No. 21-1384

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 U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Florida seeks review of the court of appeals' holding that the United States may sue to enforce Title II of the Americans with Disabilities Act. In response, the United States does not dispute that Title II "provides" remedies only "to" a "person alleging discrimination." 42 U.S.C. § 12133; *see* BIO 14–15. It also does not dispute that the United States is not such a "person." BIO 14. And, for good measure, the United States agrees that the only entity suing here is the conceded non-"person": the United States. BIO 15.

Given all that, one might have expected the United States' opposition to contain a confession of error. Instead, the United States defends the court of appeals. It contends that the *United States* may sue under Title II of the ADA because *others*—"persons" who are not parties to this case and on whose behalf the United States is not suing—have remedies under that statute. BIO 14–15.

That makes no sense. The *United States* is suing here, which is why the United States buries in a footnote the bizarre assertion that it is "irrelevant," BIO 16 n.4, whether the "persons" whose remedies the United States purports to invoke *even want* this suit. Nothing in the Rube-Goldberg scheme of statutory cross-references on which the United States relies, BIO 10–13, can obscure that "[b]ecause the Attorney General of the United States—on behalf of the United States itself . . .—filed suit in this case, it is the United States that must have a cause of action." App. 65a (Branch, J., dissenting).

The United States is also wrong to downplay the broad implications for state sovereignty that the opinion below would have. Title II of the ADA touches essentially everything that State and local governments do. Suits under Title II thus impose substantial federalism costs as federal courts are called in to oversee state programs. And when the federal government sues, it claims to avoid the normal limits on individual litigation: It aggregates claims without the procedural protections of Rule 23, it seeks prospective relief for "victims" whose claims have long been resolved, it sidesteps sovereign immunity, and it targets entire State programs in ways that no individual could. It is therefore not surprising that the federal government has used Title II to secure settlements from States in matters as diverse as nurse credentialing, prison programs, and voting booth design.

There are no vehicle problems preventing this Court from answering this important question. The United States posits only one—it suggests that it could bring its same undue-institutionalization claims under the Rehabilitation Act. BIO 23–24. But that is not true. Unlike the ADA, the Rehabilitation Act does not contain an "express recognition that isolation or segregation of persons with disabilities is a form of discrimination." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 n.11 (1999). And the Rehabilitation Act has a heightened causation requirement. All of that explains why the United States has never pursued these claims as Rehabilitation Act claims, even in the six years since the district court concluded that the United States lacked a cause of action under Title II.

The petition should be granted.

ARGUMENT

I. THE DECISION BELOW IS WRONG.

As Florida has explained, the decision below conflicts with both this Court's precedents and the text of the ADA. Pet. 11–20. Title II of the ADA provides remedies only to a "person alleging discrimination on the basis of disability." 42 U.S.C. § 12133. There is no express mention of the United States in Title II. And thus, whether the United States can bring suit under Title II requires answering a simple question: Is the United States a "person" alleging discrimination?

It is not. Title II provides remedies to persons; the United States is not a person; thus, the United States has no remedies.

1. In response to that simple logic, the United States relies on a complicated daisy chain of statutory cross-references to assert that it may sue because Title II "incorporates" Title VI's "remedial measures," and one of those remedies "is an administrative complaint process that may culminate in 'appropriate court action' by the Attorney General." BIO 10–13. But that is a non sequitur because the statute "provides" those incorporated "remedies, procedures, and rights" only "to any person alleging discrimination." 42 U.S.C. § 12133. The United States' argument might be relevant to whether a person alleging discrimination under Title II could take advantage of that administrative complaint process. But the question here is whether the United

States may sue *in its own name* apart from that process.

The United States next suggests that it may sue under Title II in its own name because its "suit will . . . 'provide[]' a 'remed[y],'" BIO 15, to unnamed "persons" not before the Court whom the United States believes may have suffered discrimination. That circular reasoning elides the antecedent question of whether the United States may bring "suit" under Title II in the first place. The only entity invoking "remedies, procedures, [or] rights" here is the United States, which is why the caption is "*State of Florida v. United States of America*." In saying that *its* suit is authorized by Title II because the statute "provides" "remedies, procedures, and rights," 42 U.S.C. § 12133, to *unknown others*, the United States grossly misuses the English language.

As the United States concedes, when it sues under Title II, it sues in its own name and litigates for its own purposes, not as a representative of anyone else. BIO 16 n.4. That is why the United States remarkably declares it "irrelevant," *id.*, whether the alleged "persons" whose "remedies" it claims to invoke by way of this lawsuit even desire its intervention. The United States needs to take that position because it sometimes seeks relief under Title II that the purported beneficiaries oppose. *United States v. Arkansas*, 794 F. Supp. 2d 935, 937 (E.D. Ark. 2011). The notion that Title II authorizes the United States to bring an oxymoronic nonrepresentative-representative action is flatly contrary to the statute.

Unable to ground its theory in Title II's text, the United States complains that, unless it may sue under

Title II, victims of discrimination will be left with "only one meaningful 'remed[y], procedure[], or right[].'" BIO 13. Even if there were an unstated statutory imperative to provide another, however, that additional remedy could be supplied by an administrative-complaint process applicable to Title II, which, as the United States stresses, BIO 12–13, Congress authorized it to promulgate. But in no way does it follow that the additional remedy must be a Title II suit by the United States in its own name.

The United States also analogizes Title II to Title VII of the Civil Rights Act, which does authorize the United States to sue in its own name. BIO 16. The appeal to statutory structure damages the United States' cause. Title VII authorizes the United States to sue only because it expressly permits suits by the "Attorney General." 42 U.S.C. § 2000e-5(f)(1); *id.* § 2000e-6. Ditto for Titles I and III of the ADA, both of which expressly authorize suit by the "Attorney General." 42 U.S.C. §§ 12117(a), 12188(b). The absence of that language in Title II of the ADA only underscores that the United States lacks the same remedy here.

Zooming in on Title I makes matters even worse for the United States' position. Just as Title II incorporates remedies from Title VI and provides them to "persons," so too does Title I incorporate the "powers, remedies, and procedures" of Title VII and gives them to "any person alleging discrimination on the basis of disability." 42 U.S.C. § 12117(a). On the United States' theory, that cross-reference to Title VII should also implicitly permit a Title I suit by the United States. That has to be wrong: again, Congress

expressly permitted the "Attorney General" to sue under Title I—language that on the United States' theory is meaningless surplusage.

2. Even if the United States' suit were properly conceived as a remedy for the "person alleging discrimination," it would not be authorized. The remedies incorporated into Title II from Title VI state that "[c]ompliance . . . may be effected . . . by any other means authorized by law." 42 U.S.C. § 2000d-1. The phrase "any other means authorized by law" does not create an independent cause of action; it merely incorporates existing ones. For Title VI, that incorporation often permits federal suits because the United States has a cause of action "in the nature of a contract" with the States that accept its funds. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Indeed, in Spending Clause programs, the federal government often has an express contract with a State. But because Title II is not a Spending Clause statute, the breach-of-contract analogy does not create an "other means authorized by law" that permits the federal government to bring Title II suits. *See* App. 149a–159a (Newsom, J., dissenting).

II. THIS CASE RAISES IMPORTANT QUESTIONS ABOUT THE RELATIONSHIP BETWEEN THE STATES AND THE FEDERAL GOVERNMENT.

Whether the United States can bring claims under Title II is a "big deal" because permitting such suits "tilt[s] the federal balance decisively in favor of the federal government," App. 163a, 164a (Newsom, J., dissenting). As 15 States explain, "the ADA applies to virtually all state and local programming and . . . claims by the United States are not subject to

the ordinary rules of sovereign immunity," so permitting the federal government to sue gives it "unprecedented power to superintend State administration of public services and programs." Tex. Br. at 1.

1. In dismissing the question presented as unimportant, the United States argues that allowing it to sue States under Title II occasions no "particular intrusion on state sovereignty," as Title II already permits "private suits." BIO 21. Yet it never disputes that even individual suits in this area are fraught because of the "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).

Claims for systemic relief brought by the United States are even more intrusive than individual claims. When a private litigant sues, his remedies are naturally limited to his injuries. *E.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). But systemic suits seek far broader relief. That is why the United States can take aim at entire State programs under Title II, not simply at one-off treatment decisions. *Compare* App. 163a–164a (documenting United States' suit against Georgia, which required "numerous substantive policy changes"), *with Olmstead*, 527 U.S. at 594 (two plaintiffs seeking community placement). Indeed, the United States' amici below touted that the federal government "is able to achieve systemic relief that private litigants" cannot. *See* Br. of Bazelon Center for Mental Health Law et al., *United States v. Florida*, No. 17-13595 at

15, 19 (11th Cir. Oct. 25, 2017). That type of systemic relief comes at the cost of "encroach[ing]" on the State's "sovereign prerogatives." App. 165a (Newsom, J., dissenting).

It is small comfort that the United States sometimes chooses to seek only modest relief under Title II, like requiring a State to "bring its websites and mobile applications into compliance with certain accessibility standards." BIO 22. That the federal government might sometimes decline to exercise the fullest extent of its claimed power hardly means that state sovereignty should be left to the "mercy of" some federal bureaucrat's "*noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). And other times the federal government has sought to use Title II to superintend whole state court systems, rewrite educational policy, or seize control over nurse credentialing. *See* Pet. 24–25. Here, for example, the United States is not asking Florida to put up a new website, but rather is seeking to rewrite Florida's statewide Medicaid policies.

2. The United States next waves away concerns about the ambitious scope of its claimed power because "the scope of relief . . . can be addressed" after liability is found. BIO 22. That misses the point—most of the United States' Title II suits are settled before suit is even filed. *See* Pet. 25 (documenting more than 200 settlements). Indeed, that front-end issues (like whether the Attorney General has a cause of action at all) are only arising in the circuits thirty years after the ADA was enacted confirms that these cases are rarely litigated and often settled.

Consider the immense settlement pressure the federal government can exert under its preferred interpretation of Title II. When the United States sues, it puts States to a choice: settle, or rack up millions in litigation fees and risk an injunction that turns over key State programs to federal control. App. 164a (Newsom, J., dissenting). Making the wrong choice can result in ceding large swaths of State policy to federal court control. *See United States v. Mississippi*, No. 16-cv-622, 2021 WL 2953672, at *1, 4 (S.D. Miss. July 14, 2021) (accepting in full a special master's recommendations and appointing a federal monitor to oversee a state health system).

3. Finally, the United States points out (BIO 20–21) that the circuits are not divided on the question presented. But this Court routinely reviews important federalism questions that have not generated a circuit split. *See* Pet. 26–27. In fact, the lack of a split only highlights the issue's importance. These cases rarely reach final judgment (and even more rarely reach the circuits) because States are so frequently forced to settle. *See* Tex. Br. at 5 ("Many States and local governments are unwilling or unable to defend such lawsuits. That results in sweeping consent decrees and settlements."). That is why the only precedent the United States (BIO 20) can muster for its position on the merits is a smattering of district court cases.

III. THIS CASE IS AN IDEAL VEHICLE.

The United States does not dispute that the case squarely implicates the question presented. The only vehicle problem it identifies is that even if Florida prevails here under Title II, "the federal government could take action to pursue relief under the

Rehabilitation Act." BIO 23–24. But the United States has not pursued Rehabilitation Act claims at any stage of this decade-old litigation and is unlikely to be able to do so here.

To begin, it is far from clear that the Rehabilitation Act would permit the federal government to pursue its theory of liability in this case—the claim that that "undue institutionalization" can be disability-based discrimination. *Olmstead*, 527 U.S. at 597–98. This Court approved that theory of liability in *Olmstead* after noting that in the ADA Congress adopted "a more comprehensive view of the concept of discrimination." *Id.* at 598. But as this Court observed in *Olmstead*, "[u]nlike the ADA," the "Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination." 527 U.S. at 600 n.11. Indeed, the United States itself argued in *Olmstead* that there was "no settled judicial understanding" that the Rehabilitation Act "prohibited unjustified" institutionalization. Br. for the United States, *Olmstead v. L.C. ex rel. Zimring*, No. 98-536 at 23–24 (Mar. 15, 1999).

Even if the United States could pursue its *Olmstead* claim under the Rehabilitation Act, proving that claim would be substantially more difficult because the Rehabilitation Act has a stricter causation requirement than the ADA. *See* 42 U.S.C. § 12132 ("by reason"); 29 U.S.C. § 794(a) ("solely by reason"). The Rehabilitation Act "allows a plaintiff to recover if he or she were deprived of an opportunity to participate in a program solely on the basis of disability, while the ADA covers discrimination on the

basis of disability, even if there is another cause as well." *CG v. Pa. Dep't of Educ.*, 734 F.3d 229, 235–36 (3d Cir. 2013).

All of that is probably why the United States did not seek to amend after the district court dismissed its complaint for failing to establish a cause of action under Title II. If the Rehabilitation Act truly were a substitute for its asserted cause of action here, surely the United States would have asserted it already. In all events, however, the United States' theoretical ability to raise a new claim long after the district court's deadline to amend is not a reason to deny review here.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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