No. 21A____

In the Supreme Court of the United States

STATE OF FLORIDA,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPLICATION FOR EXTENSION OF TIME

To the Honorable Clarence Thomas, Associate Justice of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, applicant the State of Florida respectfully requests a 30-day extension of time, to and including April 21, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. The court of appeals entered its order denying Florida's petition for rehearing en banc on December 22, 2021. Therefore, unless extended, the time within which to file a petition for a writ of certiorari will expire on March 22, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). The opinion of the court of appeals is reported at 938 F.3d 1221 and attached as Exhibit A; the order of the court of appeals denying rehearing and rehearing en banc is reported at 21 F.4th 730 and attached as Exhibit B.

1. This case arises out of a 2012 Department of Justice investigation into Florida's compliance with the Americans with Disabilities Act of 1990. When the Department of Justice concluded that Florida's policies resulted in over-institutionalization of children with disabilities, it attempted to negotiate sweeping changes to Florida's policies. After Florida refused to accede to the United States' demands, in July 2013 the United States sued Florida in the Southern District of Florida for alleged violations of Title II of the ADA. In 2016, the district court dismissed the United States' suit, holding that the Department of Justice was not

authorized to bring suit against a State under Title II of the ADA. *C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1282 (S.D. Fla. 2016).

2. The United States appealed, and a panel of the Eleventh Circuit reversed. The panel noted that Title II states that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability." It then reasoned that because "a series of cross-references" starting with section 794a of Title 29 ends in Title VI of the Civil Rights Act, and because Title VI permits federal enforcement, it follows that Title II must permit federal enforcement as well. Judge Branch dissented. She explained that the statute "provides" remedies only "to . . . 'person alleging discrimination.'" Because the United States is not such a "person," she explained, the United States lacks a cause of action enforce Title II of the ADA.

3. The State sought rehearing en banc, which the Eleventh Circuit denied. Judge Newsom dissented from the denial of rehearing. He explained that the panel opinion could not be squared with the text of the ADA and "creates a nonexistent cause of action, vests the federal government with sweeping enforcement authority that it's not clear Congress intended to give, and, in the doing, upends the delicate federal-state balance."

4. A 30-day extension is necessary because lead and assisting counsel for the applicant have substantial briefing and oral argument obligations overlapping with the preparation of the petition for writ of certiorari.

5. A 30-day extension would not work any meaningful prejudice on any party. The mandate from the Eleventh Circuit has already issued. If this Court grants the petition, it would likely issue its opinion in the October 2022 Term regardless of whether an extension is granted.

6. Accordingly, good cause exists for this motion and applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including April 21, 2022.

7. Applicant's counsel has conferred with Bonnie Robin-Vergeer, counsel for respondent, who indicated that the relief requested in this application is unopposed.

Respectfully submitted.

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Exhibit A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13595

D.C. Docket No. 0:12-cv-60460-WJZ

UNITED STATES OF AMERICA,

Plaintiff-Appellants,

versus

STATE OF FLORIDA,

Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(September 17, 2019)

Before JILL PRYOR, BRANCH, and BOGGS,* Circuit Judges.

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* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

BOGGS, Circuit Judge:

In September 2012, after completing a six-month investigation, the Department of Justice issued a Letter of Findings notifying Florida that it was failing to meet its obligations under Title II of the Americans With Disabilities Act of 1990 ("ADA") and its implementing regulations, by "unnecessarily institutionalizing hundreds of children with disabilities in nursing facilities." The Department of Justice also asserted that Florida's Medicaid policies and practices placed other

children who have "medically complex"[1] conditions, or who are "medically fragile,"[2] at risk of unnecessary institutionalization.

The Department of Justice negotiated with Florida to attempt to resolve the violations identified in the Letter of Findings. After concluding that it could not obtain voluntary compliance, the Department of Justice filed suit in the Southern District of Florida in July 2013, seeking declaratory and injunctive relief under Title II of the ADA and 28 C.F.R. § 35.130(d).

In December 2013, pursuant to Fed. R. Civ. P. 42(a), the district court consolidated the Department of Justice's suit with a previously-filed class-action complaint from a group of children who similarly alleged that Florida's policies

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[1] The Letter of Findings relied on Florida's then-operative definition of "medically complex." The term describes "a person [who] has chronic debilitating diseases or conditions of one (1) or more physiological or organ systems that generally make the person dependent upon twenty-four (24) hour-per-day medical, nursing, or health supervision or intervention." Fla. Admin. Code R. 59G-1.010(164) (2012). Florida has since amended its Administrative Code, and this definition no longer appears. *See* Fla. Admin. Code R. 59G-1.010.

[2] At the time the Letter of Findings was issued, Florida defined "medically fragile" as a person who is:

> medically complex and whose medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, *e.g.*, requires total parenteral nutrition (TPN), is ventilator dependent, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning.

Fla. Admin. Code R. 59G-1.010(165) (2012). This definition no longer appears in Florida's Administrative Code. *See* Fla. Admin. Code R. 59G-1.010.

caused, or put them at risk of, unnecessary institutionalization and unlawful segregation on the basis of disability. *See A.R. v. Sec'y Fla. Agency for Health Care Admin.*, 769 F. App'x 718 (11th Cir. 2019).

Shortly before the consolidation, Florida filed a Motion for Judgment on the Pleadings, asserting that Title II of the ADA did not authorize the Attorney General to file suit. The district court denied Florida's motion, concluding that the Department of Justice had reasonably interpreted Title II and had the authority to file suit to enforce Title II. *See A.R. v. Dudek*, 31 F. Supp. 3d 1363, 1367 (S.D. Fla. 2014).

In 2016, the district court *sua sponte* revisited the issue[3] and dismissed the Department of Justice's case because it concluded that the Attorney General lacked standing to sue under Title II of the ADA. *See C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1282 (S.D. Fla. 2016). After further litigation, the district court dismissed the children's case. This appeal followed.

[3] There do not appear to be any significant factual or legal changes between the 2014 decision and the 2016 decision. The consolidated cases were reassigned in 2014, shortly after the district court decided Florida's Motion for Judgment on the Pleadings. In 2016, the district court justified its departure from the 2014 decision because it concluded that the 2014 decision erroneously applied *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984), and improperly deferred to the Department of Justice's interpretation of the statute. *See C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1291 n.11 (S.D. Fla. 2016).

ANALYSIS

This case requires us to determine whether the Attorney General has a cause of action to enforce Title II of the ADA. This is a purely legal question, requiring statutory interpretation. Therefore, the proper standard of review is *de novo*. *Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 914 (11th Cir. 2014).

I. An Overview of Title II of the ADA

The ADA was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and establish strong, enforceable standards to achieve that goal. 42 U.S.C. § 12101(b)(1)–(2). Congress envisioned that, through the ADA, the Federal Government would take "a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities," and invoked "the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce" to "address the major areas of discrimination faced day-to-day by people with disabilities." *Id.* (b)(3)–(4). *See also United States v. Georgia*, 546 U.S. 151, 154 (2006).

Part A of Title II, 42 U.S.C. §§ 12131–12134, addresses public services provided by public entities. A "public entity" means "any State or local government," or "any department, agency, special purpose district, or other

instrumentality of a State or States or local government . . . ." 42 U.S.C. § 12131(1)(A)–(B). Title II prohibits discrimination based on disability, specifically, "[s]ubject to the provisions of this subchapter, no 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. The term "qualified individual with a disability" means:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Title II's enforcement provision states that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 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. Congress directed the Attorney General to "promulgate regulations in an accessible format that implement [Title II]." 42 U.S.C. § 12134(a). Such regulations, with the exception of specifically-identified terms,

> shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of

> Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29.

Id. (b).

It is undisputed that Title II permits a private cause of action for injunctive relief or money damages. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 750 (2017). We must determine whether Title II's enforcement scheme, 42 U.S.C. § 12133, permits the Attorney General to bring an enforcement action.[4] The starting point is the language of the statute. *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 604 (1986). If the words of the statute are unambiguous, then we may conclude the inquiry there. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

Through a series of cross-references, the enforcement mechanism for Title II of the ADA is ultimately Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 12133; 29 U.S.C. § 794a; 42 U.S.C. § 2000d-1. Section 12133 of Title II states

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[4] Florida maintains that Supreme Court decisions examining Title II's enforcement provisions that consistently mention private enforcement without considering public enforcement support a conclusion that Title II was never meant to permit public enforcement. But in each of those cases, the Supreme Court was confronted with questions stemming from private litigation (the United States intervened to defend abrogation of state sovereign immunity in two cases). *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 751–52 (2017); *United States v. Georgia*, 546 U.S. 151, 154–55 (2006); *Tennessee v. Lane*, 541 U.S. 509, 513 (2004); *Barnes v. Gorman*, 536 U.S. 181, 183 (2002); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 588 (1999). The Court was not required to consider whether the Attorney General could enforce Title II in those cases. We do not consider the Supreme Court's silence on an issue that was not presented dispositive.

that the "remedies, procedures, and rights" available to a person alleging discrimination are those available in § 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a. Section 505 contains a provision for enforcing § 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability by programs and activities receiving federal financial assistance. *See* 29 U.S.C. §§ 794(a); 794a. In relevant part, § 505 states that:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) 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.

29 U.S.C. § 794a(a)(2).

Like § 504 of the Rehabilitation Act, § 601 of Title VI of the Civil Act of 1964 prohibits discrimination, exclusion, or denial of benefits—in that statutory scheme, on the basis of race, color, or national origin—by "any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

Section 602 of Title VI requires the various federal departments and agencies that provide federal financial assistance to "effectuate" § 601 by "issuing rules, regulations, or orders of general applicability . . . ." 42 U.S.C. § 2000d-1. Agencies may "effect" "[c]ompliance with any requirement adopted pursuant to this section . . . (1) by the termination of or refusal to grant or to continue assistance

under such program or activity to any recipient . . . or (2) by any other means authorized by law . . . ." *Ibid.* Before any action may be taken, the department or agency must issue appropriate notice and determine that it cannot obtain voluntary compliance. *Ibid.*

Florida insists that we need not consider the "remedies, procedures, and rights" available in § 505 of the Rehabilitation Act, or Title VI of the Civil Rights Act. It reasons that, because the Attorney General is not a "person alleging discrimination," he is "not within the class to whom Title II provides enforcement authority," and therefore is not authorized to bring suit to enforce Title II. To support this argument, Florida compares Titles I and III of the ADA, which expressly mention the Attorney General, with Title II, which does not.[5]

The United States contends that this interpretation (followed by the district court) "misreads the plain text of Title II." It asserts that "Title II does not authorize the Attorney General to file enforcement suits by equating the Attorney General with a 'person alleging discrimination.'" Rather, it contends that the phrase "remedies, procedures, and rights" in § 12133 is the operative phrase for statutory analysis. By

[5] The dissenting opinion focuses on the presumption against treating the government as a "person," citing *Return Mail, Inc. v. U.S. Postal Serv.*, 587 U.S. ____ (2019), No. 17-1594, 2019 WL 2412904, at *5 (June 10, 2019). The Supreme Court's holding in *Return Mail* should not change our analysis: in *Return Mail*, the underlying patent-review statute provided specific remedies for a specified offended party, thus differing significantly from the complex "remedies, procedures, and rights" structure of the ADA explained in detail in Part IV of our opinion.

cross-referencing to other statutes, Congress made a "package" of remedies, rights, and procedures available that may include enforcement by the Attorney General.

In enacting the ADA, Congress legislated in light of existing remedial statutes. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 & n.4 (1999); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1176–77 (11th Cir. 2003). This decision carries significant weight. When Congress adopts a new law that incorporates 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). Because in Title II Congress expressly incorporated § 505 of the Rehabilitation Act, which in turn incorporated Title VI of the Civil Rights Act, as the available "remedies, procedures, and rights," it is "especially justified" to conclude that Congress was aware of prior interpretations, as well as the operation of, both Acts. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–98 (1979) (applying a similar presumption while using Title VI to interpret Title IX). Focusing solely on the word "person" and the difference in the language of enforcement provisions within the ADA ignores this presumption.

Title II, the Rehabilitation Act, and Title VI are structured in a similar manner. Each has a statutory provision forbidding discrimination. *Compare* 42 U.S.C. § 2000d, *with* 29 U.S.C. § 794(a), *and* 42 U.S.C. § 12132. Indeed, § 202 of Title II (42 U.S.C. § 12132) and § 504 of the Rehabilitation Act overlap substantially in their

prohibitions on discrimination on the basis of disability. *See Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002). Title II and the Rehabilitation Act share the same enforcement provision, which incorporates the entirety of Title VI. *See* 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2).

It is true that, at first glance, Title II's enforcement provision is not as specific as those in Titles I and III. But that difference should not dictate a conclusion that, absent greater specificity, we should simply assume that a single word in § 12133 ends all inquiry. Because Congress chose to cross-reference other statutory provisions to identify how Title II may be enforced, we must consider those statutory provisions. Courts construing Title II and the Rehabilitation Act have taken the same approach. *See Barnes*, 536 U.S. at 185 (Title II); *Olmstead*, 527 U.S. at 590 n.4 (Title II); *Alexander v. Choate*, 469 U.S. 287, 293 n.7 (1985) (Rehabilitation Act); *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983) (Rehabilitation Act); *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012) (Rehabilitation Act); *Shotz*, 344 F.3d at 1169–70 (Title II); *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1043–45 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) (Rehabilitation Act).

We begin in Part II by discussing the remedial provisions of Title VI of the Civil Rights Act, as it is the earliest-enacted statute and ultimate fount of the cascade of cross-references. We also examine the regulations promulgated with Title VI and

litigation that considered whether the United States could file suit to enforce Title VI. Next, in Part III, we analyze § 505 of the Rehabilitation Act, its accompanying regulations, and cases in which the United States brought suit to enforce the Rehabilitation Act. In Part IV, we return to Title II of the ADA and examine the regulations the Attorney General promulgated pursuant to Congress's directive in 42 U.S.C. § 12134, and the district court's conclusions about the scope of Title II enforcement. We analyze Title II's legislative history, and other cases in which federal courts have concluded that the Attorney General may file suit to enforce Title II.

II. The Remedial Structure of Title VI of the Civil Rights Act

Title VI contains two enforcement mechanisms. *See Alexander v. Sandoval*, 532 U.S. 275, 280–81, 288–89 (2001); Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 Harv. C.R.-C.L. L. Rev. 1, 9–10 (1983). First, § 601 contains an implied private cause of action. *See Sandoval*, 532 U.S. at 279–80. The second enforcement mechanism is in § 602, which, as discussed above, directs federal agencies to "effectuate" § 601's prohibition on discrimination by programs that receive federal funding through regulation, fund termination, and "any other means authorized by law."[6] *See id.* at

[6] The regulatory powers attached to § 602 are substantial by contrast with other grants of regulatory power elsewhere in the Civil Rights Act. In Title VII, for example, Congress specified

289. Regulations promulgated pursuant to § 602 do not create a private right of action.[7] *Id.* at 289. Agencies enforce § 601's prohibition on discrimination "either by terminating funding to the 'particular program, or part therof,' that has violated the regulation or 'by any other means authorized by law[.]" *Ibid.* (quoting 42 U.S.C. § 2000d-1). This system, developed in the 1960s, was well-established at the time the ADA and the Rehabilitation Act were enacted. *See* Block, *supra*, 9–10.

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that the EEOC could create "procedural" regulations to carry out the Title, rather than Congress's more substantive grant of authority in Title VI to implement § 601. *See* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 Stan. L. Rev. 1293, 1298 (2014) (citing 42 U.S.C. § 2000e-12).

[7] In *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001), the Supreme Court considered whether a private cause of action existed to enforce Department of Justice regulations promulgated under § 602. Sandoval had filed suit, alleging that Alabama's policy of administering driver's license examinations only in English violated a Department of Justice regulation that forbade recipients of funding from using methods of administration that had the effect of discriminating on the basis of race, color, or national origin. *Id.* at 278–79. Florida points to *Sandoval* for the proposition that expressly providing one method of enforcing a substantive rule suggests that Congress intended to preclude others. The Supreme Court made this statement in *Sandoval* as it concluded that private individuals may not sue to enforce agency regulations promulgated under § 602 because *that* statute did not contemplate a private right of action—rather, it directed authority to agencies. *Id.* at 289. *Sandoval* instructs us that we must look to the statutory language of particular provisions to assess the method of enforcement Congress has provided. Further, as the Supreme Court explained in *Cannon v. Univ. of Chi.*, 441 U.S. 677, 711 (1979), when it concluded that Title IX implied a private right of action, the fact that other provisions of a "complex statutory scheme create express remedies" is not a sufficient reason to conclude that separate sections do not contain other remedies. The Court "has generally avoided this type of 'excursion into extrapolation of legislative intent,' unless there is other, more convincing evidence that Congress meant to exclude the remedy." *Ibid.* (quoting *Cort v. Ash*, 422 U.S. 66, 83 n.14 (1975)).

A. Title VI Enforcement Regulations Contemplate Department of Justice Enforcement Suits

It is helpful to survey the Department of Justice's regulations addressing Title VI enforcement, particularly because Congress, in § 602, specifically directed the Department of Justice (and other agencies) to make those regulations. When the "empowering provision" of a statute directs the agency to regulate as necessary to carry out what Congress intends, "the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 280–81 (1969)); *see also Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984) (deferring to "contemporaneous regulations issued by the agency responsible for implementing a congressional enactment").

Individuals who believe that they have been subjected to discrimination in violation of Title VI may file a written complaint. *See* 28 C.F.R. § 42.107(b). Upon receipt of a complaint, the Department is required to "make a prompt investigation," to determine whether a recipient of federal funding has failed to comply with the antidiscrimination requirements. *Id.* (c).[8] If that investigation demonstrates that the

[8] Agencies are also required to conduct periodic compliance reviews to ensure that federal-funding recipients are complying with their obligations. 28 C.F.R. § 42.107(a). A compliance

recipient is not in compliance, then the Department must notify the recipient and attempt to resolve the matter by "informal means" if possible. *Id.* (d)(1).

If the Department and recipient are unable to resolve the matter, then further action may be taken to induce compliance. *Ibid.* Such actions may include suspending, terminating, refusing to grant or continue federal financial assistance, or "any other means authorized by law[.]" 28 C.F.R. § 42.108(a). The Department of Justice has characterized those other means as including, but not limited to "[a]ppropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking," or "[a]ny applicable proceeding under State or local law." *Id.* (a)(1)–(2). The Department may not take such actions until it has determined that it cannot secure voluntary compliance, the Attorney General has approved the action, and the non-complying party has been notified of its failure to comply and the action to be taken. *Id.* (d).

Terminating or refusing to provide federal funding is the "ultimate sanction[.]" 28 C.F.R. § 50.3. To avoid such a drastic step, the Department's guidelines urge agencies to take alternatives to achieve "prompt and full compliance

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review that indicates that there may be discrimination or noncompliance with agency regulations may also trigger an investigation. *Id.* (c).

so that needed Federal assistance may commence or continue." *Ibid.* Such alternatives include administrative action or court enforcement.

> Compliance with the nondiscrimination mandate of title VI may often be obtained more promptly by appropriate court action than by hearings and termination of assistance. Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with the other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.

Ibid.

Florida argues that Title VI (and § 505 of the Rehabilitation Act, which we discuss *infra* in Part III, pp. 23–33) do *not* authorize federal enforcement actions, and never have. It maintains that the cases the United States relies upon are limited to "specific performance of contractual assurances of compliance obtained from recipients of federal funds."

It is hardly surprising that many Title VI cases are actions to ensure compliance by recipients of federal funding. Title VI was intended to ensure that "funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544 (1964) (statement of Sen. Humphrey). One of the easiest methods of achieving this goal was to require all recipients or seekers of federal financial

assistance to execute assurances that they would not discriminate. Such assurances stated that the United States could enforce those agreements in court. *See* 28 C.F.R. § 42.105(a)(1).

B. Enforcing Title VI: Any Other Means Authorized By Law

Even though government Title VI enforcement actions may be brought to ensure a funding recipient's assurances of nondiscrimination, Title VI does *not* limit "other means authorized by law" solely to such enforcement. *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981), illustrates this principle. There, the Fifth Circuit determined that the United States had authority to sue to enforce a school district's contractual assurance to comply with Title VI's prohibition against discrimination. *Id.* at 617. The court observed that the government's complaint described the suit as one to compel specific performance and enforce Title VI and the Fourteenth Amendment. *Id.* at 609 n.3. The district court had dismissed the complaint because it concluded that, by establishing alternative means to achieve federal antidiscrimination objectives, Congress nullified the United States's existing right to sue to enforce contracts. *Id.* at 611–12.

The court rejected this reasoning, concluding that the Civil Rights Act did not limit enforcement strategies to only those means set out explicitly in the Act. The government has a right to "sue to enforce its contracts . . . as a matter of federal

common law without the necessity of a statute." *Id.* at 611. Congress may, by statute, remove that right, but only if it offers "extremely, even unmistakably clear" evidence of such intent. *Ibid.* (citing *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947)).

The language in § 602 supported this conclusion. It "clearly provide[d] that other means of action, even if not mentioned in the Act, are to be preserved." *Id.* at 612. The phrase "any other means authorized by law" showed that Congress intended to preserve other methods of enforcement—including filing suit. *Id.* at 612–13. The Civil Rights Act contained a provision that explicitly preserved the existing authority of the Attorney General, the United States, or any agency, to bring, or intervene in, any action or proceeding. *Id.* at 612 (citing 42 U.S.C. § 2000h-3).

The Fifth Circuit only considered whether § 602 permitted contract enforcement actions. The United States' response to the school district's motion to dismiss had asserted that the Title VI and Fourteenth Amendment claims were not brought as independent causes of action, but subsidiary to the contract claims. *Id.* at 609 n.3.[9] Because the Fifth Circuit resolved the case on the contractual question, it

[9] This is not necessarily the winning point Florida thinks it is. The United States's authority to bring contractual actions is, as the Fifth Circuit pointed out in *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607, 611 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981), clearly established. The decision to emphasize the contract action may have been a strategic litigation decision, or it may have been made for any of a number of reasons. Regardless, we decline to accord substantial weight to an assertion made in a brief in a different case over thirty years ago.

did not consider whether the United States had an "implied right of action under Title VI," or the "inherent authority to sue to enforce the Fourteenth Amendment." *Id.* at 616–17.

Akin to *Marion County*, in *United States v. Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988), *superseded by statute on other grounds by J.W. v. Birmingham Bd. of Educ.*, 904 F.3d 1248 (11th Cir. 2018), we acknowledged that Title VI's status as spending-power legislation, and the presence of federal funding was sufficient to permit the United States to file suit to enforce Title VI's antidiscrimination provisions. A review of the history of Title VI demonstrates that the United States has consistently used such litigation to enforce its provisions.[10]

Other cases that have considered § 602's administrative-enforcement scheme have recognized the Attorney General's right to bring legal actions as an avenue of enforcing Title VI without specifying that *only* contract actions are permissible. In

[10] *See, e.g.*, *United States v. Fordice*, 505 U.S. 717, 724 (1992); *United States v. Harris Methodist Forth Worth*, 970 F.2d 94, 96 (5th Cir. 1992); *United States v. Lovett*, 416 F.2d 386, 390 n.4, 391 n.5 (8th Cir. 1969); *United States v. Louisiana*, 692 F. Supp. 642, 649–50 (E.D. La. 1988), *vacated on other grounds by* 715 F. Supp. 606 (E.D. La. 1990); *United States v. Yonkers Bd. of Educ.*, 518 F. Supp. 191, 201 (S.D.N.Y. 1981); *United States v. El Camino Cmty. Coll. Dist.*, 454 F. Supp. 825, 826–27 (C.D. Cal. 1978), *aff'd*, 600 F.2d 1258 (9th Cir. 1979); *United States v. Texas*, 321 F. Supp. 1043, 1057–58 & n.18 (E.D. Tex. 1970), *supplemented by* 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd by* 447 F.2d 441 (5th Cir. 1971); *United States v. Tatum Indep. Sch. Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *United States by Clark v. Frazer*, 297 F. Supp. 319, 323 (M.D. Ala. 1968).

National Black Police Ass'n v. Velde, 712 F.2d 569, 572 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 963 (1984), the court considered whether agency officials' failure to terminate federal funding to discriminatory local law enforcement violated their statutorily-imposed duties. In concluding that terminating federal funding was discretionary, the court relied on Title VI's construction to permit other enforcement schemes, including "referral of cases to the Attorney General, who may bring an action against the recipient." *Id.* at 575. *See also United States v. Maricopa Cty.*, 151 F. Supp. 3d 998, 1018–19 (D. Ariz. 2015), *aff'd* 889 F.3d 648 (9th Cir. 2018); *United States v. Tatum Indep. Sch. Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *United States v. Frazer*, 297 F. Supp. 319, 323 (M.D. Ala. 1968).

The phrase "any other means authorized by law" in § 602 appears to be routinely interpreted to permit suit by the Department of Justice. *See United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) (phrase refers to federal enforcement); *Brown v. Califano*, 627 F.2d 1221, 1224 & n.10, 1227, 1233 & n.73 (D.C. Cir. 1980) (discussing referrals to the Department of Justice); *Maricopa Cty.*, 151 F. Supp. 3d at 1018–19; *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972).

A similar phrase in another statute has received a comparable interpretation. In *United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002), the Sixth Circuit considered whether the phrase "any other action authorized by law with respect to

the recipient" in the Family Educational Rights and Privacy Act ("FERPA") conferred standing upon the Department of Education to seek injunctive relief. The court observed that, while FERPA contained a general authorization to permit the Secretary of Education to "take appropriate actions to enforce" FERPA, that alone was insufficient to permit enforcement litigation. *Ibid.* (citing 20 U.S.C. § 1232g(f)). However, another provision in FERPA offered the Secretary a menu of options in response to noncompliance with FERPA, including "any other action authorized by law with respect to the recipient." *Id.* at 807–08 (citing 20 U.S.C. § 1234c(a)(4)). The court concluded that *this* language "expressly" permitted the Secretary to sue to enforce FERPA "in lieu of its administrative remedies." *Id.* at 808. In reaching this conclusion, the Sixth Circuit relied on *Baylor Univ. Med. Ctr.*, 736 F.2d at 1050, which had interpreted the Rehabilitation Act (encompassing § 602), and *National Black Police Ass'n*, 712 F.2d at 575, which discussed § 602.

A review of the statute, the regulations that Congress expressly directed the agencies to create, and precedent demonstrates that Title VI contains an administrative enforcement scheme and permits judicial enforcement of its prohibition against discrimination. We next turn to the Rehabilitation Act.

III. Section 505 of the Rehabilitation Act

The Rehabilitation Act established a "comprehensive federal program" that Congress intended to benefit individuals with disabilities. *Consolidated Rail Corp.*

v. Darrone, 465 U.S. 624, 626 (1984). It was originally enacted without an enforcement provision. *See Community Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509 (1983). Because § 504 was "patterned after Title VI of the Civil Rights Act of 1964, it was understood that responsibility for enforcing it . . . would lie with those agencies administering the federal financial assistance programs." *Ibid.* (citing S. Rep. No. 93-1297, at 39–40 (1974)).[11]

A. Rehabilitation Act Enforcement Regulations Tracked Title VI Regulations

The Department of Health, Education, and Welfare ("HEW") developed implementing regulations for § 504, and its Secretary was assigned to coordinate enforcement across federal departments and agencies. *See* S. Rep. No. 93-1297, at 40 (1974); Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (Apr. 28, 1976), *revoked by* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). HEW's 1977 regulations incorporated by reference its procedures under Title VI of the Civil Rights Act on an interim basis. *See* Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting From Federal Financial

[11] Congress amended the Rehabilitation Act in 1974. Legislative history from that amendment reveals that Congress intended § 504 to lead to "implementation of a compliance program" similar to Title VI, including regulations, investigation, review, attempts to ensure voluntary compliance, and sanctions such as termination of federal funds, or "other means otherwise authorized by law." S. Rep. No. 93-1297, at 39-40 (1974). This legislative history is especially relevant in light of the 1978 Amendments to the Rehabilitation Act. *See infra* pp. 25–27.

Assistance, 42 Fed. Reg. 22685 (May 4, 1977) (adopting 45 C.F.R. § 80.6–80.10 and Part 81 of Title 45 of the C.F.R. which specify "[T]itle VI complaint and enforcement procedures" to implement § 504).

HEW's Title VI procedures were identical to those adopted by the Department of Justice to implement Title VI, discussed *supra* at Part II.A, pp. 14–17.[12] They permit individuals to file complaints, 45 C.F.R. § 80.7(b), which require an investigation. *Id.* (c). Agencies must attempt to resolve the matter by "informal means." *Id.* (d). Like the Department of Justice's regulations, they identify other actions that may be taken against noncompliant funding recipients: termination of funding and referral to the Department of Justice for enforcement proceedings. *Compare* 45 C.F.R. § 80.8(a), *with* 28 C.F.R. § 42.108(a).

In January 1978, HEW issued coordination regulations for the Rehabilitation Act. *See* Implementation of Executive Order 11,914: Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 43 Fed. Reg. 2132 (Jan. 13, 1978). Executive Order 11,914 had directed HEW's Secretary to coordinate implementation of § 504. Exec. Order 11,914, 41 Fed. Reg. 17,871 (Apr. 28, 1976);

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[12] In 1979, the Department of Education Organization Act divided HEW into the Department of Education and the Department of Health and Human Services ("HHS"). *See National Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 91 (D.D.C. 2003). HEW's regulations promulgating § 504 of the Rehabilitation Act remain in HHS's regulations. *See* 45 C.F.R. §§ 80.7–80.8.

Consolidated Rail Corp., 465 U.S. at 634. The 1978 regulations directed agencies to establish a system to enforce § 504, which was to include "[t]he enforcement and hearing procedures that the agency has adopted for the enforcement of [T]itle VI of the Civil Rights Act of 1964 . . . ." 43 Fed. Reg. 2137, § 85.5(a).

In November 1978, Congress amended the Rehabilitation Act. There are two aspects to this amendment that are significant for the purposes of this case. First, Congress amended § 504. It directed that agencies "shall promulgate such regulations as may be necessary" to carry out the 1978 amendments. *See* Pub. L. 95-602, Title I, § 119, *codified at* 29 U.S.C. § 794(a). The agencies were required to submit copies of any proposed regulation to "appropriate authorizing committees of the Congress . . . ." *Ibid.*

Second, Congress enacted § 505, which established the enforcement procedures for violations of the Rehabilitation Act, including § 504. *See* Pub. L. 95-602, Title I, § 120, *codified* at 29 U.S.C. § 794a. As we have discussed, § 505 adopted the "remedies, procedures, and rights" set out in Title VI, and specified that those remedies "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." 29 U.S.C. § 794a(a)(2).

In *Consolidated Rail Corp.*, the Supreme Court observed that the effect of these amendments was to "incorporate the substance of the Department's regulations

into the statute." 465 U.S. at 634 n.15. Legislative history demonstrates that Congress intended § 505(a)(2) to codify HEW's regulations for § 504 enforcement. *Id.* at 635. Specifically, the "regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement."[13] S. Rep. No. 95-890, at 19 (1978); *Consolidated Rail Corp.*, 465 U.S. at 635 n.16 ("[T]hese Department regulations incorporated Title VI regulations governing 'complaint and enforcement procedures . . . .'"); *see also School Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 279 (1987); *United States v. Bd. of Trustees for Univ. of Ala.*, 908 F.2d 740, 746–47 (11th Cir. 1990); *Miener v. Missouri*, 673 F.2d 969, 978 (8th Cir. 1982).

In 1980, President Carter issued an Executive Order assigning responsibility for coordinating the implementation and enforcement of Title VI, the Rehabilitation

[13] Florida points to language in legislative history from the 1974 Amendments that it asserts showed that Congress only intended to create a private right of action. It is true that Congress stated that it intended to "permit a judicial remedy through a private right of action." S. Rep. 93-1297, at 40 (1974). But this portion of the report also discusses Congress's vision of a "compliance program" similar to Title VI enforcement. *Ibid.*; *see also supra*, note 11 (discussing the 1974 Amendments' legislative history). Congress's decision in 1978 to codify existing regulations that specifically required agencies to use Title VI's administrative enforcement procedures undercuts Florida's contentions. Congress's decision, in 1978, to mention a private remedy is not surprising, given the litigation over whether Title VI implied a private right of action. *See Sandoval*, 532 U.S. at 280; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y.*, 463 U.S. 582, 587 (1983).

Act, and Title IX of the 1972 Education Amendments[14] to the Attorney General. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), *reprinted in* 42 U.S.C. § 2000d-1, app. Executive Order 12,250 directs the Attorney General to review the existing rules and regulations to determine their adequacy and consistency, as well as "develop standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews." *Ibid.* Executive Order 12,250 revoked Executive Order No. 11,914. *Id.* at 72997. The Executive Order also preserved the coordinating regulations HEW had promulgated, which by then fell under the auspices of the newly-formed Department of Health and Human Services "HHS").

> The present regulations of the Secretary of Health and Human Services relating to the coordination of the implementation of Section 504 of the Rehabilitation Act of 1973, as amended, shall be deemed to have been issued by the Attorney General pursuant [to] this Order and shall continue in effect until revoked or modified by the Attorney General.

Ibid. The Department of Justice's regulations for enforcement of § 504 are the same as those HEW promulgated in 1978. *Compare* 28 C.F.R. § 41.5, *with* 43 Fed. Reg. 2137, § 85.5(a).

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[14] Title IX was also modeled after Title VI. *See Cannon*, 441 U.S. at 694. Section 902 of Title IX is substantially similar to § 602 of Title VI. *Compare* 20 U.S.C. § 1682, *with* 42 U.S.C. § 2000d-1.

As tedious as this administrative and regulatory history may be, it is essential to understand what Congress did when it enacted the enforcement provision of Title II. Sections 504 and 505 of the Rehabilitation Act, and their implementing regulations, established a system of administrative enforcement that replicated the one in § 602 of the Civil Rights Act. This system permits both individual complaints and federal agency oversight to lead to investigations that may end with federal enforcement actions. This is illustrated in Rehabilitation Act enforcement litigation.

B. Department of Justice Enforcement of the Rehabilitation Act

The United States and Florida dispute whether the United States has enforced the Rehabilitation Act through litigation. Florida argues that, because there have been no such enforcement actions, this undercuts the United States's argument that Congress knew the Rehabilitation Act could trigger federal litigation, and so incorporated the same intent in Title II.

The United States has filed suit to enforce the Rehabilitation Act. There appear to be fewer cases than Title VI enforcement, but this is not surprising. Federal investigations may not always culminate in litigation. The Rehabilitation Act was intended to track Title VI, which requires that agencies attempt to achieve voluntary compliance through informal means before terminating funding or taking "any other means authorized by law." 42 U.S.C. § 2000d-1; 29 U.S.C. § 794a(a)(2).

Although much of the litigation under the Rehabilitation Act was brought by private parties, that does not automatically lead to the conclusion that a private right of action is the sole method of enforcement. Reliance on a private right of action may be more attractive to individuals who want to ensure that they receive relief that best fits their circumstances and goals. For example, they can control the progress of the litigation or settle on their own terms. *See* Block, *supra*, at 9–10. Litigation over whether there was an implied private right of action in the Rehabilitation Act recognized that the Rehabilitation Act also contained an administrative-enforcement system. *See Miener v. Missouri*, 673 F.2d 969, 978 (8th Cir. 1982); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1381 (10th Cir. 1981); *Camenisch v. Univ. of Tex.*, 616 F.2d 127, 133–34 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *Kling v. Los Angeles Cty.*, 633 F.2d 876, 879 (9th Cir. 1980); *NAACP v. Med. Ctr., Inc.*, 559 F.2d 1247, 1254–55, 1258 (3d Cir. 1979).

The United States has brought suits to ensure compliance with the Rehabilitation Act, and each of those suits took place after the relevant agency had received a complaint and investigated. *See United States v. Bd. of Trustees for Univ. of Ala.*, 908 F.2d 740, 742 (11th Cir. 1990) (deaf student filed complaint in 1979 alleging University improperly denied sign-language interpreter services, government filed suit to enforce Rehabilitation Act); *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1041 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)

(deaf patient filed complaint that hospital refused to permit her to bring an interpreter, hospital refused to allow HHS to investigate); *United States v. Univ. Hosp. of State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 147 (2d Cir. 1984) (United States filed suit after receiving a complaint relating to medical treatment of disabled baby).

Florida argues that *Baylor Univ. Med. Ctr.* was not an enforcement action because the central question was whether the receipt of Medicare and Medicaid funds made the hospital a recipient of federal financial assistance subject to § 504. Florida is correct about the nature of the central question, but it errs in characterizing *Baylor* as anything other than an enforcement action. The United States and the Medical Center had both sought summary judgment on the question of federal funding, and the district court awarded it to the United States. *Id.* at 1041–42. It concluded that the Medical Center was in violation of § 504 and suspended all future Medicare and Medicaid payments to the Medical Center until it complied with the investigation. *Id.* at 1042. The question of the receipt of federal financial assistance was essential to determining whether the Medical Center was violating § 504 and whether the United States could enforce § 504. *Ibid.*

The Fifth Circuit affirmed the conclusion that the hospital was a federal-funding recipient but determined that the district court abused its discretion in suspending the funding immediately. *Id.* at 1050. It relied on the history of the

Rehabilitation Act and its relationship to Title VI. Administrative enforcement remedies, the court explained, were inconsistent with an immediate, automatic suspension of federal funding because § 602 sets out very specific procedures to be implemented before terminating funding. *Ibid.* The court also specifically stated that agencies seeking to enforce § 504 may "resort to 'any other means authorized by law'—including the federal courts." *Ibid.* (citing *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607 (5th Cir. 1980)).

The Second Circuit has considered the nature of the United States's authority to enforce § 504. In *Stony Brook*, 729 F.2d at 148, the United States filed suit, alleging that a hospital had violated § 504 and accompanying regulations by refusing to provide information regarding medical care provided to a baby born with severe disabilities. The Second Circuit, applying the assumption that § 504 covered the hospital, and determining that the baby was a "handicapped individual," *id.* at 155, nonetheless concluded that § 504 did not apply to decisions about medical treatment, and that HHS could not proceed in its investigation. *Id.* at 157–59.[15] Importantly,

[15] It is important to note that in *United States v. Univ. Hosp. of State Univ. of N.Y. at Stony Brook*, 729 F.3d 144, 161 (2d Cir. 1984), the relevant Rehabilitation Act claim was whether the baby was denied certain surgical interventions on the basis of her disability. The Second Circuit pointed out that the hospital was always willing to perform the surgeries if her parents consented, thus the baby was treated in an "evenhanded manner" by the hospital. *Ibid.* The United States's claims in this case are consistent with (although not limited to) the kind of claims raised in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999), and, *inter alia*, concern whether Florida is violating Title II of the ADA by failing to provide community placements for individuals for whom a less restrictive setting than an institution is appropriate. This is a far cry from a case

the court did *not* conclude that the government lacked *any* authority to enforce § 504. Rather, with the issue of the United States's authority before it, the court concluded *that this particular investigation and enforcement action* exceeded the congressionally delegated enforcement authority under the Rehabilitation Act because Congress did not intend for agencies to insert themselves in those circumstances. *Id.* at 160.

A review of the legislative and regulatory background of the Rehabilitation Act, its existing regulations, and legal precedent demonstrate that the Act incorporated a system of administrative procedures that included a complaint, compliance reviews, investigation, and possible enforcement action by the Attorney General. As we have discussed above, Congress was fully aware of this system, it is consistent with what Congress intended, and the 1978 Amendments to § 504 and § 505 demonstrate that Congress codified the existing administrative practice of using Title VI procedures. Further, by 1980, the Attorney General had been tasked with enforcing Title VI, the Rehabilitation Act, Title IX, and other similar statutes. It is with this background that we now address the specific language in the enforcement provision of Title II of the ADA.

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in which a federal agency sought to investigate (and possibly override) parents' reasonable, informed medical decisions for their child. *See also American Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983).

IV. Enforcement of Title II of the ADA

The United States contends that by incorporating the "remedies, procedures, and rights" of the Rehabilitation Act (and accordingly Title VI), "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." Florida argues that, because the administrative process was not designed to vindicate individual rights, such actions "taken at the executive's discretion and without the complainant's involvement" deprive the terms "right" and "remedy" of all meaning. Florida relies on precedent that recognized a private right of action under the Rehabilitation Act and rejected administrative exhaustion, particularly *Camenisch v. Univ. of Tex.*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981).

In recognizing private rights of action, courts have emphasized the potentially unsatisfactory nature of administrative remedies for individuals under Title VI and the Rehabilitation Act. *See id.* at 135. That argument lends support to finding an implied cause of action to permit individuals to seek personal redress. *Ibid.* It does not, however, automatically lead to the conclusion that government enforcement is impermissible. Ensuring that public entities subject to federal statutes comply with those states ultimately vindicates individuals' personal rights. Although some plaintiffs may prefer private remedies, that fact does not persuade us that we should

ignore Congress's decision to enact a statutory scheme that permits the government to enforce Title II.

A. Title II Enforcement Regulations Follow Regulations Promulgated Under the Rehabilitation Act and Title VI

Congress directed the Attorney General to "promulgate regulations . . . that implement" Title II. 42 U.S.C. § 12134(a). Congress directed that those regulations "be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29." *Id.* (b).

As we have discussed above in Part III.A, pp. 23–28, the 1978 regulations required agencies to establish enforcement procedures for § 504. *See* Implementation of Executive Order 11,914: Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 43 Fed. Reg. 2132, 2137, § 85.5(a) (Jan. 13, 1978). Part 41 of title 28 of the Code of Federal Regulations contains the regulations that the Attorney General promulgated in response to Executive Order 12,250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, which, as we have already observed, are the same as HEW's January 13, 1978 regulations. Those regulations required agencies to use the "enforcement and hearing procedures that the agency has adopted for the enforcement of [T]itle VI of

the Civil Rights Act of 1964[.]" *Compare* 28 C.F.R. § 41.5, *with* 43 Fed. Reg. 2137, § 85.5(a).

The Department of Justice then issued regulations that, consistent with Congress's directive in § 12134, established an administrative scheme for Title II similar to the ones available for the Rehabilitation Act and Title VI. *See* 28 C.F.R. §§ 35.170–35.174, 35.190. An individual may file a complaint with the appropriate federal agency, any agency that provides funding to the public entity allegedly discriminating, or with the Department of Justice. 28 C.F.R. § 35.170. Agencies "shall" investigate complaints, may conduct compliance reviews, and, if appropriate, attempt informal resolution.[16] *Id.* § 35.172(a)–(c). If an agency can obtain voluntary compliance, then such agreements must provide for enforcement by the Attorney General. *Id.* § 35.173(b)(5).

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[16] Florida points out that the Department of Justice amended its regulations to clarify that agencies are not obligated to investigate administrative complaints alleging violations of Title II. In 2010, the Department modified its regulations. *See* Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,228 (Sept. 15, 2010). The Department explained that, since Title II regulations went into effect, it had "received many more complaints alleging violations of [T]itle II than its resources permit it to resolve." *Ibid.* It modified a regulation to clarify that designated agencies may exercise discretion in determining which complaints they select to resolve. Agencies may still "engage in conscientious enforcement" without fully investigating each complaint. *Ibid.* Rather, the Department explained that the modification was to permit agencies to assess whether agencies are likely to succeed in enforcement, whether the enforcement is consistent with the agencies' policies, and whether agencies' limited resources are best spent on a particular complaint. *Ibid.* A person who complains to an agency may still file suit regardless of the agency's resolution of the matter. 28 C.F.R. § 35.172(d). As we have already said, this argument certainly supports an implied private right of action. But our concern is with government, rather than private, enforcement.

Agencies are required to issue a letter of findings that provides public entities their findings of fact, conclusions of law, description of remedies for violations, and notice of available rights and procedures. *Id.* § 35.172(c). If a public entity "declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action." *Id.* § 35.174. Complainants may file private suits under 42 U.S.C. § 12133, regardless of whether or not an agency finds a violation. *Id.* § 35.172(d).

The district court dismissed Congress's directive to the Attorney General in § 12134(a)–(b) to implement regulations that must be consistent with Title II and the Rehabilitation Act enforcement regulations. *C.V.*, 209 F. Supp. 3d at 1288. Relying on *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1313 (10th Cir. 2012), and *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1179 (9th Cir. 1999), the district court explained that § 12134(a) "authorizes the Attorney General to define the substantive standards for discrimination under Title II," and "the consistency mandate merely ensures that Title II's substantive standards are analogous to those under the Rehabilitation Act." *C.V.*, 209 F. Supp. 3d at 1288. It quoted *Zimmerman*, 170 F.3d at 1179, for the proposition that "42 U.S.C. § 12134(b) does not suggest that Congress intended to incorporate *any* provisions from the

Rehabilitation Act into Title II." *C.V.*, 209 F. Supp. 3d at 1288 (emphasis in original).[17]

But *Elwell* and *Zimmerman* addressed a very different issue than the one presented here. Both of those cases considered whether Title II permitted individuals to bring *employment discrimination claims* against public entities. *See Elwell*, 693 F.3d at 1305–06; *Zimmerman*, 170 F.3d at 1171–72. In those cases, plaintiffs contended that, because Title II incorporated § 505 of the Rehabilitation Act's "remedies, procedures, and rights," Congress intended to adopt the Rehabilitation Act's prohibition on employment discrimination. *Elwell*, 693 F.3d at 1312; *Zimmerman*, 170 F.3d at 1179. Both *Elwell* and *Zimmerman* firmly rejected this argument, pointing out that Congress adopted the Rehabilitation Act's procedural rights in Title II, rather than its substantive prohibitions on employment discrimination. After all, Congress had already extensively addressed employment discrimination in Title I of the ADA. *Elwell*, 693 F.3d at 1312; *Zimmerman*, 170 F.3d at 1179. Both opinions also rejected the argument that, because the Attorney

[17] The district court made a critical omission when it quoted *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1179 (9th Cir. 1999). The full sentence reads: "*Unlike 42 U.S.C. § 12133*, 42 U.S.C. § 12134(b) does not suggest that Congress intended to incorporate *any* provisions from the Rehabilitation Act into Title II." *Ibid.* (emphasis added). The Ninth Circuit emphasized that the requirement of "consistency" in areas of regulatory overlap did not demonstrate an intent to incorporate substantive provisions concerning an entirely separate subject (employment) that Congress had already addressed exhaustively in Title I. *Id.* at 1179–80. Here, by contrast, the requirement of consistency makes far more sense when Title II addresses public services provided by public entities and the relevant regulations address the same subject.

General's Title II regulations were required to be consistent with certain Rehabilitation Act regulations, it adopted the Rehabilitation Act regulations that prohibited discrimination in employment. *Elwell*, 693 F.3d at 1312–13; *Zimmerman*, 179 F.3d at 1179–80.

Elwell and *Zimmerman* do support a conclusion that the Attorney General's regulations to implement Title II *were* intended to be consistent with the Rehabilitation Act in the areas where they might overlap. The regulations included definitions of certain terms, identified types of prohibited discrimination, and accessibility standards. *Zimmerman*, 170 F.3d at 1179–80; *Elwell*, 693 F.3d at 1313. Title II: (1) expressly addresses public services provided by public entities; 42 U.S.C. § 12132; (2) directly incorporates the rights, procedures, and remedies available in § 505(a)(2) of the Rehabilitation Act for violations of the prohibition on discrimination by programs or activities that receive federal financial assistance; *id.* at § 12133; and (3) directs that regulations to implement Title II must be "consistent" with certain Rehabilitation Act regulations that apply to recipients of Federal financial assistance. *Id.* § 12134.

The consistency requirement in § 12134(b) leads to the conclusion that Congress intended the Attorney General's Title II regulations to adopt the Rehabilitation Act's Title-VI-type enforcement procedures because Title II's enforcement procedure used the Rehabilitation Act's enforcement structure. *See* S.

Rep. No. 101-116, at 57 (1989) (explaining that the Attorney General should use § 504 enforcement procedures and its role under Executive Order 12,250 as "models for regulation); H.R. Rep. No. 101-485 II, at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381 (same).

We considered that the Attorney General's Title II regulations were "entitled to controlling weight" in *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003). "Congress expressly authorized the Attorney General to make rules with the force of law interpreting and implementing the ADA provisions generally applicable to public services." *Ibid.* (citing 42 U.S.C. § 12134(a)). *See also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597–98 (1999) ("Because the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect." (citation omitted)).

These regulations are reasonably related to the legislative purpose of the ADA, which included federal enforcement. *Id.* at 1179 & n. 25. They are consistent with the remedial structure that Congress selected for Title II, in that they adopt similar enforcement procedures to the Rehabilitation Act and Title VI, as Congress directed. Thus, "[b]ecause Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984), *accord Yeskey v. Com.*

of Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997), *aff'd sub nom. Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998); *Kornblau v. Dade Cty.*, 86 F.3d 193, 194 (11th Cir. 1996).

B. Title II of the ADA Permits Department of Justice Enforcement

To be sure, the Attorney General may not, by regulation, employ a cause of action where none was intended. *See Sandoval*, 532 U.S. at 291 (concluding that regulations may not create a private right of action where Congress did not so intend); *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 677–78 & n.16 (5th Cir. 1978). But Title II incorporated the Rehabilitation Act's procedural rights. *See Elwell*, 693 F.3d at 1312; *Zimmerman*, 170 F.3d at 1179. Congress chose to use § 505(a)(2) of the Rehabilitation Act as the enforcement mechanism for Title II of the ADA, with full knowledge that those provisions established administrative enforcement and oversight in accordance with Title VI. Congress also knew that, by adopting § 502(a)(2), it incorporated Title VI's "any other means authorized by law" provision.

The district court concluded that the "simpler explanation" was that "Congress did not incorporate *all* 'remedies, procedures, and rights' available under Title VI—it incorporated only those 'remedies, procedures, and rights' that may be exercised by a 'person alleging discrimination.'" *C.V.*, 209 F. Supp. 3d at 1286–87 (quoting 42 U.S.C. § 12133) (emphasis in original). It reasoned that, as "the power

to terminate federal funding under Title VI has no foothold in Title II," the available enforcement remedy is simply a private lawsuit.[18] *Id.* at 1287.

This conclusion is inconsistent with the statutory text, and Congress's directive that Title II's remedies are the same as the Rehabilitation Act. *See Barnes*, 536 U.S. at 185. At the time Congress enacted the ADA, there had been a number of decisions from the Supreme Court and the circuits regarding the availability of an implied private right of action under Title VI and the Rehabilitation Act. If Congress *only* intended to create a private right of action under Title II, then its decision to cross-reference to § 505 of the Rehabilitation Act, which *expressly* incorporates Title VI, including its administrative enforcement scheme in § 602, would be mystifying, especially because it had directed the Attorney General to develop regulations that were to be consistent with Rehabilitation Act enforcement procedures that included Title VI enforcement. *See* 42 U.S.C. § 12134.

It is true that Title II, unlike the Rehabilitation Act and Title VI, does not condition the right to enforce the statute on a defendant's receipt of federal funding.

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[18] The district court's reliance on *Alexander v. Sandoval*, 532 U.S. 275 (2001), is misplaced. There, the Supreme Court, interpreting § 602 of the Civil Rights Act, explained that § 602 did not confer rights on individuals, rather it focused on federal agencies' responsibilities. *Id.* at 289. The implication from *Sandoval*, as was observed in *United States v. Maricopa Cty.*, 151 F. Supp. 3d 998, 1018 (D. Ariz. 2015), is that when enforcement provisions focus on a particular party, it is more likely that Congress gave that party the ability to enforce the provision. *Sandoval*'s logic lends more support to concluding that there is a right of action for federal agency enforcement in § 602's reference to "any other means authorized by law." *Ibid.*

But, as the Supreme Court observed in *Barnes v. Gorman*, 536 U.S. 181, 189 n.3 (2002), that does not mean that an analysis of the available "remedies, procedures, and rights" turns on that distinction. Justice Scalia (who wrote the Court's opinion) and Justice Stevens (who concurred only in the judgment) disagreed over the relevance of contract-law principles to the Court's conclusion that punitive damages were not available in Title II suits. *See id.* at 189–90 (Scalia, J.), 192–93 (Stevens, J., concurring in the judgment). The Court had determined that because such damages were not available in suits under Title VI or the Rehabilitation Act, which were Spending Clause legislation, they were not available in Title II suits. *Id.* at 189–90. Justice Scalia noted that the ADA is not Spending Clause legislation, but rejected the distinction because Congress had "unequivocally" selected remedies derived from Spending Clause legislation when it enacted the ADA.

> The ADA could not be clearer that the "remedies, procedures, and rights . . . this subchapter provides" for violations of § 202 are the same as the "remedies, procedures, and rights set forth in" § 505(a)(2) of the Rehabilitation Act, which *is* Spending Clause legislation. Section 505(a)(2), in turn, explains that the "remedies, procedures, and rights set forth in title VI . . . shall be available" for violations of § 504 of the Rehabilitation Act.

Id. at 189 n.3 (Scalia, J.) (emphasis in original) (citations omitted).

In *Barnes*, while interpreting the remedial structure of Title II of the ADA, the Supreme Court did not consider the federal-funding distinction persuasive *because*

Congress expressly adopted remedies from those Spending Clause statutes. Congress intended for those to be the available remedies for Title II because it said so.[19] *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). To determine the available remedies, we must take Congress at its word. This brings us to Florida's arguments concerning who may file suit under Title II.

Florida asserts that because Congress did not name the Attorney General in Title II, the Attorney General may not sue. It relies on *Director, Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995), for the proposition that if an agency is meant to have standing, then Congress expressly says so. This is one of the key concepts from *Newport News*. The other is that, when making such determinations, courts examine the nature, structure, and purpose of the relevant statutory scheme. We do not conclude that *Newport News* dictates the result Florida proposes.

Newport News examined a single, self-contained statute, rather than a complex statutory scheme with two layers of statutory cross-reference. The

[19] Of course, if a public entity does not receive federal funding, then the United States may not terminate or withhold such funding. But the ADA prohibits discrimination by all public entities, regardless of the source of funding. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1174 (11th Cir. 2003).

Supreme Court considered whether the Director of the Office of Workers' Compensation Programs could, under the judicial review provision of the Longshore Harbor Workers' Compensation Act ("LHWCA"), seek judicial review of a decision by the Benefits Review Board. 514 U.S. at 123.

The relevant statute provided that "'any person adversely affected or aggrieved by' the Board's order" could appeal the decision in a United States Court of Appeals. *Id.* at 126 (quoting 33 U.S.C. § 921(c)). The Board had affirmed an administrative law judge's determination that a worker was only partially disabled. The Director sought review in the Fourth Circuit, which independently concluded that the Director could not seek judicial review because she was not a "person adversely affected or aggrieved" by the Board's decision within the meaning of the LHWCA.[20]

The Supreme Court affirmed. The Director was not a party to the proceedings before the administrative law judge, and, under the LHWCA, she could not appeal the judge's determinations to the Board. Thus, allowing her to challenge the Board's determinations in a federal court of appeals would be quite odd. The key phrase in the judicial review provision, "a person adversely affected or aggrieved," is, the

[20] The worker did not seek judicial review, and upon inquiry by the Fourth Circuit, "expressly declined to intervene on his own behalf," although he did not oppose the Director's appeal. *Director, Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 124–25 (1995).

Court explained, a "term of art" that statutes use to "designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts." *Id.* at 126. But nothing suggested that, "without benefit of specific authorization to appeal, an agency, in its regulatory or policy-making capacity, is 'adversely affected' or 'aggrieved.'"[21] *Id.* at 127. The Court explained that the general judicial review provision of the Administrative Procedure Act does not include an agency as a person adversely affected or aggrieved, *id.* at 129, and "when an agency in its governmental capacity *is* meant to have standing, Congress says so." *Ibid.* (emphasis in original).

The Court rejected the Director's argument that she could seek judicial review because the Board's decision impaired her ability to achieve the LHWCA's purposes and perform administrative duties. *Id.* at 126. The Court observed that the Board's decision did not interfere with the Director's duties as set forth by the LHWCA, and that the purpose of the LHWCA was not to ensure adequate compensation, but rather to resolve disputes. *Id.* at 130–31. Even assuming that the LHWCA's sole purpose was to ensure compensation for workers, agencies "do not automatically have standing to sue for actions that frustrate the purposes of their statutes[,]" and the

[21] Agencies *may* be "adversely affected or aggrieved" in some circumstances, such as when they are injured in their "nongovernmental capacity . . . as . . . member[s] of the market group that the statute was meant to protect." *Newport News*, 514 U.S. at 128 (citing *United States v. ICC*, 337 U.S. 426, 430 (1949)).

plain language of the statute did not show a "clear and distinctive responsibility for employee compensation as to overcome" the obvious reading of the text—that the "person adversely affected or aggrieved" by the Board's decision is one of the parties to the proceeding. *Id.* at 132.

By contrast, here, Congress enacted a statute that drew upon two other statutes to create the remedies, rights, and procedures available for enforcement, with the full knowledge that the other statutes—the Rehabilitation Act and the Civil Rights Act—were enforceable by federal agencies through funding termination or "any other means authorized by law." *See* 42 U.S.C. § 12133. Then Congress told the Attorney General to make regulations (that we defer to) to implement Title II that were to be consistent with a set of regulations that traced directly back to Title VI regulations. 42 U.S.C. § 12134(a)–(b). Congress was quite clear that Title V of the Rehabilitation Act and its accompanying regulations were to be construed as the *minimum standard* for the ADA. 42 U.S.C. § 12201 ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.").

By the time Congress enacted the ADA, it had established administrative enforcement structures in Title VI and the Rehabilitation Act that each followed the same pattern. Various federal investigations under those statutes had culminated in

the Department of Justice filing suit in federal court to enforce these statutory provisions. Congress knew that both Title VI and the Rehabilitation Act had been enforced through Department of Justice litigation, and when it enacted the ADA, cross-referencing to Spending Clause remedies—without the federal-funding hook—such remedies necessarily entailed federal enforcement actions, particularly when § 12133 ultimately cascades back to "any other means authorized by law," a phrase that courts have interpreted to permit referral to the Department of Justice for further legal action. *See Cannon*, 441 U.S. at 710–11 (implying a private remedy in part because Congress considered it to be available at the time of enactment); *Brown v. Gen. Svcs. Admin.*, 425 U.S. 820, 828 (1976) ("For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."). The legislative, regulatory, and precedential background of the statutes that Congress incorporated demonstrate that Congress intended to create a system of federal enforcement for Title II of the ADA. Indeed, one of the purposes of the ADA was to ensure that the Federal Government "play[ed] a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

C. The Legislative History of Title II Supports the Attorney General's Authority to File Suit

In considering the legislative history, we are mindful that courts need not examine legislative history if the meaning of the statute is plain, but it may do so,

particularly if a party's interpretation is based on a misreading or misapplication of legislative history. *See Harris v. Garner*, 216 F.3d 970, 976–77 (11th Cir. 2000) (en banc), *cert. denied*, 532 U.S. 1065 (2001). Here, both parties dispute the effect of certain portions of the legislative history surrounding the enactment of the ADA.

The United States cites two committee reports, one from the Senate Committee on Labor and Human Resources, S. Rep. No. 101-116 (1989), and one from the House Committee on Education and Labor, H.R. Rep. No. 101-485 II (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, which, it asserts, demonstrate that Congress intended that the Department of Justice should enforce Title II.

Both reports note that Title II's enforcement provision specifies that the "remedies, procedures, and rights" are those available in § 505 of the Rehabilitation Act. S. Rep. No. 101-116, at 57; H.R. Rep. No. 101-485 II, at 98, 1990 U.S.C.C.A.N. at 381. The Committee reports state (in virtually identical language) that administrative enforcement of § 12133 should track federal enforcement practices under § 504 of the Rehabilitation Act, and the Attorney General "should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area." H.R. Rep. No. 101-485 II, at 98, 1990 U.S.C.C.A.N. at 381; S. Rep. No. 101-116, at 57.

> The Committee envisions that the Department of Justice will 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. Because 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.
>
> The Department of Justice 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, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.

H.R. Rep. No. 101-485 II, at 98, 1990 U.S.C.C.A.N. at 381; S. Rep. No. 101-116, at 57–58.[22]

Florida emphasizes that these reports refer to an earlier version of the bill, and cites another, later report, from the Committee on the Judiciary H.R. Rep. No. 101-485 III, *reprinted in* 1990 U.S.C.C.A.N. 445, that does not discuss federal enforcement actions under Title II. In discussing Title II's enforcement provision, the report from the Committee on the Judiciary stated:

[22] Title II of the ADA and the Rehabilitation Act do not require a private party to exhaust administrative remedies before bringing suit. *See Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1178 (9th Cir. 1999).

> Section 205 incorporates the remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973. As in [T]itle I, the Committee adopted an amendment to delete the term "shall be available" in order to clarify that Rehabilitation Act remedies are the only remedies which [T]itle II provides for violations of [T]itle II. The Rehabilitation Act provides a private right of action, with a full panoply of remedies available, as well as attorney's fees.

H.R. Rep. No. 101-485 III, at 52, 1990 U.S.C.C.A.N. at 475 (footnotes omitted).

The difference between these Committee Reports is not, however, conclusive. First, the report from the Committee on the Judiciary emphasized that Title II extended the coverage of § 504 of the Rehabilitation Act, and that it intended for Title II to "work in the same manner as Section 504." *Id.* at 49–50, 1990 U.S.C.C.A.N. at 472–73. Second, the reference to a "private right of action" included a footnote to *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982), which concluded that the Rehabilitation Act contained an implied private right of action *and* recognized the federal enforcement structure. *Id.* at 978. As we have discussed above, there had been considerable litigation over whether the Rehabilitation Act permitted a private right of action. Thus, references to that private right equally permit the inference that Congress wanted to be clear that Title II did not just track the administrative enforcement structure of the Rehabilitation Act and Title VI, but also authorized a private right of action.

This legislative history is not dispositive—indeed, we are wary of putting much, if any weight on various committee reports when the text of the bill was subsequently amended. More significantly, other courts considering this question have concluded that the Attorney General has the power to enforce Title II in federal court.[23]

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[23] Florida, adopting the district court's arguments, contends that the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. ("CRIPA"), is an express mechanism to protect the rights of institutionalized persons. The district court concluded that "[r]ecognizing the authority the Department seeks in this case would, in effect, allow an end-run around CRIPA's stringent requirements." *C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1290 (S.D. Fla. 2016).

CRIPA requires that the Attorney General have reasonable cause to believe that "any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State" is subjecting persons confined in an institution to "egregious or flagrant conditions" that deprive them of rights, privileges or immunities secured or protected by the Constitution or laws of the Untied States that causes them "grievous harm" and is "pursuant to a pattern or practice" before filing suit. 42 U.S.C. § 1997a(a). But CRIPA is irrelevant in this case. Institutions that are subject to CRIPA must be "owned, operated, or managed by, or provide[] services on behalf of any State or political subdivision of a State," 42 U.S.C. § 1997(1)(A), and include institutions that provide "skilled nursing, intermediate or long-term care, or custodial or residential care." *Id.* (B)(v). Privately owned and operated facilities are *not* subject to CRIPA if either licensing or receipt of payments under Medicaid, Medicare, or Social Security, are the "sole nexus" between the facility and the State. *Id.* (2)(C). A review of the record seems to indicate that the nursing facilities at issue are private facilities that receive payments from Florida through Medicaid. Further, the United States' claims address more than just practices within Florida's institutions.

There is nothing to suggest that CRIPA was intended to be the *only* means of enforcing the rights of institutionalized persons. Congress enacted CRIPA some ten years before the ADA. Presumably Congress was aware that CRIPA existed, and yet it chose to enact the ADA, which reaches far more broadly, and provides protection against unnecessary institutionalization. *See* 42 U.S.C. § 12101; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Obviously Congress can create different types of enforcement schemes for different types of statutory or constitutional violations.

D. The Department of Justice Has Filed Suit to Enforce Title II

We are not the first court to pass upon this issue, and a review of other cases that have considered whether Title II permits the Attorney General to file suit demonstrates that the district court's decision is an outlier.

This Circuit has generally acknowledged the scope of potential federal enforcement under Title II, in *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1175 (11th Cir. 2003). In that case, we concluded that individuals could be liable under the ADA's anti-retaliation provision where the retaliation took place in response to opposition against discrimination prohibited by Title II. *Id.* at 1163. To do so, we explained, would not be inconsistent with the "allowed scope of government enforcement action" because the ADA is not Spending Clause legislation and funding-termination procedures are not applicable to public entities that do not receive federal funding. *Id.* at 1175. We concluded that the ADA and its accompanying regulations did not "indicate" that enforcement by referral to the Department of Justice or the Attorney General for appropriate action could not be taken against individuals. *Ibid.*

In *United States v. City & Cty. of Denver*, 927 F. Supp. 1396, 1399 (D. Colo. 1996), the district court considered whether the Attorney General had authority to file suit under Title II of the ADA. After describing the statutory cascade from

§ 12133, to § 504 of the Rehabilitation Act, to § 602 of Title VI, the district court observed that "[c]ourts have interpreted the words 'by any other means authorized by law' to mean that a funding agency, after finding a violation and determining that voluntary compliance is not forthcoming, could refer a matter to the Department of Justice to enforce the statute's nondiscrimination requirements in court." *Id.* at 1400 (citing *National Black Police Ass'n*, 712 F.2d at 575 & n.33; *Marion Cty.*, 625 F.2d at 612 & n.12). The United States's regulations that implemented Title II were consistent with the administrative procedures under Title VI and the Rehabilitation Act. *Ibid.* The district court concluded that, by investigating, attempting to negotiate with Denver, and following Denver's refusal to enter into an agreement, the United States complied with the procedural requirements for Title II of the ADA (which were consistent with § 602's requirement that no action be taken until the department had advised the noncompliant party of its failure, and attempted to secure compliance through voluntary means). *Ibid.*

In *Smith v. City of Philadelphia*, 345 F. Supp. 2d 482, 484–85 (E.D. Pa. 2004), Smith filed suit alleging that, upon learning that he had AIDS, paramedics refused to assist him, in violation of Title II of the ADA. The United States intervened. *Id.* at 484. The district court ruled that Smith's claims were time barred but concluded that the United States could proceed with its enforcement action because it had a separate and independent base of jurisdiction under Title II and § 504 of the

Rehabilitation Act. *Id.* at 489. The district court's reasoning tracked the reasoning used in *City & Cty. of Denver*. Because the Title II's enforcement provision cascades to § 602, which authorizes the Attorney General to enforce compliance with Title VI by filing suit in federal court, "the Attorney General may also bring suit to enforce other statutes which adhere to the enforcement scheme set forth in Title VI." *Id.* at 490.

Other courts have considered this matter and reached the same conclusion following the same analysis. *See United States v. Harris Cty.*, No. 4:16-cv-2331, 2017 WL 7692396, at *1 (S.D. Tex. Apr. 26, 2017); *United States v. Virginia*, No. 3:12-cv-59-JAG, 2012 WL 13034148, at *2–3 (E.D. Va. June 5, 2012); *United States v. Arkansas*, No. 4:10-cv-00327, 2011 WL 251107, at *3, *8 (E.D. Ark. Jan. 24, 2011) (concluding that the Department of Justice had authority to initiate a civil action to enforce Title II but dismissing the complaint without prejudice because the Department had not sufficiently alleged that it had complied with statutory prerequisites).

Other cases the United States has filed to enforce Title II have not considered the question of standing but were litigated without jurisdictional challenge in the federal courts. *See, e.g.*, *United States v. Gates-Chili Cent. Sch. Dist.*, 198 F. Supp. 3d 228 (W.D.N.Y. 2016) (alleging ADA violations from a school's rule regarding a student's service dog); *United States v. City of Balt.*, 845 F. Supp. 2d 640, 642 n.1

(D. Md. 2012) (DOJ filed suit alleging that the City of Baltimore Zoning Code discriminates against individuals receiving treatment in residential substance abuse provisions in violation of Title II of the ADA); *United States v. N. Ill. Special Recreation Ass'n*, No. 12-c-7613, 2013 WL 1499034 (N.D. Ill. Apr. 11, 2013) (United States filed suit alleging discrimination against individuals with epilepsy in violation of Title II).

When confronted with this issue, courts have routinely concluded that Congress's decision to utilize the same enforcement mechanism for Title II as the Rehabilitation Act, and therefore Title VI, demonstrates that the Attorney General has the authority to act "by any other means authorized by law" to enforce Title II, including initiating a civil action. We agree with this reasoning.

E. Federalism Principles Do Not Alter Our Conclusion

Florida contends that principles of federalism dictate a different result and complains that "the federal government has haled a State into court over questions that go to the heart of its sovereignty: the weighing of competing healthcare policies." Relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), Florida asserts that Congress did not make a clear statement in Title II that it intended to "empower the federal executive to sue the States[.]" Florida argues that we should not presume that Congress intended to authorize such litigation without a clear statement because

federal enforcement actions impose "considerable federalism costs," and such litigation is "coercive."

In *Gregory*, the Supreme Court considered whether a mandatory age-based retirement provision for judges in the Missouri Constitution violated the Age Discrimination in Employment Act ("ADEA"). 501 U.S. at 455. The Court recognized that, under the Supremacy Clause, Congress may legislate in areas usually controlled by states provided that it is within its constitutional authority. *Id.* at 460. But, the Court pointed out, the structure of a State's government and the qualifications it establishes for exercising government authority are fundamental questions of sovereignty, particularly when it comes to identifying constitutional officers. *Ibid.* For Congress to interfere with those issues would seriously disrupt the "usual constitutional balance of federal and state powers." *Ibid.* Therefore, the Court would not read the ADEA to reach state judges *unless* Congress expressly indicated that it should. Because the ADEA identified an exception for "appointees on the policymaking level," the Court decided that was "sufficiently broad" to permit a conclusion that the ADEA did not reach state judges. *Id.* at 467. *Gregory* instructs us that, to alter the usual balance between state and federal interests, Congress must speak clearly.

Congress has done so. Twenty years ago, in *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208 (1998), the Supreme Court considered whether Title II

applied to state prisons. "Assuming, without deciding, that the plain-statement rule" of *Gregory* controlled the application of the ADA to state prisons, the Court concluded that, unlike in *Gregory*, the language of the ADA "plainly cover[ed] state institutions *without* any exception that could cast the coverage of prisons into doubt." *Id.* at 209–10 (citing 42 U.S.C. § 12131(1)(B)).[24]

Our analysis is similarly straightforward. Even assuming the "plain statement rule" applies, Congress expressly intended for Title II to reach states. Title II of the ADA defines "public entities" as "any State or local government," or "any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ." 42 U.S.C. § 12131(1)(A)–(B). Florida has been a state since 1845. Thus, it "fall[s] squarely within the statutory definition of 'public entity[]' . . . ." *Yeskey*, 524 U.S. at 210.

Florida may have valid complaints about this lawsuit, but whether it is amenable to suit by the United States is not one of them. The Supreme Court has consistently recognized that, "[i]n ratifying the Constitution, the States consented to suits brought by other states or by the Federal Government." *Alden v. Maine*, 527

[24] The Supreme Court declined to consider whether the application of the ADA to state prisons was a constitutional exercise of Congress's power under either the Commerce Clause or § 5 of the Fourteenth Amendment because the courts below had not considered the issue. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998). We similarly do not need to reach the question of whether application of the ADA to a state is a constitutional exercise of Congressional power because it is not before us.

U.S. 706, 755 (1999). States do not retain sovereign immunity from suits brought by the federal government. *See West Virginia v. United States*, 479 U.S. 305, 311 n.4 (1987); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 498–99 (5th Cir. 2003) (concluding that the Eleventh Amendment does not bar the United States from suing a state to enforce Title I of the ADA).

To be sure, there are "federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts." *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring). But the Supreme Court struck that balance in *Olmstead*, holding that the requirement that States provide community-based treatment must be tempered by: (1) a determination by the State's treatment professionals that such placement is appropriate; (2) the individuals to receive such treatment do not oppose it; and (3) the placement can be accommodated, considering the state's resources and the needs of other individuals who receive such treatment. *Id.* at 607. The same considerations in *Olmstead* apply to the merits of this case. Florida's federalism concerns do not dictate a different result.

CONCLUSION

When Congress chose to designate the "remedies, procedures, and rights" in § 505 of the Rehabilitation Act, which in turn adopted Title VI, as the enforcement provision for Title II of the ADA, Congress created a system of federal enforcement. The express statutory language in Title II adopts federal statutes that use a remedial structure based on investigation of complaints, compliance reviews, negotiation to achieve voluntary compliance, and ultimately enforcement through "any other means authorized by law" in the event of noncompliance. In the other referenced statutes, the Attorney General may sue. The same is true here.

For the foregoing reasons, we **REVERSE** the district court's judgment and **REMAND** for proceedings consistent with this opinion.

BRANCH, Circuit Judge, dissenting:

Because the United States is not a "person alleging discrimination" under Title II of the Americans with Disabilities Act ("ADA"), Title II does not provide the Attorney General of the United States with a cause of action to enforce its priorities against the State of Florida. Accordingly, I respectfully dissent.

The relevant text of Title II states:

> The remedies, procedures, and rights set forth in section 794a of Title 29 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 (emphasis added). The language of this provision is unambiguous. Title II provides enforcement rights "to any person alleging discrimination." Thus, the question is whether the Attorney General is a "person alleging discrimination" under Title II.

To answer that question, we apply "a 'longstanding interpretive presumption that 'person' does not include the sovereign,' and thus excludes a federal agency." *Return Mail, Inc. v. USPS*, 587 U.S. ____, No. 17-1594, 2019 WL 2412904, at *5 (June 10, 2019) (quoting *Vermont Agency of Natural Resources v. US ex rel. Stevens*, 529 U. S. 765, 780–781 (2000)). In *Return Mail*, the Supreme Court considered whether the United States Postal Service ("USPS"), a federal agency, was a "person" eligible to seek patent review under the America Invents Act

("AIA"). USPS had petitioned for review of Return Mail's patent under two sections of the AIA that allow for post-issuance patent review. *Id.* at *4–5. However, the language of the AIA limited post-issuance review proceedings to "a person who is not the owner of a patent," *id.* (citing 35 U.S.C. §§ 311(a), 321(a)), or when "the person or the person's real party in interest or privy has been sued for infringement." *Id.* (citing AIA § 18(a)(1)(B), 125 Stat. 330). Thus, the direct question presented to the Supreme Court in *Return Mail* was: "whether a federal agency is a 'person' capable of petitioning for post-issuance review under the AIA." *Id.* In concluding that the Government presumptively is *not* a "person" for purposes of federal statutes, the Supreme Court explained:

> This presumption reflects "common usage." *United States v. Mine Workers*, 330 U.S. 258, 275 (1947). It is also an express directive from Congress: The Dictionary Act has since 1947 provided the definition of "person" that courts use "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1; see *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199–200 (1993). The Act provides that the word "person . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." § 1. Notably absent from the list of "person[s]" is the Federal Government. *See Mine Workers*, 330 U.S. at 275 (reasoning that Congress' express inclusion of partnerships and corporations in § 1 implies that Congress did not intend to include the Government). Thus, although the presumption is not a "hard and fast rule of exclusion," *United States v. Cooper Corp.*, 312 U.S. 600, 604–605 (1941), "it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Stevens*, 529 U.S. at 781.

Id. at *6.

Given *Return Mail*'s clear explanation of the presumption in favor of excluding the Federal Government from the definition of "person," I approach the analysis of Title II the same way. As such, I begin with the presumption that "person alleging discrimination," 42 U.S.C. § 12133, does not include the United States. *See Return Mail*, 2019 WL 2412904, at *5. In order to overcome "the presumption that a statutory reference to a 'person' does not include the Government," there must be "some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government" in its definition of "person." *Id.* Nothing in the text of Title II overcomes this presumption. But *Return Mail* states that context matters, too. And so I next examine the enforcement language contained in the other Titles of the ADA.[1]

In Title I of the ADA, the enforcement language provides as follows:

> The powers, remedies, and procedures set forth in . . . this title shall be the powers, remedies, and procedures this subchapter provides **to the Commission, to the Attorney General, or to any person alleging discrimination** on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

[1] The ADA contains three primary subchapters, each referred to as a separate "Title." Each Title "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." *Tennessee v. Lane*, 541 U.S. 509, 516–17 (2004).

42 U.S.C. § 12117(a) (emphasis added). The text of Title I thus explicitly conveys the "powers, remedies, and procedures . . . to the Attorney General." *Id.* Title II echoes the "any person alleging discrimination" language contained in Title I, but the reference to "the Attorney General" is conspicuously missing from Title II. *Compare* 42 U.S.C. § 12133, *with* 42 U.S.C. § 12117(a).

Title III of the ADA also contains language bestowing enforcement authority on the Attorney General:

> If the Attorney General has reasonable cause to believe that—(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or (ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance, **the Attorney General may commence a civil action in any appropriate United States district court**.

42 U.S.C. § 12188(b)(B) (emphasis added). The text of Title III of the ADA is even more explicit than the text of Title I and clearly provides the Attorney General with the authority to bring a civil suit in federal court. Title II, by contrast, is entirely devoid of any reference to "the Attorney General" or the power to "commence a civil action." *Compare* 42 U.S.C. § 12133 *with* 42 U.S.C. § 12188(b)(B).

The difference in language across the ADA's three titles is noteworthy. It is well settled that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). If Congress had intended to grant a civil cause of action to the Attorney General in Title II, "it presumably would have done so expressly as it did in" Titles I and III. *See Russello*, 464 U.S. at 23.

Yet the majority essentially reads Title III's language (that "the Attorney General may commence a civil action in any appropriate United States district court") into Title II. Although the majority readily admits that, "at first glance, Title II's enforcement provision is not as specific as those in Titles I and III," it finds these differences inconsequential. The majority reasons that the differences between Title II and the other subchapters of the ADA "should not dictate a conclusion that, absent greater specificity, we should simply assume that a single word in § 12133 ends all inquiry." As discussed above, the inquiry does, in fact, turn on a single word. Accordingly, it is clear that the Attorney General is not a "person alleging discrimination" under Title II.

Notably, however, the United States does not argue that the Attorney General is a "person alleging discrimination." The United States instead argues that "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." The majority agrees with the United States: "Focusing solely on the word 'person' and the difference in the language of enforcement provisions within the ADA ignores" the presumption that "Congress legislated in light of existing remedial structures." But "[f]ocusing solely on the word 'person'" is precisely where this case should begin and end. Because the Attorney General of the United States—on behalf of the United States itself and *not* on behalf of any individuals served by the State of Florida—filed suit in this case, it is the United States that must have a cause of action to enforce Title II. And that determination necessarily depends on whether the Attorney General is a "person alleging discrimination" under the text of Title II. Because he is not such a person, the Attorney General has none of the "rights, procedures, and remedies" available under the Rehabilitation Act and Title VI. Accordingly, in this case, it is legally irrelevant what those "rights, procedures, and remedies" are because he simply does not possess those rights with respect to Title II. I do not agree that the multitude of cross-references to other federal regulatory schemes somehow provides a cause of action that does not otherwise exist in the text of Title II.

The Attorney General also insists that "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." But we cannot expand the definition of "person" just because such an interpretation would "further the

purpose of the" statute. *Return Mail*, 2019 WL 2412904, at *10 n.11. "Statutes rarely embrace every possible measure that would further their general aims, and, absent other contextual indicators of Congress' intent to include the Government in a statutory provision referring to a 'person,' the mere furtherance of the statute's broad purpose does not overcome the presumption in this case." *Id.* *See Cooper*, 312 U.S. at 605 ("[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made"). And Title II remains enforceable—even if the Attorney General does not have enforcement authority—because, as the Attorney General acknowledges, a "person alleging discrimination" may still enforce Title II through a private right of action.

Both the United States and the majority make much of the fact that "one of the purposes of the ADA was to ensure that the Federal Government 'play[ed] a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities.'" But, even if we find—as I do—that Title II does not allow the Attorney General to bring suit, the federal government will continue to "play a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3). Title I and Title III of the ADA clearly and explicitly confer enforcement authority on the Attorney General. *See* 42 U.S.C. §§ 12117(a), 12188(b)(B). Accordingly, a holding that the Attorney General cannot sue the States to enforce Title II does not affect, in any

way, the Attorney General's ability to enforce the other Titles of the ADA. Thus, the ADA's broad statutory purpose rationally coexists with the holding that the Attorney General cannot file federal lawsuits to enforce Title II.

Because the text of Title II is determinative, and because that text does not provide the Attorney General with a cause of action to enforce Title II against the State of Florida, I would affirm the order of the district court. I respectfully dissent.

Exhibit B

In the
United States Court of Appeals
For the Eleventh Circuit

No. 17-13595

UNITED STATES OF AMERICA,

Interested Party-Appellant,

versus

SECRETARY FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION,
in her official capacity,
STATE SURGEON GENERAL,
in his official capacity as the State Surgeon General and Secretary of the Florida Department of Health,
KRISTINA WIGGINS,
in her official capacity as Deputy Secretary of the Florida Department of Health and Director of Children's Medical Services,
STATE SURGEON GENERAL JOHN ARMSTRONG, MD,
DEPUTY SECRETARY DR. CELESTE PHILIP, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:12-cv-60460-WJZ

Before WILLIAM PRYOR, Chief Judge, WILSON, JORDAN, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, and BRASHER, Circuit Judges.*

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en banc, it is ORDERED that this case will not be reheard en banc.

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* Judge Robin Rosenbaum recused herself and did not participate in the en banc poll.

JILL PRYOR, Circuit Judge, respecting the denial of rehearing en banc:

I was a member of the panel majority. We held that the Attorney General of the United States may bring a lawsuit against the State of Florida to enforce Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131–65. Judge Newsom dissents from the denial of rehearing en banc because, in his view, nothing in the ADA authorized the Attorney General to sue Florida in this case. Judge Branch dissented from the panel majority opinion on one of the two grounds Judge Newsom raises today. I write to respond to my dissenting colleagues' arguments that the panel erred in interpreting the statutory scheme.

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The United States maintains that Florida administers its Medicaid program in a way that forces children with severe medical conditions into nursing homes to receive medical services necessary for their survival. As a result, these medically-fragile children often are placed in institutions hours away from their families, where they allegedly "spend most of their days languishing in bed or in their wheelchairs, with no one interacting with them and nothing to do." 12-cv-60460 Doc. 509 at 3.[1]

[1] When the Attorney General initially filed this action, it was assigned case number 0:13-cv-61576. The case later was consolidated with a separate civil action filed by several medically-fragile children, *A.R. v. Dudek*, and assigned case number 0:12-cv-60460. I use "13-cv-61576 Doc." to refer to the district

The United States Attorney General filed this lawsuit against the State of Florida under Title II of the ADA to vindicate the medically-fragile children's rights. The Attorney General claimed that Florida discriminated based on the children's disabilities because, although it would be possible for the children to receive the services they need while living with their families or guardians, Florida administered and funded its Medicaid program in such a way that the children can receive the services only in institutionalized settings. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999) (holding that a state engages in disability discrimination if it institutionalizes individuals with disabilities when community-based placement could be reasonably accommodated, accounting for the resources available to the state and the needs of others with disabilities.).

The question in this appeal is whether Title II of the ADA authorized the Attorney General to bring this lawsuit against the State of Florida. Title II generally prohibits state governments and agencies from discriminating based on disability. *See* 42 U.S.C. §§ 12131(1), 12132. Its enforcement provision states that "the remedies, procedures, and rights . . . provide[d] to any person alleging discrimination on the basis of disability" under § 12132 shall be the "remedies, procedures, and rights set forth in section 794a of Title 29." *Id.* § 12133.

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court's docket entries in the original case and "12-cv-60460 Doc." to refer to the district court's docket entries in the consolidated case.

Given the enforcement provision's incorporation by reference, we can answer the central 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 not one, but, as it turns out, two earlier civil rights statutes. In its opinion, the panel majority painstakingly followed this chain of statutory references. After careful review of Title II's text, the enforcement schemes incorporated by reference, and the entire statutory scheme in context, the panel majority concluded that suit by the Attorney General was indeed a remedy, procedure, or right available to a person alleging discrimination under Title II.

Title II's enforcement provision incorporates by reference the remedies, procedures, and rights available to a person alleging discrimination under section 794a of Title 29, which is the Rehabilitation Act—an earlier civil rights statute that prohibits disability discrimination in connection with "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). But when we look for the remedies, procedures, and rights available to a person alleging discrimination under the Rehabilitation Act, we find a reference to another statute, this one incorporating the remedies, procedures, and rights available under Title VI of the Civil Rights Act of 1964. *See id.* § 794a(a)(2). Title VI of the Civil Rights Act, an even earlier civil rights statute, similarly prohibits discrimination by or in "any program or activity receiving Federal financial assistance."

42 U.S.C. § 2000d. Under Title VI, though, the targeted discrimination is that based on race, color, or national origin. *Id.*

As the panel majority explained, the remedies, procedures, and rights available to a person alleging discrimination under Title VI of the Civil Rights Act include pursuing federal administrative procedures that may culminate in a lawsuit by the Attorney General to vindicate the protected rights. The panel majority determined that the remedies, procedures, and rights available to a person alleging discrimination under Title II likewise include a robust administrative scheme that may culminate in suit by the Attorney General on the person's behalf. The panel majority thus held that the Attorney General could sue Florida, on behalf of the medically-fragile children, under Title II for disability discrimination. *See United States v. Florida*, 938 F.3d 1221, 1250 (11th Cir. 2019).

In his dissental,[2] Judge Newsom advances an interpretation of Title II that would disallow suits by the Attorney General against states or state agencies to enforce rights of people with disabilities, despite the fact that such suits have long been used to enforce the Rehabilitation Act, Title VI, and Title II itself. Judge Newsom argues that the panel majority's holding was wrong because (1) the Attorney General cannot sue because he is not a "person" for purposes of the ADA and thus is afforded no remedies, procedures, or

[2] I use the term "dissental" to refer to Judge Newsom's dissent from the denial of rehearing en banc to distinguish it from Judge Branch's dissent from the panel majority's opinion.

rights under Title II's enforcement provision, and (2) the remedies, procedures, and rights available to the medically-fragile children under Title II do not include the Attorney General's suing Florida on their behalf because the Attorney General may sue a state or state agency to enforce Title II only when the state or state agency receives federal funding and agrees as a condition of the funding to refrain from engaging in disability discrimination. By permitting the Attorney General to sue states when Congress has not authorized such suits, he says, the panel opinion offends principles of federalism. As I explain below, none of these arguments is persuasive.

The dissental's first argument—that the Attorney General does not qualify as a "person" for purposes of the ADA—either takes aim at a strawman or rests on a misunderstanding of the panel opinion and the Attorney General's role in this lawsuit. The panel never suggested, much less held, that the Attorney General was the "person" referred to in § 12133. Rather, the panel concluded that the person referred to in § 12133 is the individual who claims to have suffered discrimination. Under Title II and its supporting regulations, this individual is afforded a panoply of remedies, procedures, and rights, including the right to file an administrative complaint against any public entity that engages in discrimination—a process that may culminate in suit by the Attorney General against the public entity on the individual's behalf. Because the Attorney General brings this lawsuit on behalf of a person alleging discrimination, the dissental's (and the dissent's) arguments about why the

Attorney General does not qualify as a "person" under § 12133 miss the mark entirely.

The dissental's second argument—that the remedies, procedures, and rights available to a disabled person do not include enforcement via suit on her behalf by the Attorney General against a public entity that receives no federal funding—warrants closer attention. But this argument, too, is unavailing. The statutory text, when read in context, permits the Attorney General to sue to enforce Title II's prohibition on disability discrimination by public entities, regardless of whether the public entity receives federal funding and agrees as a condition of that funding not to engage in disability discrimination. Indeed, unlike its predecessor statutes, which contained an express federal-funding limitation, Title II contains no reference to federal funding, and, as Judge Newsom concedes, its implied private right of action is not limited to federally-funded defendants.

The dissental argues lastly that the panel opinion offends principles of federalism. This argument rests entirely on the dissental's assumption that Congress did not authorize the Attorney General to sue states or state agencies for discrimination when the discrimination occurred in connection with a program or activity that did not receive federal funding. Because Congress did in fact authorize the Attorney General to sue any public entity for discrimination in violation of Title II, there is no federalism problem here.

Before addressing the dissental's arguments, I begin by providing an overview of the ADA and Title II. I then respond to the dissental's arguments in turn.

I. Overview of Title II of the ADA

Congress enacted the ADA "after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004). Congress etched into the ADA's text the findings from its thorough investigation. *See* 42 U.S.C. § 12101(a).

The statutory text observes that "historically, society tended to isolate and segregate individuals with disabilities." *Id.* § 12101(a)(2). Despite the passage of legislation like the Rehabilitation Act, which effected "some improvements" in the treatment of individuals with disabilities, Congress found that disability discrimination "continue[d] to be a serious and pervasive social problem." *Id.* Discrimination against individuals with disabilities "persist[ed]" in "critical areas" including "housing . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* § 12101(a)(3). Individuals with disabilities were subjected not only to "outright intentional exclusion" but also to "segregation" and "relegation to lesser services, programs, activities, [and] benefits." *Id.* § 12101(a)(5). Individuals with disabilities "often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(4).

After setting out these findings about the scope of the disability-discrimination problem, Congress expressed its intent in enacting the ADA: to combat the problem by establishing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1). The ADA would prevent such discrimination by creating "clear, strong, consistent, [and] enforceable standards" to "address the major areas of discrimination faced day-to-day by people with disabilities." *Id.* § 12101(b)(2), (4). Lest any doubt remain, the text spelled out the ADA's central purpose: "to ensure that the ***Federal Government plays a central role in enforcing*** the standards established" under ***the ADA "on behalf of individuals with disabilities***." *Id.* § 12101(b)(3) (emphasis added).

Consistent with its broad remedial purpose, the ADA's three titles bar different types of entities from engaging in disability discrimination: Title I applies to employers, Title II applies to public entities, and Title III applies to places of public accommodation. As I explain below in section III-A below, although Congress authorized the Attorney General to bring a suit to enforce each title, it structured each title's enforcement provision—the provision that authorizes the Attorney General to sue—in a different way. *See id.* §§ 12117(a), 12133, 12188(b).

I turn now to Title II,[3] as this case concerns alleged discrimination by a public entity. Under Title II, "no 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." *Id.* § 12132. A "public entity" includes "any State or local government" as well as "any department [or] agency . . . of a State . . . or local government." *Id.* § 12131(1)(A), (B).

Importantly, its passage of Title II was not the first time Congress acted to prohibit public entities from engaging in disability discrimination. The Rehabilitation Act already barred disability discrimination by programs or activities operated by state or local governments. *See* 29 U.S.C. § 794(a). But, by its express terms, the Rehabilitation Act applies only to programs or activities that "receiv[e] [f]ederal financial assistance." *Id.* By contrast, Title II of the ADA extended the scope of protection afforded to individuals with disabilities by prohibiting ***any*** program run by a public entity from engaging in disability discrimination—it contains no reference to federal financial assistance or funding. *See* 42 U.S.C. §§ 12131(a); 12132; *see Shotz v. City of Plantation*, 344 F.3d 1161, 1174 (11th

[3] Title II is divided into two subchapters: subchapter A sets forth the general provisions that prohibit discrimination by public entities, and subchapter B pertains to discrimination in public transportation specifically. *See* ADA, Pub. L. No. 101-336 § 1, 104 Stat. 327, 327–28 (1990). Because subchapter B is not at issue in this case, I use "Title II" to refer to subchapter A.

Cir. 2003) ("The ADA makes *any* public entity liable for prohibited acts of discrimination, regardless of funding source.").

Section 12133 lays out how Title II's broad prohibition barring any public entity from engaging in disability discrimination is enforced. As I explained above, § 12133 provides that the "remedies, procedures, and rights" available to a person alleging disability discrimination under Title II are the "remedies, procedures, and rights" of the Rehabilitation Act, which in turn incorporates the "remedies, procedures, and rights" set out in Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 12133; *see* 29 U.S.C. § 794a(a)(2). Under the Rehabilitation Act and Title VI, when a state or local public entity receiving federal funding engages in disability discrimination or race discrimination, respectively, the federal government may enforce compliance with the statute by terminating federal funding to the program or activity or taking "any other means authorized by law." 42 U.S.C. § 2000d-1; *see* 29 U.S.C. § 794a(a)(2). There is no dispute that, under these statutes, the "other means authorized by law" include the Attorney General's filing of an enforcement lawsuit against the public entity.

In another noteworthy provision of Title II, Congress addressed the creation of a regulatory scheme to enforce the statute's mandate. Section 12134 directs the Attorney General to promulgate regulations to implement § 12132's prohibition on discrimination by public entities. *Id.* § 12134(a). Congress instructed the Attorney General to adopt regulations "consistent . . . with the coordination regulations" under the Rehabilitation Act. *Id.* § 12134(b).

With this provision, Congress directed the Attorney General to create an administrative scheme through which individuals could file with federal agencies complaints alleging that a state or local public entity had engaged in discrimination, and the administrative proceedings could culminate in a lawsuit brought by the Attorney General against the public entity. We know this by once again following a series of references to enforcement schemes for earlier civil rights statutes. Section 12134 expressly refers to the Rehabilitation Act's coordination regulations, which already existed when Congress enacted the ADA. These regulations direct each federal agency to establish "a system for the enforcement of [the Rehabilitation Act's prohibition on disability discrimination] . . . with respect to the programs and activities to which it provides assistance." 28 C.F.R. § 41.5(a). According to the coordination regulations, each agency's enforcement system must incorporate the administrative scheme used to enforce Title VI of the Civil Rights Act, including "[t]he enforcement and hearing procedures." *Id.* § 41.5(a)(1). Under Title VI's administrative scheme, an individual alleging discrimination by a recipient of federal financial assistance files a complaint with a federal agency, which then investigates the complaint. *See id.* § 42.107(b)–(c). If the investigation reveals that discrimination occurred, the federal agency attempts to negotiate a resolution with the recipient of the federal financial assistance. *Id.* § 42.107(d)(1). If the agency is unable to negotiate a resolution, the Attorney General then may sue to enforce the prohibition on discrimination. *See id.* § 42.108(a).

Since Congress enacted the ADA more than 30 years ago, the federal government has routinely enforced Title II's prohibition on disability discrimination by state and local public entities. Federal agencies have frequently investigated and attempted to resolve through informal means complaints that state and local governments violated Title II. And the Attorney General has filed dozens of lawsuits against public entities in federal court to vindicate the rights of individuals with disabilities.[4]

II. The Dissental's Argument that the Attorney General Is Not a "Person" Is Irrelevant to the Question Whether the Attorney General Was Authorized to Sue Florida.

With this background about the relevant statutory scheme in mind, we turn to Judge Newsom's first argument. Echoing Judge Branch's panel dissent, Judge Newsom argues that the panel erred in holding that the Attorney General could sue under § 12133 because the Attorney General does not qualify as a "person alleging discrimination" under the ADA. 42 U.S.C. § 12133.

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[4] *See, e.g.*, U.S. Dep't of Justice, ADA Enforcement, Cases 2006-Present, Title II, https://www.ada.gov/enforce_current.htm#TitleII (last visited Dec. 16, 2021); U.S. Dep't of Justice, ADA Enforcement, Cases 1992-2005, Title II, https://www.ada.gov/enforce_archive.htm#TitleII (last visited Dec. 16, 2021); U.S. Dep't of Justice, *Olmstead* Enforcement, https://www.ada.gov/olmstead/olmstead_enforcement.htm (last visited Dec. 16, 2021). Together these websites list the instances when the Attorney General has secured settlements from public entities or, when unable to negotiate resolutions, brought enforcement actions against them.

Judge Newsom's position rests on the assumption that in this case the Attorney General sued as a "person alleging discrimination" who is afforded remedies, procedures, and rights under Title II of the ADA. But this assumption is mistaken. When the Attorney General sues under Title II, the "person alleging discrimination" is the individual with a disability. One of the remedies, procedures, and rights afforded to this individual is that the Attorney General may sue to vindicate the individual's rights and to enforce federal law.

The record in this case confirms that the persons alleging discrimination were the medically-fragile children who allegedly were unnecessarily forced into institutions to receive necessary medical services. According to the complaint, the Attorney General brought the lawsuit "to enforce the rights of children" whom Florida had "discriminate[d] against" by subjecting them to "prolonged and unnecessary institutionalization." 13-cv-61576 Doc. 1 at 2. The remedies the Attorney General sought were to benefit the children. To that end, the Attorney General requested injunctive relief to end Florida's alleged practice of unnecessarily institutionalizing the children and monetary damages to compensate the children for injuries they allegedly suffered because of Florida's discriminatory conduct.

Throughout this litigation, the Attorney General has consistently maintained the position that the persons alleging discrimination are the children, not himself. As far I can tell, he has never taken the position in this case that he is the person alleging

discrimination under § 12133. In fact, he has expressly disavowed making such a claim. *See* Appellant's Br. at 25 (explaining that when the Attorney General files suit he is not the person alleging discrimination); Response to Petition for Reh'g En Banc at 2 (stating that the Attorney General "explicitly *disclaimed* the position that the Attorney General is a person alleging discrimination under Title II's enforcement provision" (emphasis in original) (internal quotation marks omitted)).[5] The record is unambiguous: the Attorney General sued under § 12133 on behalf of the medically-fragile

[5] The dissental asserts the Attorney General has in fact taken the position that he is the person referred to in the statute. As support, the dissental cites to the Attorney General's reply brief stating that when the Attorney General "files a Title II lawsuit, he proceeds on behalf of the United States—not as the attorney for any individual complainant." Reply Br. at 5. The dissental takes this statement out of context.

In its appellee's brief, the State of Florida argued that the Attorney General's filing of a lawsuit under the ADA is not a remedy, procedure, or right available to a person alleging discrimination. Florida contended that an individual with a disability had no "private right" to require the Attorney General to bring an enforcement action on his behalf because a federal agency "cannot be compelled to act on a complaint" filed by an individual. Appellee's Br. at 23–24. In reply, the Attorney General agreed that a victim of discrimination had "no 'right' *to compel* the Attorney General to file a lawsuit" on the victim's behalf because the Attorney General did not proceed "as the attorney for [the] individual complainant." Reply Br. at 4–5. Instead, the remedies, procedures, and rights available to a person alleging discrimination "include[d] a longstanding federal administrative enforcement scheme" that, *at the discretion of the Attorney General*, may culminate in the filing of a lawsuit by the United States government against a public entity to vindicate the individual complainant's rights. *Id.* at 5.

children who were the victims of disability discrimination—the persons alleging discrimination who may enforce Title II through the relevant remedies, procedures, and rights. So, the question of whether the Attorney General may qualify as a "person" under Title II is simply not raised by this case.

Setting this fact aside, the dissental argues at length that the Supreme Court's decision in *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019), forecloses the idea that the Attorney General can himself qualify as a "person" alleging discrimination. *Return Mail* addressed whether the United States Postal Service ("USPS") may sue on *its own behalf*, to protect *its own rights*. Nowhere did the case address when a government official, such as the Attorney General, may sue on behalf of another person to enforce a federal statute protecting that person's rights.

In *Return Mail*, the Supreme Court confronted the question whether USPS could challenge an issued patent before the U.S. Patent and Trademark Office. *Id.* at 1858–59. After Return Mail sued USPS for infringing Return Mail's patented mail-sorting system, USPS filed a petition with the United States Patent and Trademark Office for review and cancellation of Return Mail's patent. *Id.* at 1861. In filing the application, USPS sought relief only for itself and not for any other person or party.

The Supreme Court considered whether the relevant federal statute, which permits a "person" to petition for review and cancellation of a patent, authorized USPS to bring a petition for review and cancellation. *See id.* (quoting 35 U.S.C. § 311(a)). As an agency

of the federal government, the Supreme Court held, USPS was not a "person" under the statute and could not bring a petition for review. *Id.* at 1867. The Court based its opinion on a long line of cases establishing a presumption that the sovereign is not a person. *See id.* at 1862–63.

Our panel majority opinion correctly concluded that *Return Mail* was distinguishable. The opinion reasoned that Title II's "complex" enforcement provision "differ[ed] significantly" from the simpler statutory scheme that the Court was addressing in *Return Mail*. *See Florida*, 938 F.3d at 1227 n.5. Unlike the statute in *Return Mail*, which permitted only "a person" to petition for review and cancellation of a patent, Title II's enforcement provision "provides" to "person[s] alleging discrimination" the "remedies, procedures, and rights" of the Rehabilitation Act and Title VI. 42 U.S.C. § 12133. Under these incorporated predecessor statutes, at least, it is clear that the Attorney General can sue on behalf of the aggrieved person, rather than as the person. *See Florida*, 938 F.3d at 1226–38.

In this case, the persons alleging discrimination under Title II and who are afforded "remedies, procedures, and rights" are the children who have been subjected to prolonged and unnecessary institutionalization. Because the Attorney General did not bring this lawsuit on his own behalf as the "person" described in § 12133, the panel majority opinion did not treat the Attorney General or federal government as a "person," and this case does not implicate the presumption addressed in *Return Mail*.

III. The Dissental's Argument that the Attorney General May Sue to Enforce Title II Only When a Public Entity Receives Federal Funding Cannot Be Reconciled with the Statutory Text and Conflicts with Supreme Court Precedent.

The panel majority correctly concluded that under Title II the Attorney General is authorized to sue any public entity, regardless of whether it receives federal funding. There is no dispute in this case that Title II's enforcement provision incorporates by reference the remedies, procedures, and rights available to a person alleging discrimination under the Rehabilitation Act and Title VI of the Civil Rights Act. There is also no dispute that the remedies, procedures, and rights available under those earlier statutes include that the victim of discrimination may file an administrative complaint that may culminate in the filing of an enforcement action by the Attorney General on the victim's behalf. *See, e.g., United States v. Bd. of Trs. for Univ. of Ala.*, 908 F.2d 740, 742 (11th Cir. 1990) (suit brought by United States against state university to enforce Rehabilitation Act on behalf of individuals alleging discrimination by the university); *United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 608–09 (5th Cir. 1980) (suit brought by United States against school district to enforce Title VI on behalf of individuals alleging discrimination by the school district). Because the Attorney General had the authority to enforce the Rehabilitation Act and Title VI of the Civil Rights Act by bringing civil enforcement actions, the panel majority correctly concluded that Title II's

enforcement provision similarly authorized the Attorney General to bring civil suits to vindicate the rights that Title II protects—freedom from disability discrimination by state or local public entities. *See Florida*, 938 F.3d at 1250.

Judge Newsom argues that the Attorney General's authority to sue a public entity to enforce the Rehabilitation Act or Title VI of the Civil Rights Act arises from the fact that the public entity agreed as a condition of receiving federal funding not to engage in discrimination. So, he says, the Attorney General's authority to sue to enforce Title II must be similarly limited. In Judge Newsom's view, the Attorney General can sue a public entity only when it receives federal funding and expressly agrees as a condition of the funding not to engage in disability discrimination.

This argument has some appeal. Ultimately, though, it too is flawed. The dissental adopts an interpretation that reads Title II's enforcement provision in isolation instead of reading the statutory text in context. Moreover, the dissental's interpretation would lead unavoidably to a result the Supreme Court has rejected: that an individual would have an implied private right of action under Title II to sue a public entity that receives no federal funding, yet the federal government would have no corresponding enforcement authority.

A. The Dissental's Interpretation Cannot Be Reconciled with the Statutory Text When Read in Context.

Judge Newsom says his conclusion that the Attorney General may sue to enforce Title II only when a public entity agrees as a condition of federal funding not to engage in disability discrimination is consistent with the relevant statutory text. But his interpretation runs afoul of basic principles of statutory construction because it ignores statutory context.

The question of whether the Attorney General may sue to enforce Title II is a question of statutory interpretation. When we interpret a statute, we must begin "with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). But "[s]tatutory language has meaning only in context." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005); *see Wachovia Bank, N.A. v. United States*, 455 F.3d 1261, 1267 (11th Cir. 2006) ("[C]ontext is king."). In interpreting a statute, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (internal quotation marks omitted); *see Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

Here, the statutory text, when read in context, reflects that Congress intended to authorize the Attorney General to bring a lawsuit to enforce Title II against any public entity, regardless of whether it obtained federal funding. In Title II, by expressly importing the remedies, procedures, and rights available under the Rehabilitation Act and Title VI of the Civil Rights Act, Congress ratified and incorporated into Title II administrative procedures that may culminate in an enforcement action by the Attorney General. Unlike the earlier statutes, which are expressly limited to addressing discrimination by public entities that receive federal funding, however, Title II regulates against all public entities, with no mention of federal funding. Thus, none of Title II's remedies, procedures and rights—of which suit by the United States government is one—are so limited.

"Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs." *Lane*, 541 U.S. at 524. This pattern of disability discrimination persisted despite Congress's efforts to address it. *See id.* at 525–26. The earlier legislative efforts included the Rehabilitation Act, which prohibited disability discrimination by state and local governments. But because Congress enacted the Rehabilitation Act pursuant to its Spending Clause power, the Rehabilitation Act's prohibition was limited to state and local governments that operated a program or activity receiving federal financial assistance. *See* 29 U.S.C. § 794(a). The limited reach of the Rehabilitation Act's prohibition on discrimination by state and local government

rendered it "inadequate to address the pervasive problems of discrimination that people with disabilities [were] facing." *Lane*, 541 U.S. at 526 (internal quotation marks omitted).

Congress adopted Title II to remedy this inadequacy by extending the prohibition on disability discrimination to reach any program or activity of a state or local government, not merely those that receive federal funding. This is no novel insight by the panel majority. Our court recognized nearly two decades ago that "an integral purpose of [Title] II" was to make the Rehabilitation Act's prohibition on discrimination applicable to "all programs, activities, and services provided or made available by state and local governments . . . , *regardless of whether or not such entities receive Federal financial assistance*." *Shotz*, 344 F.3d at 1174 (emphasis added) (internal quotation marks omitted).

The text of Title II supports this understanding. It states that "no qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination by ***any*** [public] entity." 42 U.S.C. § 12132 (emphasis added). Title II broadly defines a public entity to include "***any*** State or local government," with no requirement that the entity receive federal funding. *Id.* § 12131(1)(A) (emphasis added). Because of this broad language, Judge Newsom must concede that Title II permits an individual to sue any public entity for disability discrimination, regardless of whether it receives federal financial assistance, yet his interpretation imposes an atextual limitation on the other avenue of relief under the statute.

Both textual and contextual clues reveal that Title II was Congress's response to the shortcomings of the Rehabilitation Act, which prohibited public entities from engaging in disability discrimination only to the extent they received federal funding. Title II was meant to fill the gap by expanding the prohibition on disability discrimination to all state governmental entities, regardless of whether the state program or activity said to be discriminatory receives federal funding. The dissental's interpretation of § 12133 fails because it carries forward into Title II the very limitations of the Rehabilitation Act that Congress intended Title II to remedy.

The dissental magnifies its error by ignoring § 12134. Section 12134 of Title II instructs the Attorney General to promulgate regulations to create an administrative enforcement framework, directing that the regulations must be "consistent" with the regulations promulgated under the Rehabilitation Act (and, by incorporation, Title VI of the Civil Rights Act). *Id.* § 12134(b). As I explained above, the regulations promulgated under the Rehabilitation Act and Title VI of the Civil Rights Act create a robust administrative process in which federal agencies investigate and attempt to resolve, through informal means, claims alleging disability discrimination by public entities and, if the investigating agency is unable to resolve the claim, the Attorney General may sue the public entity. *See* 28 C.F.R. §§ 41.5(a)(1); 42.107(b)–(d); 42.108.

I cannot square the dissental's interpretation, which leaves the Attorney General without any authority to enforce Title II against public entities that receive no federal funding, with

Congress's direction in § 12134 that Title II's prohibition on discrimination should be enforced through a robust administrative scheme. Under the dissental's interpretation, upon receiving a complaint that a non-federally-funded public entity has discriminated against a person with a disability, a federal agency pours resources into investigating the complaint and attempting to reach an informal settlement. But if that process ultimately proves unsuccessful, the federal government must give up—because it may not sue the public entity to enforce the law. Without any enforcement teeth, such a regulatory process would be utterly ineffectual.

Lastly, the dissental's narrow interpretation of the Attorney General's enforcement authority conflicts with Congress's express legislative findings about the ADA's purpose. By leaving the federal government with no enforcement power when unlawful disability discrimination is perpetrated by a public entity that receives no federal funding, the dissental's interpretation undermines Congress's intention for the ADA to serve as "comprehensive" legislation to address the continuing problem of disability discrimination, which persisted across all dimensions of a disabled person's life, including "access to public services." 42 U.S.C. § 12101(a)(3), (b)(1). This interpretation also undermines Congress's expressed intent for the ADA to set forth "consistent" standards prohibiting the disability discrimination and to give the federal government "a central role"

in enforcing the prohibition on disability discrimination. *Id.* § 12101(b)(2)–(3).[6]

The dissental's interpretation effectively treats the ADA, like the earlier Rehabilitation Act, as a Spending Clause statute in which Congress regulated state and local governments only where they receive federal funding. As we previously explained in *Shotz*, this interpretation makes little sense. The types of conduct that constitute discrimination under the Rehabilitation Act and Title II are so similar that if Congress had intended for Title II's provisions to apply only to federal funds recipients, "it would have been far easier to amend the Rehabilitation Act to account for the minor differences between it and [Title] II of the ADA than to insert an otherwise unnecessary [title] in the ADA itself." *Shotz*, 344 F.3d at 1174. Rather, in enacting the ADA, Congress expressly "invoke[d] the

[6] I pause to address my reliance on § 12101. Our court has warned against adopting an interpretation of a statute that relies solely on a statement of legislative purpose, saying "it is hornbook abuse of the whole-text canon to argue that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1194–95 (11th Cir. 2019) (internal quotation marks omitted). But my argument here is different. The text of Title II itself tells us that Congress intended to extend the prohibition against disability discrimination to all public entities by eliminating the distinction among public entities based on their receipt of federal funding. I look to the statements of purpose in § 12101 only for additional support. The Supreme Court has endorsed this approach in the context of this very statutory scheme. *See Olmstead*, 527 U.S. at 599–600 (looking to substantive provisions in Title II as well as the findings in § 12101 when construing the term "discrimination" in § 12132).

sweep of [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce" so that it could "address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

The dissental fails to grapple with these problems in its interpretation. Instead, it attacks the panel majority's reasoning by pointing to differences between the enforcement provision in Title II of the ADA and the enforcement provisions in Titles I and III. It says that because Titles I and III expressly authorize the Attorney General to sue, the absence of a similar provision in Title II must mean that Congress did not intend for the Attorney General to be able to sue under Title II. But the dissental overlooks an important piece of the puzzle: with each title of the ADA, Congress was legislating upon a different existing statutory framework. Thus, the different language Congress used in the enforcement provisions of each title merely reflects the different approaches that Congress took to incorporate existing law; it does not reflect different remedies. Judge Newsom never confronts this nuance.

I begin with Title I, which concerns employment claims. *See* 42 U.S.C. § 12112(a). Title I's enforcement provision states, "[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." *Id.* § 12117(a). Although this provision bears some

resemblance to Title II's enforcement provision, there are two important differences. First, Title II's enforcement provision speaks to the "remedies, procedures, and rights" available, *id.* § 12133, whereas Title I addresses "powers, remedies, and procedures," *id.* § 12117(a). Second, the relevant actors are treated differently in the two statutes. Title II's enforcement provision incorporates the parts of the Rehabilitation Act and Title VI that set forth the remedies, procedures, and rights of a "person alleging discrimination," *id.* § 12133, whereas Title I's enforcement provision incorporates portions of Title VII of the Civil Rights Act of 1964 that set forth the powers, remedies, and procedures provided to the EEOC, the Attorney General, or a person alleging discrimination, *id.* § 12117(a).

These two differences indicate that sections 12133 and 12117 serve overlapping, but not identical, purposes. Although both provisions incorporate other statutes setting out the remedies available to a person alleging discrimination, § 12117 also incorporates provisions from Title VII addressing how power to enforce Title VII is shared between the EEOC and the Attorney General. As the Attorney General explains, "[b]ecause the point of [§] 12117(a) was to make clear that the same division of authority among the various actors under the five different sections of Title VII [of the Civil Rights Act] 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." Appellant's Br. at 28-29. No similar reference to the Attorney General (or the EEOC) was needed in

Title II because the pre-existing statutes that Congress was incorporating there had simpler enforcement schemes that did not involve the sharing of "powers," 42 U.S.C. § 12117(a), between the Attorney General and the EEOC.

Judge Newsom argues that the differences between Title I and Title II support his position because Title I's enforcement provision shows that Congress knew how to expressly reference the Attorney General when necessary. He is correct, of course, that "[w]here 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Dissental at 46 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). But the general presumption is overcome here. The differences between the enforcement provisions in Title I and Title II and, importantly, the earlier statutes they each incorporate suffice to explain why Congress would mention the Attorney General in Title I but not in Title II. "The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress'[s] design—grows weaker with each difference in the formulation of the provisions under inspection." *Clay v. United States*, 537 U.S. 522, 532 (2003) (internal quotation marks omitted).

I now turn to Judge Newsom's similar argument about Title III. Title III prohibits discrimination against a person "on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation." 42 U.S.C. § 12182(a). Title III's enforcement

provision is structured differently than the enforcement provisions in either Title I or Title II.

Title III's enforcement provision is § 12188. Subsection (a) of § 12188 gives an individual who was subjected to discrimination a private right of action to sue the operator of a place of public accommodation. In § 12188(a), Congress established this private right of action through an incorporation by reference: "The remedies and procedures set forth in section 2000a-3(a) [Title II of the Civil Rights Act of 1964] are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability." *Id.* § 12188(a). In an action under § 12188(a), the aggrieved person may seek only "preventive relief," such as a permanent or temporary injunction or restraining order. See *id.* § 2000a-3(a).[7] The aggrieved person may not recover damages.

In subsection (b) of § 12188, however—without incorporating remedies from any other statute—Congress expressly authorized "the Attorney General [to] commence a civil action." *Id.* § 12188(b)(1)(B). In contrast to the private right of action under subsection (a), in an action brought by the Attorney General under subsection (b), the court may award, in addition to equitable relief such as temporary, preliminary, or permanent injunctive relief,

[7] In addition, a prevailing party may recover its reasonable attorney's fees. *See* 42 U.S.C. § 2000a-3(b)

damages to any "persons aggrieved" or may assess a civil penalty. *Id.* § 12188(b)(2).

Section 12188(b) is unique among the ADA's three titles because it is the only enforcement provision in which Congress expressly authorized the Attorney General to commence an action instead of incorporating by reference an enforcement provision from another statute. Why? Because in Title III Congress was creating a brand-new remedy, one which did not exist in earlier statutes, available to the Attorney General to combat discrimination by operators of places of public accommodation. Although Title II of the Civil Rights Act of 1964 allowed the Attorney General to sue an operator of a place of public accommodation who engaged in discrimination, the Attorney General could seek only injunctive relief, not damages or a penalty. *See, e.g.*, *id.* § 2000a-5(a) (permitting Attorney General to bring civil actions seeking injunctive relief, not damages). Because Title III of the ADA created a new, expanded role for the Attorney General, it necessarily had to describe that role rather than incorporating an earlier provision by reference.[8]

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[8] Judge Newsom lists several other federal statutes where Congress expressly authorized the Attorney General to commence an action to enforce the statute. But it is not the case, of course, (and Judge Newsom stops short of saying) that Congress *must* include such express language to authorize the Attorney General to sue. If Congress *had* to include such express language, then the Attorney General would have no authority to enforce the Rehabilitation Act (because its enforcement provision incorporates by reference the remedies, procedures, and rights of Title VI of the Civil Rights Act) even against public entities that receive federal funding. *See* 29 U.S.C. § 794a(a)(2).

When viewed in context, the enforcement provisions in the ADA demonstrate that Congress took two different approaches in setting out the remedies available for a violation of the ADA, and there were good reasons for taking those different approaches. As one approach, Congress incorporated by reference the enforcement provision of an existing civil rights statute to incorporate the remedies available under the earlier statute, as it did in Titles I and II.[9] For another approach, Congress included rights-creating language to expressly authorize the Attorney General to sue, as it did in Title III. Therefore, I cannot agree with the dissental that the rights-creating language in § 12188(b), which expressly authorizes the Attorney General to sue to enforce Title III, indicates that Congress did not intend to authorize the Attorney General to sue under Title II to enforce the rights of victims of discrimination. The dissental's interpretation flies in the face of Congress's incorporation by reference of the existing enforcement provisions in the Rehabilitation Act and Title VI of the Civil Rights Act, both of which give the Attorney General the right to sue on behalf of victims of discrimination. The panel majority correctly interpreted the statutory

[9] Although Titles I and II are similar in that Congress incorporated by reference the enforcement provisions of existing statutes, I explained above that other differences in the relevant statutory schemes explain why Congress expressly mentioned the Attorney General in Title I but not in Title II. Unlike in Title II, where Congress was simply extending the reach of existing remedies to public entities regardless of whether they receive federal funding, in Title I Congress was dealing with a complex statutory scheme with multiple actors sharing enforcement roles.

text as permitting the Attorney General to sue any public entity for disability discrimination.

B. The Dissental's Interpretation Conflicts with Supreme Court Precedent.

Another glaring problem with the dissental's interpretation warrants mention: it creates a situation where an individual alleging disability discrimination has an implied private right of action against a public entity that receives no federal funding under Title II, but the federal government has no corresponding enforcement authority. I have difficulty squaring this result with the Supreme Court's decision in *NCAA v. Smith*, where the Court explained that when a civil rights statute, such as Title II of the ADA, creates an implied right of action to sue, the implied private right of action is no broader than the federal government's authority to enforce that statute. 525 U.S. 459, 467 n.5 (1999).

To put this explanation in context, we need to review what happened in *Smith*. An athlete alleged that the NCAA discriminated against her on the basis of sex when it denied her permission to play intercollegiate volleyball. *Id.* at 462. She sued the organization under Title IX, which prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance." *Id.* (quoting 20 U.S.C. § 1681(a)). The question before the Supreme Court was whether the NCAA received federal funding. Although the NCAA itself received no direct federal funding, the athlete argued that she could sue the organization under

Title IX because it received dues payments from its member universities, which did receive federal financial assistance. *Id.* at 464. The Supreme Court rejected the athlete's argument.

In concluding that the NCAA could not be sued under Title IX, the Supreme Court relied on its earlier decision in *U.S. Department of Transportation v. Paralyzed Veterans of America*. *See id.* at 467 (citing 477 U.S 597, 603–12 (1986)). In *Paralyzed Veterans*, the Court considered whether the Rehabilitation Act permitted a federal agency to prohibit commercial airlines from discriminating based on disability. *See* 477 U.S. at 604. The commercial airlines received no funding directly from the federal government, but the plaintiffs argued that the Act authorized the federal government to regulate the airlines because they indirectly benefited from the federal funding airports received. *Id.* at 606. The Supreme Court disagreed, holding that the Rehabilitation Act permitted the federal government to regulate only actual recipients of federal funds. *Id.* at 606–07.

The athlete in *Smith* had tried to distinguish *Paralyzed Veterans* on the ground that it "involved a Government enforcement action," whereas she had brought a "private suit." *Smith*, 525 U.S. at 467 n.5. The athlete's argument hinged on the premise "that the private right of action available under" Title IX was "potentially broader than the Government's enforcement authority" under Title IX. *Id.*

The Court said no. It explained that there was "no express authorization for private lawsuits in Title IX" and that Congress

had instead authorized an implied private right of action. *Id.* "[I]t would be anomalous," the Court said, "to assume that Congress intended the implied right of action to proscribe conduct that Government enforcement may not check." *Id. Smith* teaches that when Congress creates an implied private right of action to sue for civil rights violations, the private right of action and the federal government's enforcement authority are coextensive.

Judge Newsom's position mirrors the argument the athlete made, and the Court rejected, in *Smith*. He acknowledges that an individual may file suit for discrimination prohibited by Title II against any public entity but maintains that the government may enforce Title II's prohibition against only those public entities that receive federal funding. Thus, under his interpretation of Title II, an individual's implied private right of action is broader than the government's enforcement authority.[10]

But in *Smith* the Court rejected the idea that the private right of action could be broader than this enforcement authority when it said such a result would be "anomalous." *Id.* Although theoretically it might be possible for Congress to enact a civil rights statute giving individuals an implied private right of action to sue

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[10] Although *Smith* involved a different civil rights statute, Title IX's enforcement provision—like Title II's—was patterned on Title VI's enforcement provision. *Compare* 20 U.S.C. § 1682, *with* 42 U.S.C. § 2000d-1. We have declared Title IX case law to be "informative" in interpreting the Rehabilitation Act because both statutes were "modeled after Title VI." *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 346 (11th Cir. 2012).

but leaving the Attorney General without corresponding authority to enforce against the prohibited conduct, Judge Newsom has identified no statute that has been interpreted this way.[11]

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[11] Judge Newsom tries to ameliorate the impact of his reading of Title II by suggesting that even if the Attorney General lacks the authority to sue Florida under Title II, the United States could vindicate the children's rights nonetheless by suing Florida under the Civil Rights of Institutionalized Persons Act ("CRIPA"), a separate federal statute that authorizes the Attorney General to sue a state when it "subject[s] persons residing in or confined to an institution . . . to egregious or flagrant conditions" and "caus[es] such persons to suffer grievous harm." 42 U.S.C. § 1997a(a).

But as the panel majority carefully explained, the Attorney General could not have sued Florida under CRIPA because the facilities where the children are placed do not appear to meet CRIPA's definition of "institution." *See Florida*, 938 F.3d at 1246 n.23. Under CRIPA, a "skilled nursing, intermediate or long-term care, or custodial or residential care" facility generally qualifies as an institution if it is "owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State." 42 U.S.C. § 1997(1), (B)(v). A privately owned and operated facility does not qualify as an institution when its "nexus" with the state is limited to state licensing of the facility and the facility's receipt of payments under Medicaid, Medicare, or Social Security. *Id.* § 1997(2). As the panel majority noted, a review of the record in this case indicates that the facilities housing the medically-fragile children were privately owned and operated and thus did not qualify as institutions under CRIPA. *Florida*, 938 F.3d at 1246 n.23.

In any event, even if the Attorney General also could sue Florida under CRIPA, "[t]here is nothing to suggest that CRIPA was intended to be the only means of enforcing the rights of institutionalized persons." *Id.* (emphasis omitted). Congress enacted the ADA ten years after CRIPA. Despite CRIPA's existence, Congress found that discrimination against individuals with disabilities "persist[ed]" in "critical areas" including via their "institutionalization." *See* 42 U.S.C. § 12101(a)(3); *Olmstead*, 527 U.S. at 599–600.

IV. Contrary to the Dissental's Claim, the Panel Opinion Does Not Conflict with Federalism Principles.

Before concluding, I must address one last criticism the dissental levels against the panel majority's opinion. The dissental says that the opinion's holding "comes at [a] real cost to core principles of federalism." Dissental at 61. This critique flows from the dissental's assumption that the ADA does not authorize the Attorney General to sue a public entity when it receives no federal funding and thus that the panel majority opinion "creates a nonexistent cause of action." *Id.* at 41, 64.

But if the panel majority was correct that Congress intended to authorize the Attorney General to sue to enforce Title II's prohibition on discrimination against all public entities, regardless of whether they receive federal funding, then the majority opinion "creates" no cause of action and presents no federalism concerns. If so, the dissental's critique amounts to a policy argument about why Congress should not have decided to authorize the Attorney General to sue a state government to enforce federal law. Because Congress acted and authorized the Attorney General to sue, however, adopting the dissental's interpretation would violate principles of separation of powers by taking away from the Attorney General power the considerable authority that Congress gave

him.[12] *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1300–01 (11th Cir. 2010) ("Courts may not rewrite the language of a statute in the guise of interpreting it in order to further what they deem to be a better policy than the one Congress wrote into the statute.").

V. Conclusion

The panel majority got the law right. In Title II of the ADA, Congress authorized the Attorney General to sue any public entity, regardless of whether it receives federal funding, to enforce the statute. Reading the broad statutory language in its proper context, the panel correctly held that the Attorney General was authorized in this case to sue the State of Florida, on behalf of the medically-fragile children, for disability discrimination.

[12] Judge Newsom does not dispute that Congress has the authority under the Constitution to authorize the Attorney General to enforce Title II against state governments even when they receive no federal funding.

NEWSOM, Circuit Judge, dissenting from the denial of rehearing en banc, in which BRANCH, Circuit Judge, joins:

I

This case involves the Americans with Disabilities Act. Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (quoting 42 U.S.C. § 12101(b)(1)). The Act contains three titles: Title I covers employment; Title II covers public services, programs, and activities; and Title III covers public accommodations. *See id.* at 516–17. Our focus here is Title II—and, specifically, the question whether the Attorney General of the United States can sue to enforce it. As background—much more on this later—Title II's enforcement provision states in full:

> The remedies, procedures, and rights set forth in section 794a of Title 29 [*i.e.*, § 505 of the Rehabilitation Act of 1973] shall be the remedies, procedures, and rights this subchapter [*i.e.*, Title II] provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12133.

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Briefly, the specifics of this case: The allegations here—that the State of Florida has mistreated children with severe medical conditions and disabilities—are extremely serious. In particular, in

a Letter of Findings, the DOJ informed Florida that it was violating Title II by "unnecessarily institutionalizing hundreds of children with disabilities in nursing facilities." *United States v. Florida*, 938 F.3d 1221, 1224 (11th Cir. 2019). The DOJ further alleged that Florida's Medicaid policies put some children—those who are "medically fragile" or who have "medically complex" conditions—"at risk of unnecessary institutionalization." *Id.* at 1225. After failed negotiations, the DOJ sued Florida, seeking declaratory and injunctive relief under Title II. *See id.* The district court consolidated the government's case with a class action brought on behalf of children alleging similar claims against the state. *See id.* Ultimately, that court dismissed the government's case, holding that the Attorney General lacked standing to sue under Title II. *C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1282 (S.D. Fla. 2016), *rev'd and remanded sub nom.*, *United States v. Florida*, 938 F.3d 1221.

In a split decision, a panel of this Court reversed. The panel majority zeroed in on the "remedies, procedures, and rights" language in Title II's enforcement provision. Because Title II references § 505 of the Rehabilitation Act of 1973, which in turn references Title VI of the Civil Rights Act of 1964, the panel concluded that Title VI is the "ultimate fount of the cascade of cross-references"—and thus effectively "the enforcement mechanism for Title II." *United States v. Florida*, 938 F.3d at 1227, 1229. Section 602 of Title VI allows the government to "effect" compliance with that statute by (1) terminating or refusing to grant funds; or (2) "by any other means authorized by law." *Id.* at 1227 (quoting 42 U.S.C.

§ 2000d-1). The phrase "any other means authorized by law," the panel held, encompassed lawsuits by the Attorney General. *Id.* at 1233. Because Title II's "remedies, procedures, and rights" language "adopt[ed] federal statutes" that contemplate enforcement and suit by the Attorney General, the majority reasoned—having spent dozens of pages untangling the cross-reference "cascade"—that the Attorney General can likewise sue under Title II. *Id.* at 1229, 1250. For reasons I'll explain, I disagree.

The panel's opinion can plausibly be understood in either of two ways—neither of which, I hope to show, withstands scrutiny. First, one might read the opinion to hold that the Attorney General is himself a "person alleging discrimination" within the meaning of 42 U.S.C. § 12133 and, accordingly, has standing to sue under Title II. If that's what the panel's opinion means, then for many of the reasons that Judge Branch identified in her dissent—and that I'll aim to underscore here—it seems to me flat wrong. *See United States v. Florida*, 938 F.3d at 1251–54 (Branch, J., dissenting). Second, and perhaps more charitably, the majority's opinion might be read to hold that the Attorney General has standing to sue on behalf of *other* "person[s] alleging discrimination" under Title II. While that reading avoids many of the more obvious pitfalls identified by Judge Branch, I contend that it fails just the same.

Because the panel's decision creates a nonexistent cause of action, vests the federal government with sweeping enforcement authority that it's not clear Congress intended to give, and, in the doing, upends the delicate federal-state balance, this Court should

have reheard it en banc. I respectfully dissent from its refusal to do so.

II

I begin with the first possible reading of the panel opinion—that the Attorney General has standing to sue to enforce Title II of the ADA because he is, within the meaning of that statute's remedial provision, a "person alleging discrimination." 42 U.S.C. § 12133. As Judge Branch explained in her dissent, the Supreme Court's recent decision in *Return Mail, Inc. v. U.S. Postal Service*, 139 S. Ct. 1853 (2019), all but forecloses that theory.

The question in *Return Mail* was "whether a federal agency is a 'person' able to seek" administrative review and to challenge the validity of a patent (post-issuance) under the Leahy-Smith America Invents Act. 139 S. Ct. at 1858–59. In a 6–3 decision authored by Justice Sotomayor, the Supreme Court held that the agency was *not* a "person." *Id.* at 1859. In arriving at that conclusion, the Court began with the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 1861–62 (citing cases dating back nearly 150 years). The presumption doesn't just reflect "common usage," the Court explained, but "is also an express directive from Congress" because the Dictionary Act, 1 U.S.C. § 1, supplies the definition of "person" that courts should use in "determining the meaning of any Act of Congress, unless the context indicates otherwise." *Id.* at 1862 (quoting 1 U.S.C. § 1). "Notably absent from the list of 'person[s]'" in the Dictionary Act, the Court emphasized, "is the Federal Government."

Id. (alteration in original) (citation omitted). The Court further confirmed that the presumption applies even when it operates, in effect, to "exclude the Federal Government or one of its agencies from accessing a benefit or favorable procedural device." *Id.* (citing *United States v. Cooper Corp.*, 312 U.S. 600, 604–05 (1941), which held that the United States is not a "person" who can sue under the Sherman Antitrust Act for treble damages).

The *Return Mail* Court explained that while the presumption isn't a "hard and fast rule of exclusion," it can be "disregarded" only if there is "some indication in the text or context of the statute that affirmatively shows Congress intended to include the government." *Id.* at 1862–63 (citations and quotations omitted). So back to our case, are there any presumption-defeating indicators in the text or context of Title II's enforcement provision—or the ADA more generally—that affirmatively show that Congress intended to include the Attorney General (in his capacity as representative of the United States) within the meaning of the phrase "any person alleging discrimination"? There are not. Quite the opposite, in fact. Title II's enforcement provision—particularly when understood in the ADA's larger context—confirms that the Attorney General is *not* covered.

Notably, Congress explicitly gave the Attorney General standing to sue under Titles I and III of the ADA. In full, Title I's enforcement provision, which addresses discrimination in employment, expressly authorizes the Attorney General to sue, and does so *separately* from "any person alleging discrimination":

> The powers, remedies, and procedures set forth in . . . this title shall be the powers, remedies, and procedures this subchapter [*i.e.*, Title I] provides to the Commission, to the *Attorney General*, or to *any person alleging discrimination* on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12117(a) (emphasis added).

Title III's enforcement provision, which addresses discrimination in public accommodations, is structured a bit differently, but it too clearly vests the Attorney General with authority to sue. It initially provides "remedies and procedures . . . to *any person* who is being subject to discrimination on the basis of disability in violation of [Title III]." *Id.* § 12188(a)(1) (emphasis added). It goes on, though, to provide explicitly—and separately—for enforcement by the Attorney General. In particular, it gives the Attorney General a duty to "investigate alleged violations" of Title III and to "undertake periodic reviews of compliance" with Title III, *id.* § 12188(b)(1)(A)(i), as well as permission to "certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of" the ADA, *id.* § 12188(b)(1)(A)(ii). Most importantly here, it gives the Attorney General an express right to sue to enforce Title III:

> If the Attorney General has reasonable cause to believe that—(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter [*i.e.*, Title III]; or (ii) any person or group of persons has been discriminated against under this subchapter [*i.e.*, Title III] and such discrimination raises an issue of general public importance, *the Attorney General may commence a civil action* in any appropriate United States district court.

Id. § 12188(b)(1)(B) (emphasis added).

The fact that Titles I and III reference the Attorney General by name and, more to the point, expressly authorize him to sue, tells us (at least) two things about the way Congress drafted the ADA. *First*, the Attorney General is not included within the term "person" under Titles I and III—otherwise why mention the "Attorney General" in addition to and alongside the word "person"? *See, e.g.*, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) (explaining that courts should be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law" (quotation omitted)). And because courts have a "duty to construe statutes, not isolated provisions," and, therefore, should ordinarily follow the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568, 570 (1995), if the term "person" doesn't include the Attorney General in Titles I or III, then it doesn't include the Attorney General in Title II, either.

Second, Titles I and III show that when Congress intended the Attorney General to have enforcement power under the ADA, *it said so*. This is consistent with the Supreme Court's observation that "the United States Code displays throughout that when an agency in its governmental capacity *is* meant to have standing, Congress says so." *Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995). In *Newport News*, the Supreme Court considered whether the Director of the Office of Workers' Compensation Programs in the U.S. Department of Labor had standing to appeal decisions of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act, which allowed a "person adversely affected or aggrieved" to appeal. *Id.* at 123, 126 (quoting 33 U.S.C. § 921(c)). The Court emphasized that the Act's "silence regarding the Secretary's ability to take an appeal is significant when laid beside other provisions of law"—such as the Black Lung Benefits Act, Title VII of the Civil Rights Act of 1964, and the Employee Retirement Income Security Act of 1974—that mentioned the agency or agency head by name. *Id.* at 129–30. The inference that follows from comparing the enforcement provision in Title II of the ADA to those in Titles I and III is even stronger, as all three provisions are located *within the same statute*. Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted).

Lastly, there are "good reasons" here—of the sort the Supreme Court deemed significant in *Return Mail*—why Congress might have wanted the Attorney General to be able to sue under Titles I and III, but not Title II. *See* 139 S. Ct. at 1866. Whereas Titles I and III apply predominantly to private defendants—employers and providers of public accommodations, respectively—Title II regulates every service, program, and activity administered by every state in the country. Accordingly, as I'll explain in greater detail shortly, Title II enforcement could bring the federal and state governments into broad-scale conflict in a way that suits under Title I and III would not. And to be clear, a holding that the Attorney General can't sue under Title II wouldn't mean that its provisions would go unenforced or that its purposes would go unaccomplished. Congress clearly gave private parties the ability to sue under Title II, and the Attorney General has long had explicit authority to enforce the Civil Rights of Institutionalized Persons Act against the states in this space. *See* 42 U.S.C. § 1997a(a).

The panel largely sidestepped both *Return Mail* and the presumption against treating the government as a statutory "person." Its lengthy opinion mentioned *Return Mail* only once—in a brief footnote. There, the panel concluded that *Return Mail* wasn't applicable because the statute at issue in that case "differ[ed] significantly from the complex 'remedies, procedures, and rights' structure of the ADA." *United States v. Florida*, 938 F.3d at 1227 n.5. For my part, I don't think *Return Mail*—or the more than 100 years of Supreme Court precedent on which it rests—is so easily

shrugged off. No matter how "complex" the "remedies, procedures, and rights" provided for in Title II may be, they apply only to a "person alleging discrimination." It seems absolutely clear to me that the Attorney General doesn't fit that description, and to the extent that the panel opinion is meant to hold otherwise, it is plainly erroneous.

III

Which leads me to a second, and perhaps more charitable, reading of the panel's opinion—namely, that it means to hold *not* that the Attorney General is himself a "person alleging discrimination" within the meaning of Title II's enforcement provision but, rather, that the Attorney General has standing to sue on behalf of *other* "person[s] alleging discrimination." It's worth noting at the outset that this interpretation is in pretty stark tension with the government's own briefing in the case, which emphasized that "[w]hen the Attorney General files a Title II lawsuit, he proceeds on behalf of the United States—not as the attorney for any individual complainant." Reply Br. of United States at 5. But I'll leave that aside for present purposes. Even on its own terms, the contention that Title II authorizes the Attorney General to sue to vindicate others' statutory rights comes up short.

Explaining why that's so will require a bit of unpacking, but here's the short story: Title II's remedial provision, to which I've already alluded and whose terms I'll revisit shortly, does not itself create a cause of action authorizing the Attorney General, or the federal government more generally, to sue. Rather, by virtue of its

incorporation of the remedies provided by the Rehabilitation Act of 1973, which in turn incorporates the remedies provided by the Civil Rights Act of 1964—more on the cross-references below—Title II directs courts to look elsewhere for a cause of action that is "authorized by law." And yet no one—neither the government in its briefs nor the panel in its opinion—has pointed to a valid source of law that gives the federal government a cause of action to sue for violations of Title II. Instead, so far as I can tell, the Rehabilitation Act and Title VI precedents cited by the government and the panel—which I'll explore in detail—support only the much more limited proposition that the federal government can sue *federal-funding recipients for breach of contract*. While those precedents seem to me correct as far as they go, they don't go nearly far enough. In particular, they don't move the needle where, as here, the government's suit isn't predicated on the violation of any contractual funding condition embedded in a Spending Clause statute.

At the end of the day, there simply is no cause of action authorizing the government's *non*-contract suit here. And we aren't at liberty to conjure one, no matter how sympathetic the plaintiffs' case. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (explaining that without clear evidence of congressional intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

A

I start, as promised, with the text of the pertinent provisions. Title II of the ADA gives to any "person alleging discrimination"—which for present purposes I'll assume is an individual on whose behalf the Attorney General is suing—the remedies provided by the Rehabilitation Act. In particular, Title II's remedial provision states that

> [t]he remedies, procedures, and rights set forth in [the Rehabilitation Act's remedial provision] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II].

42 U.S.C. § 12133. The Rehabilitation Act, in turn, confers the remedies provided by Title VI of the Civil Rights Act. In particular, the Rehabilitation Act's remedial provision states that

> [t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal providers of such assistance under . . . this title.

29 U.S.C. § 794a(a)(2). And finally, Title VI's remedial provision states that

> [c]ompliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom

> there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law.

42 U.S.C. § 2000d–1. Accordingly, by dint of Title II's incorporation of the Rehabilitation Act's incorporation of Title VI's remedies, there are two methods by which a plaintiff can seek to "effect[]" compliance with Title II: (1) "termination" (or refusal) of federal funding; and (2) "any other means authorized by law."

All here agree that this case has nothing to do with the termination of federal funding. The controlling question, therefore, is whether the Attorney General's suit here to enforce Title II constitutes an "other means authorized by law." Title VI's reference to funding termination, though, hints at the mismatch that plagues, and ultimately defeats, the panel's opinion—or, more particularly, the alternative reading of it that I'm presently assessing. Title VI, in which the funding-termination and "any other means authorized by law" remedies originate, was enacted pursuant to Congress's Spending Clause power. *See Barnes v. Gorman*, 536 U.S. 181, 185 (2002). So was the Rehabilitation Act. *See id.* at 189 n.3. Problematically for the panel opinion—for reasons I will explain in detail—Title II of the ADA was not.

The statutory phrase "*other means* authorized by law"—included in Title VI and incorporated by reference into Title II—requires us to ask whether, in the absence of the statute, *something else* would sanction the proposed "means." This case, accordingly,

turns on whether a government-brought action to remedy an alleged Title II violation is *elsewhere* "authorized by law." It is not.

In our legal system, a lawsuit is "authorized by law"—greenlighted, in essence—via a cause of action. Sometimes, a cause of action arises from the common law—an action for tort, breach of contract, etc. Just as often, a cause of action is created by a statute. When Congress wants to "authorize[]" the Attorney General to sue violators of a statute outside of the common law, it creates an express cause of action empowering him to do so. And perhaps not surprisingly, it does so pretty routinely. *See, e.g.*, 18 U.S.C. § 216(b) ("The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under . . . this title and . . . such person shall be subject to a civil penalty of [damages]."); 18 U.S.C. § 1345(a)(1)(C) (authorizing "the Attorney General" to "commence a civil action in any Federal court to enjoin [a] violation"); 20 U.S.C. § 1706 ("The Attorney General of the United States . . . for or in the name of the United States, may . . . institute . . . a civil action on behalf of [an] individual [denied an equal educational opportunity].").

Here, though, no such cause of action exists. No one has directed our attention to a common-law or statutory cause of action "authoriz[ing]" the federal government to sue for a violation of Title II. Congress did not create a cause of action, for instance—à la *any* of the statutes just cited—empowering the Attorney General to "institute a civil action on behalf of an individual who claims to have been the victim of discrimination."

B

Where, then, did the panel find the requisite "authoriz[ation]"? Seemingly, in analogies to cases in which courts have affirmed the federal government's common-law cause of action to sue under Title VI and the Rehabilitation Act—Title II's (step) sister statutes—for breach of contract. But therein lies the problem, because the analogy doesn't hold up.

It is well-settled that the common law authorizes the federal government to sue funding recipients for violating conditions attached to their receipt of federal funds. *See, e.g.*, *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 155 (1866). The grant of funds from the "United States to the State upon conditions, and the acceptance of the grant by the State, constitute[s] a contract," as it includes "competent parties, proper subject-matter, sufficient consideration, and consent of minds." *Id.* Statutes that impose conditions on federal funds—*i.e.*, Spending Clause statutes—thereby create contractual obligations, which means that the federal government can sue when those obligations aren't met. "When a federal-funds recipient violates conditions of Spending Clause legislation," the Supreme Court has explained, "the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient *compensates* the Federal Government . . . for the loss caused by that failure." *Barnes*, 536 U.S. at 189. But because this widely recognized cause of action comes

from the common law of contracts, it authorizes suit only for—and upon—a breach of contract. *See McGee*, 71 U.S. at 155.[1]

As already noted—but the point bears repeating—while Title VI and the Rehabilitation Act are Spending Clause statutes, the ADA is not. And, therefore, not surprisingly, the federal government here does not allege that any sort of funding relationship existed between it and the State of Florida, nor does it allege that Florida violated any conditions attached to any federal funds. Instead, the government alleges a bare violation of Title II—without any contentions regarding a meeting of the minds, consideration, or any other aspect of contract formation or performance.

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[1] The Supreme Court has acknowledged that the cause of action against funding recipients may not be governed by contract law in all respects—sometimes saying, for instance, that contract law provides the governing "analogy." *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) ("We have acknowledged the contract-law analogy, but we have been clear not [to] imply . . . that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.") (alterations in original) (quotation marks omitted)). But the Court has made this point only to suggest that the cause of action against funding recipients may be in some respects even more limited in scope than contract law would indicate. *See id.* at 290 (noting that past cases had invoked a contract analogy for the Spending Clause "only as a potential *limitation* on liability"); *Barnes*, 536 U.S. at 186–87 (although not "all contract-law rules apply to Spending Clause legislation," contract law operates to limit "the scope of conduct" giving rise to liability and the "scope of damages remedies" available (emphasis omitted)). And as particularly relevant here, the Court has clarified that "[w]e have not relied on the Spending Clause contract analogy to *expand* liability beyond what would exist under nonspending statutes." *Sossamon*, 563 U.S. at 290 (emphasis added).

Accordingly, it seems clear beyond peradventure that the government has no cause of action in this case based in contract-law principles.

So far as I can tell, *all* of the binding precedent concerning the trio of statutes that (either directly or by adoption) use the term "other means authorized by law" demonstrates that the federal government's right to sue violators of those statutes is rooted in—and limited by—contract principles. To begin, this Circuit has long recognized that the government can sue federal-funding recipients under the Rehabilitation Act—again, a Spending Clause statute—given the "contractual relationship" that attaches to "conditions of accepting federal monies disbursed under the spending power." *United States v. Bd. of Trustees for Univ. of Ala.*, 908 F.2d 740, 750 (11th Cir. 1990). We have similarly held that the government's right to sue under Title VI—based on that statute's status as a "contractual spending power provision"—does not extend to programs and activities not receiving federal funding. *United States v. Alabama*, 828 F.2d 1532, 1547–51 (11th Cir. 1987) (quotation marks omitted). In the same vein, our predecessor court held that the federal government can sue funding recipients under Title VI because of its "right to sue to enforce its contracts." *United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 611 (5th Cir. 1980). Notably, the court in that case emphasized that the federal government's claims, which it allowed to proceed, "were not intended to be asserted as independent causes of action, only as subsidiary to the contract claim," *id.* at 609 n.3, and it made clear that it was not

"pass[ing] on the question" of whether the United States had an "implied right of action under Title VI," *id.* at 616–17.[2] In just the same way, decisions from other circuits seem to recognize only causes of action that arise out of contractual relationships.[3]

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[2] *Camenisch v. Univ. of Texas*, 616 F.2d 127 (5th Cir. 1980), and *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161 (11th Cir. 2003), both of which the panel cited, are inapposite, as both concerned lawsuits initiated by private parties. *United States v. Fordice* also concerned a lawsuit initiated by a private party, and the federal government's intervention into the case was justified by a concern about federal funding. *See* 505 U.S. 717, 722 n.1, 723–24 (1992).

[3] The Fifth Circuit decisions cited in the panel opinion held that the federal government can sue federal-funding recipients under the Rehabilitation Act for termination of funding, based on the funding recipient's "contractual assurance that it would comply with Section 504." *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1041 (5th Cir. 1984); *accord United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 104 (5th Cir. 1992) (referring to enforcement of Title VI against funding recipients). The Eighth Circuit decision cited there concerned a suit brought by the federal government against a funding recipient. *See United States v. Lovett*, 416 F.2d 386, 387 (8th Cir. 1969). So too, the Second Circuit decision cited in the opinion concerned a suit brought by the federal government against a funding recipient seeking the disclosure of medical records. *See United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 148 (2d Cir. 1984). And the Sixth Circuit decision cited there—a case under the Family Education Rights and Privacy Act's analogous provision allowing "any other action authorized by law"—held that the United States' right to sue "in the absence of statutory authority" applies to "Spending [C]lause legislation, when knowingly accepted by a fund recipient," and where the suit seeks to "enforce conditions imposed on the recipients of federal grants." *United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002). The other six circuit-level decisions cited in the panel opinion—*National Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569 (D.C. Cir. 1983); *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980); *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982);

Accordingly, the relevant caselaw identifies and concerns a cause of action that has no application under the circumstances of this case. The cases instead follow the logic of the particular statutory schemes that underlie them and support the conclusion that the government's cause of action is limited to suits authorized by principles of contract. Because the ADA isn't a Spending Clause statute, their logic just doesn't translate.

C

Briefly, a few words in response to Judge Jill Pryor's thoughtful opinion concurring in the denial of rehearing en banc.

First, Judge Pryor asserts that my reading of Title II contradicts clues that we can discern from "the entire statutory scheme

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Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); and *NAACP v. Med. Ctr., Inc.*, 599 F.2d 1247 (3d Cir. 1979)—all concerned suits brought by private plaintiffs.

So far as I can tell, only four courts ever—all district courts—have said that either Title II, the Rehabilitation Act, or Title VI creates a freestanding cause of action for the federal government without regard to whether a contractual relationship existed. One did so in dicta, *see United States v. Frazer*, 297 F. Supp. 319, 322–23 (M.D. Ala. 1968), two said that such a suit could proceed only upon referral from a "funding agency," *see United States v. City & Cty. of Denver*, 927 F. Supp. 1396, 1400 (D. Colo. 1996); *United States v. Virginia*, No. 12-cv-00059, 2012 WL 13034148 at *2–3 (E.D. Va. June 5, 2012), and the fourth thought the federal government's freestanding cause of action followed from "the plain language of [Title II] itself," without any external "authoriz[ation] by law," *see United States. v. Harris Cty.*, No. 16-cv-02331, 2017 WL 7692396 at *1 (S.D. Tex. Apr. 26, 2017). I'm not persuaded.

in context." Pryor Conc. Op. at 5, 8, 21–33. In particular, she says, Title II was meant to "fill the gap" left by the Rehabilitation Act—a Spending Clause statute—"by expanding the prohibition on disability discrimination to all state governmental entities, regardless of whether the state program or activity said to be discriminatory receives federal funding." *Id.* at 24. In short, because Congress enacted Title II to "remedy th[e] inadequacy" of the Rehabilitation Act's limited application to funding recipients, it must have intended Title II to have a broader reach. *Id.* at 23. And so, she concludes—and this is where the rubber really meets the road—Title II must be understood to authorize the Attorney General to bring a lawsuit against any public entity, regardless of whether it receives federal funding. *Id.* at 22. With respect, I just don't think that Judge Pryor's conclusion follows from her premises.

I quite agree that Congress intended the ADA to have a broader scope than the Rehabilitation Act. To that end, as Judge Pryor repeatedly says, Congress "extended the scope of protection afforded to individuals with disabilities by prohibiting any program run by a public entity from engaging in disability discrimination," regardless of whether it receives federal funding. *Id.* at 11 (emphasis omitted); *see also, e.g.*, *id.* at 22, 23, 24, 26 n.6. To be precise, the ADA newly imposed substantive liability on "any State or local government," without regard to funding status. 42 U.S.C. § 12131. It then carried over the "remedies" and "rights" available under Title VI of the Civil Rights Act, which we all agree include a *private* cause of action against non-funding-recipients. *Id.* § 12133; *see also*

Barnes, 536 U.S. at 185. It then went even further and newly imposed liability on employers and places of public accommodation. *See* 42 U.S.C. § 12111–12117; *id.* § 12181–12189. So if Congress intended to "extend[] the scope of protection" against disability discrimination through the ADA, mission accomplished. But it doesn't follow from that "exten[sion]" that Congress gave the federal government the authority to sue. We might wish that Congress had taken that last step, but it undoubtedly has the prerogative to proceed moderately. "[N]o legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

In any event, a statute's perceived "context" can't override its plain text. By its express terms, Title II gives the federal government no more enforcement authority than it has under Title VI—namely, a contract-based cause of action applicable only to funding recipients. It may be that Congress "just stubbed its toe" in the drafting process and failed to confer on the federal government a more general right to sue, but even if that's the case, "it's not our place or prerogative to bandage the resulting wound." *CRI-Leslie, LLC v. Comm'r of Internal Revenue*, 882 F.3d 1026, 1033 (11th Cir. 2018).

Second, and separately, Judge Pryor contends that my reading of Title II "conflicts with Supreme Court precedent." Pryor Conc. Op. at 33. In particular, she says, my interpretation can't be squared with *NCAA v. Smith*, 525 U.S. 459 (1999). In that case, a private plaintiff sued the NCAA under Title IX, which prohibits

discrimination by educational programs "receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court considered "whether a private organization that does not receive federal financial assistance"—*i.e.*, the NCAA itself—"is subject to Title IX because it receives payments from entities that do"—*i.e.*, its constituent schools. *Id.* at 465. The Court held that because the NCAA didn't receive federal financial assistance, it wasn't subject to Title IX. *Id.* at 468. In a footnote, it addressed the plaintiff's alternative argument that, because she was a private citizen, the words "receiving Federal financial assistance" in Title IX might be interpreted more loosely. *Id.* at 467 n.5. The Court quickly dispatched that contention: "[I]t would be anomalous to assume that Congress intended the implied private right of action to proscribe conduct that Government enforcement may not check." *Id.*

I take the Court to have meant only that a private cause of action can't of its own force expand the scope of liability beyond the plain terms of the statute, not—as Judge Pryor suggests—that the existence of a private right of action necessitates a corresponding government cause of action, regardless of whether the statute authorizes it. *See* Pryor Conc. Op. at 35. Congress, of course, can decide whether any given statutory right will be enforced by private plaintiffs, the federal government, or both. *See, e.g.*, *Dir., Off. of Workers' Comp.*, 514 U.S. at 129. And more fundamentally, our law is now clear that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander*, 532 U.S. at 287.

IV

So it seems to me that on either reading of its opinion, the panel's decision is wrong. It also, I fear, comes at real cost to core principles of federalism. The Supreme Court has recognized that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *see also* The Federalist No. 39, at 242 (James Madison) (Clinton Rossiter ed., 1961) (stating that states retain "a residuary and inviolable sovereignty"). The incidents and benefits of the federal system are well-rehearsed, and there's no point in re-rehearsing them here. Suffice it to say that while "[t]he actual scope of the Federal Government's authority with respect to the States has changed over the years, . . . the constitutional structure underlying and limiting that authority has not," *New York v. United States*, 505 U.S. 144, 159 (1992), and that the "separation of the two spheres is one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997); *see also Gregory*, 501 U.S. at 458 ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

The upshot of the panel's holding is that the Attorney General can enforce Title II of the ADA by suing state governments. That's a big deal. To see why, one need look no further than Georgia's settlement agreement with the Department of Justice in a similar case. *See* Joint Motion to Enter the Parties' Settlement Agreement (Ex. A), *United States v. Georgia*, No. 1:10-cv-00249-CAP

(N.D. Ga. filed October 19, 2010) [hereinafter Georgia Settlement Agreement]. Without admitting to any of the alleged wrongdoing, Georgia agreed to numerous substantive policy changes governing how it would serve those with developmental disabilities and mental illness. *See* Georgia Settlement Agreement at 5–25. Georgia also agreed to allow an independent reviewer to determine—at state expense—its compliance with the settlement. *See id.* at 27, 30–31 (providing that the state must maintain a fund containing at least $100,000 from which payments for the reviewer would be withdrawn). Additionally, the agreement gave the United States "full access" to any persons, records, or materials "necessary to assess the State's compliance." *Id.* at 27.

Georgia's settlement agreement demonstrates the result of allowing the Attorney General to enforce Title II—namely, tilting the federal balance decisively in favor of the federal government. The panel's opinion, by sanctioning the Attorney General's enforcement of Title II, could force other public entities (like Georgia and Florida) to make a choice either (1) to enter into settlement agreements, which not only impose monetary and resource costs but also lead to federal oversight of local policy decisions, or (2) to risk thousands (possibly millions) of dollars in litigation costs by disputing liability or terms of compliance.

None of this is to say, of course, that the DOJ's goals in enforcing Title II aren't laudable, or that Congress can't regulate states in seemingly local matters (or even provide for federal enforcement, through lawsuits or otherwise). *See, e.g.*, *Garcia v. San*

Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985) (holding that Congress could, through the Commerce Clause, prescribe minimum wage and overtime rates under the Fair Labor Standards Act for a local transit system). In the ever-delicate federal-state balance, the Supremacy Clause gives the federal government "a decided advantage." *Gregory*, 501 U.S. at 460 (citing U.S. Const., art. VI, cl. 2). The point is simply that although the federal government holds the upper hand, the wielding of its federal power against the states cannot be taken lightly or casually inferred. *See id.* (stating that the ability of Congress to "legislate in areas traditionally regulated by the States . . . is an extraordinary power in a federalist system . . . that we must assume Congress does not exercise lightly"); *id.* at 464 ("[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." (quoting Laurence H. Tribe, American Constitutional Law § 6–25, at 480 (2d ed. 1988))).

It's up to the judicial branch to uphold our constitutional structure by policing the limits of federal power. By reading Title II's enforcement provision to allow the Attorney General to subject Florida to suit and thereby regulate its provision of services to its residents, the panel's decision sanctions DOJ encroachment on Florida's sovereign prerogatives—*in the absence of any solid evidence that Congress intended such a result*. I don't quibble with the fact that Congress could regulate states in this regard if it

wanted to. But we must presume that Congress wouldn't do so lightly—and certainly not impliedly.

* * *

The question here is not whether Title II of the ADA *should* authorize the Attorney General to sue to enforce its terms but, rather, whether it *does*. And as I read the statute, it just doesn't. In concluding otherwise, the panel's opinion either flouts Supreme Court precedent, creates a nonexistent cause of action, or both—and, in the doing, skews the federal-state balance. I remain of the view that it is a mistake to allow the panel's decision to stand without reconsidering the important issues that it presents. Accordingly, I respectfully dissent from the Court's order denying en banc rehearing.