No. 21-1384

In the Supreme Court of the United States

FLORIDA

v.

UNITED STATES

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, GEORGIA, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, and Utah. Notwithstanding this Court's precedent, the Eleventh Circuit held that the United States is a "person" who may "alleg[e] discrimination on the basis of disability," under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12133. *See United States v. Florida*, 938 F.3d 1221, 1244-45 (11th Cir. 2019). Because the ADA applies to virtually all state and local programming and because claims by the United States are not subject to the ordinary rules of sovereign immunity, this ruling gives the federal government unprecedented power to superintend State administration of public services and programs. And it cannot be squared with this Court's repeated recognition that "[p]aramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022).

Amici States do not dispute that Congress *may* authorize the United States to bring suits against the States pursuant to Article I, including the interstate commerce power Congress invoked in support of the ADA. But Congress *has not* done so here. The Court should grant review to correct the Eleventh Circuit's counterintuitive statutory construction, which intrudes on state autonomy in a way Congress never authorized.

SUMMARY OF ARGUMENT

I. The Eleventh Circuit's decision to extend Title II's *private* right of action to the United States disregards the States' independent sovereignty and

warrants this Court's correction. As this Court has repeatedly acknowledged, the Constitution "spli[t] the atom of sovereignty." *Cameron*, 142 S. Ct. at 1011 (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). The States were sovereign before the Constitution, and they "retain[] 'a residuary and inviolable sovereignty.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475, (2018) (quoting THE FEDERALIST No. 39, p. 245 (C. Rossiter ed. 1961)). Respect for such sovereignty is not for the States' sake: it preserves the liberty of the people through the division of authority enshrined in our Constitution.

This Court should grant review to vindicate Florida's legitimate right to enforce its duly enacted laws without interference from claims by the United States that have never been authorized by Congress. Title II of the ADA provides a cause of action to only one class of claimants: "person[s] alleging discrimination on the basis of disability." 42 U.S.C. § 12133. Though Congress certainly knows *how* to create a cause of action for (or extend a cause of action to) the federal government, it chose not to do so here.

By nevertheless treating the United States as if it is a "person alleging discrimination," the Eleventh Circuit empowered the Attorney General to superintend how Florida—and, by extension, every State within the court's geographic jurisdiction—administers too many state and local programs to count. That is an affront to the States' sovereignty; and it cannot be justified by the Eleventh Circuit's reliance on conditional-spending precedent. Title II of the ADA is not conditional-spending legislation. The States do not dispute that they accede to federal requirements when, under conditional-spending schemes, they enter into contract-like

obligations with the federal government. But that simply does not answer the quesiton of whether Title II subjected them to the type of amorphous lawsuit the United States seeks to bring here. It does not.

II. The difference between a private lawsuit and a suit by the United States is no mere technicality. To the contrary, the States cannot raise their sovereign immunity in lawsuits brought by the United States. That means a cause of action for the United States significantly expands the States' liability.

Title II's substantive requirements are broader than its abrogation of state sovereign immunity, which applies to private lawsuits but not suits by the United States. The delta exists because the ADA's substantive requirements were justified under Congress's interstate commerce clause power, U.S. CONST. art I, § 8, but that power does not allow Congress to abrogate the States' sovereign immunity. The Fourteenth Amendment does allow Congress to abrogate state sovereign immunity, but abrogation must be congruent and proportional to a demonstrated constitutional violation. As a result, the States' liability in private litigation is narrower than Title II's substantive scope. Not having to contend with the States' sovereign immunity, the United States could hold a State program liable to a much broader degree than a private person could, giving the United States that much more potential to exert pressure on and control over State programs. This Court should respect the limit Congress placed on the States' liability when it declined to give the United States a cause of action to enforce Title II.

ARGUMENT

I. The Court Should Grant Review to Vindicate the States' Ability to Administer their Programs Without Facing Suits—and Federal Oversight—that Congress Did Not Authorize.

A. The States' sovereignty preexisted the Constitution; the Constitution "limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy*, 138 S. Ct. at 1475 (citation omitted). As a result, "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748. So too must the federal courts. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997).

This Court has safeguarded this division of authority *not* for the benefit of States as entities or even state officials. Rather, the "ultimate purpose" of federalism "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *see also Bond v. United States*, 572 U.S. 844, 862–63 (2014). Written by men who had just fought a war to free their country of a tyrannical executive, the "Constitution diffuses power the better to secure liberty," while at the same time "contemplate[ing] that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring opinion). The Framers viewed the "principle of separation of powers" as the absolute central guarantee of a just government." *Morrison v. Olson*, 487 U.S.

654, 697 (1988) (Scalia, J. dissenting); *see also, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992). Maintaining a "healthy balance of power between" state and federal governments reduces "the risk of tyranny . . . from either" sovereign. *Murphy*, 138 S. Ct. at 1477. The dual sovereigns, each required to further divide its power amongst co-equal branches of government, thus "resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

As Florida has ably explained, allowing the Attorney General to sue to enforce Title II would "work a 'significant change in the sensitive relation between' the federal government and the states." Pet. 16 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). And as Judge Newsom explained in dissent, allowing the United States to sue under Title II significantly increases the pressure on States and local government to settle or acquiesce to consent decrees, at the cost of significant federal oversight of State programs and policy. *See United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730, 758 (11th Cir. 2021) (Newsom, J., dissenting from denial of rehearing en banc).

The pressure to accede to the Department of Justice's demands is not small. Texas, for example, has been mired in Title II litigation against the Department of Justice for over a decade. *See Steward v. Abbott*, No. 5:10-CV-1025-OG (W.D. Tex.). Many States and local governments are unwilling or unable to defend such lawsuits. That results in sweeping consent decrees and settlements like the Georgia settlement agreement Judge Newsom discussed at length in dissent from the denial of rehearing en banc. *Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th at 757–58 (Newsom, J., dissenting from

denial of rehearing en banc); *see also* Pet. 18, 20–21. It also leads to more targeted—but no less intrusive—agreements, like one in which a State agency gave the Department of Justice authority to approve (or to veto) its policies for providing communication assistance to individuals with impaired hearing. *See* Settlement Agreement Between the United States of America and the Washington State Department of Children, Youth, and Families Child Welfare Program ¶¶ 24–25, 32 (April 16, 2021), ada.gov/dcyf_cwp_sa.html.

Despite these significant costs to federalism, the Eleventh Circuit dismissed Florida's concerns with a quip: "Congress expressly intended for Title II to reach states," and "Florida has been a state since 1845." *Florida*, 938 F.3d at 1249-50. That flippancy misses the point.

B. Florida has never disputed that Title II applies to its state-run programs or that "any *person* alleging discrimination" may sue. 42 U.S.C. § 12133 (emphasis added); *see Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). But the question whether a statute's substantive requirements apply to a putative defendant is very different from the question whether Congress gave a putative plaintiff a right to sue. *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001); *see also Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (explaining the Court has "abandoned" any "common-law powers to create causes of action"). Indeed, as the United States itself pointed out in its briefing below, "*[s]etting* standards . . . is one thing, but *enforcing* the standards . . . is quite another." Appellant's Br. at 32, *United States v. Florida*, No. 17-13595 (11th Cir. Oct. 18, 2017). That is as true for government enforcement as it is for private causes of action. *See Dir., Office of Workers' Comp. Programs, Dep't of Lab. v.*

Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 129-30 (1995).

It is not enough to say that Title II applies to the States. Florida does not dispute that. But that does not mean the United States has a cause of action for the type of wide-ranging injunctive relief it seeks here and has sought in similar litigation in other States.

C. In enacting the ADA, Congress did not provide the United States a cause of action to seek wide-ranging institutional reform of state health-care systems. Title II of the ADA "provides" "remedies, procedures, and rights" to "any *person alleging discrimination*." 42 U.S.C. § 12133 (emphasis added). That is Title II's only enforcement provision. And the United States does not contend it is a "person alleging discrimination." *See Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1861–62 (2019). Yet the Eleventh Circuit held the United States can sue Florida because a "cascade of cross-references" creates an implied cause of action that the United States can use to sue to enforce Title II. *Florida*, 938 F.3d at 1229; *see also Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th at 732–33 (J. Pryor, J., respecting the denial of rehearing en banc). That holding is as troubling as it is erroneous.

When Congress wishes to allow suit by the United States against the States, it must "mak[e] its intention unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). Congress has recognized this obligation in numerous instances. For example, the Attorney General is empowered to seek injunctive relief for violations of the Twenty-Sixth Amendment, 52 U.S.C. § 10701(a)(1), to enforce the Voting Rights Act, *see* 52 U.S.C. §§ 10101(c), 10308(d), 10504, 20510, and to "intervene in" certain federal equal-

protection suits, 42 U.S.C. § 2000h-2. Congress has also given the Attorney General express causes of action to enforce various statutory rights. *See* 18 U.S.C. § 248(c)(2)(A); 42 U.S.C. §§ 2000a-5(a), 2000e-5(f)(1).

Congress chose *not* to create a cause of action for the federal government here. Other titles of the ADA expressly include a cause of action for suits by the Attorney General. *See, e.g.*, 42 U.S.C. § 12117(a). But Title II's enforcement provision is different—it provides a remedy only to a "person alleging discrimination." 42 U.S.C. § 12133. Indeed, this Court acknowledged as much in its first decision interpreting Title II, *Olmstead v. Zimring*, 527 U.S. 581 (1999). Discussing the plain text, the Court observed that individuals can enforce Title II, while both individuals and the Attorney General can enforce Titles I and III. *Id.* at 591 n.5. And by the time of the ADA's passage in 1990, this Court had established that States are not typically considered "persons" in the context of civil-rights legislation, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and the rationale for that applies equally to the United States. By "transplant[ing]" the term "persons" into the ADA, Congress is presumed to have intentionally "br[ought] the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019).

Congress's decision to draw the line at individual enforcement is eminently reasonable given the federalism costs associated with Title II. Title II already imposes significant federalism costs by providing "persons" the ability to seek and obtain review of state-run public services in federal courts. Allowing the United States nonetheless to bring suit would significantly add to these already substantial costs for the reasons Florida has

explained. *See* Pet. 27–28. Amici States will not repeat those reasons here.

D. The Eleventh Circuit reached its conclusion by relying on a "cascade" of statutory cross references, *Florida*, 938 F.3d at 1229, inapposite cases, *id.* at 1232–33, 1236–37, and a hefty reliance on serving the statute's perceived purpose, *id.* at 1238–41. None of these sources satisfies the clear-statement rule required to recognize a cause of action against a State.

First, the Eleventh Circuit's "cascade" of statutory cross references focuses too closely on the droplets at the expense of the waterfall. In particular, the Eleventh Circuit concluded the United States may sue to enforce Title II of the ADA based on a provision in Title VI of the Civil Rights Act that says "[c]ompliance . . . may be effected . . . "by any other means authorized by law." 42 U.S.C. § 2000d-1(2); *see Florida*, 938 F.3d at 1227–28. "[C]ourts have interpreted" this phrase "to permit referral to the Department of Justice for further legal action," the Eleventh Circuit said, so the Attorney General surely can sue on behalf of the United States. *Florida*, 938 F.3d at 1245.

That reasoning assumes the conclusion. "Any other means authorized by law" does not, by itself, purport to create an independent cause of action. Congress does not authorize enforcement actions in less than explicit terms, *see Newport News*, 514 U.S. at 129–30; that is especially true in Spending Clause legislation like Title VI of the Civil Rights Act, where any condition on the grant of federal funds must be unambiguous, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15–17 (1981). Instead, "other means" must denote "means" authorized by some other law—that is, powers conferred by some law outside Title VI. Where the Attorney General can bring suit, it is

because he has a cause of action actually authorized by another law—which Title II does not do.

Second, the Eleventh Circuit pointed to past cases in which the United States "has brought suits to ensure compliance with the Rehabilitation Act." *Florida*, 938 F.3d at 1236–37. That does not show it is proper for the United States to bring suit to enforce Title II of the ADA. Like any other litigant, the United States must identify a cause of action before it can bring suit. Even when constitutional rights are concerned, "almost every court that has had the opportunity to pass on the question" has agreed "that the United States may not sue to enjoin violations of individuals' fourteenth amendment rights without specific statutory authority." *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) (collecting cases). This has been the state of the law for decades.

Each case the Eleventh Circuit cited involved the obligations "in the nature of a contract" that are said to accompany acceptance of federal funds under Spending Clause legislation. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). "[I]n return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Id.* (citation omitted). So such lawsuits would be "otherwise authorized by law"—namely, the common law of contract, which the United States can invoke just like any other litigant. *Cf. United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (reasoning that the United States "should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual"); *In re Smoot*, 82 U.S. 36, 45 (1872) (holding "the ordinary principles of contracts must and should apply" to "contracts to which the United States is a party.").

Title II of the ADA is not spending-clause legislation, so it creates no such obligation "in the nature of a contract," *Gorman*, 536 U.S. at 186, that would allow the United States to sue for breach. The United States has identified no other cause of action at law or in equity that otherwise "authorize[s]" it to enforce Title II. 42 U.S.C. § 2000d-1(2)).

Third, the Eleventh Circuit relied heavily on perceived Congressional purpose in reaching its atextual conclusion. *Florida*, 938 F.3d at 1244–45. But even assuming Congress's purpose could meaningfully be identified, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). "Every statute has a stopping point, . . . [and a] court must determine not only the direction in which a law points but also how far to go in that direction." *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1160 n.6 (10th Cir. 2016); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage."). The "how far" question is answered by Congress through the statutory text, which in this case provides authority only to "persons"—not the sovereign—to sue. *Compare* 42 U.S.C. § 12117(a), *with id.* § 12133. The Eleventh Circuit erred when it disregarded this fundamental precept. Given the wide-ranging application of the ADA to state and local programs, this Court should grant review to correct that error.

II. The Eleventh Circuit Conflated the Absence of Sovereign Immunity for the State with the Existence of a Cause of Action for the United States.

The Eleventh Circuit's reasoning is particularly concerning because of the way it deployed the absence of state sovereign immunity in suits brought by the United States. Specifically, the court brushed aside Florida's federalism and separation-of-powers concerns with the statement that "States do not retain sovereign immunity from suits brought by the federal government." *Florida*, 938 F.3d at 1250. Though indisputably true, this conflates two fundamental—but fundamentally different—limitations on federal-court power. It is also irrelevant: the question presented in this case is not whether Congress can authorize suit by the United States—it can—but whether it has done so here. And the absence of state sovereign immunity from suits brought by the United States is one reason why Congress must be clear when it creates a cause of action for the United States.

A. As an initial matter, the Eleventh Circuit's improperly conflates two different limitations on federal-court power. Sovereign immunity is a limitation on the types of cases that a federal court may hear. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) ("Structural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity."). This is particularly true with regard to States, which enjoy not only a structural form of immunity that sounds in personal jurisdiction, but an Eleventh Amendment immunity, which deprives the court of jurisdiction. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493–94 (2019). Indeed, the States' freedom

from unconsented suit is so important that Congress must make an "unmistakably clear" statement in order to abrogate state sovereign immunity. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991). In the same way, to protect the State's fundamental sovereignty, a State's waiver of sovereign immunity must be "unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

No one disputes that States may not raise sovereign immunity against the United States. WRIGHT & MILLER, 13 FED. PRAC. & PROC. § 3524 (3d ed.). The absence of state sovereign immunity, however, does not give the United States a cause of action. *See supra* at 9–10. Yet the Eleventh Circuit said the absence of state sovereign immunity means Florida's objection to allowing the United States to sue is not even a "valid complaint[]." *Florida*, 938 F.3d at 1250.

B. The States' lack of sovereign immunity from suits brought by the United States makes judicial creativity to allow such suits even more troubling. Even in the presence of the necessary clear statement, Congress's authority to abrogate sovereign immunity is limited by the reach of its power under section 5 of the Fourteenth Amendment. "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001); *see City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury

to be prevented or remedied and the means adopted to that end.").

This Court has held that Title II of the ADA is "congruent and proportional to its object of enforcing the right of access to the courts," *Tennessee v. Lane*, 541 U.S. 509, 532 (2004), or preventing other "conduct that actually violates the Fourteenth Amendment," *United States v. Georgia*, 546 U.S. 151, 156 (2006).

But Title II's substantive reach is much broader than that. *See Lane*, 541 U.S. at 522; *Georgia*, 546 U.S. at 160 n.* (Stevens, J., concurring). It applies not only to such fundamental rights as access to the courts, but also to "seating at state-owned hockey rinks" and other State-run programs that do not implicate fundamental rights. *Lane*, 541 U.S. at 530. To support this broader reach, Congress invoked its interstate commerce power in enacting the ADA. 42 U.S.C. § 12101. That power allows Congress to impose substantive regulations in a way that section 5, which is solely remedial, does not. *Compare Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985), *with Flores*, 521 U.S. at 519–29. But, importantly, Congress cannot abrogate state sovereign immunity based on the Commerce Clause. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996). In private lawsuits, therefore, the States' liability is limited by the congruence and proportionality principle. *See Lane*, 541 U.S. at 531.

But because the States cannot raise sovereign immunity in lawsuits brought by the United States, such lawsuits would not be so limited. That means an implied cause of action for the United States significantly expands the States' potential liability under Title II.

The Eleventh Circuit got the analysis backward when it used the absence of State sovereign immunity to

justify allowing the United States to sue. *Florida*, 938 F.3d at 1250. Congress is of course empowered to create a cause of action for the United States when exercising its article I, section 8 powers, including the power to regulate interstate commerce that it invoked to support the ADA. *See Garcia*, 469 U.S. at 555–56. But "when an agency in its governmental capacity is meant to have standing, Congress says so." *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995). Thus, the question is not whether Congress may give the United States a cause of action, but whether it has. And Congress has not done so here for the reasons discussed above. *Supra* at 6–11.

If not corrected, this inversion of the ordinary rules of construction would open up new avenues for suits against States that should not be adopted without this Court's involvement. "Congress . . . does not . . . hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and it may not hide abrogation of sovereign immunity under cupboards, *see Blatchford*, 501 U.S. at 786. This Court does not countenance impingements on dual sovereignty absent a clear statement from Congress. *Kimel*, 528 U.S. at 73. A "cascade of cross-references," *Florida*, 938 F.3d at 1229, is hardly the explicit language this Court requires—particularly in a statute with the type of wide-ranging implications seen in Title II of the ADA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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