the Court of Appeals denied on January 28, 2009. Exh. 8. The Court of Appeals also denied Plaintiff's motion for reconsideration on March 17, 2009, which ended any conceivable state court proceeding in this matter. Exh. 9. Sacred Heart did not raise claims under the ADA, the Rehabilitation Act, or the FHAA in its state court proceedings.

III. STATUTORY FRAMEWORK

A. Legal Standard

In their 12(b)(1) Motion to Dismiss, Defendants challenge the truth of the jurisdictional facts alleged in Plaintiff's Amended Complaint. (Defendants' Motion to Dismiss at 5). Thus, Plaintiff has the burden of proving jurisdiction exists in order to survive the Motion to Dismiss. *DLX, Inc. v Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

B. Plaintiff's ADA and Rehabilitation Act Claims

Congress enacted the Americans with Disabilities Act ("ADA") in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Therefore, Congress enacted the ADA to establish new federal civil rights because it found that "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing."[2] For those reasons, title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Title II defines a "public entity" as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ." 42 U.S.C. § 12131(1). The Defendants Richmond Township and the Richmond Township Planning Commission are unquestionably public entities covered by title II's anti-discrimination provision. Title II employs expansive language, intended to reach all

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[2] The Senate Report on the ADA declared:

> [E]nough time has . . . been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action.... [E]xisting States laws do not adequately counter such acts of discrimination."

S. REP. NO. 101-116 at 6 (1989).

actions taken by public entities. *See Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 209-210 (1998) (holding that title II of the ADA applies to state institutions without exception). *See Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir. 1998) (finding that the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does). *See also Innovative Health Sys., Inc. v. City of White Plains;* 117 F.3d 37, 44-45 (2d Cir.1997) (applying anti-discrimination provision to "all discrimination by a public entity, regardless of the context"); *Barden v. City of Sacramento,* 292 F.3d 1073,1076 (9th Cir.2002) (noting that a number of circuits have "construed the ADA's broad language [as] bring[ing] within its scope 'anything a public entity does'").

Zoning activities and decisions are plainly among the "services, programs, or activities" conducted by public entities and covered by the reach of the ADA. Numerous Rehabilitation Act cases place zoning issues squarely within this purview.[3] *See Innovative Health Systems,*

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[3]In *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998), the Sixth Circuit in explaining the relationship between § 504 and the ADA stated:

> "[T]his broad reading of 'programs, services, and activities' is consistent with the broad definition used in § 504 of the Rehabilitation Act ('the term 'program or activity' means all of the operations'). 29 U.S.C. § 794(b). This is significant, because we look to the Rehabilitation Act for guidance in construing similar provisions in the Americans with Disabilities Act. *See McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 459-60 (6th Cir. 1997) (en banc); *Monette v. Electronic Data Sys. Corp.,* 90 F.3d 1173, 1177 (6th Cir.1996); *Patton v. TIC United Corp.*, 77 F.3d 1235, 1245 (10th Cir.), cert. denied, 518 U.S. 1005, 116 S.Ct. 2525, 135 L.Ed.2d 1049 (1996); HOUSE REPORT at 50 (1990), 1990 U.S.C.C.A.N. at 473 ('The Committee intends that title II work in the same manner as Section 504.')." Because Richmond Township receives federal funding, including a community block grant, their actions are also covered by the Rehabilitation Act. See Exh. 2 (Fuerstenau Dep. 14:4-9, Sept. 4, 2009).

Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997) ("[B]oth the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity.")[4]. *See also*, *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 728 (9th Cir. 1999) (same).

IV. ARGUMENT

A. Plaintiff's ADA and § 504 Rehabilitation Act Claims Are Ripe Because Exhaustion of State Administrative Remedies Is Not Required

Defendants argue that Plaintiff's lawsuit is not ripe and should be dismissed by this Court because Plaintiff's damages claim is effectively a "takings" claim that is barred from federal court review because Plaintiff failed to pursue its takings claim first in state court. (Defendants' Motion at 5). Defendants' ripeness argument is without merit because it is based upon an erroneous interpretation of the law and facts in this case.

In support of their ripeness argument, Defendants essentially claim that Sacred Heart failed to exhaust state remedies. Plaintiff, however, never alleged a takings claim in its state court appeal. Indeed, Plaintiff in its state circuit court appeal expressly reserved its right to bring a takings claim. *See* Exh. 6 at p. iv. Judge Maceroni correctly noted this important

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[4] Since the ruling in *Innovative Health Systems*, federal courts have consistently applied the Second Circuit's interpretation. *See, Wisc. Comm. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir. 2006) ("[m]unicipal zoning qualifies as a public 'program' or 'service,' under the ADA," and zoning enforcement is a local government 'activity'); *Sunrise Dev. Inc. v. Town of Huntington, N.Y.*, 62 F. Supp. 2d 762, 773 (E.D.N.Y. 1999) (zoning is a "service" within the meaning of the ADA); *S.D. Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1041 (D.S.D. 2002) ("Title II applies to anything a public entity does" including local zoning ordinances because they "limit how property may be used and, indirectly, who may use the property."); and *Dadian v. Village of Wilmette*, 1999 WL 299887 at *4,5 (N.D. Ill. 1999)("After *Innovative Health Systems*, every district court opinion follows the Second Circuit" and noting the ADA's catch–all phrase, banning 'discrimination by any such entity' supports a broad interpretation").

distinction when he wrote: "[a]s a preliminary matter, Sacred Heart's appeal does not allege a taking of their property." *See* Exh. 7 at p. 3. Similarly, Plaintiff in its federal Amended Complaint never alleged a takings claim. Rather, Plaintiff alleged, among other claims, violations of title II of the ADA, Section 504 of the Rehabilitation Act, and § 3601 *et seq* of the Fair Housing Act Amendments (Amended Complaint, Counts I and V), none of which have preconditions for filing direct actions in federal court. Thus, despite Defendants' argument to the contrary, Plaintiff was not required to (1) assert an inverse condemnation claim in state court or (2) assert they were denied just compensation prior to filing a lawsuit in this Court.

This case raises the critical issue of whether Defendants discriminated against Sacred Heart during the special land use permit process because its residents are individuals with disabilities – various addictive disorders. Although Defendants contend that they denied the permit because Sacred Heart did not meet the eight factors required under Article 12 § 12.00(A) of the zoning ordinance and the proposed addition was a non-conforming use, the extensive evidence of community opposition voiced at the three public hearings based on negative stereotypes, myths, and fears of persons with addictive disorders suggests that the real reason for the denial was that Township officials adopted the discriminatory animus of the neighbors who attended Township meetings. Additionally, it can be inferred that Defendants based their decision to deny the special use permit on unlawful discriminatory animus because Sacred Heart was permitted to operate its Richmond Facility since 1967 without any hindrance until public hearings were held and local residents began their campaign to stop the improvement and expansion of the facility.

Consequently, if this Court analyzes Plaintiff's pending lawsuit under the appropriate ripeness/jurisdiction standard applicable for the alleged violations under title II of the ADA and § 504 of the Rehabilitation Act, Plaintiff's complaint should not be dismissed because it is well established that Congress chose not to require the exhaustion of State or administrative remedies prior to the issuance of federal judicial relief under title II of the ADA. *See e.g., Zimmer v. State of Or. Dept. of Justice*, 170 F.3d 1169, 1177-78 (9th Cir. 1999) (title II incorporates Rehabilitation Act's provisions, including lack of exhaustion requirement); *Downs v. Mass. Bay Transp. Auth.,* 13 F. Supp. 2d 130, 134 (D. Mass. 1998) (title II requires no exhaustion); *Cable v. Dept. of Develop'l Svcs.*, 973 F.Supp. 937, 940 (C.D. Cal. 1997) (courts have consistently held no exhaustion under title II of ADA); *Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996); *Roe v. County Comm'n of Monongalia* Cty., 926 F. Supp. 74, 77 (N.D.W.V. 1996); *Noland v. Wheatley, et al.*, 835 F. Supp. 476 at 482 (N.D. Ind. 1993). *See also Neighborhood Action Coalition v. City of Canton Ohio,* 882 F.2d 1012, 1015 (6th Cir. 1989) (holding, under title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[5] that "litigants need not exhaust their administrative remedies before pursuing their private cause of action in federal court").[6]

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[5] The Sixth Circuit's analysis of title VI is controlling in the instant case because § 504 of the Rehabilitation Act adopts title VI rights, remedies, and procedures at 42 U.S.C. § 794a(a)(2)) and title II adopts the Rehabilitation Act's rights, remedies, and procedures at 42 U.S.C. § 12133.

[6] Similarly, several § 504 cases have held that persons need not exhaust administrative remedies. *See, e.g.*, *Tuck v. HCA Health Servs. of Tenn., Inc.,* 7 F.3d 465, 471 (6th Cir. 1993) (exhaustion of federal administrative remedies is not required); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990) (same); *Cheeney v. Highland Cmty. Coll.*, 819 F. Supp. 749, 750 (N.D. Ill. 1993) (plaintiff not required to file action in state court prior to bringing § 504 suit in federal court).

Moreover, to the extent that the finality concerns expressed in the Sixth Circuit's *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 343-344 (6th Cir. 2002) decision are raised in the instant case, finality is satisfied here as there was nothing more Plaintiff could have done to challenge Defendants' discriminatory decision to deny its special land use permit. Nonetheless, Defendants contend that Plaintiff could have appealed to the Township's Zoning Board of Appeals ("BZA") the Township's determination that a special land use [permit] was required in this situation. (Defendants' Motion to Dismiss at 2).

Despite this contention, it is clear from the evidence in this case that it would have been procedurally impossible for Plaintiff to do so. Article 14 of the Richmond Township Zoning Ordinance governs the authority of the ZBA and it prohibits the ZBA from hearing appeals involving special land use permits. As a result, Judge Maceroni in his Circuit Court Opinion noted the following in describing why the Defendants' finality argument lacks merit:

> The Zoning Board of Appeals shall not have the right to review an appeal to a decision made by the Township Planning Commission for cases involving special land use or planned unit development.
>
> As noted, the plain language of Section 14.05(2)(d) divests the Zoning Board of Appeals from hearing a decision involving special land use. The broad language of Section 14.05(2)(d) would encompass the decision to require an applicant to seek a special land use permit as well as the ultimate decision as to whether a special land use permit should be granted. Therefore, Sacred Heart did not have an available appeal to the Zoning Board of Appeals of the Richmond Township Planning Commission's decision to require Sacred Heart to obtain a special land use permit.

Exh. 7 at 3.

Plaintiff in this case was not required to exhaust any administrative remedies to pursue its allegations of discriminatory zoning practices pursuant to title II of the ADA and § 504 of the Rehabilitation Act prior to filing suit in federal court. Indeed, if this Court were to dismiss

the Amended Complaint and hold that an individual who alleges that her civil rights under the ADA and the Rehabilitation Act were violated must first pursue and exhaust such remedies, this would be a significant curtailment of the intended purposes of both of these statutes. Such a ruling would have far-reaching implications for civil rights enforcement across the country.

B. Plaintiff's ADA and Rehabilitation Claims Are Not Barred by the *Rooker-Feldman* Doctrine

Defendants argue that "Sacred Heart's lawsuit is barred by the *Rooker-Feldman* doctrine to the extent that it seeks appellate review by this Court of the Macomb County Circuit Court decision." (Defendants' Motion to Dismiss at 7). There is no legal or factual support for this argument. The *Rooker-Feldman* doctrine in essence "precludes a federal district court from exercising appellate jurisdiction over state-court judgments." *Walters v. Bd. of Counseling*, 2009 WL 3837276 at *7 (E.D. Mich. Nov. 16, 2009) (citing *Tropf v. Fidelity Nat'l Title Ins. Co.*, 289 F.3d 929, 936 (6th Cir. 2002)).

Defendants rely on six federal court decisions to support their argument that the *Rooker-Feldman* doctrine applies in this case. *(See* Defendants' Motion to Dismiss, pp. 7-13). However, all of these cases applied the legal analysis that was appropriate when determining if the *Rooker-Feldman* doctrine applied to specific cases before the Supreme Court's decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005)[7], which clearly altered the

[7] The Supreme Court itself has applied the *Rooker-Feldman* doctrine to preclude district court jurisdiction, first in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and then, sixty years later, in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-284 (2005). Since that time, the Supreme Court has "warned that the lower courts have at times extended *Rooker-Feldman* 'far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of

landscape for the application of the *Rooker-Feldman* doctrine. In *Exxon*, the Supreme Court explained the narrow and limited application of the *Rooker-Feldman* doctrine as follows:

> The *Rooker-Feldman* doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state court actions."

Exxon, 544 U.S. at 284.

In the wake of *Exxon*, the Sixth Circuit has "distinguished between plaintiffs who bring an impermissible attack on state court judgment-situations in which *Rooker-Feldman* applies- and plaintiffs who assert independent claims before the district court-situations in which *Rooker-Feldman* does not apply." *Lawrence v. Welch,* 531 F.3d 364, 368 (6th Cir. 2008) (citing *Pittman v. Cuyahoga County Dep't of Children and Family Serv*., 241 Fed.Appx. 285, 287 (6th Cir. 2007) (citing *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006)).[8]

In the instant, case the *Rooker-Feldman* doctrine is inapplicable because when Plaintiff filed its federal Complaint, the Macomb County Circuit court had not rendered its decision and thus the "source of the injury" that Plaintiff asserted in its federal Complaint was not a state court judgment as one did not exist at that time. In fact, Plaintiff filed its federal lawsuit on

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preclusion law pursuant to 28 U.S.C. § 1738." *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (quoting *Exxon*, 544 U.S. at 283). More important, since *Feldman*, the Supreme Court "has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction." *Exxon*, 544 U.S. at 287.

[8] In *McCormick*, the court explained "that the pertinent inquiry after *Exxon* is whether the 'source of the injury' upon which plaintiff bases his federal claim is the state court judgment. If the source of the injury is the state court decision, then the *Rooker-Feldman* doctrine would prevent the district court from asserting jurisdiction." *Lawrence, 531* F.3d at 368.

May 14, 2008, approximately three months before the State case was decided and thus Plaintiff was not a "state-court loser" complaining of injuries caused by a state-court judgment and was not inviting district court review of that judgment. Plaintiff in the instant case filed its federal lawsuit in these Court alleging violations of the ADA, the Rehabilitation Act, and later the Fair Housing Amendments Act, to litigate the issue of whether the Township had violated its federally protected civil rights in the implementation of its zoning decision regarding Sacred Heart.[9]

C. Abstention is not Warranted in This Case Under *Colorado River* and *Younger* Because There is No Parallel Proceeding in State Court and the Various Factors Under Each Doctrine Do Not Apply

The Defendants contend that abstention is warranted in this case based on the factors set out in *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976), *Younger v. Harris*[10], 401 U.S. 37 (1971), and its progeny. As the Supreme Court explained in *Colorado River*,

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow

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[9] To the extent that Defendants argue that Plaintiff's federal claims, even though they do not assert injury from the Macomb County Circuit Court judgment, are "inextricably intertwined" with that judgment so as to fall within the reach of *Rooker-Feldman*, that argument must also fail. The Supreme Court noted that it was this "inextricably intertwined" language that was the source of the pre-*Exxon Mobil* problems with the application of *Rooker-Feldman*. *Id.* at 369. In *Exxon*, "the Supreme Court implicitly repudiated the circuits' post-*Feldman* use of the phrase 'inextricably intertwined' to extend *Rooker-Feldman* to situations [where] the source of the injury was not the state court judgment." *Id.* Thus, the "inextricably intertwined" analysis asserted by Defendants in this case is improper and does not change the fact that the *Rooker-Feldman* doctrine is inapplicable in this case.

[10]For purposes of this *amicus* brief, the United States will only address certain relevant issues related to the *Colorado River* and *Younger* doctrines.

> exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Id. at 813 (quoting *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959).

The Sixth Circuit in *Romine v. Compuserve Corp*., 160 F.3d 337, 340-341 (6th Cir. 1998) set out the eight factors that a federal district court must consider when determining whether "exceptional circumstances" justify dismissing or staying an action in favor of parallel litigation in a state court:

> (1) whether either court has assumed jurisdiction over a res
> (2) the inconvenience of the federal forum
> (3) the desirability of avoiding piecemeal litigation
> (4) the order in which the forums obtained jurisdiction.
> (5) whether federal or state law controls; and
> (6) whether the state forum will adequately protect the interests of the parties.
> (7) the relative progress of the state and federal proceedings; and
> (8) the presence or absence of concurrent jurisdiction.

The first prerequisite under *Colorado River* is that there is parallel litigation in a state court. *Id.* at 339. There is simply no ongoing parallel state litigation in this matter. The matters in this case were not parallel[11] at any time because Sacred Heart did not allege

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[11]Even though the state circuit court case was pending on May 14, 2008, the date Plaintiff filed its federal Complaint, the circuit court case was over on August 4, 2008, when Macomb Circuit Judge Maceroni issued an opinion and order denying Plaintiff's appeal on the denial of its special land use application. In fact, Judge Maceroni stated "[t]his *Opinion* and *Order* resolves the last pending claim in this matter and closes the case." (*See* Exh. 5, p. 5). On August 25, 2008, Plaintiff filed an application for leave to appeal to the Michigan Court of Appeals, which the Court of Appeals denied on January 28, 2009. The Court of Appeals also denied Plaintiff's motion for reconsideration on March 17, 2009, which ended any conceivable state court proceeding. Thus, there is not, and never was, a parallel state court proceeding in this case. Accordingly, the Court need not consider the remaining six *Colorado River* factors. *See Godfried v. Med. Planning Svc.s, Inc*., 142 F.3d 326, 329 (6th Cir. 1998) ("where, as here, there is no presently ongoing state proceedings parallel to the federal case, the exceptional circumstances necessary for *Colorado River* abstention do not exist") (citation omitted).

violations of the ADA, the Rehabilitation Act or the Fair Housing Amendments Act in its state court complaint.[12]

The Sixth Circuit succinctly set forth the prerequisites for applying the *Younger* abstention[13] doctrine in *Carroll v. City of Mount Clemens*, 139 F.3d 1072 (6th Cir. 1998). *Kolley v. Adult Protection Services*, 2009 WL 3388374 (E.D. Mich.). *Younger* applies "when [a] state proceeding (1) is currently pending, (2) involves an important state interest, and (3) affords the plaintiff an adequate opportunity to raise constitutional claims." *Id.* (quoting *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Kelm v. Hyatt*, 44 F.3d 415, 419 (6th Cir. 1995)). Clearly the important state interest related to the second *Younger* factor does not warrant abstention in this case. While "land use and zoning regulations implicate important state interests" (Defendants' Motion to Dismiss at 19), it is beyond peradventure that a critical federal interest, for which a federal court should retain jurisdiction, is the determination of whether public entities such as Defendants are employing discriminatory zoning practices or engaging in discriminatory zoning enforcement based solely on the stereotypes, unfounded fears, and myths regarding people with disabilities as prohibited by the ADA, Section 504, and the FHAA.

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[12] *See Baskin v. Bath Twp. Bd. of Zoning Appeals*, 15 F.3d 569, 572-73 (6th Cir. 1994) ("in deciding whether a state action is parallel for abstention purposes, the district court must compare the issues in the federal action to the issues actually raised in the state court action, not those that might have been raised").

[13] Although *Younger* involved criminal proceedings, the doctrine has been extended to civil enforcement proceedings and civil proceedings including civil contempt orders or appellate bond requirements. If a federal action does not seek to challenge a state court proceeding, there is no need to examine the specific factors under *Younger* because the doctrine does not apply. *See Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 791-793 (6th Cir. 2004).

CONCLUSION

For the reasons set forth above, the United States as, *amicus curiae*, respectfully requests that the Court deny Defendants' Motion to Dismiss Under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Respectfully submitted, this 11th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11th, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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