No. _____

In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ASHLEY MOODY
Attorney General
HENRY C. WHITAKER
Solicitor General
Counsel of Record
DANIEL W. BELL
Chief Deputy Solicitor General
CHRISTOPHER J. BAUM
Senior Deputy Solicitor General
EVAN EZRAY
Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for Petitioner

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act, which grants any "person alleging discrimination" certain "remedies, procedures, and rights," 42 U.S.C. § 12133, authorizes the United States to sue the states in its own name.

PARTIES TO THE PROCEEDING

Petitioner is the State of Florida. Respondent is the United States of America.

RELATED PROCEEDINGS

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

C.V. v. Dudek, No. 12-cv-60460 (Sept. 20, 2016)

United States v. Florida, No. 13-cv-61576 (Dec. 6, 2013)

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

United States v. Florida, No. 17-13595 (Sept. 17, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Florida, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

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

JURISDICTION

The court of appeals entered judgment on September 17, 2019. App.1a. The court of appeals denied rehearing en banc on December 22, 2021. App.102a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In 42 U.S.C. § 12132, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, provides as follows:

> Subject 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.

In 42 U.S.C. § 12133, the ADA provides:

> 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.

Other pertinent statutory provisions are reproduced in the appendix to this petition. App.197a–199a.

INTRODUCTION

Title II of the ADA provides remedies only to a "person alleging discrimination on the basis of disability." 42 U.S.C. § 12133. This Court's precedents make clear that the United States is not such a "person." Yet a divided panel of the Eleventh Circuit somehow concluded that that this provision authorizes the United States to bring Title II suits in its own name against states.

That conclusion is not just dead wrong—it is also massively consequential. Title II of the ADA governs virtually all state and local activities and programs. And unlike in an individual Title II suit, when the United States sues, it asserts the power to bring claims respecting amorphous masses of unidentified individuals. Through lawsuits brought against states under Title II, the United States has asserted sweeping authority to reshape all manner of state programs, shifting the balance of federal-state power. Most state and local governments—over 200 so far—give up without a fight, meaning that in most cases the United States' far-reaching claims of authority are essentially unreviewable.

In greenlighting this suit, the panel brushed aside this Court's precedent at every turn. It dismissed this Court's cases construing the term "person" across a panoply of statutes and consistently adhering to a "longstanding interpretive presumption that 'person' does not include the sovereign." *E.g.*, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000). The panel also turned to general notions of policy to find a cause of action notwithstanding this Court's contrary instruction that federal agencies do

not "automatically have standing to sue for actions that frustrate the purposes of their statutes." *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132 (1995). Finally, the panel failed to heed this Court's instruction that Congress must be "clear" if it wishes to alter the traditional federal-state balance. *Bond v. United States*, 572 U.S. 844, 860 (2014).

The Eleventh Circuit's error comes at great expense. When the United States sues under Title II, it seeks system-wide relief (as it did here). Such claims put states to a stark choice. States must either "(1) . . . enter into settlement agreements, which not only impose monetary and resource costs but also lead to federal oversight of local policy decisions, or (2) . . . risk thousands (possibly millions) of dollars in litigation costs by disputing liability or terms of compliance," all while risking a federal-court injunction if the defense fails. App.164a (Newsom, J., dissenting). The result has been that in one policy area after another—from institutionalization rates, to educational discipline, to polling-place design—states have cut their losses and acceded to settlements that permit the federal government to oversee critical areas of state government. In our federalist system, "[t]hat's a big deal." App.163a (Newsom, J., dissenting).

This Court should review this issue, and it should do so now. Given that most states give up without enduring the burdens of litigation, the passage of additional time is unlikely to result in further percolation of the question presented. And the Eleventh Circuit's decision only enhances the United

States' leverage in future suits, increasing the likelihood that such suits will end in forced settlements—in each instance an unreviewable federal overreach.

STATEMENT

1. The ADA "forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III). *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (footnotes omitted). Congress created separate mechanisms for enforcing each of those titles. *See generally Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591 n.5 (1999). Title I's proscription is enforceable by the Equal Employment Opportunity Commission, by "the Attorney General," or by "any person alleging discrimination on the basis of disability." 42 U.S.C. § 12117(a). Title III may be enforced by "any person who is being subjected to discrimination on the basis of disability," 42 U.S.C. § 12188(a)(1), as well as through suits brought by the "Attorney General," but only if the Attorney General certifies that the issue is "of general public importance" or is based on a pattern of discrimination. 42 U.S.C. § 12188(b). Title II, by contrast, provides remedies only to "any person alleging discrimination on the basis of disability." 42 U.S.C. § 12133.

Titles I and III principally regulate private entities, while Title II regulates state and local governments. Title II provides 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. Title II thus regulates every service, program, or activity administered by every state and local government in the nation.

2. In *Olmstead v. L.C. ex rel. Zimring*, this Court held that "undue institutionalization" by a state of a patient with a mental-health disability may in certain circumstances constitute disability discrimination in violation of Title II. 527 U.S. at 597–603. The Court concluded that "under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 607.

Although the plaintiff in *Olmstead* was a private citizen, years after the decision the Department of Justice "launched an aggressive" campaign of Title II enforcement against state defendants. U.S. Dep't of Justice, *Olmstead: Community Integration for Everyone*, https://www.ada.gov/olmstead (last visited April 20, 2022); *see also* Zachary E. Shapiro et al., Olmstead *Enforcements for Moderate to Severe Brain Injury: The Pursuit of Civil Rights Through the Application of Law, Neuroscience, and Ethics*, 95 Tul. L. Rev. 525, 566 (2021) ("From 2009 to 2016, Obama's

DOJ was involved in fifty *Olmstead* integration cases . . . .").

Those suits were not brought on behalf of specific individuals. Rather, in each case, the United States sought systemic relief against state governments, even when the allegedly aggrieved individuals "oppose[d] the claims of the United States." *United States v. Arkansas*, 794 F. Supp. 2d 935, 937 (E.D. Ark. 2011). Those claims put states to a near-Hobson's choice: either meet the immense resources of the Department of Justice with a massive investment of similarly immense resources or accede to a consent decree or settlement that would let the Department of Justice effectively dictate state healthcare policy through court-appointed monitors. Most states took the latter course. *See*, *e.g.*, *United States v. Georgia*, No. 1:10-cv-249 (N.D. Ga. filed Jan. 28, 2010).

3. Florida chose the former. In July 2013, the United States brought this Title II suit against Florida, alleging that the State's policies regarding nursing facilities and community-based services resulted in the unnecessary admission of children with complex medical conditions to nursing facilities. *See* App.166a–196a. The United States sought injunctive relief and compensatory damages. App.193a–194a.

As in previous cases, the United States did not sue on behalf of any specific children. Indeed, several children had already brought their own claims against Florida in a putative class action that ultimately was rendered moot when Florida changed its policies. *See A.R. by & through Root v. Sec'y Fla. Agency for Health Care Admin.*, 769 F. App'x 718 (11th Cir. 2019).

Instead, the United States was clear that it alone was the plaintiff, suing in its own name. *See* App.169a. Consistent with that assertion, the United States' allegations swept far more broadly than any individual suit could have. The United States alleged, for example, that "[n]early two hundred" children were cared for in institutional settings in Florida. App.168a. It said that "[o]ther children with significant medical needs" required more services in community care. App.167a. It alleged that "[n]umerous policies, practices, and actions by the State" had "limited the availability of many community-based services" for an unnamed number of other children, App.176a, using individuals only as examples supporting its systemic allegations, App.188a–189a. And the United States alleged that all this occurred because Florida "administer[ed] and fund[ed] its programs and services for these individuals in a manner that has resulted in their prolonged and unnecessary institutionalization in nursing facilities or placed them at risk of such institutionalization." App.167a–168a.

Florida moved for judgment on the pleadings, arguing that the United States lacked a cause of action under Title II. Mot. for Judgment on the Pleadings, *United States v. Florida*, No. 13-cv-61576, ECF No. 28 (S.D. Fla. Nov. 1, 2013). Unlike Titles I and III of the ADA—which expressly give the U.S. Attorney General a cause of action—Florida explained that Title II grants enforcement authority only to "person[s] alleging discrimination," which under longstanding interpretive principles presumptively excludes the United States. *Id.* at 1, 3–6.

The district court initially denied the motion, Order, *United States v. Florida*, No. 13-cv-61576, ECF No. 40 (S.D. Fla. May 30, 2014), but following reassignment to another judge, dismissed the complaint, App.97a. The district court reasoned that, "[w]here Congress has conferred standing on a particular actor in one section of a statutory scheme, but not in another, its silence must be read to preclude standing." App.73a. The district court found it significant that Title II permits suits only by "person[s] alleging discrimination," whereas Titles I and III expressly permit suit by the Attorney General. App.74a–75a. And the district court reasoned that under the "longstanding interpretive presumption that 'person' does not include the sovereign," Title II's reference to "person[s] alleging discrimination" did not include the United States. App.75a–76a.

4. The United States appealed, and a divided Eleventh Circuit panel reversed. App.59a. The panel majority allowed that Title II's enforcement provision was "not as specific as those in Titles I and III." App.11a. But it declined to "assume that a single word in § 12133"—*i.e.*, the fact that the statute provides remedies only to "person[s]"—"ends all inquiry." App.11a. Instead, looking beyond that text, the panel attached significance to a convoluted series of inferences based on a daisy-chain of statutory "cross-references," App.12a–32a, 40a–47a, specifying the remedies that the statute "provides to any person." 42 U.S.C. § 12133. The panel declared that, in specifying that those remedies include remedies available under Title VI of the Civil Rights Act of 1964, Title II "adopts" those remedies. App.59a. And one such

remedy, the panel asserted, included a suit by the United States. App.59a.

In dissent, Judge Branch explained that Title II provides remedies—whatever they are—only to a "person alleging discrimination." App.60a. "Because the United States is not a 'person alleging discrimination' . . . Title II does not provide the Attorney General of the United States with a cause of action to enforce its priorities." App.60a (Branch, J., dissenting). As a result, Judge Branch observed, the panel majority's heavy reliance on cross-references to remedies in other statutes containing different language was entirely irrelevant. App.65a–66a (Branch, J., dissenting).

The Eleventh Circuit denied Florida's petition for rehearing en banc. App.103a. Judge Newsom, joined by Judge Branch, dissented. He emphasized this Court's presumption that the term "person" does not include the sovereign and explained that the panel majority was "flat wrong" to conclude that the United States could be a "person alleging discrimination" under the statute. App.142a (Newsom, J., dissenting). He further explained that "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." App.143a (Newsom, J., dissenting).

REASONS FOR GRANTING THE PETITION

Title II "provides remedies, procedures, and rights" only "to a person alleging discrimination." 42

U.S.C. § 12133. The United States is not such a "person." End of story.

The Eleventh Circuit grievously erred in expanding that authorization to include a suit by the United States. In doing so, it approved a type of Title II suit not tethered to discrimination against any particular individual, but instead one seeking to institute federal supervision of state programs at a systemic level. Unlike the individual claims the statute authorizes, these claims for systemic relief—with the full might of the federal government behind them—put enormous pressure on defendant states to settle by agreeing to federal oversight in important policy areas. The result is to empower the Department of Justice to dictate to states core sovereign choices through the threat of broad Title II ADA liability.

In authorizing sweeping claims by the United States against states without a whisper of statutory authority for it to sue, the panel "shrugged off" multiple lines of this Court's precedent, including precedent that has been consistently re-affirmed for "more than 100 years." App.149a (Newsom, J., dissenting). The panel's decision to permit the United States' power grab warrants this Court's review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES AND THE TEXT OF THE AMERICANS WITH DISABILITIES ACT.

The Eleventh Circuit's decision conflicts with the text of the statute and with three lines of this Court's precedents: *First*, absent specific statutory language indicating otherwise (of which there is none in Title II), the term "person" does not include the sovereign.

See, *e.g.*, *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019). *Second*, federal agencies do not "automatically have standing to sue for actions that frustrate the purposes of their statutes." *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. at 132. Rather, "when an agency in its governmental capacity *is* meant to have standing [to sue], Congress says so." *Id.* at 129. And *third*, when "dramatically intrud[ing] upon traditional state [functions]," Congress must speak "clear[ly]." *Bond*, 572 U.S. at 857.

1. Title II grants rights and remedies to "a person alleging discrimination." Thus, under Title II's plain language, the United States has no rights and remedies unless it is "person." Under this Court's cases, it is not.

The Eleventh Circuit's contrary decision conflicts with this Court's cases establishing a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Res.*, 529 U.S. at 780. That presumption rests on the plain meaning of the word "person": "As [this Court has] often noted, 'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Int'l Primate Prot. League v. Adm'r of Tulane Educ. Fund*, 500 U.S. 72, 82–83 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989)). The presumption is reinforced by the Dictionary Act, which defines the term "person," as used in "any Act of Congress," to include an individual and corporation, but not the government, "unless the context indicates otherwise." *Return Mail*, 139 S. Ct. at 1862 (citing 1 U.S.C. § 1). For example, in *Return Mail* the Court

rejected the idea that the United States was a "person" entitled to challenge the validity of a patent under the Leahy-Smith America Invents Act of 2011, even though references to "persons" elsewhere in the statute included the United States. 139 S. Ct. at 1863–64.

This is an easier case than *Return Mail*. Far from rebutting the presumption that United States is not a "person," the ADA makes clear that it is not. Unlike Title II, Title I provides "powers, remedies, and procedures . . . to the [EEOC], to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter[.]" 42 U.S.C. § 12117(a). Title III does much the same, making clear that "[i]f the Attorney General" believes "that—(i) any person . . . engaged in a pattern or practice of discrimination . . . or (ii) any person . . . has been discriminated against . . . and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action." 42 U.S.C. § 12188(b)(1)(B). Congress in those companion statutes therefore used the term "person" to refer to *individuals*—not to the United States, much less to the Attorney General specifically. By contrast, Title II provides "remedies, procedures, and rights" only "to any person alleging discrimination." 42 U.S.C. § 12133. Congress presumably used the word "person" in Title II likewise to mean individuals, and not to mean the United States (much less the "Attorney General"). *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568, 570 (1995) (it is a "normal rule of statutory construction that identical words used in different parts of the same act

are intended to have the same meaning" (internal quotation marks omitted)).

This Court said as much in *Olmstead* in describing the ADA's remedial scheme. There, this Court distinguished suits by "persons"—individuals—alleging discrimination and suits by the Attorney General. The Court said that under Title II a "person alleging discrimination" can file a complaint in federal court or with an appropriate federal agency. *Olmstead*, 527 U.S. at 591 n.5. By contrast, this Court explained, Title I may be enforced by the "EEOC, the Attorney General, [or] persons alleging discrimination." *Id.* And under Title III, "the Attorney General and persons alleging discrimination" may seek enforcement. *Id.* The panel majority opinion did not so much as grapple with that discussion.

The decision below is likewise at odds with the position of the United States—at least so far—that it is not a "person" within the meaning of the remedial provisions of the Fair Credit Reporting Act, even though that statute *defines* the term "person" to include "governments." *See*, *e.g.*, Br. for the United States at 4, 40–55, *United States v. Bormes*, 568 U.S. 6 (2012). At least two federal courts of appeals have accepted that contention. *See Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (4th Cir. 2019); *Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. 2018); *but see Mowrer v. U.S. Dep't of Trans.*, 14 F.4th 723 (D.C. Cir. 2021) (concluding the opposite); *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014) (same). If the United States is not a "person" even when the statute expressly defines it to be one, how can it be a "person" entitled to sue under Title II of the ADA?

2. The panel's decision conflicts with this Court's precedents in at least two other ways. *First*, the panel majority found enforcement by the Attorney General appropriate because it was consistent with the "purposes of the ADA." App.47a. But this Court has been clear that federal agencies do not "automatically have standing to sue for actions that frustrate the purposes of their statutes." *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. at 132; *see also Return Mail*, 139 S. Ct. at 1867 n.11 (finding that the Postal Service was not a person who could bring suit and explaining that "mere furtherance of the statute's broad purpose" could not permit suit). Rather, because "an agency literally has no power to act . . . unless and until Congress confers power upon it," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), "when an agency in its governmental capacity *is* meant to have standing [to sue], Congress says so," *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. at 129.

Second, the panel decision ran roughshod over the principle that Congress must speak "clear[ly]" before working a significant alteration in the federal-state balance. *Bond*, 572 U.S. at 860; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."). Title II regulates every service, program,

or activity administered by every state and local government in the nation. Even Title II suits brought by individuals carry "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); *accord id.* at 624 (Thomas, J., dissenting) (noting the same "federalism costs"). Vesting the Department of Justice with discretion to bring claims for systemic relief would thus work a "significant change in the sensitive relation between" the federal government and the states. *United States v. Bass*, 404 U.S. 336, 349 (1971).

The panel majority did not even try to contend that Title II "clearly" gives the federal government the power to sue. Instead, the panel purported to find such authority "[t]hrough a series of cross-references." App.8a. Indeed, the panel admitted that "Title II's enforcement provision is not as specific as those in Titles I and III" in giving the Attorney General power to sue. App.11a. That was an understatement: The plain language of Title II, far from rebutting the federalism clear-statement rule, shows that the United States is *not* a "person" entitled to sue under it. 42 U.S.C. § 12133.

In the panel's view, however, *Olmstead* had already taken any federalism concerns into account. App.58a. But *Olmstead* featured an individual claim, not a claim for systemic relief brought by the federal government. 527 U.S. at 593–94. This Court has consistently recognized that systemwide claims are an entirely different animal from individual claims.

Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1414 (2019); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Permitting the United States to bring claims for systemic relief against state and local governments under the broad substantive prohibitions of the ADA would reshape the federal-state balance in a manner not remotely contemplated by Congress in enacting Title II.

3. In her statement respecting the denial of rehearing en banc, Judge Jill Pryor insisted that the panel's opinion did not hold that the United States (or the Attorney General) is a "person alleging discrimination" within the meaning of Title II. App.108a. Instead, Judge Pryor claimed that "the panel concluded that the 'person' referred to in § 12133 is the individual who claims to have suffered discrimination" and that a federal enforcement action initiated by the United States is merely a right or remedy that Title II provides to that individual. App. 108a–109a.

That is seriously wrong. The only plaintiff here is the *United States*, and it is bringing the suit in its own name, not in the name of, or on behalf of, anyone else. Indeed, the United States has repeatedly disavowed any notion that it is litigating on behalf of any individual claimant. *E.g.*, U.S. Responses to Fla.'s Seventh Set of Interrogatories, *A.R. v. Dudek*, No. 12-cv-60460, ECF No. 402-1 at 2 (S.D. Fla. Sept. 8, 2015) ("The United States has not brought and does not maintain this action on the behalf of any individuals; rather this lawsuit is brought through the U.S. Department of Justice on behalf of the United States."); *id.* at 3–4 ("While many or all of these

individuals may have Title II claims separate and apart from the present claim maintained by the United States, the United States is not litigating the claims of individual children."); Statement of Material Facts in Supp. of the U.S.' Opp'n to Summ. J., *A.R. v. Dudek*, No. 12-cv-60460, ECF No. 467-1 at 1 (S.D. Fla. Apr. 7, 2016) ("The United States is not litigating individual claims of, or on behalf of, individual children."). That position is not new for the United States. For example, in Arkansas, it brought claims that were *opposed* by the individuals the United States purported to benefit, *Arkansas*, 794 F. Supp. 2d at 937, and in Georgia, the United States' settlement agreement "completely ignore[d]" the "individual desire of each patient," Donnalee Donaldson, *Can We Stop the Madness? Finding Legal Solutions to the Housing Crisis Facing the Mentally Ill*, 5 S. Region Black L. Students Ass'n L.J. 38, 46 (2011).

The United States' concession that it is not bringing representative claims when it sues under Title II is well-founded. A unilateral suit by the Attorney General to pursue disability-discrimination claims on behalf of individuals, even when those individuals do not welcome the claims (and without regard to the class-action requirements of Federal Rule of Civil Procedure 23 no less), would require a souped-up claim-aggregation procedure not present in the statute. Where Congress has wished the Attorney General to have special authority to prosecute an individual's claim on behalf of that individual, it has made that authority abundantly clear. The Uniformed Services Employment and Reemployment Rights Act, for instance, says that "the Attorney General may appear on behalf of, and act as attorney for, the person

on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person." 38 U.S.C. § 4323(a). It is even less plausible that Title II allows the Attorney General to sue on behalf of amorphous masses of individuals who may not even want to be nannied by the Department of Justice.

The panel majority opinion, Judge Pryor's opinion respecting the denial of rehearing en banc, and the United States' theory of this case more broadly all rest on a simple analytical error. The statute says that "[t]he remedies, procedures, and rights set forth in section 794a of title 29"—the Rehabilitation Act—"shall be the remedies, procedures, and rights" that Title II "provides to any person alleging discrimination." 42 U.S.C. § 12133. The Rehabilitation Act, in turn, incorporates the remedies of Title VI. *See* 29 U.S.C. § 794a(a)(2). Judge Pryor's view (like the United States') is that because the "rights set forth" in the Rehabilitation Act (and Title VI) include suits by the United States, Title II must likewise authorize the United States to bring suit. *See*, *e.g.*, App.108a–109a (opinion of Pryor, J.).

But the conclusion (that the United States may sue under Title II in its own name) simply does not follow from the premise (that the United States may sue under the Rehabilitation Act and under Title VI).[1]

[1] In any event, as Judge Newsom explained, the cross-referenced remedies are inapplicable to Title II for an independent reason. *See* App.149a–159a (Newsom, J., dissenting). The United States can bring suit under the Rehabilitation Act and under Title VI because those statutes were enacted pursuant to Congress's powers under the Spending

Title II provides the cross-referenced "remedies, procedures, and rights" only "*to any person* alleging discrimination on the basis of disability." 42 U.S.C. § 12133 (emphasis added). Thus, only if the United States is a "person" can it pursue *any* remedy under Title II. Nothing in the statute's "cross-references"—or in the 93 pages of opinions below straining to construe them to permit suit by the United States—moves the needle one bit in establishing authority for the United States to sue under Title II.

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

The decision below, if allowed to stand, will have far-reaching consequences, delegating to the federal government massive power to reshape state policy. Title II of the ADA regulates almost everything state and local governments do. And in its *Olmstead* cases, the federal government has demanded (and obtained) sweeping settlements that commandeer even the most picayune details of state healthcare management.

Consider the federal government's *Olmstead* settlement with Georgia. *See* Joint Mot. to Enter the Parties' Settlement Agreement (Ex. A), *United States v. Georgia*, No. 1:10-cv-249, ECF No. 112 (N.D. Ga. Oct. 19, 2010). Georgia agreed—without admitting fault—to sweeping changes to its state medical policy spelled out in granular detail. For example, Georgia

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Clause. App.156a (Newsom, J., dissenting). Title II, by contrast, is not Spending Clause legislation. So the contract-like claims that the United States may bring under the Rehabilitation Act or Title VI have no application in this context.

agreed to move, every year, a specified number of people from institutionalized settings to community settings. *Id.* at 5–7. Georgia likewise agreed to create specific programs, like a mobile crisis team, and to set those programs up with specific staffing levels. *Id.* at 9–10. Georgia agreed to provide settlement-mandated services to its community-setting population. *Id.* at 12–22. And Georgia agreed that its medical services would be superintended by a federal monitor (paid by the state) and that the federal government would have "full access" to Georgia's employees, records, and materials to ensure compliance. *Id.* at 27, 30.

It is a big deal, in our federalist system, to wrest from states control over healthcare policy and administration. In *Olmstead* itself, five Justices recognized as much. Justices Kennedy and Breyer recognized that the states play a lead role in providing medical services to the disabled. *See Olmstead*, 527 U.S. at 608–09 (Kennedy, J., concurring). They were therefore concerned that even suits brought by individual plaintiffs bore "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." *Id.* at 610. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, likewise urged caution in light of the "significant federalism costs" associated with "directing States how to make decisions about their delivery of public services." *Id.* at 624 (Thomas, J., dissenting). Those concerns are only magnified by the United States' move from *Olmstead*'s individual model of enforcement to a systemic one.

Given the cost of defending systemic litigation and the risk that an adverse judgment could result in federal-court control over key state policy areas, most states sued by the United States have succumbed to its Title II demands. In most such cases, the United States asserts sprawling, amorphous claims regarding many individuals with disabilities in the jurisdiction. That dramatically raises the cost of litigation, and the consequence of defeat would be to cede control of key state programs to a federal court. That forces the states 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" all while risking a sweeping injunction or monetary penalty. App.164a (Newsom, J., dissenting); *see also United States v. Mississippi*, 3:16-cv-622, 2021 WL 2953672, at *1 (S.D. Miss. July 14, 2021) (accepting in full the recommendations of a court-appointed special master who was empowered to shape Mississippi's health systems after Mississippi litigated and lost an *Olmstead* claim brought by the federal government); App.193a–194a (seeking an injunction and compensatory damages). Given the stakes, that "choice" is often really none at all. *Cf. Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good.").

Those types of "'in terrorem' settlements" are bad enough in the class-action context. *AT&T Mobility LLC*, 563 U.S. at 350. But at least there, Rule 23 affords defendants procedural protections. The federal government under Title II shirks even that small comfort, insisting (unlike a class litigant) that it can bring its claims over the objection of its supposed beneficiaries. *See Arkansas*, 794 F. Supp. 2d at 937. The United States also insists (unlike a class litigant) that it can bring sweeping claims without even identifying, much less being responsible to, the disabled individuals it purports to benefit. *See* App.149a (Newsom, J., dissenting) (noting the United States' position 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"). And the United States insists (unlike a class litigant) that it can litigate its claims without even coming forward with individual-specific evidence.

In all, the United States' asserted Title II cause of action "tilt[s] the federal balance decisively in favor of the federal government." App.164a (Newsom, J., dissenting). The United States has secured at least 14 settlements against the states and Puerto Rico under *Olmstead*—which allowed two individual plaintiffs to challenge their institutionalization under Title II—requiring the states to reengineer their institutional and community care programs.[2] And the issue doesn't

[2] U.S. Dep't of Justice, *Olmstead* Enforcement by Circuit Court (last visited April 20, 2022), https://www.ada.gov/olmstead/olmstead_enforcement.htm; U.S. Dep't of Justice, *Olmstead* Enforcement by Case or Matter (last

stop at *Olmstead*. Using the cudgel of Title II, the federal government has sought a sweeping injunction aimed at controlling a state court system,[3] challenged the design of a state's nursing credentialing program,[4] and obtained settlements governing state polling-place procedures,[5] educational policy,[6] police

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visited April 20, 2022), https://www.ada.gov/olmstead/olmstead_cases_list2.htm.

[3] U.S. Dep't of Justice, Justice Department Files Suit Against Pennsylvania Court System for Discriminating Against People with Opioid Use Disorder (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-files-suit-against-pennsylvania-court-system-discriminating-against-people.

[4] U.S. Dep't of Justice, Justice Department Finds that Indiana State Nursing Board Discriminates Against People with Opioid Use Disorder (March 25, 2022), https://www.justice.gov/opa/pr/justice-department-finds-indiana-state-nursing-board-discriminates-against-people-opioid-use.

[5] U.S. Dep't of Justice, United States Reaches Agreement with Travis County Clerk's Office to Ensure Polling Place Access for Voters with Disabilities (March 8, 2022), https://www.justice.gov/usao-wdtx/pr/united-states-reaches-agreement-travis-county-clerk-s-office-ensure-polling-place.

[6] U.S. Dep't of Justice, Justice Department Settles with Florida's Volusia County School District to Protect Students with Disabilities from Classroom Removals and Other Discrimination (Aug. 3, 2021), https://www.justice.gov/opa/pr/justice-department-settles-florida-s-volusia-county-school-district-protect-students.

services,[7] the layout of local transportation websites,[8] the layout and design of civic buildings,[9] and state prison programs.[10] Indeed, the United States' amici below touted this settlement record, noting that the federal government "is able to achieve systemic relief that private litigants" cannot, and citing "219 settlement agreements with 204 localities in all 50 states." *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) (Bazelon Br.).

If legislation expressly authorizing any of those settlements had been considered by Congress—imagine hearings about the Federal Control Over State Programs Act—they would no doubt have

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[7] U.S. Dep't of Justice, Justice Department Reaches Agreement with the Philadelphia Police Department to Ensure Effective Communication for Deaf and Hard of Hearing Individuals (Aug. 2, 2018), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-philadelphia-police-department-ensure-effective.

[8] U.S. Dep't of Justice, Justice Department Secures Agreement to Improve Web Accessibility for Public Transportation Users with Disabilities in Champaign-Urbana, Illinois (Dec. 14, 2021), https://www.justice.gov/opa/pr/justice-department-secures-agreement-improve-web-accessibility-public-transportation-users.

[9] U.S. Dep't of Justice, Justice Department Reaches Agreement with Milwaukee to Ensure Civic Access for People with Disabilities (June 9, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-milwaukee-ensure-civic-access-people-disabilities.

[10] U.S. Dep't of Justice, Justice Department Reaches Agreement with Vermont Department of Corrections to Improve Access for Inmates with Disabilities (Oct. 28, 2021), https://www.justice.gov/opa/pr/justice-department-reaches-agreement-vermont-department-corrections-improve-access-inmates.

"be[en] treated with great skepticism." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). All the more so if, as here, Congress had not made its intention to expand federal power "unmistakably clear." *Gregory*, 501 U.S. at 460–61.

This Court has on many occasions reviewed questions concerning fundamental issues about the division of power between the states and the national government, even without a circuit split. *E.g.*, *Torres v. Tex. Dep't of Public Safety*, No. 20-603 ("Whether Congress has the power to authorize suits against nonconsenting states pursuant to its War Powers."), *granted* Dec. 15, 2021; *United States v. Texas*, No. 21-588 (asking, in part, whether the United States had a cause of action to sue states under the Fourteenth Amendment), *granted* Oct. 22, 2021; *PennEast Pipeline Co. v. New Jersey*, No. 19-1039 ("Whether the NGA delegates to FERC certificate holders the authority to exercise the federal government's eminent domain power to condemn land in which a state claims an interest."), *granted* Feb. 3, 2021; *Allen v. Cooper*, No. 18-877 ("Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act."), *granted* June 3, 2019; *Murphy v. NCAA*, No. 16-476 ("Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States?"), *granted* June 17, 2017; *Bond v. United States*, No. 12-158 ("Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute . . . intrudes on traditional

state prerogatives . . . ?"), *granted* Jan. 18, 2013; *Shelby County v. Holder*, No. 12-96 ("Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula . . . violated the Tenth Amendment."), *granted* Nov. 9, 2012.

The same federalism concerns that counselled in favor of review in those cases are present here. The decision below blesses federal coercion across an array of policy fields that are traditional areas of state and local control. Such a scheme of federal policymaking via threat of litigation "comes at real cost to core principles of federalism." App.162a (Newsom, J., dissenting). Those consequences warrant review.

And the time for review is now. The decision below forces states either to settle with the United States or spend millions litigating only to be faced with the ultimate prospect of an injunction promising federal-court superintendence should the state's defenses falter. That threat will only get worse—the decision below will embolden the federal government to launch evermore Title II suits against the states and their subdivisions. *See generally* U.S. Dep't of Justice, Disability Rights Section News, https://www.justice.gov/crt/disability-rights-section-news (last visited Apr. 20, 2022).

Moreover, because the costs of litigating against the federal government's sweeping Title II claims are so high (because the government insists, unlike any individual litigant, that it can litigate systemically) and because the risks of an adverse judgment are so high (an injunction allowing a federal court to oversee wide swaths of state policy), there is little chance that

another case raising this question will reach this Court. Indeed, nearly all of the federal government's Title II claims have settled long before any appeal could be taken. The simple math is this: Given the stakes, the vast majority of DOJ-brought Title II suits settle before anyone could seek this Court's review. *E.g.*, Bazelon Br. at 14–15 (explaining that "[w]hile this case may give the impression otherwise, the vast majority" of DOJ's Title II claims end in settlement). If the decision below is left to stand, then the question presented may well evade this Court's review indefinitely.

III. THIS CASE IS AN IDEAL VEHICLE.

This case is also an ideal vehicle to address the question presented.

First, the case presents a clean legal issue in a case-dispositive setting. Florida raised the Attorney General's authority to bring these claims in a motion for judgment on the pleadings. The district court addressed that question. App.68a–101a. The court of appeals also addressed the question and reversed. App.1a–67a. It did so in a split panel opinion that led to lengthy opinions debating whether to grant rehearing en banc. App.1a–67a, 102a–165a. The question presented has thus been addressed throughout this case and arrives at this Court as a purely legal issue with dueling opinions airing every side of the issue. Moreover, because any individual claims against Florida have already been resolved, *A.R.*, 769 F. App'x at 727, the issue comes to the Court in a case-dispositive posture.

Second, this case places in stark relief the sweeping implications of treating the United States as a "person" under Title II. The United States sued only after a nearly year-long process to get the State to accede to its demands. *See* App.168a, 192a. And the case comes to the Court with a record that underscores the breadth of the United States' assertion of power. In the trial court, the United States repeatedly took the position that when it sues under Title II, it need not point to any individual violation. As the United States explained below, "we are not bringing individualized claims here. . . . [W]e do not have documents from the state's production that support an individualized basis for relief as to these children. Since we are not bringing an individualized claim . . . these children would be beneficiaries of our injunctive systemic relief in this case that would be based on systemic evidence." Tr. of Jan. 7, 2016 Hearing, *A.R. v. Dudek*, No.12-60460, ECF No. 439 at 25:21, 27:7–13 (S.D. Fla. Jan. 26, 2016).

CONCLUSION

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

Respectfully submitted.

ASHLEY MOODY
Attorney General

HENRY C. WHITAKER
Solicitor General
Counsel of Record
DANIEL W. BELL
Chief Deputy
Solicitor General
CHRISTOPHER J. BAUM
Senior Deputy
Solicitor General
EVAN EZRAY
Deputy Solicitor General
Office of the
Attorney General
The Capitol – PL-01
Tallahassee, FL 32399
Phone: (850) 414-3300
henry.whitaker@
myfloridalegal.com

April 21, 2022