No. 17-13595-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

A.R., *et al.*,

Plaintiffs-Appellants

v.

SECRETARY, FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT

JOHN M. GORE
Acting Assistant Attorney General

THOMAS E. CHANDLER
BONNIE I. ROBIN-VERGEER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195
Bonnie.Robin-Vergeer@usdoj.gov

UNITED STATES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the United States as Appellant hereby certifies that the following persons and parties may have an interest in the outcome of this case:

A.G., by and through his next friend, Gamal Gasser, Plaintiff-Appellant in related appeal No. 17-13572-BB

Annino, Paolo G., Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

A.R., by and through her next friend, Susan Root, Plaintiff-Appellant in related appeal No. 17-13572-BB

Bardos, Andy, Counsel for Defendant-Appellee

Bond, Rebecca B., Counsel for the United States

Chandler, Thomas E., Counsel for the United States

C.M., by and through his next friend, Norine Mitchell, Plaintiff-Appellant in related appeal No. 17-13572-BB

C.V., by and through his next friends, Michael and Johnette Wahlquist, Plaintiff-Appellant in related appeal No. 17-13572-BB

Dietz, Matthew W., Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

Disability Independence Group, Inc., Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

Esposito, Beth A., Counsel for the United States

Florida State University College of Law, Public Interest Law Center, Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

Gandy, William Eugene, Jr., Counsel for Celeste Philip and Cassandra Pasley, Defendants-Appellees in related appeal No. 17-13572-BB

Goodman, Lisa C., Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

Gore, John M., Counsel for the United States

GrayRobinson, P.A., Counsel for Defendant-Appellee

Greenberg, Benjamin G., Counsel for the United States

Grunewald, Edward J., Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

Harrell-James, Veronica, Counsel for the United States

Hunt, Patrick M., United States Magistrate Judge, Southern District of Florida

Lukis, Ashley Hoffman, Counsel for Defendant-Appellee

Mawhinney, Allison G., Counsel for Defendant-Appellee

McDannell, Jennifer K., Counsel for the United States

McDonald, Elizabeth E., Counsel for the United States

M.D., by and through her next friend, Pamela DeCambra, Plaintiff-Appellant in related appeal No. 17-13572-BB

Meros, George N., Jr., Counsel for Defendant-Appellee

Moore, James Timothy, Jr., Counsel for Defendant-Appellee

North Florida Center for Equal Justice, Inc., Counsel for Plaintiffs-Appellants in related appeal No. 17-13572-BB

Park, H. Justin, Counsel for the United States

Pasley, Cassandra G., Director of the Florida Department of Health's Children's Medical Service, Defendant-Appellee in related appeal No. 17-13572-BB

Philip, Celeste, M.D., Surgeon General of the State of Florida and Secretary of the Florida Department of Health, Defendant-Appellee in related appeal No. 17-13572-BB

Raish, Anne S., Counsel for the United States

Reynolds, J. Patrick, Counsel for Celeste Philip and Cassandra Pasley, Defendants-Appellees in related appeal No. 17-13572-BB

Robin-Vergeer, Bonnie I., Counsel for the United States

Rosenbaum, Robin S., Former United States District Judge, Southern District of Florida

Senior, Justin, Secretary of the Florida Agency for Health Care Administration, Defendant-Appellee in related appeal No. 17-13572-BB

Sheeran, Andrew T., Counsel for Defendant-Appellee

State of Florida, Defendant-Appellee

Street, Leslei Gayle, Counsel for Defendant-Appellee

T.H., by and through her next friend, Paolo Annino, Plaintiff-Appellant in related appeal No. 17-13572-BB

Thomas, Victoria, Counsel for the United States

United States of America, Plaintiff-Appellant

Weinstock, Lindsey, Counsel for the United States

Zloch, William J., United States District Judge, Southern District of Florida

Date: October 18, 2017

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in this case.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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STATEMENT OF JURISDICTION

The United States sued the State of Florida to enforce Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* The district court had jurisdiction under 28 U.S.C. 1331. The lawsuit filed by the United States was consolidated with a similar case brought by private plaintiffs. Doc. 215 (D. Ct. No. 12-cv-60460); Doc. 34 (D. Ct. No. 13-cv-61576).[1] On

[1] The complaint and other pleadings in the United States' case were initially docketed in D. Ct. No. 13-cv-61576. In consolidating the cases, the district court (continued…)

September 20, 2016, the district court issued an order dismissing the United States from the case. Doc. 543. That order was interlocutory because the claims of several plaintiffs were still pending. See Fed. R. Civ. P. 54(b). On June 9, 2017, the district court entered a final order of dismissal as to all remaining plaintiffs' claims, thereby issuing a final judgment. Doc. 645. On August 7, 2017, the United States filed a timely notice of appeal. Doc. 648; see Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the Attorney General has a cause of action to enforce Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (Title II).

STATEMENT OF THE CASE

1. The ADA prohibits both public and private entities from discriminating on the basis of disability. Title II of the ADA addresses discrimination by public entities such as States and state agencies. 42 U.S.C. 12131(1)(A)-(B). Congress enacted Title II to expand the reach of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794(a), which prohibits disability discrimination by

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(…continued)
ordered that the two cases proceed thereafter under D. Ct. No. 12-cv-60460. Doc. 34, at 14-15 (D. Ct. No. 13-cv-61576); Doc. 215, at 14-15 (D. Ct. No. 12-cv-60460). Unless otherwise indicated, district court docket entries cited herein refer to the latter docket.

public and private programs or activities, but only if they receive federal financial assistance. Accordingly, Title II makes "*any* public entity liable for prohibited acts of discrimination, regardless of funding source." *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003). Title II sets forth a general prohibition on disability discrimination: "[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. It then directs the Attorney General to flesh out the statutory requirements by promulgating regulations consistent with the statute and the Section 504 coordination regulations set forth in 28 C.F.R. Pt. 41. 42 U.S.C. 12134.

2. The State of Florida administers a system of services for children with complex medical needs. Doc. 1, at 3-5 (D. Ct. No. 13-cv-61576). Following an investigation, the Department of Justice (DOJ) determined that Florida's system was unnecessarily serving hundreds of children with disabilities in institutions rather than in integrated settings. Doc. 1, at 1-3, 7-20. DOJ also determined that other children with complex medical needs were at risk of receiving similar treatment. *E.g.*, Doc. 1, at 2, 9, 11, 20. On July 22, 2013, the United States filed a complaint in the Southern District of Florida under Title II and one of its implementing regulations, 28 C.F.R. 35.130(d). Doc. 1. The United States sought,

among other things, to enjoin Florida from discriminating against these children by failing to provide services and support in the most integrated setting appropriate to their needs. Doc. 1, at 22-23.

Previously, ten children filed a class action against Florida officials and others, alleging that they and members of the putative class had been unnecessarily institutionalized and segregated in nursing facilities or were at risk of such unnecessary segregation. Doc. 62. These private plaintiffs alleged that defendants violated Title II and other federal statutes. Doc. 62, at 4-5, 40-45. In December 2013, the district court consolidated the United States' action and the private action. Doc. 215.

Meanwhile, in November 2013, Florida moved for judgment on the pleadings in the United States' case, arguing that the ADA did not authorize the Attorney General to sue to enforce Title II of that statute. Doc. 28 (D. Ct. No. 13-cv-61576). The United States opposed the motion, arguing that the ADA's text, purposes, and legislative history established that the Attorney General had authority to file a civil action to enforce Title II. Doc. 226.

On May 30, 2014, then-District Judge Robin S. Rosenbaum denied Florida's motion, finding DOJ's interpretation of Title II "a reasonable construction of the statute." Doc. 40, at 6 (D. Ct. No. 13-cv-61576) (*Dudek I*). That same day, the consolidated cases were reassigned to District Judge William J. Zloch.

3. More than two years later, on September 20, 2016, Judge Zloch sua sponte dismissed the United States from the case on the ground that Title II of the ADA does not confer "standing" on the Attorney General to sue but provides only a private right of action. Doc. 543, at 13, 17 & n.10, 29.

Because the claims of several of the private plaintiffs remained pending, the district court's dismissal of the United States was not a final appealable order. See Fed. R. Civ. P. 54(b). The United States first moved to vacate the consolidation order to allow a final judgment to issue in its case. Doc. 553. The district court denied the motion. Doc. 560. The United States then moved for entry of final judgment as to the United States under Rule 54(b) or alternatively for certification of the district court's September 20, 2016, order for interlocutory review under 28 U.S.C. 1292(b). Doc. 586. The court denied that motion as well. Doc. 590. The court later entered orders dismissing the remaining plaintiffs' claims as moot. See Doc. 596, 631; see also Doc. 618. On June 9, 2017, the court issued its final order dismissing the claims of the last remaining plaintiffs and effectively entering final judgment. Doc. 645.

On August 7, 2017, the United States appealed the district court's September 2016 order dismissing it from the case. Doc. 648.[2]

[2] Six of the private plaintiffs also appealed. Doc. 649. Their related appeal is proceeding in No. 17-13572-BB.

SUMMARY OF ARGUMENT

This Court should reverse the district court's erroneous holding that the Attorney General of the United States lacks authority to enforce Title II of the ADA. The language, purposes, and legislative history of Title II all confirm that Congress intended the Attorney General to have a cause of action to enforce this statute on behalf of individuals with disabilities—authority the Department of Justice has repeatedly exercised for more than a quarter century.

1. In enacting Title II's enforcement section, Congress ratified and incorporated into Title II the longstanding administrative and judicial interpretations of the Attorney General's authority to enforce Title VI of the Civil Rights Act of 1964 (Title VI) and Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act). Title II states that the "remedies, procedures, and rights" of Section 505 of the Rehabilitation Act are those that Title II "provides to any person alleging discrimination." 42 U.S.C. 12133. Section 505, in turn, incorporates the "remedies, procedures, and rights" of Title VI. 29 U.S.C. 794a(a)(2).

When Congress enacted the ADA in 1990, the law was clear that the "remedies, procedures, and rights" available to persons under Section 505 and Title VI included not only a private right of action but also a federal administrative enforcement process that may culminate in the Attorney General filing a lawsuit in federal court. In particular, the law was established that persons who believed they

had been the victims of discrimination in violation of Section 504 or Title VI could file an administrative complaint with a federal agency, which (if unsuccessful in resolving the matter informally) could refer the matter to the Attorney General for an enforcement action. The prospect of a DOJ enforcement action was (and still is) an integral part of the "remedies, procedures, and rights" that Section 505 and Title VI make available to persons alleging discrimination who decide to use the administrative enforcement process to vindicate their rights.

Accordingly, by importing the "remedies, procedures, and rights" language into Title II's enforcement provision, 42 U.S.C. 12133, Congress ratified and incorporated into the ADA the longstanding interpretation that those "remedies, procedures, and rights" include the possibility of enforcement actions filed by the Attorney General. See *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). That Congress intended this construction makes perfect sense: one of Congress's core purposes in enacting the ADA was to "ensure that the Federal Government plays a central role in enforcing the standards established * * * on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(3).

2. The statute's legislative history unequivocally confirms Congress's intent to give the Attorney General a cause of action to enforce Title II. Both the Senate and House Committee reports accompanying the ADA's enactment make clear that Congress intended that "the major enforcement sanction for the Federal

government" in enforcing Title II "will be referral of cases by * * * Federal agencies to the Department of Justice," which may "then proceed to file suits in Federal district court." H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 98 (1990) (House Report II); accord S. Rep. No. 116, 101st Cong., 1st Sess. 57-58 (1989) (Senate Report).

3. Despite this clear evidence of congressional intent, the district court held that the Attorney General has no authority to file a lawsuit to enforce Title II and that the only available enforcement mechanism is a private right of action. This holding simply cannot be squared with Congress's mandate that persons alleging discrimination be provided "the *same* * * * 'remedies, procedures, and rights'" under Title II that they enjoy under Section 505 and Title VI. *Barnes* v. *Gorman*, 536 U.S. 181, 189 n.3 (2002) (citing 42 U.S.C. 12133) (emphasis added).

Under the district court's flawed interpretation, the bundle of remedies, procedures, and rights provided to persons under Title II would *not* be the same as—indeed, would be far inferior to—those provided under the two earlier statutes. Victims of discrimination seeking relief under the Rehabilitation Act or Title VI can pursue either (or both) a private right of action or a federal administrative enforcement process backed up by a potential DOJ lawsuit. But under the district court's holding, persons alleging discrimination under Title II would be limited to a single method of enforcement: a private lawsuit. At best, they would get only

half the bundle of "remedies, procedures, and rights" afforded to victims of discrimination under Section 505 and Title VI, in direct contravention of Congress's clear intent.

This Court should reject the district court's incorrect reading of Title II and reverse the dismissal of the United States' complaint.

STANDARD OF REVIEW

"This Court reviews legal questions, including the interpretation of federal statutes, de novo." *Stansell* v. *Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 914 (11th Cir. 2013).

ARGUMENT

THE ATTORNEY GENERAL HAS A CAUSE OF ACTION TO ENFORCE TITLE II OF THE ADA

This case presents a question of paramount importance to the enforcement of the ADA—whether the Attorney General has authority to bring a civil action to enforce Title II, which prohibits disability discrimination by public entities. The text, purposes, and legislative history of Title II all demonstrate that the answer to that question is yes. As discussed below, in enacting Title II, Congress ratified and incorporated into the ADA the longstanding administrative and judicial interpretations of Title VI and the Rehabilitation Act as authorizing the Attorney General to file lawsuits against violators of these statutes' anti-discrimination mandates.

A. In Enacting Title II, Congress Ratified And Incorporated Longstanding Administrative And Judicial Interpretations Of The Attorney General's Authority To Enforce Title VI And The Rehabilitation Act

"[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); see also *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."). That general rule controls the outcome here: Congress intended the Attorney General to have the same enforcement powers with respect to Title II—including the power to file civil actions—that regulations and judicial decisions, by 1990, had uniformly and unanimously interpreted the Attorney General to have with respect to Title VI and the Rehabilitation Act. Such federal enforcement authority is part of the bundle of "remedies, procedures, and rights" that Title II "provides to any person alleging discrimination on the basis of disability," 42 U.S.C. 12133, and the district court erred in concluding otherwise.

Title II's enforcement section states that "[t]he remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act] shall be the remedies,

procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. 12133.

Section 505 is the enforcement provision for Section 504 of the Rehabilitation Act, which prohibits disability discrimination by public and private programs or activities that receive federal financial assistance. 29 U.S.C. 794(a). Section 505 provides, as relevant here: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [*i.e.*, under Section 504 of the Rehabilitation Act]." 29 U.S.C. 794a(a)(2).

Title VI, in turn, prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance. 42 U.S.C. 2000d. Title VI's "remedies, procedures, and rights" are set out in Section 602, which provides that compliance may be effected by (1) administrative termination of federal funds to a recipient, or (2) "by any other means authorized by law." 42 U.S.C. 2000d-1.

1. The "remedies, procedures, and rights" available to a person alleging discrimination in violation of Title VI include the prospect of an enforcement

action brought by the Attorney General. Title VI's enforcement procedures are detailed in its implementing regulations, adopted shortly after the statute was enacted in 1964. These regulations established a federal administrative enforcement scheme under which persons who believe that they have been the victims of unlawful discrimination may file complaints with federal agencies, which then conduct investigations. See, *e.g.*, 29 Fed. Reg. 16,301 (Dec. 4, 1964) (45 C.F.R. 80.7(b)-(c)) (issued by the Department of Health, Education and Welfare (HEW)); see also 31 Fed. Reg. 10,267 (July 29, 1966) (28 C.F.R. 42.107(b)-(c)) (issued by DOJ). If the agency believes that a particular complaint has merit, it first attempts to resolve the matter through "informal means." 45 C.F.R. 80.7(d); 28 C.F.R. 42.107(d). If those efforts are unsuccessful, the agency may refer the matter to DOJ to bring "appropriate proceedings" (including lawsuits) against Title VI violators. 45 C.F.R. 80.7(d), 80.8(a); 28 C.F.R. 42.107(d), 42.108(a).[3] Similarly, DOJ's Guidelines for Enforcement of Title VI cite "appropriate court action" against noncompliant recipients of federal financial assistance as among the available "alternative courses of action" that agencies should consider before terminating federal funding. 31 Fed. Reg. 5292 (Apr. 2,

[3] Multiple federal agencies issued similar contemporaneous regulations. See 29 Fed. Reg. 16,277, 16,281-16,282, 16,285-16,286, 16,290, 16,295, 16,307 (Dec. 4, 1964) (7 C.F.R. 15.6, 15.8(a); 24 C.F.R. 1.7, 1.8(a); 29 C.F.R. 31.8, 31.9(a); 41 C.F.R. 101-6.210-2 to 101-6.210-4, 101-6.211-1; 43 C.F.R. 17.6, 17.7(a); 45 C.F.R. 611.7, 611.8(a)).

1966) (28 C.F.R. 50.3(c)(I)(A)-(B)); see also 28 C.F.R. 42.411(a), 42.412(b) (DOJ regulations coordinating Title VI enforcement).

The "remedies, procedures, and rights" available to a person alleging discrimination under Section 504 of the Rehabilitation Act also include the prospect of enforcement actions brought by the Attorney General. When Section 504 was enacted in 1973, it did not contain an explicit enforcement provision. With the oversight and approval of Congress, HEW issued regulations implementing Section 504 in 1977. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984). Those regulations incorporated HEW's Title VI complaint and enforcement procedures and, in so doing, created an administrative enforcement process that could culminate in a DOJ enforcement lawsuit. See 42 Fed. Reg. 22,685, 22,694-22,695 (May 4, 1977) (45 C.F.R. 84.61, incorporating HEW's Title VI regulations, including 45 C.F.R. 80.7-80.8). One year later, HEW issued the Rehabilitation Act coordination regulations, which directed agencies to follow the same enforcement and hearing procedures they used for Title VI. 43 Fed. Reg. 2137, § 85.5(a)(1) (Jan. 13, 1978) (now codified as 28 C.F.R. 41.5(a)(1)). See, *e.g.*, 28 C.F.R. 42.530 (DOJ Rehabilitation Act compliance procedures, incorporating Title VI procedures).

These HEW regulations were "of particular significance" because, at that time, HEW was the agency responsible for coordinating the implementation and

enforcement of Section 504. *Bragdon*, 524 U.S. at 632; *Darrone*, 465 U.S. at 634. The Supreme Court has emphasized that HEW's 1977 regulations "particularly merit deference" because they were drafted with congressional committee participation, and "Congress itself endorsed the regulations in their final form." *Darrone*, 465 U.S. at 634 & n.15; accord *United States* v. *Board of Trs. for Univ. of Ala.*, 908 F.2d 740, 746-747 (11th Cir. 1990).[4]

In particular, in 1978, Congress amended the Rehabilitation Act to add Section 505. Section 505(a)(2) expressly incorporates the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." Pub. L. No. 95-602, § 120(a), 92 Stat. 2983 (1978) (29 U.S.C. 794a(a)(2)). That provision "was intended to codify the [1977 HEW] regulations * * * governing enforcement of § 504" as "a specific statutory requirement." *Darrone*, 465 U.S. at 635 & n.16 (citing S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978)).

By the time Congress enacted the ADA in 1990, every court to consider the matter (of which we are aware) had recognized that the Attorney General could file lawsuits against violators of Title VI or the Rehabilitation Act. See, *e.g.*, *United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *National Black Police Ass'n* v. *Velde*, 712 F.2d 569, 575

[4] HEW's coordination role was later reassigned to DOJ. See Exec. Order 12,250, 3 C.F.R. 298 (1980 comp.).

(D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); *United States* v. *Marion Cty. Sch. Dist.*, 625 F.2d 607, 612-613 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981); *Adams* v. *Richardson*, 480 F.2d 1159, 1161 n.1, 1164 (D.C. Cir. 1973) (en banc); *United States* v. *Louisiana*, 692 F. Supp. 642, 649 (E.D. La. 1988), vacated on other grounds, 751 F. Supp. 606 (E.D. La. 1990); *United States* v. *Tatum Indep. Sch. Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969).[5]

2. And so, when Congress incorporated into Title II the "remedies, procedures, and rights" of Section 505 of the Rehabilitation Act, which, in turn, incorporated the "remedies, procedures, and rights" of Title VI, see 42 U.S.C. 12133; 29 U.S.C. 794a(a)(2), Congress adopted a federal administrative enforcement scheme in which persons claiming unlawful discrimination may complain to and enlist the aid of federal agencies in compelling compliance, potentially leading to a DOJ lawsuit. To that end, and at Congress's direction, 42 U.S.C. 12134(a)-(b), DOJ issued a Title II regulation that sets up a similar administrative enforcement scheme for Title II. See 28 C.F.R. 35.170-35.174, 35.190. If, after an investigation, the agency believes that a complaint alleging

[5] In addition to the federal enforcement process, the Supreme Court has found an implied private right of action under Title VI. See *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001); *Cannon* v. *University of Chi.*, 441 U.S. 677, 703 (1979). Section 505(a)(2) creates a private right of action to enforce Section 504. *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

disability discrimination under Title II has merit, it will attempt to negotiate a resolution with the public entity that is the alleged violator. 28 C.F.R. 35.172, 35.173.[6] If those efforts are unsuccessful and a violation has been found, the agency shall refer the matter to DOJ for the possible filing of a lawsuit. 28 C.F.R. 35.174. Thus, as with Title VI and the Rehabilitation Act, the prospect of a lawsuit by the Attorney General is an essential feature of the package of "remedies, procedures, and rights" that Title II "provides to any person alleging discrimination on the basis of disability." 42 U.S.C. 12133.

B. The ADA's Legislative History Confirms That Congress Intended The Attorney General To Have A Cause Of Action To Enforce Title II

The legislative history confirms what the statutory text makes clear: that the Attorney General has a cause of action to enforce Title II. Both the House and Senate committee reports accompanying the enactment of the ADA state that enforcement of Title II "should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act" and that the Attorney General "should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models." House Report II, at 98; Senate Report 57. The committees envisioned that the Department of Justice

[6] Under the regulation, DOJ, in addition to other designated federal agencies, has authority to investigate any complaint it receives alleging a violation of Title II. 28 C.F.R. 35.190(e).

would identify appropriate Federal agencies to oversee compliance activities for State and local governments. "As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, the Federal government would use the enforcement sanctions of section 505 of the Rehabilitation Act of 1973." House Report II, at 98; Senate Report 57.

Most significantly, the committee reports go on to explain that, "[b]ecause the fund termination procedures of section 505 are inapplicable to State and local government entities that do not receive Federal funds, the *major enforcement sanction* for the Federal government will be *referral of cases* by these Federal agencies to the Department of Justice," so that the Department "may then proceed *to file suits in Federal district court*. As with section 504, there is also a private right of action for persons with disabilities." House Report II, at 98 (emphasis added); Senate Report 57-58 (same); see also Senate Report 101 (views of Sen. Hatch) (bill "subjects state and local governments to the remedies available under Section 505," which include referrals of cases to the Department of Justice).

Thus, the legislative history of the ADA unambiguously expresses the intent of the House and Senate committees that persons alleging disability discrimination under Title II (as is also the case under Title VI and the Rehabilitation Act) would

have access to a federal administrative scheme that enlists the aid of federal agencies in obtaining relief and potentially would lead to a DOJ enforcement suit. As discussed in the next section, the possibility of a DOJ lawsuit is crucial to the federal administrative enforcement scheme.

C. The Attorney General's Power To File A Civil Action Under Title II Is Indispensable To Enforcement Of The ADA

The ADA expressly states that one of Congress's predominant purposes in enacting the statute was "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(3). "[T]his chapter" encompasses all of the ADA, including Title II.[7] Not only did Congress intend a significant enforcement role for the federal government, but it described the federal government as enforcing the ADA "*on behalf of individuals with disabilities*." 42 U.S.C. 12101(b)(3) (emphasis added). That wording further confirms that the federal administrative enforcement process and DOJ enforcement suits are among the "remedies, procedures, and rights" that Title II "provides" to persons alleging unlawful discrimination.

[7] As enacted, the ADA referred to the federal government playing a central role in enforcing the standards "established in this Act." Pub. L. No. 101-336, § 2(b)(3), 104 Stat. 327, 329 (1990).

But successful resolution of Title II complaints through the federal administrative enforcement process depends heavily on the Attorney General having power to sue Title II violators in federal court. Because Congress enacted Title II specifically to prohibit disability discrimination by public entities that do *not* receive federal financial assistance, there often will be no threat of federal funding termination or other incentives that federal agencies can use as leverage to bring noncompliant public entities to the table during the administrative process. Thus, a holding that the Attorney General cannot continue to bring lawsuits to enforce Title II would seriously undermine federal enforcement of the ADA against public entities. The prospect of a federal lawsuit animates the entire administrative scheme.

This Court in *Shotz* recognized as much in construing the ADA's anti-retaliation provision, which itself incorporates the "remedies and procedures" available under the enforcement provisions of Titles I, II, and III, 42 U.S.C. 12203(c). As this Court observed, because "an integral purpose" of Title II is to make "*any* public entity liable for prohibited acts of discrimination, regardless of funding source," and funding termination procedures are inapplicable to public entities that do not receive federal funds, "the major enforcement sanction" available to the federal government under Title II is the referral of cases to the Department of Justice "for appropriate action." *Shotz* v. *City of Plantation*, 344

F.3d 1161, 1174-1175 (2003) (quoting Senate Report 57; 28 C.F.R. 35.174). And, indeed, for more than 25 years, the Attorney General, through the administrative enforcement process, has taken "appropriate action" by bringing lawsuits in federal court and entering into settlements to remedy public entities' violations of Title II.[8]

If the district court's flawed interpretation prevails, however, then the "remedies, procedures, and rights" provided to a "person alleging discrimination" under Title II would be far less robust than the "remedies, procedures, and rights" provided to victims of discrimination under the Rehabilitation Act or Title VI. Victims of discrimination under the two earlier statutes can elect one or both of two alternative enforcement mechanisms to secure compliance with these statutes' anti-discrimination mandates: (1) a private right of action, or (2) a federal administrative enforcement process backed up by the threat of a DOJ lawsuit if voluntary compliance cannot be achieved. But under the district court's holding, a person alleging discrimination under Title II would be limited to a single method of enforcement: a private right of action. The end result is that, at best, they would be provided only *half* of the package of "remedies, procedures, and rights" that are afforded to victims of discrimination under Section 505 and Title VI.

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[8] See, *e.g.*, U.S. Dep't of Justice, *ADA Enforcement, Title II (Cases 2006-Present)*, https://www.ada.gov/enforce_current.htm#TitleII (last visited Oct. 16, 2017); U.S. Dep't of Justice, *ADA Enforcement, Title II (Cases 1992-2005)*, https://www.ada.gov/enforce_archive.htm#TitleII (last visited Oct. 16, 2017).

Construing Title II to deny the Attorney General a cause of action not only would sharply curtail federal enforcement of Title II but would also subvert Congress's core purpose in enacting Title II, which was to *expand* the reach of Section 504 of the Rehabilitation Act to *all* state and local government programs, activities, and services (not just those that receive federal funds) as part of a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(a)(3), (b)(1) and (3), 12132; see also *Shotz*, 344 F.3d at 1174; House Report II, at 84. Given that defining goal, it would make little sense to construe Title II to create a *weaker* enforcement mechanism than those available under the Rehabilitation Act and Title VI. As the Supreme Court recognized in *Barnes* v. *Gorman*: "The ADA could not be clearer that the 'remedies, procedures, and rights,'" of Title II "are the same as the 'remedies, procedures, and rights set forth in' § 505(a)(2) of the Rehabilitation Act" and Title VI. 536 U.S. at 189 n.3.[9]

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[9] See also *Hainze* v. *Richards*, 207 F.3d 795, 799 (5th Cir.) (Congress intended that protections of the Rehabilitation Act be extended "to cover all programs of state or local governments, regardless of the receipt of federal financial assistance" and that Title II would "work in the same manner as Section 504.") (citation omitted), cert. denied, 531 U.S. 959 (2000); 42 U.S.C. 12201(a) (the ADA should not be construed to provide less protection than the Rehabilitation Act).

D. All Courts To Have Addressed This Question, Except For The District Court Here, Have Recognized The Attorney General's Authority To Sue Under Title II

Except for Judge Zloch's ruling, all courts to have considered the question—including the first ruling by Judge Rosenbaum in this same case—have recognized the Attorney General's authority to file lawsuits under Title II. See, *e.g.*, *Smith* v. *City of Phila.*, 345 F. Supp. 2d 482, 489 (E.D. Pa. 2004) (United States has a "separate and independent basis for jurisdiction" under Title II); *United States* v. *City & Cty. of Denver*, 927 F. Supp. 1396, 1399-1400 (D. Colo. 1996) (recognizing United States' authority to bring Title II action); *United States* v. *Virginia*, No. 3:12-cv-59, Doc. 90, at 3 (E.D. Va. June 5, 2012) ("As a threshold matter, the United States has the authority to initiate legal action to enforce Title II of the ADA."); *Dudek I*, Doc. 40, at 12 (D. Ct. No. 13-cv-61576) (when voluntary compliance is not possible, "the Attorney General has the authority to take action to secure an appropriate remedy, including by filing a lawsuit").

The district court in *United States* v. *Harris County*, No. 4:16-cv-2331 (S.D. Tex. Apr. 26, 2017) (Doc. 53), recently refused to follow Judge Zloch's decision. It ruled that "the plain language of the ADA, its legislative history, and the implementing regulations clearly establish that the United States has authority to bring lawsuits under Title II of the ADA." Doc. 53, at 1. As the court concisely summed up: "Title II of the ADA and Section 504 of the Rehabilitation Act both

incorporate the 'remedies, procedures and rights' set forth in Title VI of the Civil Rights Act of 1964." Doc. 53, at 2 (citations omitted). Section 602 of Title VI, in turn, the court explained, "authorizes the Attorney General to enforce compliance with Title VI by filing an action in federal court." Doc. 53, at 2. "By extension," the court concluded, "the Attorney General may also bring suit to enforce other statutes which adhere to the enforcement scheme set forth in Title VI," including Title II. Doc. 53, at 2-3 (citing cases).

E. The District Court Erred In Denying The Attorney General A Cause Of Action To Enforce Title II

The district court erred in rejecting Congress's clear intent and holding that the Attorney General may not file a civil action to enforce Title II. The court conceived of the question as whether Title II conferred "standing" on the Attorney General to sue (Doc. 543, at 3-4, 21, 29), a question the court thought implicated its own jurisdiction (Doc. 543, at 21). But whether the Attorney General may bring a lawsuit to enforce Title II is not a question of "standing" in any constitutional sense, and it does not involve the district court's jurisdiction. As the Supreme Court has clarified, the absence of a valid "cause of action under the statute" does "not implicate subject-matter jurisdiction." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n.4 (2014).

In all events, whether conceived as an issue of "standing" or enforcement authority, the district court offered two primary rationales for its novel holding. Neither overcomes the clear indication that, as Congress intended, the Attorney General has a cause of action to enforce Title II.

1. The District Court Misunderstood The Use Of "Person" In Section 12133

The district court's decision rests heavily on its view that the Attorney General is not a "person alleging discrimination" under Section 12133. Doc. 543, at 7-8. The court believed that, because Section 12133 refers to a "person alleging discrimination" but not specifically to the Attorney General, the Supreme Court's decision in *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995) (*Newport News*), precludes the Attorney General from filing a lawsuit to enforce Title II. According to the district court, *Newport News* makes clear that "when an agency in its governmental capacity is meant to have standing, Congress says so." Doc. 543, at 3 (quoting *Newport News*, 514 U.S. at 129) (emphasis omitted). The court thus declared that "Congress did not incorporate *all* 'remedies, procedures, and rights' available under Title VI," but "only those 'remedies, procedures, and rights' *that may be exercised by* a 'person alleging discrimination.'" Doc. 543, at 12 (quoting 42 U.S.C. 12133) (emphasis added).

This reasoning misreads the plain text of Title II. Title II does not authorize the Attorney General to file enforcement suits by equating the Attorney General with a "person alleging discrimination." Instead, Title II provides to "persons" alleging discrimination the "remedies, procedures, and rights"—including the prospect of Attorney General enforcement—that are provided to persons under the Rehabilitation Act and Title VI. 42 U.S.C. 12133. Thus, even if the district court's premise that the Attorney General is not a "person alleging discrimination" is correct, its conclusion that the Attorney General therefore lacks authority to file a civil action to enforce Title II is not.

Indeed, Congress made clear that it intended to provide persons alleging discrimination under Title II the bundle of "remedies, procedures, and rights" provided under Section 505, not merely those that "*may be exercised by* a 'person alleging discrimination.'" Doc. 543, at 12 (quoting 42 U.S.C. 12133) (emphasis added). The statute states that the remedies, procedures, and rights of Section 505 are those that Title II "*provides* to any person alleging discrimination on the basis of disability." 42 U.S.C. 12133 (emphasis added). To "provide" is "to supply or make available." Merriam-Webster, https://www.merriam-webster.com/dictionary/provide (definition of "provide") (last visited Oct. 16, 2017). In other words, Congress has "made available" to persons alleging discrimination under Title II the package of "remedies, procedures, and rights" available to persons

under Section 505, which includes enforcement actions by the Attorney General. This interpretation comports with the nearly identical language of Section 505(a)(2), which provides that the "remedies, procedures, and rights" set forth in Title VI "shall be available" to any aggrieved person, 29 U.S.C. 794a(a)(2)—regardless of whether that aggrieved person may directly "exercise" them on her own behalf.

Finally, nothing in *Newport News* bars Congress from establishing the Attorney General's enforcement authority through incorporation by reference, as it did in Title II, rather than by explicitly naming the Attorney General. There is nothing remarkable about Congress using the "remedies, procedures, and rights" formulation in Section 12133 as shorthand for the mix of private and governmental enforcement that is available under the Rehabilitation Act, which uses the identical phrase for the mix of private and governmental enforcement that is available under Title VI. 29 U.S.C. 794a(a)(2). Moreover, unlike the statute at issue in *Newport News*, Title II is not couched in terms of who may file an action or appeal in court, but instead incorporates a well-established remedial structure that for 50 years has relied on federal government enforcement.

For this reason, the district court's conclusion that Title II authorizes only a *private* right of action (Doc. 543, at 13), cannot stand. Indeed, if the only enforcement mechanism Congress intended to create for Title II was a private right

of action, there were far simpler ways to do so than by incorporating the "remedies, procedures, and rights" created in two predecessor statutes that indisputably provide for federal enforcement *in addition to* private enforcement. 42 U.S.C. 12133. See, *e.g.*, 33 U.S.C. 921(c) ("[a]ny person adversely affected or aggrieved by a final order * * * may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred"), construed in *Newport News*, 514 U.S. at 125-130.

But Congress chose instead to import the "remedies, procedures, and rights" provided under Section 505 and Title VI wholesale into Title II. The district court overrode that choice by a judicial reinterpretation that picks and chooses from among the remedies Congress authorized and reads federal enforcement out of the statute. This Court should respect Congress's legislative choice by reversing the district court's flawed interpretation and upholding the Attorney General's authority to bring a civil action to enforce Title II.

2. The District Court Drew The Wrong Conclusion From The Differences Among The Enforcement Sections In Titles I, II, And III

The district court's alternative reasoning fares no better. The court believed that "Congress's grant of litigation authority to the Attorney General in Titles I and III of the ADA—juxtaposed against its omission in Title II"—compels the conclusion that Congress did not intend to grant the Attorney General litigation authority in Title II. Doc. 543, at 7. But the enforcement sections of Titles I and

III are very different from that in Title II because, unlike Title II, they could not have conveyed their intended meanings without explicit references to particular government actors, including the Attorney General. Therefore, Titles I, II, and III simply illustrate different ways in which Congress can grant litigation authority to the Attorney General, not an indirect intent to preclude the Attorney General from bringing actions to enforce Title II.

a. The explicit references to the Attorney General in Titles I and III are easy to explain. The enforcement section of Title I, which addresses disability discrimination in employment, states, in relevant part, that "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the [Equal Employment Opportunity] Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability." 42 U.S.C. 12117(a). Title I thereby cross-references five different provisions of Title VII of the Civil Rights Act of 1964 (Title VII), which establishes a complicated regime in which different enforcement actions may be taken by complainants, the Equal Employment Opportunity Commission, and the Attorney General. Because the point of Section 12117(a) was to make clear that the same division of authority among the various actors under the five different sections of Title VII applies to Title I of the ADA, it was only natural that Congress would

avoid confusion by specifying the actors among whom the authority is divided. No such reference to the Attorney General was necessary to prevent confusion under Title II, which cross-references only a single section of another statute to incorporate a single well-established enforcement mechanism—a federal administrative process that includes the prospect of DOJ civil actions.

Title III, unlike Titles I and II, does not merely incorporate a preexisting enforcement scheme. To be sure, the enforcement provision of Title III, which addresses disability discrimination in public accommodations, incorporates the remedies and procedures of Title II of the Civil Rights Act of 1964, which also addresses discrimination in public accommodations. 42 U.S.C. 12188(a) (citing 42 U.S.C. 2000a-3(a)). But Title III also expands on the Attorney General's enforcement authority by including new authority to seek damages and civil penalties. 42 U.S.C. 12188(b). These remedies are not available in civil actions brought by either the Attorney General or private persons under Title II of the Civil Rights Act of 1964, see 42 U.S.C. 2000a-3(a), 2000a-5(a), or in private actions under Title III of the ADA. See 42 U.S.C. 12188(a)-(b). Congress could not have expanded the enforcement power of the Attorney General in Title III of the ADA without express reference to the Attorney General. Accordingly, Title III's enforcement provision does not imply that the Attorney General lacks enforcement authority under Title II.

b. Title II of the ADA, on the other hand, incorporates the existing enforcement scheme established under Title VI and the Rehabilitation Act. As discussed above, when Congress enacted Title II, the Attorney General's authority to enforce these two statutes through litigation had already been established. Congress simply repeated in Title II the same "remedies, procedures, and rights" formulation that the Rehabilitation Act used to incorporate the "remedies, procedures, and rights" available under Title VI.

The relative lack of detail in Title II's enforcement provision comports with Congress's approach to Title II generally. Both Titles I and III set out detailed statutory provisions describing how the anti-discrimination principle operates and may be enforced. See 42 U.S.C. 12112, 12182; see also 42 U.S.C. 12117, 12188. But not Title II.[10] Because Congress intended that Title II simply extend the reach of Section 504 of the Rehabilitation Act to all state and local programs and services (regardless of whether they receive federal financial assistance), Title II sets forth only a general principle of anti-discrimination (leaving it to the Attorney General to flesh out the prohibition through regulations), and simply incorporates

[10] Subpart B of Title II, 42 U.S.C. 12141-12165, sets out more specific requirements, but only with respect to public transportation.

the Rehabilitation Act's "remedies, rights, and procedures." 42 U.S.C. 12132-12134.[11]

The district court speculated that Congress decided to limit enforcement of Title II (but not of Titles I and III) to private suits to avoid compounding "significant federalism costs." Doc. 543, at 14. But even on the court's reading, Title II imposes "significant federalism costs" because it uses federal law to impose substantive—and substantial—anti-discrimination mandates on state and local governments, regardless of whether they receive federal funding. Thus, the only question is not whether Congress imposed those costs, but whether it intended for the Attorney General to have the right to enforce the obligations that Title II creates. As explained above, the text, purposes, and legislative history of Title II reflect that Congress intended Title II to incorporate the well-established mechanism of federal enforcement by the Attorney General. *See* pp. 10-18, *supra*.

The court similarly erred in denying that the federal government had a "central role" to play in enforcing Title II, just as it does under Titles I and III. See Doc. 543, at 19 (citing 42 U.S.C. 12101(b)(3)). Instead, the court maintained,

[11] In explaining Congress's different drafting approach to Title II, as compared with Titles I and III, one House Committee Report accompanying the ADA's enactment emphasized that "[t]he Committee has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments." House Report II, at 84.

Title II empowers the Attorney General "to set the substantive standards that define disability discrimination under Title II." Doc. 543, at 19 (citing 42 U.S.C. 12134(a)). That is true but beside the point. *Setting* standards—such as by issuing regulations implementing Title II's broad prohibition on discrimination—is one thing, but *enforcing* the standards, as the ADA provides in Section 12101(b)(3), is quite another. See *Black's Law Dictionary* (10th ed. 2014) (defining "enforce," in relevant part, as "[t]o give force or effect to (a law, etc.); to compel obedience to"). Congress's purpose of "ensur[ing] that the Federal Government plays a central role in *enforcing* the standards established in this chapter," 42 U.S.C. 12101(b)(3) (emphasis added), includes no exemption for Title II or any other portion of the ADA.

* * * * *

In sum, in enacting Title II, Congress incorporated Section 505's well-understood "remedies, procedures, and rights," using the same formulation that Section 505 used to incorporate Title VI enforcement mechanisms, to give the Attorney General a cause of action to enforce Title II. "If a word or phrase has been * * * given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012), quoted in *Texas Dep't of Hous. &*

Cmty. Affairs v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). There is no credible reason to believe, as the district court did, that Congress imported Section 505's established "remedies, procedures, and rights"—which include a cause of action by the Attorney General—to create only a private right of action for Title II of the ADA.

For all these reasons, this Court should hold that the Attorney General has a cause of action to enforce Title II.

CONCLUSION

This Court should reverse and remand for further proceedings.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

s/ Bonnie I. Robin-Vergeer
THOMAS E. CHANDLER
BONNIE I. ROBIN-VERGEER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195
Bonnie.Robin-Vergeer@usdoj.gov

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains no more than 7269 words.

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s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney

Date: October 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney