In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 25-2010

HAYMARKET DUPAGE, LLC,

Plaintiff,

v.

VILLAGE OF ITASCA, *et al.*,

Defendants-Appellees,

APPEAL OF: UNITED STATES OF AMERICA,

Proposed Intervenor-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 22 C 160, Steven C. Seeger, *Judge*.

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

ANDREW S. BOUTROS
United States Attorney
for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

THOMAS P. WALSH
Assistant United States Attorney
Civil Division Chief

JORDAN A. ROSEN
Assistant United States Attorney
(312) 353-5331

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INTRODUCTION

Public entities have a long, ongoing history of discriminating against people with disabilities, from the use of state-sponsored eugenics programs to exclusionary zoning and land-use laws. Congress sought to end such discrimination by enacting disability rights standards under the Rehabilitation Act of 1973 and later expanding them under the Americans with Disabilities Act (ADA). Congress underscored its concern by dedicating a main title of the ADA, Title II, to establishing standards that address disability discrimination by public entities and ensuring that the federal government enforces those standards in court. Congress built the standards of Title II upon the ADA's bedrock purpose "to establish clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing" them "on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(2)-(3).

The district court nevertheless construed the ADA as *prohibiting* the federal government from playing any central enforcement role when *public entities* commit disability discrimination. The district court denied the United States' motion to intervene by right largely based on its view

that the federal government cannot enforce Title II. From this, the court ruled that the United States' interest in intervening in this disability rights action did not satisfy Federal Rule of Civil Procedure 24(a)(2) and was adequately represented by plaintiff Haymarket DuPage, LLC. The district court rejected in a mere footnote the United States' argument explaining the Attorney General's enforcement authority and cited the *dissent* from the Eleventh Circuit's order denying rehearing en banc after that court *recognized* the Attorney General's authority. On appeal, the defendants and amicus States reassert the dissent's rejected arguments.

As we explained in our opening brief, Congress gave the United States a central role in enforcing the ADA against public entities. In 1990, Congress adopted Title II's enforcement provision, which incorporates, without qualification, the "remedies, procedures, and rights" of Section 504 of the Rehabilitation Act and of Title VI of the Civil Rights Act of 1964. 42 U.S.C. 12133; 29 U.S.C. 794a(a)(2). As Congress knew, both sets included, at their core, a deep-rooted enforcement process that had long enabled victims of discrimination to enlist the federal government's aid under each civil rights statute. That process, established under Title VI as early as 1964 and widely used to this day,

provides persons the right to allege discrimination in complaints with federal agencies that may result in the federal government investigating the allegations and enforcing the civil rights statute in court. Congress imported this process into Title II and has preserved it for decades, even as it has been relied on by victims alleging discrimination, shared across three civil rights statutes, routinely used by federal agencies, and recognized by federal courts. Thus, the United States holds a central role in enforcing the ADA against public entities and an interest in intervening to enforce Title II that satisfies Rule 24(a)(2), concerns the public's interest, and is not adequately represented by the parties here.

The district court also abused its discretion by denying permissive intervention under Rule 24(b)(2) and Rule 24(b)(2)(B). The defendants concede that permissive intervention could have been granted on either basis, though the district court did not believe so, and the district court further erred in finding undue prejudice and delay under Rule 24(b)(3). Moreover, the defendants are wrong that the intervention motion was untimely, which the district court did not find. Timeliness is concerned with averting real adverse consequences, not with the mere passage of time, which is at the heart of the defendants' argument.

ARGUMENT

I. The district court erred by denying the United States' motion to intervene by right under Rule 24(a)(2).

Federal Rule of Civil Procedure 24(a)(2) required the district court to grant the United States' motion to intervene by right upon its showing of a "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment" of "that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Bost v. Illinois State Bd. of Elections*, 75 F.4th 682, 686 (7th Cir. 2023) (citation omitted). The district court erred in denying the motion based on the second and fourth factors.

A. The United States showed an interest to intervene by right.

The district court improperly found that the United States lacks an interest to intervene under Rule 24(a)(2) because the Attorney General cannot enforce Title II. The parties agree that the United States may hold the required interest, provided Congress "authorized it to enforce" Title II in court, but they dispute whether Congress did so. Resp. at 14.

1. Title II incorporates the Attorney General enforcement process set forth in the Rehabilitation Act and Title VI.

The Attorney General is authorized to enforce Title II in court, as established by the text, purposes, context, and history of the ADA and

earlier civil rights statutes. This has been recognized by the Eleventh Circuit and every court outside that circuit to have considered the question, except the district court in this case. U.S. Br. at 16-36; *see also United States v. Florida*, 938 F.3d 1221 (11th Cir. 2019), *reh'g en banc denied*, 21 F.4th 730 (11th Cir. 2021), *cert denied*, 143 S. Ct. 89 (2022).

The defendants and States challenge the Attorney General's authority by resuscitating arguments from the *dissent* in *Florida*, 21 F.4th at 747-59. Those arguments did not persuade the Eleventh Circuit, including when that court ordered the issue would not be reheard en banc. They also did not persuade the Supreme Court to grant certiorari.

The defendants and States argue that authority is absent because the enforcement provisions in Titles I and III mention the Attorney General but the one in Title II only mentions a "person alleging discrimination" and add that the sovereign is presumptively not a person, citing *Return Mail, Inc. v. U.S. Postal Serv.*, 587 U.S. 618 (2019). Resp. at 3, 16-17; Amicus Br. at 2, 5-6. From this, they believe that the *expressio unius* canon "encapsulates why the District Court's ruling should be affirmed." Resp. at 3. Their argument distorts the terms,

purposes, context, and history of the ADA and two earlier civil rights statutes and misapplies the interpretive canon.

Title II provides any "person alleging discrimination" the "remedies, procedures, and rights" set forth in Section 505 of the Rehabilitation Act of 1973. 42 U.S.C. 12133. Section 505, in turn, provides the "remedies, procedures, and rights set forth in" Title VI. 29 U.S.C. 794a(a)(2). This means that the "remedies, procedures, and rights" that Title II "provides to any person alleging discrimination," 42 U.S.C. 12133, are those Congress has made available under Title VI and Section 505. 29 U.S.C. 794a(a)(2). When "Congress adopts a new law incorporating sections of a prior law," it "normally can be presumed to have knowledge of the interpretation given to the incorporated law." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). And when Congress passed the ADA in 1990, the law was clear that the "remedies, procedures, and rights" available to persons alleging discrimination under Section 505 and Title VI included an enforcement process that may result in an enforcement action by the Department of Justice. The defendants and States therefore undertake considerable efforts to distract from any source

specifying what the "remedies, procedures, and rights" of Section 505 and Title VI have included leading up to 1990 and afterwards.

The argument under *Return Mail* that the Attorney General lacks enforcement authority because she is presumptively not a "person" is one such distraction and misses the mark. Resp. at 16. The Attorney General has asserted authority not based on her personhood, but because the "remedies, procedures, and rights" of Section 505 and Title VI imported into Title II have long included, at their core, an administrative enforcement process involving lawsuits by the Department of Justice.

The Eleventh Circuit confirmed this understanding in rejecting the argument under *Return Mail* that "because the Attorney General is not a 'person alleging discrimination,'" she cannot sue under Title II. *Florida*, 938 F.3d at 1227-28. As a member of the panel majority explained when the Eleventh Circuit denied rehearing en banc, the argument "that the Attorney General does not qualify as a 'person'" either "takes aim at a strawman or rests on a misunderstanding of the panel opinion and the Attorney General's role in this lawsuit." *Florida*, 21 F. at 733 (Jill Pryor, J., respecting denial of rehearing en banc). One can "answer the question of statutory interpretation here—whether the

remedies, procedures, and rights available to a person alleging discrimination include suit by the Attorney General to vindicate the disabled person's rights—only after identifying the remedies, procedures, and rights available" under "earlier civil rights statutes." *Id.* at 732. This "careful review," *id.*—which the defendants and States distract from—establishes the Attorney General's authority because Title II provides "a panoply of remedies, procedures, and rights, including the right to file an administrative complaint against any public entity that engages in discrimination," which "may culminate in a suit by the Attorney General against the public entity on the individual's behalf," *id.* at 733.

Indeed, Title VI's enforcement remedies, procedures, and rights have included two enforcement methods: an enforcement process involving suits by the Attorney General, U.S. Br. at 5-6; and an implied private right of action under 42 U.S.C. 2000d, *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001). Under the former process, agencies attempt to informally resolve meritorious administrative complaints and, if unsuccessful, may refer allegations to the Department of Justice to enforce Title VI against violators in court. Regulations and guidelines issued shortly after Title VI's enactment establish that persons alleging

Title VI discrimination may seek relief through an administrative complaint, which may result in "appropriate court action" by the Attorney General. 28 C.F.R. 50.3(c)(I)(B)(1); *see also*, *e.g.*, 45 C.F.R. 80.7, 80.8; *accord* 28 C.F.R. 42.411(a), 42.412(b).

Rehabilitation Act regulations also adopt this process. *See*, *e.g.*, 45 C.F.R. 84.61; 45 C.F.R. 85.5(a)(1) (1978) (currently codified at 28 C.F.R. 41.5(a)(1)). In 1977, the Department of Health, Education, and Welfare (HEW) issued regulations implementing Section 504 of the Rehabilitation Act by incorporating HEW's Title VI complaint and enforcement procedures, which established an administrative enforcement process that includes suits by the Department of Justice. *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).

As the Supreme Court recognized in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35 (1984)—a case the defendants and States ignore—the HEW regulations were adopted with oversight and approval from Congress. The year after their adoption, in 1978, Congress added Section 505(a)(2) to the Rehabilitation Act, which incorporated Title VI's "remedies, procedures, and rights." 29 U.S.C. 794a(a)(2). Congress

intended for this provision "to codify" the 1977 regulations "governing enforcement of 504" as "a specific statutory requirement." *Consolidated Rail*, 465 U.S. at 635 & n.16 (citation omitted). Thus, Congress intended to make available to persons alleging discrimination under Section 505 the "remedies, procedures, and rights" of Title VI, including the process involving enforcement actions by the Department of Justice.

By 1990, it was beyond controversy that a "means authorized by law" to enforce Title VI and Section 505 included enforcement actions by the Department of Justice. 42 U.S.C. 2000d-1; *see also Florida*, 938, F.3d at 1229-38, 1247-48; U.S. Br. at 22; *Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983); *United States v. Conty of Maricopa*, 151 F. Supp. 3d 998, 118-19 (D. Ariz. 2015); *United States v. Tatum Indep. Sch. Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984). Indeed, the question that preoccupied courts was whether private parties, in addition to the United States, had a cause of action. *E.g.*, *Sandoval*, 532 U.S. at 289. And "where, 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*, 434 U.S. at 581. Accordingly, Congress's enactment of Title II ratified and incorporated these longstanding administrative and judicial interpretations. S*ee Florida*, 938 F.3d at 1250. Accepting the defendants and States' view, by contrast, would jettison more than 50 years of judicial decisions and administrative interpretations and practices.

Congress is also "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 577 U.S. 230, 239-40 (2009) (quoting *Lorillard*, 434 U.S. at 580). In 2008, Congress amended the ADA without amending Title II's enforcement provision. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. By then, Title II regulations had long made clear that the Attorney General may sue under the administrative complaint process, and the Attorney General had routinely used that process to secure relief for Title II complainants. 28 C.F.R. 35.174; *Shotz v. City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003); U.S. Br. at 30 & n.7. Congress's incorporation of the Attorney General enforcement process into Title II is further supported by Congress's instructions regarding Executive

Branch implementation of Title II. *Id.* at 23-25; *see also* 42 U.S.C. 12134 (directing Attorney General to promulgate Title II regulations consistent with those under Section 504 of the Rehabilitation Act).

All the evidence above and more establishes the Attorney General's enforcement authority, but the evidence is largely absent from the briefs of the defendants and States. Both brush the evidence aside as a "matryoshka doll," Amicus Br. at 2, without answering why the lawyers all cohesively support the Attorney General's authority, and as mere "appeals to 'context' and 'intent,'" Resp. at 15, which disregards the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 576 U.S. 473, 492 (2015) (quoting *Utility Air Regul. Group v. E.P.A.*, 573 U.S. 302, 320 (2014)).

This Court has often construed terms in accordance with "the Statute's main purposes." *United States v. Patel*, 778 F.3d 607, 615 (7th Cir. 2015); *United States v. Johnson*, 47 F.4th 535, 543 (7th Cir. 2022) (to determine a term's plain meaning, "courts frequently look to dictionary definitions and sometimes consider the construction of similar terms in other statutes, as well as the purpose of the statute being interpreted").

Moreover, the *expressio unius* canon, a centerpiece of the defendants' and States' argument, has been repeatedly described by this Court as "'much-derided' and 'disfavored'" and *particularly* reliant on context. *White v. United Airlines, Inc.*, 987 F.3d 616, 622 (7th Cir. 2021) (quoting *Dahlmstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 943 (7th Cir. 2015)); *Exelon Gen. Co., LLC v. Local 15, Intern. Broth. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 571 (7th Cir. 2012). "Virtually all the authorities who discuss" that canon "emphasize that it must be applied with great caution, since its application depends so much on context." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (2012) at 107. Context readily explains that Congress explicitly referenced the Attorney General in the enforcement provisions of Titles I and III because it could not have conveyed its intention to confer authority on specific government actors in those titles without explicit references, unlike with Title II. *See Florida*, 938 F.3d at 1228-29; 21 F.4th at 742-45.

The terms in Title II's enforcement provision, properly read, authorize enforcement actions by the Attorney General. There is no dispute that the process comfortably falls within the definitions of the terms "remedies," "procedures," and "rights" used in 42 U.S.C. 12133.

Notably, amicus States have abandoned their argument before the district court that the process does not satisfy those definitions, Doc. 117-1, at 6-7, after the United States explained it does, Doc. 120, at 10-14. Title VI regulations have long referred to the process as being among the *procedures* for effecting compliance. *E.g.*, 45 C.F.R. 80.8, "*Procedure* for effecting compliance" (emphasis added). There is also no dispute that the process has long been a core component of the enforcement remedies, procedures, and rights "set forth" in Title VI and Section 505. *See* 42 U.S.C. 12133, "Enforcement." And Title II "provides" the remedies, procedures, and rights "set out" under those statutes to any "person alleging discrimination" under Title II, 42 U.S.C. 12133, thereby advancing the ADA's codified purpose to ensure the federal government "plays a central role in enforcing" Title II's standards "on behalf of individuals with disabilities," 42 U.S.C. 12101(b)(2)-(3).

2. The Attorney General's Title II enforcement authority advances the ADA's fundamental purposes.

The ADA's purposes further establish the Attorney General's Title II enforcement authority. The defendants' reading cannot comport with even Congress's most fundamental purpose in enacting the ADA: "to establish clear, strong, consistent, enforceable standards addressing

discrimination against individuals with disabilities" and "ensure that the Federal Government plays a central role in enforcing" them "on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(2)-(3).

This purpose, codified at the outset of the ADA, plainly establishes Congress's intent to ensure the federal government's central role in enforcing the ADA's disability rights standards—including those of Title II, one of the statute's three main titles. The defendants assert that the text does not answer "*who*" Congress wanted to enforce the standards or "*how*." Resp. at 23. But the text answers both questions. The *who* is the "Federal Government," which is represented by the Attorney General as its chief law enforcement officer. The *how* is that the federal government is to play "a central role in enforcing" the ADA's "standards addressing discrimination against individuals with disabilities" on "behalf of individuals with disabilities." The United States fulfills this central role Congress envisioned by enforcing Title II's standards on behalf of people with disabilities in court, not by exerting pressure from the sidelines, and only when victims of disability discrimination choose to file suit.

The defendants also suggest that their reading preserves the federal government's *central* enforcement role, but that is betrayed by

the severely *limited* role they describe. Resp. at 45. They assert that their reading still preserves the United States' abilities to enforce Title II by filing "amicus briefs" and moving to intervene by permission or, if it happens to hold a "stake in the property," by right. But filing amicus briefs does not *enforce* a federal civil rights statute, let alone pursuant to a *central enforcement role*, and intervening to protect *property* does not enforce disability rights standards "on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(2)-(3). The States limit the United States role even more, suggesting that *investigations* and *settlements* under Title II, such as those they cite, are prohibited. *See* Amicus Br. at 13.

The defendants' reading also defeats a *second* integral purpose of Title II: Congress's intent to expand Section 504 of the Rehabilitation Act through Title II by "making *any* public entity liable for prohibited acts of discrimination, regardless of funding source." *Shotz*, 344 F.3d at 1174. Under the reading, Title II creates a feebler enforcement mechanism than the one in the Rehabilitation Act, which Congress found inadequate to combat disability discrimination by public entities. *See New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) (courts

"cannot interpret federal statutes to negate their own stated purposes"). But as the Supreme Court has emphasized, Title VI's enforcement provision focuses on enforcement by *federal agencies*, not private parties. *Sandoval*, 532 U.S. at 289. The federal government has long enforced that Title VI through lawsuits as an alternative to terminating federal funding, a severe sanction. And reading federal enforcement out of Title II would provide victims of disability discrimination by public entities far less valuable "remedies, procedures, and rights" than those available under the two earlier civil rights statutes, though Congress directed for them to be the same. 42 U.S.C. 12133; *Barnes v. Gorman*, 536 U.S. 181, 190 n.3 (2002).

3. The ADA's legislative history confirms the Attorney General's Title II enforcement authority.

The legislative history further confirms that Congress intended that the Attorney General's "fil[ing] suits in Federal district court" where an agency is "unable to resolve a complaint by voluntary means" serves as "the major enforcement sanction for the federal government" under Title II. S. Rep. No. 116, 101st Cong., 1st Sess. 57-58 (1989) (Senate Report); accord H.R. Rep. No. 485, Pt. 2 101st Cong. 2d Sess. 98 (1990) (House Report II); *see also Shotz*, 344 F.3d at 1175. The defendants

retreat from the legislative history presented by the United States, U.S. Br. at 25-27, by only asserting that it "deserves no weight" and must yield to unambiguous text in Title II's enforcement provision, Resp. at 21. But that text favors the United States, as addressed, and the defendants concede through silence that the legislative history decisively does, too.

4. The Spending Clause argument lacks merit.

The defendants and States observe that Congress enacted the Rehabilitation Act and Title VI under the Spending Clause, but the same is not true of Title II of the ADA, and infer that the Rehabilitation Act and Title VI authorize Attorney General suits on a common law breach-of-contract theory, which is unavailable under Title II. *See* Resp. at 20; Amicus Br. at 16-17. This argument fails on multiple grounds.

The Supreme Court has rejected the premise that "suits under Spending Clause legislation are suits in contract," *Gorman*, 536 U.S. at 188 n.2. Instead of relying on the "imperfect analogy" between contract law and Spending Clause litigation, the Court should focus on whether Congress provided a remedy under the statute at issue. *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 230 (2022) (Kavanaugh, J., concurrence). The premise would not support the defendants anyway.

Whatever the legal basis for the remedies, procedures, and rights of Title VI and the Rehabilitation Act, Congress explicitly directed that those same remedies, procedures and rights are available under Title II.

The Supreme Court made this clear in *Barnes*, which held that Title VI's status as "Spending Clause legislation" and related contract-law principles meant that punitive damages are not available in private suits under Title VI. *Id.* at 189. In a separate opinion, Justice Stevens suggested that this analysis "does not carry over to" Title II "because the latter is not Spending Clause legislation." *Id.* at 189 n.3. But the majority emphatically rejected that argument, explaining that Title II "could not be clearer that the 'remedies, procedures, and rights'" it provides "are the same as the 'remedies, procedures, and rights'" set forth in Title VI and the Rehabilitation Act. *Id.* (quoting 42 U.S.C. 12133). "These explicit provisions," the Court held, "make discussion of the ADA's status as a 'non Spending Clause' tort statute quite irrelevant" in determining the scope of the remedies it provides. *Id.*; *see also id.* at 185. By this logic, if the Attorney General can sue to enforce the Rehabilitation Act and Title VI, she can sue to enforce Title II of the ADA as well.

Similarly, the Sixth Circuit held in *Jones v. City of Detroit*, 20 F.4th 1117, 1122 (6th Cir. 2021) that cases interpreting a closely related Spending Clause statute also determined what remedies Title II provides regardless of whether the ADA was enacted under the Spending Clause. The court reasoned that the Spending Clause "distinction makes no difference" because "Congress is free to define the remedies available" under a given statute by incorporating those available under another "kind of legislation," even if enacted under "the Spending Clause." *Id.* "Where Congress does so, it overrides any default rule or background principle applicable to the remedies available." *Id.*

5. The federalism arguments lack merit.

Defendants suggest that Congress "might" have limited Title II to a private right of action based on federalism concerns, a view the States echo. Resp. at 23; Amicus Br. at 8, 14. This is also derived from the dissent in *Florida*, 21 F.4th at 757-58. The argument is that Congress must use clear language to "alter the usual constitutional balance between the federal government and the states," *Gregory v. Ashcroft*, 501 U.S. 452, 460, 463-64 (1991), as Title II supposedly does. The rule is implicated only when Congress "intends to pre-empt the historic powers

of the States," and is "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional schemes." *Gregory*, 501 U.S. at 461 (citation omitted). The Eleventh Circuit was not persuaded by this meritless argument.

First, allowing the federal government to enforce Title II against public entities does not "alter the usual constitutional balance." The Supreme Court has repeatedly recognized that in "ratifying the Constitution, the States consented to suits" by "the Federal Government." *Alden v. Maine*, 527 U.S. 706, 755 (1999). Thus, no "provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *see also United States v. Texas*, 143 U.S. 621, 645-46 (1892); *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1327-28 (11th Cir. 2012). Indeed, statutes authorizing the United States to sue public entities are commonplace. In the anti-discrimination context alone, they include Title VI, the Rehabilitation Act, Title VII, 42 U.S.C. 2000e-5(f)(1), Title I of the ADA, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-2(f). The States cite no decision that has held that

Gregory requires any "exceedingly clear language" in such statutes. They also raise *state* sovereign immunity concerns, which are irrelevant here; the United States seeks to *intervene*, and the defendant is a *municipality*.

The States' assertion that the United States has imposed federalism costs by extracting policy concessions under Title II is also misplaced. Amicus Br. at 1, 11-15. Disputes regarding a public entity's *legal obligations* under Title II are not *policy disagreements*. Even if they were, courts may tailor remedies to avoid any federalism concerns, so such concerns do not support holding that the United States lacks Title II enforcement authority altogether. *Pulliam v. Allen*, 466 U.S. 522, 539, 542-543 & n.22 (1984) (federalism concerns are more appropriately addressed by tailoring relief, not by immunizing officials). Moreover, federal civil rights statutes permit private parties to enforce federal standards in court against public entities, even ones that receive no federal funding. Yet the "generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity," *Alden*, 527 U.S. at 715, while a suit by the federal government against a state "does no violence to the inherent nature of sovereignty, *Texas*, 143 U.S. at 646.

Second, even if *Gregory* required a clear statement, the ADA's text, context, and purposes clearly demonstrate Congress's desire for federal intervention in the disability rights realm. The ADA announces at its outset its core purpose to ensure "the Federal Government plays a central role in enforcing" the ADA's disability discrimination standards "on behalf of individuals with disabilities"—without excepting the entirety of one of the ADA's three main titles. 42 U.S.C. 12101(b)(3). As the Supreme Court has observed, it "is not difficult to perceive the harm that Title II is designed to address," which is pervasive unequal treatment in the administration of state services and programs[.]" *Tennessee v. Lane*, 541 U.S. 516, 524 (2004); *see also Pennsylvania Dep't of Cor. v. Yeskey*, 524 U.S. 206, 209 (1998) (the "ADA plainly covers state institutions."). Moreover, Title II incorporates the full range of established remedies, procedures, and rights under Title VI and Section 505, which have long included the Attorney General enforcement process as a core component.

6. Defendants mischaracterize judicial decisions recognizing the Attorney General's Title II authority.

The defendants mischaracterize district court decisions recognizing the Attorney General's authority as applying only "follow-the-leader" and "*ipse dixit*" reasoning. Resp. at 22; *see also*, *e.g.*, *United States v.*

Mississippi, 2019 WL 2092569, at *2 (S.D. Miss. May 13, 2019), *rev'd on other grounds*, 82 F.4th 387 (5th Cir. 2023); *United States v. Harris Cnty.*, 2017 WL 7692396, at *1 (S.D. Tex. Apr. 26, 2017); *United States v. Virginia*, 2012 WL 13034148, at *2-3 (E.D. Va. June 5, 2012); *Smith v. City of Phila*, 345 F. Supp. 2d 482, 489 (E.D. Pa. 2004); *United States v. City & Cnty. of Denver*, 927 F. Supp. 1396, 1399-1400 (D. Colo. 1996).

The defendants do not explain how decisions predating those of the purported leader (the Eleventh Circuit) can follow that leader, and the decisions are not grounded in *ipse dixit* reasoning. In *Harris County*, for example, the court permitted extensive, over-sized briefing and oral argument on the Attorney General's Title II authority, including from the Department of Justice. *Harris County*, 2017 WL 7692396, Doc.. 11, 27, 36, 44, 53. The court recognized the Attorney General's authority after drawing support from other district court decisions that had also done so and reasoning, as the Department of Justice had extensively argued, that the "plain language of the ADA, its legislative history, and the implementing regulations" established that Congress incorporated into Title II the enforcement process involving the Attorney General. *Harris County*, 2019 WL 2092569, at *1. Other courts found that when Congress

enacted the ADA in 1990, the "remedies, procedures, and rights" under Section 505 and Title VI included the Attorney General enforcement process. *Virginia*, 2012 WL 13034148, at *3 (E.D. Va. June 5, 2012); *Smith*, 345 F. Supp. 2d at 490.

B. Haymarket does not adequately represent the United States' interests.

The district court improperly found that the United States did not satisfy the adequacy of representation standard, which imposed a "minimal" burden on the United States, *Bost*, 75 F.4th at 691, to show that the parties' representation of its interests "may be" inadequate, *Planned Parenthood Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). The United States easily satisfied this burden.

Congress recognized the Department of Justice's unique regulatory and enforcement roles under Title II by conferring regulatory and enforcement authority, 42 U.S.C. 12133, 12134(a), and explicitly stating that the ADA's fundamental purpose is "to ensure that the Federal Government plays a central role in enforcing the standards established in" the ADA "on behalf of individuals with disabilities," 42 U.S.C. 12101(b)(3). Haymarket is charged with none of those roles and thus, at a minimum, "may not" adequately represent all interests those roles

implicate. *Kaul*, 942 F.3d at 799. Haymarket alleges violations of Title II and Department of Justice implementing regulations while asking that they be interpreted and enforced in its favor. Doc. 81, at 14-17.

The defendants do not distinguish any case we cited to show that Haymarket does not adequately represent the United States' interests. U.S. Br. at 37-39. Instead, they argue that the United States and Haymarket share the same goals by seeking the same relief and thus the United States needed but failed to show "some conflict" with Haymarket. Resp. at 27-28. But the United States's goal to serve the *public's interest* by enforcing Title II and its regulations to protect persons with disabilities generally, 42 U.S.C. 1201(b)(3), differs from Haymarket's goal to represent its interests as a specific entity, *see EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002); *Heaton v. Monogram Credit Card Bank*, 297 F.3d 416, 424 (5th Cir. 2002).

Moreover, "some conflict" had already manifested by June 2024; the United States and Haymarket had chosen to press different claims against different parties under different regulations and statutes. *Compare* Doc. 1 (suing Village and others under several federal statutes and regulations) & Doc. 81, at 14-17, *with* Doc. 94-1 (pressing limited

Title II claims against the Village). And unlike Haymarket, the United States emphasized challenges to the Village's legislation, *id.*, ¶¶ 30-54, while expressing the Department of Justice's particularized commitment to using every available tool to combat the opioid crisis, which is exacerbated by the Village's exclusionary zoning tactics against a substance use treatment center, Doc. 113-1, at 19 & n.4. There "may" be conflict if Haymarket settles for zoning approval without adequately representing systemic interests implicated by the Village's generally applicable legislation and the opioid crisis.

II. The district court abused its discretion by denying permissive intervention.

The district court abused its discretion in denying permissive intervention under Rules 24(b)(1)(B) and 24(b)(2)(A). U.S. Br. at 40-48.

Rule 24(b)(1)(B) permits intervention because the United States' Title II claims against the Village's zoning review and denial share "with the main action a common question of law or fact." The district court improperly found the rule to be unavailable because the Attorney General cannot enforce Title II, but recognized that the United States' claims "overlap" with Haymarket's "legally and factually." Doc. 152, at 12. And Rule 24(b)(1)(B) permits an agency to intervene where an

agency's claims are based on a statute it administers. The Department of Justice develops and issues regulations under Title II and presses Title II claims here, yet the district court found the rule would only permit intervention if Title II's constitutionality were at issue. Doc. 152, at 15.

The defendants concede that "there is no question that the District Court *could* have granted the United States permissive intervention" on either basis, Resp. at 29, but argue denial "was still discretionary" based on the undue prejudice and delay standard of Rule 24(b)(3), *id.* at 33. But the district court abused discretion there as well.

First, the district court improperly found undue prejudice and delay because the "marginal cost" of permitting intervention "can't be zero" given that "[m]ore lawyers equals more burdens," adding that the United States would participate in discovery and trial, Doc. 152, at 13, in ways that routinely follow intervention, as the defendants acknowledge, Resp. at 31. Accepting this rationale would render the *undue* standard meaningless, as would the defendants assertion that it is proper based on the general experience of district courts. *Id.* at 30. The defendants also suggest that no denial of permissive intervention was ever reversed. *Id.* The Sixth Circuit, however, reversed a denial of permissive

intervention, despite the district court's general experience, for resting on similarly "bare-bones" speculation of a "risk of delay and prejudice" that offered no meaningful explanation about how the risk would unduly "frustrate an expeditious resolution." *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 578 (6th Cir. 2018).

Second, the district court improperly reasoned that permitting the United States to enforce Title II against the Village felt "like piling on" and "overkill." Doc. 152, at 14. This boils down to the unsupportable notion that it would be *undue* for the United States to exert pressure to enforce a federal disability discrimination statute. And third, the district improperly reasoned that Haymarket is "capable of defending its own interests," Doc. 152, at 14, which is irrelevant to whether intervention would unduly prejudice or delay the proceeding, U.S. Br. at 48. The defendants offer no meaningful defense for either rationale above.

III. The United States' intervention motion was timely.

The defendants argue that the intervention motion should be denied as untimely, which the district court did not find. They concede that the district court had discretion to find intervention timely, Resp. at 29, but assert that the mere passage of time and alleged burdens

concerning the period *after* the United States moved to intervene warrant denial, *id.* at 25-27. This disregards the purposes and scope of timeliness.

To determine timeliness, courts consider "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; and (4) any other unusual circumstances." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797-98 (7th Cir. 2013).

The United States moved to intervene in June 2024, soon after concluding from an extensive investigation that the Village violated Title II in denying Haymarket zoning approval and being unable to secure the Village's voluntary compliance with Title II. The investigation concerned a planned-development zoning process that involved "more than 35 hearings" from 2019 to late-2021. Doc. 1, at 4, 8. That process, unprecedented in length and duration, involved anomalous participation from residents, attorneys, officials, and ten experts. The United States received over 110,000 pages of documents from the Village alone and interviewed many witnesses. Doc. 94-1, at 16, ¶ 62; Doc. 71, at 1; Doc. 115, at 8.

The defendants argue that timeliness required the United States to speed through its investigation and intervene within months from when Haymarket sued in January 2022. Resp. at 25-26. But timeliness "is contextual; absolute measures of timeliness should be ignored." *Sierra Club v. Epsy*, 18 F.3d 1202, 1205 (5th Cir. 1994). Timeliness is neither based on an absolute measure nor a tool to punish tardiness, *id.* at 1204-05, and "delay in and of itself does not mean that intervention should be denied." 7C Wright & Miller, *Federal Practice & Procedure* 1913 (2024). Timeliness is "'determined from all the circumstances,' and 'the point to which [a] suit has progressed is'" not "'solely dispositive.'" *Cameron v. EMW Women's Surgical Ctr.*, 595 U.S. 267, 279 (2022) (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)).

Courts therefore reject arguments based on time's mere passage. *Mountain Top Condo. Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370 (3rd Cir.1995) (allowing intervention where four years passed between complaint and intervention motion and "there were no depositions taken, dispositive motions filed, or decrees entered" during the period); *Usery v. Brandel*, 87 F.R.D. 670, 675 (W.D. Mich. 1980) (intervention allowed when suit had "not advanced beyond early

discovery"); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125-26 (5th Cir. 1970) (intervention allowed when there were no legally significant proceedings other than completion of discovery and intervention would not cause overall delay).

Rather, the "most important consideration" is "whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (quoting 7C Charles Alan Wright et al., *Federal Practice & Procedure: Civil* 1916 (2d ed. 1986)). Timeliness ensures that intervention will not "upset the progress made towards resolving a dispute" or cause unique disruption. *Grochocinski*, 719 F.3d at 797; *NAACP*, 413 U.S. at 366-67. Yet the defendants point to no disruption of any progress towards a resolution from the United States' timing.

As of June 2024, intervention would not have upset progress towards a *settlement* resolution because the parties were at a settlement standstill. In a May 2024 status report, the parties reported that they were not "in the same ballpark" on settlement. Doc. 88, at 1, ¶ 1. The Village had also issued public statements against Haymarket evincing

no desire to settle. *E.g.*, Doc. 94-1 (U.S. Compl.), ¶¶ 43-54. Intervention could have only helped the parties overcome their settlement standstill.

Intervention would also not have disrupted progress towards resolution through motion practice or trial. By June 2024, the defendants had only answered Haymarket's pleadings (other defendants moved to dismiss), Doc. 29, 83, and produced to Haymarket a partial set of documents already "produced to the Department of Justice (DOJ) during its pending investigation," Doc. 83, at 1. The district court had entered a scheduling order the month before setting fact discovery to close on January 31, 2025, Doc. 84, 85, 94, which the parties continue to move to extend, *e.g.*, Doc. 118. Thus, from the defendants' perspective, the United States moved to intervene after they answered the operative pleading.

The defendants assert prejudice would result if intervention is granted *now* because "[s]ome discovery" will "have to be re-done" and "opportunity for efficiencies in combined discovery responses is gone." Resp. at 26. But timeliness concerns when the intervention motion is *filed*, not *decided*. Fed. R. Civ. P. 24; *Nissei*, 31 F.3d at 439 (asking whether the timing in "moving for intervention" would prejudice parties).

By June 2024, the defendants had just filed answered the operative pleading and produced limited documents the United States already had.

Moreover, as the defendants' assertion recognizes, any burden would only be greater if the United States brought a second lawsuit rather than intervened to "combine discovery" to bring "efficiencies." Intervention "in a pending enforcement suit, unlike initiation of a separate suite," subjects the defendant "to relatively little additional burden." *Trbovich v. United Mine Workers*, 404 U.S. 528, 536 (1972) (intervention "in a pending enforcement suit, unlike initiation of a separate suit" subjects the defendant "to relatively little additional burden"); *Smith v. Pangilinan*, 651 F.2d 1320, 1324-25 (9th Cir. 1981).

As for the third and fourth timeliness factors, denying the United States' request to enforce standards in a federal disability discrimination statute on behalf of people with disabilities prejudices the United States' Title II interests, the interests of persons with disabilities, and the public's interest generally. The Attorney General has unique regulatory, administrative, and enforcement roles under Title II, and enforcement is warranted to clarify the guideposts concerning discrimination in the municipal zoning context, particularly as they pertain to people with

substance-use disorders and entities associated with them. The United States conducted an extensive investigation into the Village's Title II compliance in leading an over-complicated zoning process involving countless anomalies requiring explanation.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of the intervention motion.

Respectfully submitted,

HARMEET K. DHILLON
Assistant Attorney General

ANDREW S. BOUTROS
United States Attorney

THOMAS P. WALSH
Assistant United States Attorney
Civil Division Chief

PATRICK JOHNSON
Assistant United States Attorney

s/ Jordan A. Rosen
JORDAN A. ROSEN
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5331
jordan.rosen@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) and Seventh Circuit Rule 32(c) because it contains 6,924 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complied with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

s/ Jordan A. Rosen
JORDAN A. ROSEN
Assistant United States Attorney

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