No. 21-1384

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KRISTEN CLARKE
Assistant Attorney General
BONNIE I. ROBIN-VERGEER
SYDNEY A.R. FOSTER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Attorney General may sue to enforce Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

C.V. v. *Senior*, No. 12-cv-60460 (June 9, 2017)

United States Court of Appeals (11th Cir.):

A.R. v. *Dudek*, No. 16-15518 (Dec. 20, 2016)

A.R. v. *Secretary Fla. Agency for Health Care Admin.*, No. 17-13572 (Apr. 17, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Statutes, regulations, and rule—Continued: Page

In the Supreme Court of the United States

No. 21-1384

STATE OF FLORIDA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 938 F.3d 1221. The order of the court of appeals denying rehearing en banc (Pet. App. 102a-165a) is reported at 21 F.4th 730. The order of the district court (Pet. App. 68a-101a) is reported at 209 F. Supp. 3d 1279. A prior order of the district court is reported at 31 F. Supp. 3d 1363.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2019. A petition for rehearing was denied on December 22, 2021 (Pet. App. 102a-103a). On March 7, 2022, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 21, 2022, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, prohibits certain public and private entities from discriminating on the basis of disability. Congress enacted the ADA "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing [those] standards * * * on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(2) and (3).

Title II of the ADA, 42 U.S.C. 12131 *et seq.*, establishes the anti-discrimination requirements governing "public entit[ies]," including States and local governments. 42 U.S.C. 12131(1). Title II's substantive prohibition largely tracks Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 794(a), by specifying that "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. But whereas Section 504 reaches only certain federal programs and activities and entities that receive "Federal financial assistance," 29 U.S.C. 794(a), Title II covers *all* "public entit[ies]" whether or not they receive federal funding, 42 U.S.C. 12131(1), 12132.

2. Congress set forth the means for "[e]nforc[ing]" Title II's guarantees in Section 12133. 42 U.S.C. 12133 (emphasis omitted). Rather than spelling out particular enforcement mechanisms, Section 12133 cross-references Section 505 of the Rehabilitation Act, 29 U.S.C. 794a—

the enforcement provision for Section 504. Specifically, Section 12133 provides that "[t]he remedies, procedures, and rights set forth in [Section 505] shall be the remedies, procedures, and rights [the ADA] provides to any person alleging discrimination" under Title II. 42 U.S.C. 12133.

Section 505, in turn, cross-references a third statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which bars recipients of federal financial assistance from discriminating based on race, color, or national origin. 29 U.S.C. 794a(a)(2). Specifically, Section 505 provides that "[t]he remedies, procedures, and rights set forth in [T]itle VI * * * shall be available to any person aggrieved" under Section 504. *Ibid.*

Title VI's "remedies, procedures, and rights," 29 U.S.C. 794a(a)(2), consist of an implied private right of action under 42 U.S.C. 2000d, *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001), and an administrative and judicial enforcement scheme established by 42 U.S.C. 2000d-1. Under Section 2000d-1, agencies extending financial assistance must "effectuate" Title VI's antidiscrimination mandate by, among other things, issuing regulations. *Ibid.* Section 2000d-1 also specifies that "[c]ompliance" with Title VI may be "effected" by (1) terminating financial assistance following an administrative proceeding; or (2) "any other means authorized by law." *Ibid.*

3. Since long before the ADA's enactment, regulations implementing Title VI and the Rehabilitation Act have established enforcement procedures that include an administrative complaint process that may culminate in suits by the Department of Justice (DOJ). See, *e.g.*, 28 C.F.R. 41.5; 45 C.F.R. 80.8.

Under Title VI regulations promulgated by the relevant federal agencies shortly after the statute's enactment, persons who believe that they have been discriminated against may file complaints with the agencies, which then conduct investigations. See, *e.g.*, 29 Fed. Reg. 16,241, 16,301 (Dec. 4, 1964) (45 C.F.R. 80.7(b) and (c)) (establishing administrative complaint procedures for the Department of Health, Education, and Welfare, which now apply to the Department of Health and Human Services). If an investigation reveals a violation, the agency first attempts to resolve the matter through "informal means." *E.g.*, 45 C.F.R. 80.7(d)(1). If those efforts are unsuccessful, the agency may effect compliance by withdrawing funding or by "any other means authorized by law," including referring the matter to DOJ to bring "appropriate proceedings" in court. *E.g.*, 45 C.F.R. 80.8(a)(1); see 45 C.F.R. 80.8(d)(1).[1]

DOJ's contemporaneous guidelines coordinating agencies' enforcement of Title VI likewise specify that "[c]ompliance with the nondiscrimination mandate of Title VI" may be obtained by "appropriate court action," and they further emphasize that "[t]he possibility of court enforcement should not be rejected without consulting [DOJ]." 31 Fed. Reg. 5277, 5292 (Apr. 2, 1966) (28 C.F.R. 50.3(c)(I)(B)(1)); see 28 C.F.R.

---

[1] See also, *e.g.*, 29 Fed. Reg. at 16,277 (7 C.F.R. 15.6, 15.8(a)) (Department of Agriculture); 29 Fed. Reg. at 16,281-16,282 (24 C.F.R. 1.7, 1.8(a)) (Department of Housing and Urban Development); 29 Fed. Reg. at 16,285-16,286 (29 C.F.R. 31.8, 31.9(a)) (Department of Labor); 29 Fed. Reg. at 16,295 (43 C.F.R. 17.6, 17.7(a)) (Department of Interior); 29 Fed. Reg. at 16,307 (45 C.F.R. 611.7, 611.8(a)) (National Science Foundation); 31 Fed. Reg. 10,235, 10,267 (July 29, 1966) (28 C.F.R. 42.107(b)-(d), 42.108(a)) (DOJ).

42.411(a), 42.412(b) (DOJ regulations coordinating Title VI enforcement).

After the Rehabilitation Act was enacted in 1973, the Department of Health, Education, and Welfare, which was charged with coordinating enforcement of the statute by all federal agencies, Exec. Order No. 11,914, 3 C.F.R. 117 (1976 comp.), promulgated regulations requiring each agency to "establish a system for the enforcement of section 504" that "include[s] * * * [t]he enforcement and hearing procedures that the agency has adopted for the enforcement of [T]itle VI." 43 Fed. Reg. 2132, 2137 (Jan. 13, 1978) (45 C.F.R. 85.5(a) (1979)). Responsibility for coordinating Section 504 enforcement was later reassigned to DOJ, see Exec. Order No. 12,250, 3 C.F.R. 298 (1980 comp.), which repromulgated the relevant coordination regulations under its own authority, 46 Fed. Reg. 40,686, 40,686-40,687 (Aug. 11, 1981) (28 C.F.R. 41.5).

4. Title II of the ADA explicitly cross-references the Rehabilitation Act's coordination regulations, providing that the "Attorney General shall promulgate regulations" that are "consistent with * * * the coordination regulations" promulgated under the Rehabilitation Act. 42 U.S.C. 12134(a) and (b). Pursuant to that authority, the Attorney General has issued regulations establishing enforcement procedures consistent with those established under Title VI and the Rehabilitation Act. The Title II regulations provide that a person alleging discrimination may file a complaint with the appropriate agency, 28 C.F.R. 35.170; that the agency will investigate and attempt to gain "voluntary compliance" when appropriate, 28 C.F.R. 35.172(a), 35.173(b); and that—if those efforts are unsuccessful—the "agency shall refer the matter to the Attorney General with a recommenda-

tion for appropriate action," which may include a lawsuit, 28 C.F.R. 35.174; see 28 C.F.R. 35.175, 35.178 (contemplating judicial enforcement).

B. The Present Controversy

1. Petitioner, the State of Florida, administers a system of services for children with complex medical needs. Pet. App. 69a-70a. After receiving complaints of disability discrimination alleging that petitioner is unnecessarily institutionalizing certain children with disabilities and placing other children at risk of unnecessary institutionalization, see D. Ct. Doc. 700, at 20 (June 15, 2022) (Amended Complaint), DOJ investigated the allegations and found that petitioner was violating Title II of the ADA, *ibid.*; see Pet. App. 2a-3a; cf. *Olmstead* v. *L. C.*, 527 U.S. 581, 587 (1999) (holding that the unnecessary institutionalization of individuals with disabilities violates Title II in certain circumstances); *id.* at 607 (opinion of Ginsburg, J.).

When DOJ's efforts to obtain petitioner's voluntary compliance were unsuccessful, the United States filed suit under Title II, and the district court consolidated that suit with a putative class action filed by a group of children asserting similar claims. Pet. App. 3a. Petitioner moved for judgment on the pleadings in the United States' case, arguing that the ADA did not authorize the Attorney General to sue to enforce Title II. *Id.* at 4a. The court denied the motion. *Ibid.*

2. More than two years later, and after the case had been reassigned to a new judge, the district court sua sponte reversed course and dismissed the United States from the case. Pet. App. 68a-101a. The court acknowledged that Title II "provides" any "person alleging discrimination" with the "remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation

Act]," 42 U.S.C. 12133, which in turn incorporates the "remedies, procedures, and rights set forth in [T]itle VI," 29 U.S.C. 794a(a)(2). Pet. App. 78a-79a. But in the court's view, even if Title VI grants the Attorney General the right to sue, Title II does not because "Congress did not incorporate [into Title II] 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.'" *Id.* at 79a-80a & 98a n.7 (quoting 42 U.S.C. 12133). The court determined that only one of Title VI's "remedies, procedures, and rights" satisfies that standard—the implied right of action under 42 U.S.C. 2000d. Pet. App. 81a, 99a n.10 (citation omitted).[2]

3. The court of appeals reversed. Pet. App. 1a-67a. The court began by recognizing that Title II "provides" a "person alleging discrimination" the "remedies, procedures, and rights" of Section 505, which in turn incorporates the remedies, procedures, and rights of Title VI. *Id.* at 6a, 8a-9a (quoting 42 U.S.C. 12133). The court rejected petitioner's contention that "because the Attorney General is not a 'person alleging discrimination,'" it necessarily follows that he is not authorized to sue under Title II. *Id.* at 9a. The court explained that "[b]ecause Congress chose to cross-reference" Section 505, and therefore Title VI, it was necessary to "consider those statutory provisions" in assessing what remedies Title II provides to "persons alleging discrimination" and whether those remedies include an enforcement action by the Attorney General. *Id.* at 11a.

The court of appeals thus carefully analyzed the text, context, and history of the enforcement mechanisms

---

[2] In separate decisions, the district court dismissed the putative class action brought by private plaintiffs. Pet. App. 5a.

provided by Title VI and the Rehabilitation Act, and it determined that both statutes allow individuals to file administrative complaints that may result in enforcement suits by the Attorney General. Pet. App. 12a-22a (Title VI); *id.* at 22a-32a (Rehabilitation Act). The court therefore held that "[t]he express statutory language" of Title II's enforcement provision "create[s] a system of federal enforcement" that includes the "investigation of complaints" submitted by persons alleging discrimination and, "ultimately," enforcement through "'any other means authorized by law,'" including a suit by the Attorney General. *Id.* at 59a; see *id.* at 46a-47a, 55a.

Judge Branch dissented. Pet. App. 60a-67a. She believed that the Attorney General cannot sue under Title II because he is not a "person alleging discrimination." *Id.* at 60a. And she would have rejected the government's argument that an administrative process potentially culminating in a suit by the Attorney General is one of the remedies, procedures, and rights that Title II supplies to such persons by cross-referencing the Rehabilitation Act and Title VI. *Id.* at 65a-66a.

4. The court of appeals denied rehearing en banc. Pet. App. 102a-103a. Judge Newsom, joined by Judge Branch, dissented. *Id.* at 140a-165a. Judge Jill Pryor, who had joined the panel opinion written by Sixth Circuit Judge Danny Boggs (sitting by designation), issued an opinion responding to Judge Newsom's dissent. *Id.* at 104a-139a. Among other things, she emphasized that the panel's holding did not rest on a determination that the Attorney General is a "person alleging discrimination" under Title II. *Id.* at 108a-109a.

ARGUMENT

Petitioner principally contends (Pet. 11-14) that the court of appeals erroneously held that the Attorney

General is a "person alleging discrimination" under 42 U.S.C. 12133. That misreads the decision below. The court of appeals did not hold that the Attorney General is a "person" under Section 12133; instead, it held that the Attorney General may bring suit under Title II of the ADA because Section 12133 provides "any person alleging discrimination" with the "remedies, procedures, and rights" set out in the Rehabilitation Act and Title VI, and one of those "remedies, procedures, and rights" is the ability to file an administrative complaint that may result in a suit by the Attorney General.

That holding is correct, and it does not conflict with any decision of this Court or another court of appeals. Indeed, aside from the now-reversed district court decision in this case, *no* court has ever concluded that the Attorney General lacks authority to bring enforcement actions under Title II. During the 30 years since Title II's enactment, "the Attorney General has filed dozens of lawsuits against public entities" under Title II and settled many more cases. Pet. App. 115a. The court of appeals' decision thus merely reaffirms a long-established understanding. And even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. This case concerns petitioner's Medicaid program, which relies on federal funds. Accordingly, even if the United States could not proceed under Title II, the federal government could take action to pursue relief under the materially identical substantive provisions of the Rehabilitation Act, which petitioner concedes can be enforced through suits by the Attorney General.

1. The court of appeals correctly determined that the Attorney General may bring suit to enforce Title II of the ADA. Pet. App. 33a. Title II "provides any

person alleging discrimination" with the "remedies, procedures, and rights" established under Title VI of the Civil Rights Act. 42 U.S.C. 12133. And under Title VI, a victim of discrimination may file an administrative complaint that may culminate in an enforcement suit by the Attorney General.

a. Title II incorporates the remedial measures established under Title VI of the Civil Rights Act through a series of cross-references. It provides that the "remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights [the ADA] provides to any person alleging discrimination on the basis of disability in violation of [Title II]." 42 U.S.C. 12133. Section 505 in turn provides 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" a violation of the Rehabilitation Act. 29 U.S.C. 794a(a)(2). Section 12133 therefore establishes that the "remedies, procedures, and rights" that Title II "provides to any person alleging discrimination," 42 U.S.C. 12133, are the "remedies, procedures, and rights set forth in" Title VI, 29 U.S.C. 794a(a)(2).

One of the "remedies, procedures, and rights," 42 U.S.C. 12133, available under Title VI is an administrative complaint process that may culminate in "appropriate court action" by the Attorney General. 28 C.F.R. 50.3(c)(I)(B)(1); see, *e.g.*, 45 C.F.R. 80.7, 80.8; pp. 3-5, *supra*. Indeed, "a reference to the Department of Justice" so that it may initiate "appropriate proceedings" has long been a key means through which agencies vindicate the rights of victims of discrimination under Title VI. *E.g.*, 45 C.F.R. 80.8; see p. 4 n.1 (collecting analogous agency regulations). For example, in 1964, the

Department of Health, Education, and Welfare promulgated regulations establishing that a victim of discrimination could file an administrative complaint alleging a violation of Title VI, and that—if the agency's investigation validated the claim and "informal means" failed to bring the discriminating entity into compliance—the victim's complaint could be resolved through "a reference to the Department of Justice with a recommendation that appropriate proceedings be brought * * * under any law of the United States * * * or any assurance or other contractual undertaking." 29 Fed. Reg. at 16,301 (45 C.F.R. 80.7(b)-(d), 80.8(a)(1) (1966 Cum. Supp.)). And the DOJ's "Guidelines for Enforcement of Title VI," first promulgated around the same time and still in force today, provide that "[t]he possibility of court enforcement should not be rejected without consulting" DOJ. 31 Fed. Reg. at 5292 (28 C.F.R. 50.3(c)(I)(B)(1)) (emphasis omitted). As contemplated by those provisions, "the United States has consistently used * * * litigation to enforce" Title VI. Pet. App. 19a-20a; see *id.* at 20a-21a & n.10 (collecting cases).

In accordance with the Rehabilitation Act's directive that persons alleging discrimination under Section 504 be afforded the "remedies, procedures, and rights" set forth in Title VI, 29 U.S.C. 794a(a)(2), regulations initially promulgated in the 1970s to implement the Rehabilitation Act have adopted the same enforcement process—including the possibility of suits by the Attorney General. See p. 5, *supra*. And as under Title VI, the United States has brought suits in court to enforce the Rehabilitation Act. See Pet. App. 29a-32a (collecting cases).

Because administrative complaint procedures potentially culminating in an Attorney General action have

long been a part of the remedial scheme established by Title VI and the Rehabilitation Act, they are among the "remedies, procedures, and rights" that Section 12133 "provides to any person alleging discrimination" under Title II of the ADA. 42 U.S.C. 12133. When "Congress adopts a new law incorporating sections of a prior law, [it] normally can be presumed to have had knowledge of the interpretation given to the incorporated law." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); see *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998). When the ADA was enacted, not only was Title VI's administrative enforcement scheme well-established, but courts had uniformly recognized that the United States may pursue enforcement actions under both Title VI and the Rehabilitation Act.[3]

b. Another provision of the ADA, 42 U.S.C. 12134, further confirms that Title II incorporates Title VI's administrative complaint process, including the possibility of Attorney General enforcement suits. Section 12134 requires the Attorney General to "promulgate regulations" under Title II that are "consistent with"

---

[3] See, *e.g.*, *United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984) (holding that under the Rehabilitation Act, "an agency may resort to 'any other means authorized by law'—including the federal courts"), cert. denied, 469 U.S. 1189 (1985); *National Black Police Ass'n* v. *Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) (holding that "referral of cases to the Attorney General, who may bring an action against the recipient," is one of the "'other means authorized by law'" under Title VI, 42 U.S.C. 2000d-1), cert. denied, 466 U.S. 963 (1984); *Adams* v. *Richardson*, 480 F.2d 1159, 1161 n.1, 1163 (D.C. Cir. 1973) (en banc) (concluding that Title VI "sets forth two alternative courses of action by which enforcement may be effected"—fund termination or "other means authorized by law," including a "reference to [DOJ]" to bring "appropriate proceedings"); see also Pet. App. 19a-21a & n.10, 29a-32a (citing additional cases).

the Rehabilitation Act's "coordination regulations," found in "part 41 of title 28, Code of Federal Regulations." 42 U.S.C. 12134(a) and (b). One of the Rehabilitation Act's "coordination regulations" provides that federal agencies "shall establish a system for the enforcement" of the Act that "shall include * * * [t]he enforcement and hearing procedures that the agency has adopted for the enforcement of [T]itle VI." 28 C.F.R. 41.5. Title II's express statutory text thus requires the Attorney General to establish an administrative enforcement scheme "consistent" with that established under Title VI—that is, a scheme that may culminate in an enforcement suit by the Attorney General. 42 U.S.C. 12134(b).

c. If Title II did not permit suits by the Attorney General, it would mean that by providing "any person alleging discrimination" with the "remedies, procedures, and rights" set out in the Rehabilitation Act and Title VI, Section 12133 provides such a person with only one meaningful "remed[y], procedure[], or right[]": an implied private right of action. The other "remedies, procedures, and rights" available to aggrieved persons under Title VI and the Rehabilitation Act all involve filing administrative complaints, which can lead to either withdrawals of funding or suits by the Attorney General. But the first option is not available in Title II cases involving public entities that do not receive federal funds. Accordingly, if suits by the Attorney General were not available either, Title II's administrative process would include *no* means of enforcement against entities that do not receive federal funds—which are, of course, the very entities that Title II was enacted to cover. See p. 2, *supra*.

It is not plausible to assert, as petitioner necessarily must, that Congress intended to provide such an "utterly ineffectual" administrative enforcement scheme. Pet. App. 126a. And Committee Reports from both the House and Senate confirm that Congress did no such thing: Those reports explain that "the major enforcement sanction for the Federal government" in Title II matters is a referral to the DOJ so that the Attorney General may "proceed to file suit[] in Federal district court." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 98 (1990); accord S. Rep. No. 116, 101st Cong., 1st Sess. 57-58 (1989).

2. Petitioner acknowledges (Pet. 19-20) that Title II expressly incorporates the enforcement provisions of the Rehabilitation Act and Title VI, and petitioner further acknowledges (Pet. 19 n.1) that the "United States can bring suit under the Rehabilitation Act and under Title VI." Petitioner insists (Pet. 11-20), however, that the United States may *not* bring suit under Title II. Each of the arguments petitioner advances in support of that contention fails.

a. Petitioner primarily asserts (Pet. 11-14) that the Attorney General is not a "person alleging discrimination" under 42 U.S.C. 12133. But that is irrelevant. The court of appeals did not hold that the Attorney General is himself a "person alleging discrimination." Rather, the court held that such "persons"—for example, children unnecessarily institutionalized in violation of Title II—are entitled to the same bundle of remedies, procedures, and rights available to persons alleging discrimination under Title VI and Section 505. See, *e.g.*, Pet. App. 9a-11a & n.5, 32a-33a, 46a-47a, 59a. And that bundle includes the right to file an administrative complaint potentially culminating in a civil action by the Attorney

General that will "vindicate[]" the complaining "individual['s] personal rights." *Id.* at 33a.

Petitioner fails to cite anything in the court of appeals' opinion to support its assertion (Pet. 11-14) that the court held that the Attorney General is a "person" under Section 12133. As Judge Pryor explained, the 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." Pet. App. 108a (respecting the denial of rehearing en banc). Judge Pryor also reiterated that the panel held that the Attorney General may bring suit under Title II because a person alleging discrimination is afforded the "panoply of remedies, procedures, and rights" established under Title VI and that bundle "includ[es] the right to file an administrative complaint" that invokes "a process that may culminate in suit by the Attorney General." *Ibid.* Judge Branch likewise recognized that the United States had not argued—and that the panel had not held—"that the Attorney General is a 'person alleging discrimination.'" Pet. App. 65a.

Petitioner emphasizes (Pet. 17-18) that the United States has acknowledged that it is the "only plaintiff" in this suit and that it is not "litigating on behalf of any individual claimant." But the fact that the persons whose administrative complaints instigated the process that culminated in this litigation are not plaintiffs does not mean that the suit will not "provide[]" a "remed[y]" for them. 42 U.S.C. 12133. The United States' operative complaint asks the court to enjoin petitioner to "cease discriminating against" those victims, D. Ct. Doc. 700, at 22. If the Attorney General obtains a court order to that effect, the persons alleging discrimination

will have obtained a remedy for their harms without being forced to bear the burdens of litigation themselves—a result consistent with Congress's express contemplation that "the Federal Government" would play "a central role in enforcing" the ADA "on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(3).

This Court has made precisely that point in the context of Title VII, which establishes a similar enforcement scheme by allowing individuals to file charges of discrimination with the Equal Employment Opportunity Commission that may result in suits by the Commission or DOJ. 42 U.S.C. 2000e-5(b), (f), and (g). The Court explained that the Commission—like the Attorney General here—"bring[s] suit in its own name" and not in a "representative capacity." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 324, 327 (1980). But the Court also emphasized that the Commission's suits serve to "obtain[] appropriate relief for those persons injured by discriminatory practices." *Id.* at 325; see *id.* at 324 ("relief for a group of aggrieved individuals").[4]

---

[4] Petitioner asserts (Pet. 18) that the Attorney General brings Title II suits even when the affected individuals are "*opposed*" to that action. Even if that were true, it would be irrelevant. The question posed by the statutory text is whether administrative procedures potentially culminating in a suit by the Attorney General are among the "remedies, rights, or procedures" available to persons alleging discrimination under Title II. 42 U.S.C. 12133. The answer to that question is yes even though—like the Commission suing under Title VII—the Attorney General does not bring suit in a representative capacity. And in any event, the decision on which petitioner relies does not support its assertion that the Attorney General brings Title II suits over the opposition of the affected individuals. In *United States* v. *Arkansas*, 794 F. Supp. 2d 935 (E.D. Ark. 2011), the court

b. Petitioner's alternative contentions also fail. Petitioner asserts (Pet. 13-14) that Title II does not provide for Attorney General suits because, while the enforcement provisions in Titles I and III of the ADA expressly mention the Attorney General, Title II's enforcement provision does not. But referencing the Attorney General in Title II's enforcement provision would have been redundant because the text already provides for enforcement actions by the Attorney General through its cross-references to Title VI and the Rehabilitation Act, which have long been understood to authorize suits by the Attorney General. See 42 U.S.C. 12133, 12134; see also pp. 3-5, *supra*.

In addition, there is an obvious explanation for Congress's omission of an express reference to the Attorney General in Title II despite including one in Titles I and III: In Title II, Congress was simply tracking the language of the Rehabilitation Act's enforcement provision. Compare 42 U.S.C. 12133, with 29 U.S.C. 794a(a)(2); see Pet. App. 128a (Jill Pryor, J., respecting the denial of rehearing en banc) (observing that the differences in the enforcement provisions of Titles I, II, and III of the ADA reflect the different "existing statutory framework[s]" that formed the backdrop for each title). Section 505 of the Rehabilitation Act also makes no mention of the Attorney General, but—as petitioner concedes

---

noted that the parents and guardians of certain institutionalized children "opposed" the United States' claims "so far as the record show[ed]." *Id.* at 937. But *Arkansas* was not a Title II suit in the relevant sense because the United States was suing under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997a, and it was alleging violations of Title II as one of several reasons that it was entitled to the equitable relief that 42 U.S.C. 1997a authorizes. *Arkansas*, 794 F. Supp. 2d at 980; Compl. at 1-3, 9, *United States* v. *Arkansas*, No. 09-cv-33 (E.D. Ark. Jan. 16, 2009).

(Pet. 19 n.1)—the Attorney General may nevertheless sue under that Act.

Petitioner similarly errs in asserting that the Attorney General has no right to sue because federal agencies do not "automatically have standing to sue for actions that frustrate the purposes of their statutes." Pet. 15 (quoting *Director, Off. of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132 (1995)). The Attorney General's authority to sue under Title II is not established by the "purposes" of the ADA, *ibid.*; it is established by the text. Title II provides "any person alleging discrimination" with the remedies set forth under Title VI, and one of the remedies Title VI "provides to any person alleging discrimination" is the ability to file an administrative complaint that may result in an Attorney General suit that secures relief for that person. To deny the Attorney General the ability to bring such suits would thus be to deny persons alleging discrimination a remedy guaranteed to them by the text of the relevant statutes.

Petitioner also errs in invoking (Pet. 15-17) this Court's statement that Congress must use "unmistakeably clear" language if it wants to "alter the usual constitutional balance" between the federal government and the States. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460, 463-464 (1991) (citation and internal quotation marks omitted). Permitting the federal government to sue the States does not "alter the usual constitutional balance." *Id.* at 460 (citation and internal quotation marks omitted). To the contrary, this Court has repeatedly recognized that "[i]n ratifying the Constitution, the States consented to suits brought by * * * the Federal Government." *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); see, *e.g.*, *United States* v. *Mississippi*, 380 U.S. 128, 140

(1965) (no "provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"); *United States* v. *Texas*, 143 U.S. 621, 645-646 (1892) (suit by the United States against a State "does no violence to the inherent nature of sovereignty"). Statutes authorizing the United States to bring such suits are commonplace. In the anti-discrimination context alone, they include not just Title VI and the Rehabilitation Act, but also Title VII, see 42 U.S.C. 2000e-5(f)(1); Title I of the ADA, 42 U.S.C. 12112(a), 12117(a); see 42 U.S.C. 12111(2) and (5); and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-2(f). This Court has never suggested that such statutes are subject to a clear-statement rule.

Finally, in a footnote, petitioner briefly asserts (Pet. 19 n.1) that the Attorney General may bring suit under Title VI and the Rehabilitation Act only because those statutes "were enacted pursuant to Congress's powers under the Spending Clause" and thus can be enforced through "contract-like claims." From that premise, petitioner infers that the United States cannot bring suit under Title II because it is not Spending Clause legislation. *Ibid.* But this Court has already rejected petitioner's premise that "suits under Spending Clause legislation are suits in contract." *Barnes* v. *Gorman*, 536 U.S. 181, 188 n.2 (2002). And even if that premise were correct, it would not support petitioner's conclusion: Whatever the underlying legal basis for the remedies, procedures, and rights available under Title VI and the Rehabilitation Act, Congress expressly directed that those same remedies shall be available under Title II.

In *Barnes*, therefore, this Court rejected an argument much like the one petitioner presses here. The Court had held that Title VI's status as "Spending

Clause legislation" meant that punitive damages are not available in private suits under Title VI. 536 U.S. at 189. In a separate opinion, Justice Stevens suggested that this analysis "does not carry over to [Title II of] the ADA because [it] is not Spending Clause legislation." *Id.* at 189 n.3. Writing for the Court, Justice Scalia emphatically disagreed, explaining that Title II "could not be clearer that the 'remedies, procedures, and rights'" it provides "are the same as the 'remedies, procedures, and rights'" set forth in Title VI and the Rehabilitation Act. *Ibid.* (quoting 42 U.S.C. 12133). "These explicit provisions," the Court held, "make discussion of the ADA's status as a 'non Spending Clause' tort statute quite irrelevant" in determining the scope of the remedies it provides. *Ibid.*; see *id.* at 185. So too here.

3. Petitioner does not allege that the decision below conflicts with any decision by another court of appeals. To the contrary, no other court of appeals has even addressed the issue. And, with the exception of the now-reversed district court decision in this case, the district courts that have considered the question have all agreed that the Attorney General is authorized to bring suit to enforce Title II. See, *e.g.*, *United States* v. *Mississippi*, No. 16-cv-622, 2019 WL 2092569, at *2-*3 (S.D. Miss. May 13, 2019), appeal on other grounds pending, No. 21-60772 (5th Cir. filed Oct. 6, 2021); *United States* v. *Harris Cnty.*, No. 16-cv-2331, 2017 WL 7692396, at *1 (S.D. Tex. Apr. 26, 2017); *United States* v. *Virginia*, No. 12-cv-59, 2012 WL 13034148, at *2-*3 (E.D. Va. June 5, 2012); *Smith* v. *City of Philadelphia*, 345 F. Supp. 2d 482, 489-490 (E.D. Pa. 2004); *United States* v. *City & Cnty. of Denver*, 927 F. Supp. 1396, 1399-1400 (D. Colo. 1996); see also Pet. App. 52a-55a (citing cases). Despite

that consensus, petitioner asserts that this Court's review is warranted for two reasons. Neither has merit.

a. Petitioner first asserts (Pet. 26) that this Court has "reviewed questions concerning fundamental issues about the division of power between the states and the national government, even without a circuit split." But this case raises no such questions and scarcely resembles the examples on which petitioner relies, most of which involved challenges to the constitutionality of a federal statute. Petitioner does not and could not dispute that Congress can authorize the Attorney General to sue the States; the only question is whether it has done so in Title II. That is a routine question of statutory interpretation—and one on which the decades-long consensus in the lower courts counsels strongly against this Court's review.

In arguing otherwise, petitioner seeks to portray suits by the Attorney General enforcing Title II as a particular intrusion on state sovereignty. But that is difficult to square with the well-established proposition that private individuals may bring individual or class-action suits under Title II. See *Olmstead* v. *L. C.*, 527 U.S. 581, 587 (1999); *id.* at 607 (opinion of Ginsburg, J.); see also Fed. R. Civ. P. 23. As this Court has recognized, private suits intrude on state sovereignty in ways that suits by the federal government do not. See *Penn-East Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244, 2258-2259 (2021).

Petitioner's assertion that the opposite is true under Title II is based on the contention (Pet. 20-25) that the United States may seek systemic relief. But petitioner exaggerates the nature of the relief in cases it cites; the United States does not, for example, exercise a "massive power to reshape state policy," Pet. 20, when it

enters into a settlement agreement that requires a public transportation provider to bring its websites and mobile applications into compliance with certain accessibility standards, see Pet. 25 n.8 (citing Press Release, Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District: DJ No. 204-24-129 at 1-3 (Dec. 14, 2021), https://perma.cc/P5ZN-C9QG).

In any event, any concerns about the scope of relief in the Attorney General's Title II suits can be addressed as appropriate in cases where the issue actually arises. But no such questions are presented here: Because this case is still in its preliminary stages, no court has determined whether petitioner is liable, much less considered an appropriate remedy. Petitioner will have ample opportunity to litigate those remedial questions if and when they arise on remand.

b. Petitioner also asserts that the lack of division in the lower courts is the result of "in terrorem" settlements. Pet. 23 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011)); see Pet. 27-28. There is no basis for that assertion. Petitioner does not contend that the Attorney General's Title II suits threaten the sort of crippling damages liability the Court contemplated in *AT&T Mobility*. Instead, petitioner primarily relies (Pet. 22-23, 27) on litigation costs. But experience has shown that States are fully capable of litigating with the federal government when they wish to do so. See, *e.g.*, *Biden* v. *Texas*, 142 S. Ct. 2528 (2022); *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022); *United States* v. *Washington*, 142 S. Ct. 1976 (2022); *Biden* v. *Missouri*, 142 S. Ct. 647 (2022) (per curiam); *United States* v. *Texas*, 142 S. Ct. 522 (2021) (per curiam).

Fears about litigation costs are a particularly implausible explanation for the dearth of precedent supporting petitioner's position here. Any State or local government that believes the Attorney General lacks the authority to sue under Title II may move to dismiss on that basis as soon as a complaint is filed. If the district court denies the motion, the State or local government may seek interlocutory review through 28 U.S.C. 1292(b). The absence of *any* other court of appeals decisions on this issue therefore suggests either that public entities have not viewed the proposition that the Attorney General may sue as sufficiently in doubt to justify a request for interlocutory review, or that courts receiving such requests have uniformly determined that there is not a " substantial ground for difference of opinion" on the issue. *Ibid.*

4. Finally, even if the question presented otherwise warranted this Court's review, this case would not be a suitable vehicle in which to consider it. If petitioner prevailed, the Attorney General would not be able to bring this suit under Title II. But petitioner receives federal Medicaid funding for the children's health programs at issue here. Pet. App. 69a. Those programs are thus subject to the substantially similar prohibition on disability discrimination in the Rehabilitation Act. See 29 U.S.C. 794. And petitioner concedes (Pet. 19 n.1) that "[t]he United States can bring suit under the Rehabilitation Act."

When this suit was filed, DOJ had no reason to proceed under the Rehabilitation Act because no court had ever suggested that the Attorney General lacks the authority to sue under Title II. But if petitioner prevailed here, the federal government could take action to pursue relief under the Rehabilitation Act. And there is no

reason for this Court to take up the question presented in a case where it makes little or no practical difference to a State's exposure to suit by the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KRISTEN CLARKE
Assistant Attorney General
BONNIE I. ROBIN-VERGEER
SYDNEY A.R. FOSTER
Attorneys

AUGUST 2022