No. 17-13595-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

A.R., *et al.*,

Plaintiffs-Appellants

v.

SECRETARY, FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT

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UNITED STATES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the United States as Appellant hereby furnishes this amended certificate of persons and parties that may have an interest in the outcome of this case:

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A.R., by and through her next friend, Susan Root, Plaintiff-Appellant in related appeal No. 17-13572-BB

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Arc of the United States, Amicus Curiae in support of the United States and, in related appeal No. 17-13572-BB, Amicus Curiae in support of neither side

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A.R. v. *Secretary, Florida Agency for Health Care Admin.*, No. 17-13595-BB

Zloch, William J., United States District Judge, Southern District of Florida

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
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Date: March 1, 2018

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INTRODUCTION

This appeal presents the question whether the Attorney General has a cause of action to enforce Title II of the Americans with Disabilities Act of 1990 (ADA). The district court held that the Attorney General does not, and that the only available enforcement mechanism is a private right of action. We argued in our opening brief that this Court should reverse the district court's erroneous holding. As we explained, the language, purposes, and legislative history of Title II all confirm that Congress intended the Attorney General to have the authority to sue to enforce this title in the event a federal agency is unable to secure voluntary

compliance through the administrative enforcement process—authority the Department of Justice (DOJ) has repeatedly exercised for more than 25 years.

Florida takes the contrary view, contending that the ADA's text, as well as precedent, establishes that the Attorney General has no authority to sue under Title II, 42 U.S.C. 12133. FL Br. 6-19. To reach that conclusion, Florida distorts our discussion of Title II's text and dismisses statutory purposes and context. Florida further declares that the United States essentially invented enforcement authority under Title II in 2009, when it began bringing healthcare-related lawsuits against the States. FL Br. 6, 17. Yet, as described at pp. 14-17, *infra*, the United States has been vigorously enforcing Title II to prevent and remedy discrimination by state and local governments since shortly after Title II took effect in 1992, Pub. L. No. 101-336, § 205(a), 104 Stat. 338 (1990). And it has been doing so consistent with Title II's legislative history, which definitively establishes that Congress intended the Attorney General to have the authority to sue public entities when federal agencies are unable to resolve administrative complaints of discrimination. See U.S. Br. 16-18.

Florida also maintains that Congress could not have intended to incorporate into Title II the Attorney General's authority to file lawsuits to enforce the Rehabilitation Act of 1973 (Rehabilitation Act) and Title VI of the Civil Rights Act of 1964 (Title VI) because these earlier statutes supposedly do not authorize

federal enforcement authority. Accepting this argument would jettison more than 50 years of judicial decisions and administrative interpretations and practice, all of which have construed Title VI and the Rehabilitation Act as authorizing the federal government to sue violators when voluntary compliance cannot be achieved. The upshot of Florida's argument is that there is *no* federal enforcement remedy or procedure under Title VI or the Rehabilitation Act that Congress could have imported into Title II. FL Br. 1. That view is particularly ironic and ahistorical given that, as the Supreme Court has emphasized, Title VI's enforcement provision focuses on enforcement by *federal agencies*, not private parties. *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001).

ARGUMENT

THE ATTORNEY GENERAL HAS AUTHORITY TO SUE TO ENFORCE TITLE II OF THE ADA

A. Section 12133 Provides The Attorney General Authority To Enforce Title II In The Event A Federal Agency Is Unable To Secure Voluntary Compliance

Florida first asserts that the United States "identifies no textual authorization in Title II for federal enforcement actions." FL Br. 3. But we did. As explained in our opening brief, Title II "provides to any person alleging discrimination on the basis of disability in violation of section 12132," the "remedies, procedures, and rights" set forth in the Rehabilitation Act and Title VI. 42 U.S.C. 12133. Among these is a federal administrative enforcement process that, if unsuccessful in

resolving a complaint, could culminate in a lawsuit by the Attorney General. See U.S. Br. 11-18, 25-27.

Florida claims that this argument is "novel" and "unprecedented." FL Br. 4. Not so. The wording of Section 12133 is substantially identical to Section 505(a)(2) of the Rehabilitation Act, 29 U.S.C. 794a(a)(2), which incorporates the "remedies, procedures, and rights" of Title VI, 42 U.S.C. 2000d-1. The Attorney General has long enforced Title VI through lawsuits as an alternative to the more draconian course of action of terminating federal funding. See U.S. Br. 11-15; Section E, *infra*. To read federal enforcement authority out of Title II would give victims of disability discrimination in public services far less valuable "remedies, procedures, and rights" than victims have under the two earlier statutes—even though Congress directed that they be the "same." *Barnes* v. *Gorman*, 536 U.S. 181, 190 n.3 (2002).

Florida further asserts that no private party has a "right" to either an administrative complaint process or a federal enforcement action. FL Br. 5, 21-27. But that assertion distorts our argument. While a private party has a right to file with a federal agency an administrative complaint alleging disability discrimination by a public entity, see 28 C.F.R. 35.170(a), the complainant has no "right" to compel the Attorney General to file a lawsuit. We never suggested otherwise. Instead, we argued that the "remedies, procedures, and rights" of

Title VI and Section 505 of the Rehabilitation Act include a longstanding federal administrative enforcement scheme in which aggrieved persons may "complain to and enlist the aid of federal agencies in compelling compliance, potentially leading to a DOJ lawsuit." U.S. Br. 15. When the Attorney General files a Title II lawsuit, he proceeds on behalf of the United States—not as the attorney for any individual complainant.[1]

Florida also contends that the administrative enforcement process is not "set forth" in any statute incorporated by Title II. FL Br. 20. This is incorrect: Title VI establishes *two* alternative federal enforcement mechanisms—federal funding termination or a lawsuit by a federal agency. 42 U.S.C. 2000d-1; see also U.S. Br. 11-16; Section E, *infra*. Before a federal agency may exercise either of these options, however, the statute requires that the agency determine that "compliance cannot be secured by voluntary means." 42 U.S.C. 2000d-1. That is where the administrative enforcement process comes in.

[1] Florida protests that the United States did not identify any individual complainant in this case. FL Br. 32. But the Department of Justice received administrative complaints of disability discrimination in connection with Florida's policies and practices before filing suit. No court has ever required the United States to plead that it received an administrative complaint, but the United States could amend its complaint on remand, if necessary, to include allegations regarding these administrative complaints.

Under Title VI's administrative enforcement scheme, federal agencies attempt to resolve meritorious administrative complaints through informal means, and if those efforts are unsuccessful, then the agency may refer the matter to DOJ to bring lawsuits against Title VI violators. U.S. Br. 12-13. In 1977, the Department of Health, Education, and Welfare (HEW) issued regulations implementing Section 504 of the Rehabilitation Act, which incorporated HEW's Title VI complaint and enforcement procedures. U.S. Br. 13; see also U.S. Br. 12. The 1977 HEW regulations thereby adopted an administrative enforcement process for the Rehabilitation Act that, if unsuccessful in achieving voluntary compliance, could culminate in a DOJ enforcement suit. U.S. Br. 13.

The following year, Congress added Section 505(a)(2) to the Rehabilitation Act, which incorporated Title VI's "remedies, procedures, and rights," 29 U.S.C. 794a(a)(2). As the Supreme Court has recognized—in a case ignored by Florida—Congress intended that new provision "to codify the [1977 HEW] regulations * * * governing enforcement of § 504" as "a specific statutory requirement." *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 635 & n.16 (1984) (citation omitted); see U.S. Br. 14. In other words, in enacting Section 505, Congress intended to make available to victims of disability discrimination the "remedies, procedures, and rights" of Title VI, which include an administrative enforcement process that may lead to a DOJ enforcement action. Title II, in turn, provides these

same "remedies, procedures, and rights" to persons alleging discrimination. Accordingly, Title II, by its terms, authorizes the Attorney General to bring enforcement actions such as this case. U.S. Br. 10-16.

B. Construing Section 12133 To Authorize Federal Enforcement Of Title II Advances The ADA's Purposes

1. 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. 42 U.S.C. 12101(b)(2)-(3).

Florida asserts that these express congressional statements of statutory purpose cannot confer power on the Attorney General to enforce Title II. FL Br. 8. But "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King* v. *Burwell*, 135 S. Ct. 2480, 2492 (2015) (citation omitted). Here, as this Court has recognized, an integral purpose of Title II was to extend the reach of Section 504 of the Rehabilitation Act to "make[] *any* public entity liable for prohibited acts of discrimination, regardless of funding source." *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003). Given that goal, it makes no sense to construe Title II to create a feebler enforcement mechanism than that available under the Rehabilitation Act and Title VI. See *New York State Dep't of Social Servs.* v. *Dublino*, 413 U.S. 405, 419-420 (1973) (courts "cannot interpret federal statutes to negate their own stated

purposes"). Yet that is precisely what Florida asks the Court to do by removing the federal government from *any* role in enforcing Title II and leaving all such enforcement to private parties. Given the statute's express purposes, it is implausible that Congress intended to deny the federal government authority to enforce Title II.

2. Florida further asserts that federalism concerns compel the conclusion that Congress intended federal government enforcement of Titles I and III of the ADA but not Title II. FL Br. 11. Florida also contends that if Congress truly had intended to allow the Attorney General to sue States, it would have been required to include a clear statement to that effect. FL Br. 4, 12-13 (citing *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991)). The State is wrong on both counts.

First, even on Florida's reading, Title II already entails "considerable federalism costs." FL Br. 13. Title II imposes non-discrimination mandates on state and local governments across-the-board, regardless of whether they receive federal funding. Indeed, Florida concedes that Title II provides a private right of action to enforce those mandates against States. FL Br. 1-2. Florida's suggestion that it somehow raises *greater* federalism concerns for Congress to authorize the Attorney General to enforce federal law against the States stands federalism principles on their head. After all, lawsuits by the United States against a State do not infringe on State sovereignty like suits by individuals do. See *United States* v.

Texas, 143 U.S. 621, 645-646 (1892). As the Supreme Court has explained, a suit by the federal government against a State "does no violence to the inherent nature of sovereignty," *id.* at 646, whereas private lawsuits do implicate State sovereignty, see, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from *private* suits central to sovereign dignity.") (emphasis added). Simply put, nothing in any 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. *Mississippi*, 380 U.S. 128, 140 (1965); see also *United States* v. *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1327-1328 (11th Cir. 2012) (rejecting argument that State enjoyed immunity from suit by the United States, and noting that "one of the important 'methods of ensuring the States' compliance with federal law' is allowing the DOJ to 'bring suit in federal court against a State'") (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.14 (1996)).

Second, Florida's contention that Congress was required to provide a clear statement of federal government enforcement authority in Title II ignores both the statutory text and the governing case law. In the first place, given the accepted interpretation of Title VI and Section 504 at the time of the ADA's enactment, Congress's importation of the same remedies, procedures, and rights *did* clearly state that federal enforcement is available under Title II. U.S. Br. 10-16.

Moreover, the clear statement rule that Florida invokes governs how Congress must legislate in order to override state sovereignty, not to provide for federal enforcement of federal law. Indeed, the purpose of the "clear statement" rule is to require Congress to "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." See *Gregory*, 501 U.S. at 461 (citation omitted). Here, it is not open to question that Title II includes a clear statement that it applies to state functions. See *Pennsylvania Dep't of Corr*. v. *Yeskey*, 524 U.S. 206, 209 (1998) ("[T]he ADA plainly covers state institutions."). There is no requirement of an *additional* "clear statement" regarding *who* may enforce a statute that undeniably applies to the States. Because suits by the United States against a State do not "alter the 'usual constitutional balance between the States and the Federal Government,'" *Gregory*, 501 U.S. at 460 (citation omitted), the predicate for the "clear statement" rule simply is not present. The only question presented here is whether the Attorney General may enforce Title II against public entities—a straight question of statutory construction.

Finally, Florida also invokes federalism concerns when it claims that the United States is "second-guess[ing]" its "policy choices" and might obtain expansive relief if it were to prevail in this litigation. See FL Br. 1, 13-14, 28-30. But this case is a legal dispute regarding Florida's obligations under Title II, not a "policy" disagreement. In any event, the proper response to Florida's professed

concern about intrusive remedies is for the district court at the remedial stage of this case to carefully tailor the scope of relief to avoid federalism concerns—not to hold that the United States lacks authority altogether to sue a governmental entity for violating Title II, regardless of the nature of the suit or the relief sought. Cf. *Pulliam* v. *Allen*, 466 U.S. 522, 539, 542-543 & n.22 (1984) (holding that federalism concerns are more appropriately addressed as a question of whether and to what extent equitable relief can be granted in any given case, not by immunizing officials from suit altogether).

C. The ADA's Legislative History Confirms That Congress Intended The Attorney General To Have Authority To File Lawsuits To Enforce Title II

Although Florida addresses the legislative history of Title VI at length, it dismisses the dispositive legislative history of the ADA, the actual statute directly at issue. That history powerfully confirms that Congress intended that the Attorney General's "fil[ing] suits in Federal district court"—in the event that a federal agency is "unable to resolve a complaint by voluntary means"—would serve as "the major enforcement sanction for the Federal government" in enforcing Title II. S. Rep. No. 116, 101st Cong., 1st Sess. 57-58 (1989) (Senate Report); accord H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 98 (1990) (House Report II); see also *Shotz*, 344 F.3d at 1175 (discussing this legislative history); U.S. Br. 16-18.

Florida asserts that this Court should disregard the committee reports because they discuss an earlier version of the bill to which a slight change was made. FL Br. 47-49. But that minor change to Title II's enforcement section does not reflect an intent to eliminate the Attorney General's litigation authority. The language reported by these committees provided:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) *shall be available with respect to any individual* who believes that he or she is being subjected to discrimination on the basis of disability * * * .

House Report II, at 10 (§ 205), 98 (emphasis added); see also Senate Report 57; S. 933, 101st Cong. § 205 (as reported by S. Comm. on the Judiciary, Aug. 30, 1989). That version of the language also passed the Senate. S. 933, 101st Cong. § 205 (as passed by Senate, Oct. 16, 1989). The House Judiciary Committee amended the language to read:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) *shall be the remedies, procedures and rights this title provides to any individual* who believes that he or she is being subjected to discrimination on the basis of disability * * * .

H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 10 (§ 205) (1990) (emphasis added) (House Report III).

The House Judiciary Committee amended the text for reasons wholly unrelated to the Attorney General's Title II enforcement authority. Indeed, the change arose out of the committee's concern about a different provision of the

ADA: Title I, which prohibits employment discrimination. As originally drafted, the enforcement provision for Title I provided that certain "remedies and procedures" under Title VII of the Civil Rights Act of 1964 (Title VII) "shall be available[] with respect to" any individual alleging discrimination. See S. 933, 101st Cong. § 107 (as passed by Senate, Oct. 16, 1989); see also H.R. 2273, 101st Cong. § 205 (as introduced in the House, May 9, 1989). The committee was concerned that the "shall be available" formulation in § 107 could be read to imply "that a plaintiff could bypass the administrative remedies of Title VII and go directly to court under title I of the ADA." House Report III, at 48-49; see also *id.* at 49 n.48. Accordingly, the committee modified Section 107 by changing the phrase "s*hall be available, with respect to*" an alleged victim to "s*hall be the powers, remedies, and procedures this title provides to"* such a person. *Id.* at 7 (§ 107) (emphasis added); see also *id.* at 49.

Having done that for Title I's enforcement section, the House Judiciary Committee then made conforming changes to the parallel text in Titles II and III. See House Report III, at 52 ("As in title I, the Committee adopted an amendment to delete the term 'shall be available' in order to clarify that Rehabilitation Act remedies are the only remedies which title II provides for violations of title II."); see also *id.* at 23. The Conference Committee accepted the amendment without

discussion. H.R. Rep. No. 558, 101st Cong., 2d Sess. 64 (1990) (Conf. Rep.); H.R. Rep. No. 596, 101st Cong., 2d Sess. 68 (1990) (Conf. Rep.).

This technical amendment, which simply made a clerical change conforming the language of the ADA's three titles, in no way calls into question the Attorney General's enforcement authority under Title II. It is implausible that the House Judiciary Committee would have made this minor wording change for the purpose of eliminating the authority that both the Senate Labor and Human Resources Committee and the House Education and Labor Committee explicitly intended the Attorney General to have to enforce Title II. See Senate Report at 57-58; House Report II, at 98. If Congress had intended such a momentous change, presumably it would have said so explicitly both in the House Judiciary Committee report and the Conference Committee report. Congress does not "hide elephants in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

D. Case Law And Past Federal Enforcement Practice Further Support The Attorney General's Authority To Enforce Title II

Even though every federal district court to have considered the question, other than the court below, has held that the Attorney General has authority to enforce Title II (see U.S. Br. 22-23), Florida incorrectly insists that both precedent and past enforcement practice are on its side.

1. First, Florida notes that the Supreme Court has recognized only a private right of action in its Title II cases, without suggesting the existence of a federal

enforcement action. FL Br. 14-17. But the Court has acknowledged that a person alleging disability discrimination in violation of Title II "may seek to enforce its provisions by commencing a private lawsuit, *or* by filing a complaint" with a federal agency. *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 591 n.5 (1999) (emphasis added). That administrative process would be seriously undermined if federal agencies had no power to enforce Title II against public entities. U.S. Br. 18-21. Moreover, although the Supreme Court has not yet had an opportunity to directly address federal Title II enforcement authority, the Attorney General's assertion of such authority would come as no surprise. DOJ has filed numerous briefs with the Court claiming authority to enforce Title II and documenting extensive federal enforcement of this title dating back to the 1990s.[2]

2. Florida also belittles historic federal enforcement practices, suggesting that DOJ filed only one lawsuit to enforce Title II before 2009: *United States* v.

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[2] See U.S. Br. at 1, *Fry* v. *Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017) (No. 15-497); U.S. Br. at 1-2, 4, 25, *Barnes*, 536 U.S. 181 (No. 01-682); U.S. Br. at 1, *Olmstead*, 527 U.S. 581 (No. 98-536); see also U.S. Br. 29 n.23 & Addendum C, *United States* v. *Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236) (documenting DOJ's enforcement of Title II in correctional facilities, from the 1990s); U.S. Br. at 22-23 & n.15 and Appendix B, *Tennessee* v. *Lane*, 541 U.S. 509 (2004) (No. 02-1667) (documenting DOJ's enforcement of Title II regarding access to judicial proceedings, from the 1990s); U.S. Br. at 1, 16 n.5, *Yeskey*, 524 U.S. 206 (No. 97-634) (DOJ enforcement efforts regarding correctional facilities). The appendices and addenda to the U.S. briefs filed in *Tennessee* and *Georgia*, respectively, are available at https://www.justice.gov/osg/supreme-court-briefs.

City & Cty. of Denver, 927 F. Supp. 1396 (D. Colo. 1996). FL Br. 6, 15-16 & n.7. That is not correct. In 2003, the United States filed a complaint against Massachusetts under Title II concerning courthouse inaccessibility. *United States* v. *Massachusetts*, No. 03-cv-10246 (D. Mass filed Feb. 6, 2003). In 2004, the United States filed an action under Title II challenging the inaccessibility of housing units. *United States* v. *Housing Auth. of Balt. City*, No. 04-cv-3017 (D. Md. filed Sept. 29, 2004). And, as Florida acknowledges, the United States has intervened in private lawsuits to assert its own interests in enforcing Title II. FL Br. 17; see, *e.g.*, *Smith* v. *City of Phila.*, 345 F. Supp. 2d 482 (E.D. Pa. 2004).

Moreover, DOJ has achieved numerous successes over the years in persuading state and local governments to enter into pre-suit settlements to resolve alleged Title II violations. See Addendum C (at 7c-9c) to U.S. Br., *United States* v. *Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236); Appendix B to U.S. Br., *Tennessee* v. *Lane*, 541 U.S. 509 (2004) (No. 02-1667); see also DOJ's ADA enforcement websites (cited in U.S. Br. 20 n.8) for many additional U.S. settlements under Title II. Florida argues that these agreements are not an exercise of the Attorney General's authority to sue. FL Br. 16. But U.S. settlement agreements resolving administrative complaints under Title II—again, dating to the 1990s—routinely invoked the Attorney General's authority to bring a civil action under 42 U.S.C. 12133 if DOJ failed to secure voluntary compliance. See

Addendum A to this brief (citing examples). It is that enforcement authority and the concomitant threat of litigation by the Attorney General that gives DOJ and other federal agencies that receive administrative complaints the leverage to induce such voluntary compliance through settlement. U.S. Br. 19-21. Without the possibility of a DOJ lawsuit as a backstop, state and local governmental entities would have little incentive to come to the negotiating table and reach a voluntary resolution during the administrative process.

This history of DOJ enforcement of Title II refutes Florida's assertion that there was a "dearth of federal enforcement actions for eighteen years" after the enactment of the ADA. FL Br. 16. DOJ's longstanding enforcement efforts are all the more significant given Congress's acquiescence in the exercise of that federal authority. In 2008, Congress amended the ADA but did not amend Title II's enforcement provision, Section 12133. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-240 (2009) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)); accord *Phillip C.* v. *Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 696-697 (11th Cir. 2012), cert. denied, 134 S. Ct. 64 (2013). By 2008, (1) the Title II regulations had long provided that

the Attorney General has authority to file a lawsuit in the absence of voluntary compliance, 28 C.F.R. 35.174; see also *Shotz*, 344 F.3d at 1174 (citing that regulation in explanation of federal enforcement scheme); (2) the Attorney General had acted on that authority by undertaking numerous enforcement activities under Title II; and (3) courts had construed Section 12133 as providing the Attorney General authority to enforce Title II. See U.S. Br. 16, 19-20, 22-23. In the absence of a "clear expression" of congressional intent to overturn these settled administrative and judicial interpretations, this Court should "continue to read" Section 12133 as authorizing the Attorney General to sue under Title II. *Forest Grove Sch. Dist.*, 557 U.S. at 240.

3. Florida further argues that an administrative complaint process that may culminate in a DOJ enforcement action cannot be among the "remedies, procedures, and rights" that Title II provides to persons alleging discrimination because the federal administrative enforcement scheme—modeled after that established 50 years ago to enforce Title VI—is of no benefit to complainants. According to Florida, federal agencies lack power to secure individualized redress through the administrative process. FL Br. 24-25.

Again, Florida is misinformed. Federal agencies routinely secure individualized relief—both monetary and equitable—for complainants through the Title II administrative enforcement process, in addition to obtaining broader

systemic relief. We cite numerous examples of such settlement agreements with state and local governments, dating to the 1990s, in Addendum B to this brief. Recently, for example, the Sheriff of Arlington County, Virginia, agreed to pay $250,000 to a deaf individual who was denied effective communications services while incarcerated. See Settlement Agreement Between the United States of America and Elizabeth F. Arthur, in her Official Capacity as the Arlington County Sheriff ¶ 58 (2016), available at https://www.ada.gov/arlington_co_sheriff_sa.html. Nor is the federal government's ability to secure individual relief through the administrative enforcement process new to Title II. For years, federal agencies have been doing just that with administrative complaints they receive alleging discrimination under Title VI or the Rehabilitation Act.[3]

E. Longstanding Judicial And Administrative Interpretations Recognize That The Attorney General Has Authority To Enforce Title VI And The Rehabilitation Act

Florida contends that in enacting Title II, Congress could not have intended to incorporate federal enforcement authority under Title VI and the Rehabilitation

[3] See, *e.g.*, U.S. Dep't of Educ., Office for Civil Rights (OCR), Annual Report to Congress, Fiscal Year 1997 (describing OCR's processing of administrative complaints under "Title VI" and "Section 504/Title II," and citing examples of relief obtained for complainants), available at https://www2.ed.gov/about/offices/list/ocr/AnnRpt97/edlite-index.html; U.S. Dep't of Hous. & Urban Dev., The State of Fair Housing, FY 2008 Annual Report on Fair Housing 44 (describing voluntary compliance agreements under the Rehabilitation Act), available at https://www.hud.gov/sites/documents/DOC_12309.PDF.

Act because those statutes do not authorize federal enforcement actions. FL Br. 33. In making this argument, Florida ignores more than 50 years of judicial decisions and administrative interpretations and practice.

1. The Rehabilitation Act And Title VI Authorize Federal Enforcement Actions

Florida contends that Title VI's enforcement provision, 42 U.S.C. 2000d-1 (directing federal agencies to effect compliance in the second subsection "by any other means authorized by law"), recognizes that the Attorney General has authority to file an action enforcing Title VI's non-discrimination mandate, but *only* if the suit relies on legal theories arising under other laws. FL Br. 33-41. Accordingly, Florida asserts, there is no federal enforcement authority for Title II to incorporate. But from the earliest years, and as Congress knew well in 1990, courts have construed Title VI as setting forth *two* alternative federal enforcement mechanisms to compel compliance with its non-discrimination requirements—termination of federal funding or a lawsuit by the United States. See pp. 21-23 & nn. 4-5, *infra*. Because Title II applies to public entities that do not receive federal financial assistance, only the second federal enforcement alternative—a federal lawsuit—has any meaning in this context. It is that remedy or procedure, set forth in Title VI (and thus, in the Rehabilitation Act, as well), that Congress incorporated in Title II.

a. Florida does not dispute that the Attorney General has authority to enforce the non-discrimination requirements of Title VI and the Rehabilitation Act by filing lawsuits in court. FL Br. 33-47. But Florida argues that in these cases the Attorney General is not suing "directly" under the statutes, but rather is proceeding under other legal theories, such as breach of contract. FL Br. 5, 33, 42-47. This argument is entirely beside the point.

For purposes of divining Congress's intent in enacting Title II, it makes no difference which legal theories underpinned the lawsuits filed by the United States to enforce the non-discrimination requirements of Title VI and the Rehabilitation Act. What matters is that Congress knew in 1990 that, under both statutes, a federal lawsuit is available if a federal agency is unable to resolve an individual's administrative complaint through voluntary means. In enacting the ADA, Congress intended persons alleging discrimination under Title II to have the "same" remedies, procedures, and rights as victims have enjoyed under the other two statutes. *Barnes*, 536 U.S. at 189-190 n.3. Without the prospect of a federal suit under Title II, the administrative complaint process would be far less meaningful.

Congress "is presumed to" have been aware of the case law over the past 50 years construing Title VI and its implementing regulations to establish two alternative federal enforcement mechanisms to compel compliance with its

requirements—termination of federal funding or a lawsuit by the United States. *Forest Grove Sch. Dist.*, 557 U.S. at 239 (citation omitted); see, *e.g.*, *Adams* v. *Richardson*, 480 F.2d 1159, 1161 n.1, 1163 (D.C. Cir. 1973) (en banc) (Title VI "sets forth two alternative courses of action by which enforcement may be effected"—either fund termination or a referral to DOJ to bring "appropriate proceedings"); *National Black Police Ass'n* v. *Velde*, 712 F.2d 569, 575-576 (D.C. Cir. 1983) (apart from fund termination, Title VI may be enforced by "referral of cases to the Attorney General, who may bring an action against the recipient"), cert. denied, 466 U.S. 963 (1984); *Brown* v. *Califano*, 627 F.2d 1221, 1224-1225 & n.10 (D.C. Cir. 1980) (federal agency can enforce Title VI through fund termination or through "other means authorized by law," primarily referrals to DOJ with a recommendation of appropriate legal action) (citing 42 U.S.C. 2000d-1); *United States* v. *Maricopa Cty.*, 151 F. Supp. 3d 998, 1017-1019 (D. Ariz. 2015) (finding right of action for federal agency enforcement under Title VI), appeal pending on other grounds, No. 15-17558 (docketed Dec. 31, 2015).[4] Although

[4] See also *United States* v. *Louisiana*, 692 F. Supp. 642, 649 (E.D. La. 1988) ("Having received a referral from HEW, the Attorney General has authority to sue on behalf of the United States to enforce statutory requirements under Title VI."), vacated on other grounds, 751 F. Supp. 606 (E.D. La. 1990); *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1521 & n.154 (S.D.N.Y. 1985) (United States seeks to enforce Title VI and its regulations; "the clear weight of legal authority" suggests that the United States is "empowered to sue to enforce the provisions of Title VI"), aff'd, 837 F.2d 1276 (2d Cir. 1987); *United States* v. *City*

(continued…)

Florida attempts to distinguish *Adams* and *National Black Police Association* because they were not federal enforcement actions (FL Br. 44), the D.C. Circuit's analysis of the federal agencies' Title VI enforcement options was central to its holdings in these cases, and in *Brown* as well.[5]

b. Florida also erroneously declares that we cited "*not a single enforcement action* ever brought in the 45-year history of the Rehabilitation Act." FL Br. 46. Florida disputes that *United States* v. *Baylor University Medical Center*, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985) (cited at U.S. Br. 14), is

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(…continued)
of Phila., 482 F. Supp. 1248, 1259 (E.D. Pa. 1979) (Title VI "authorizes the Attorney General to bring suit against state or local government units" when they are administering federally funded programs in a discriminatory manner), aff'd on other grounds, 644 F.3d 187 (3d Cir. 1980); *United States* v. *Tatum Indep. Sch. Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969) ("The United States is authorized to bring this action under Title VI of the Civil Rights Act of 1964, and its implementing regulations, 45 C.F.R. 80.8(a)."); *United States* v. *Texas*, 321 F. Supp. 1043, 1057 n.18 (E.D. Tex. 1970) (same), aff'd, 447 F.2d 441 (5th Cir. 1971).

[5] Notably, in addition to the cases discussed at 21-23 & n.4, *supra*, and in U.S. Br. 14-15, the United States brought many other actions to enforce Title VI before Congress enacted the ADA in 1990. See, *e.g.*, *United States* v. *Harris Methodist Fort Worth*, 970 F.2d 94, 96 (5th Cir. 1992) (U.S. suit under Title VI filed in 1989); *United States* v. *Alabama*, 828 F.2d 1532, 1534, 1546 (11th Cir. 1987), cert. denied, 487 U.S. 1210 (1988); *United States* v. *El Camino Cmty. Coll. Dist.*, 454 F. Supp. 825, 826 (C.D. Cal. 1978), aff'd, 600 F.2d 1258 (9th Cir. 1979); *United States* v. *Bakersfield City Sch. Dist.*, No. 1:84-cv-00039, 2011 WL 121638, at *1 (E.D. Cal. Jan. 12, 2011) (noting that United States filed Title VI action in 1984).

an example because there the question was whether the Rehabilitation Act applies to hospitals that accept Medicare and Medicaid payments. FL Br. 46-47. That Baylor resisted coverage under the Rehabilitation Act does not alter the fact that the United States sued to enforce the statute in response to complaints it received that the hospital was failing to provide effective services to hearing-impaired patients. *United States* v. *Baylor Univ. Med. Ctr.*, 564 F. Supp. 1495, 1496-1497 (N.D. Tex. 1983). Indeed, the first sentence of the district court's opinion describes the action as "brought by the United States to enforce the provisions of Section 504 of the Rehabilitation Act of 1973" and "regulations promulgated thereunder." *Id.* at 1496. The district court held that "[b]oth federal common law and statutory authority provide the United States with the right to sue in this case." *Id.* at 1498. The Fifth Circuit affirmed the decision in all relevant respects, 736 F.2d at 1040-1041, reiterating that a federal agency seeking to enforce Section 504 "may resort" to "the federal courts," *id.* at 1050. Florida also overlooks *United States* v. *Board of Trustees for University of Alabama*, 908 F.2d 740 (11th Cir. 1990) (cited at U.S. Br. 14), another case from this Circuit in which the United States sued to enforce the Rehabilitation Act after receiving a complaint by a deaf student regarding the university's provision of auxiliary services. *Id.* at 742-744.

2. Under The Rationale Of Barnes *v.* Gorman*, The Attorney General Has Authority To Sue Under Title II*

The Supreme Court's reasoning in *Barnes* v. *Gorman*, 536 U.S. 181 (2002), reinforces that the Attorney General has the same authority to file lawsuits to enforce Title II as he does to enforce Title VI and the Rehabilitation Act. *Barnes* held that punitive damages may not be awarded in private suits under Title II or Section 504 of the Rehabilitation Act. In reaching that decision, the Court relied on a contract-law analogy to Title VI. See *id.* at 188 ("Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages."). The Court held that punitive damages are likewise unavailable under Title II, *id.* at 189, even though Title II's coverage does not depend on acceptance of federal funding.

Three Justices concurring in the judgment in *Barnes* contended—analogously to Florida's argument here—that the Court's "analysis of Title VI does not carry over to the ADA because the latter is not Spending Clause legislation." 536 U.S. at 189 n.3; *id.* at 192-193 (Stevens, J., concurring); cf. FL Br. 44 ("Here, however, the United States does not claim to have a contract to enforce."). The Court rejected that argument, relying on the enforcement provisions of Title II and the Rehabilitation Act (42 U.S.C. 12133 and 29 U.S.C. 794a(a)(2), respectively), which the Court viewed as "unequivocally" directing that the "remedies, procedures, and rights" will be the "same" under all three statutes.

Barnes, 536 U.S. at 190 n.3. Importantly, the Court's point was that, although the contract-law rationale for disallowing punitive damages under Title VI and the Rehabilitation Act did not apply to suits under Title II, Congress's express directives that the three statutes be enforced in the same manner were controlling. That same logic dictates that if the Attorney General can sue to enforce the Rehabilitation Act and Title VI, he can sue to enforce Title II of the ADA as well, even though one rationale—the contract-law analogy—for allowing suits under the earlier statutes is inapposite here.

Ultimately, the question here is what "remedies, procedures, and rights" Congress *perceived* were available under Title VI and the Rehabilitation Act when it incorporated them into Title II of the ADA. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 711 (1979) ("For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.") (citation omitted). And here, Congress would have understood that Title VI and the Rehabilitation Act authorized DOJ lawsuits (in the event that voluntary compliance is not achieved through the administrative process) as one of the principal enforcement options available to the federal government in enforcing those statutes' non-discrimination mandates. In enacting the ADA, Congress ratified this enforcement regime and incorporated it into Title II.

CONCLUSION

This Court should reverse and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains no more than 6345 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2016 in a 14-point Times New Roman font.

s/ Bonnie I. Robin-Vergeer
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Attorney

Date: March 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2018, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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ADDENDA

ADDENDUM A

Examples Of Pre-2009 U.S. Settlement Agreements In Which The United States Invoked Its Authority To File A Civil Action to Enforce Title II of the ADA[1]

Settlement Agreement Between the United States of America and North Kingstown Police Dep't, North Kingstown, RI, second unnumbered paragraph (Dec. 12, 1996), available at https://www.ada.gov/kingsett.htm

Settlement Agreement Between the United States of America and Philadelphia Court of Common Pleas, PA, ¶ 3 (Oct. 23, 1997), available at https://www.ada.gov/philcour.htm

Settlement Agreement Between the United States of America and the Town of Kingstree, SC, ¶ 3 (Nov. 5, 1997), available at https://www.ada.gov/kingstre.htm

Settlement Agreement Between the United States of America and the Borough of Olyphant, PA, ¶ 2 (Apr. 1, 1998), available at https://www.ada.gov/olyphant.htm

Settlement Agreement Between the United States of America and the City of Fort Walton Beach, FL, ¶ 3 (Sept. 11, 2002), available at https://www.ada.gov/ftwalbch.htm

Settlement Agreement Between the United States of America and the City of Bryan, TX, ¶ 3 (Aug. 26, 2002), available at https://www.ada.gov/bryantx.htm

Settlement Agreement Between the United States of America and the City of Franklinton, LA, second unnumbered paragraph (Aug. 25, 2004), available at https://www.ada.gov/franklintonpolice.htm

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[1] The copies of settlement agreements at these website links do not always include execution dates. The dates of agreements pre-dating 2006 may be found in the list of cases at https://www.ada.gov/enforce_archive.htm, and of agreements from 2006 to the present, at https://www.ada.gov/enforce_current.htm. See Addendum B for additional examples of agreements in which the United States has invoked its authority to file a civil action to enforce Title II.

Settlement Agreement Between the United States of America and Nevada State Welfare Division, ¶ 2 (Jan. 26, 2005), available at https://www.ada.gov/nvwelfare.htm

Settlement Agreement Between the United States of America and Consolidated City of Jacksonville, FL, ¶ 2 (Sept. 27, 2007), available at https://www.ada.gov/jacksonvillefla.htm

Settlement Agreement Between the United States of America and the District of Columbia, ¶ 4 (Dec. 10, 2008), available at https://www.ada.gov/dc_shelter.htm

ADDENDUM B

Examples Of U.S. Settlement Agreements Under Title II Of The ADA That Provide Individualized Equitable Or Monetary Relief To Complainants[1]

Settlement Agreement Between the United States of America and Hancock Cty., MS, ¶ 6 (Feb. 11, 1997), available at https://www.ada.gov/hancocks.htm

Settlement Agreement Between the United States of America and City of Jackson, MS, ¶ 3(a) and (c) (July 17, 2003), available at https://www.ada.gov/jackson.htm

Settlement Agreement Between the United States of America and Maryland Dep't of Juvenile Servs., ¶ 11 (Mar. 29, 2004), available at https://www.ada.gov/mdjs.htm

Settlement Agreement Between the United States of America and City of Franklinton, LA, ¶ 30 (Aug. 25, 2004), available at https://www.ada.gov/franklintonpolice.htm

Settlement Agreement Between the United States of America and City of Bogalusa, LA, ¶ 30 (Aug. 30, 2004), available at https://www.ada.gov/bogalusa911.htm

Settlement Agreement Between the United States of America and City of Minnetonka, MN, ¶ 8.1 (Aug. 6, 2006), available at https://www.ada.gov/minnetonka.htm

Settlement Agreement Between the United States of America and Colorado Peace Officers Standards & Training Bd., ¶¶ 16-18 (Mar. 19, 2008), available at https://www.ada.gov/coloradopost.htm

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[1] The copies of settlement agreements at these website links do not always include execution dates. The dates of agreements pre-dating 2006 may be found in the list of cases at https://www.ada.gov/enforce_archive.htm, and of agreements from 2006 to the present, at https://www.ada.gov/enforce_current.htm.

Settlement Agreement Between the Elk Grove Vill. Police Dep't, Elk Grove, IL and the United States of America, ¶ 8(a) (Oct. 28, 2008), available at https://www.ada.gov/elk_grove.htm
Settlement Agreement Between the United States of America and Town of Gretna, VA, ¶¶ 8, 11, 15 (June 28, 2010), available at https://www.ada.gov/gretna.htm

Settlement Agreement Between the United States of America and Town of Rocky Hill, CT, ¶¶ N, O (May 1, 2012), available at https://www.ada.gov/rocky-hill.htm

Settlement Agreement Between the United States of America and University of Medicine & Dentistry of NJ, ¶¶ 21-22 (Mar. 8, 2013), available at https://www.ada.gov/umdnj_sa.htm

Settlement Agreement Among the United States of America; County of Arapahoe, CO; Arapahoe Cty. Sheriff J. Grayson Robinson; and Plaintiffs in *Lawrence, et al.* v. *City of Englewood, et al.*, ¶ 44 (Mar. 22, 2013), available at https://www.ada.gov/lawrence-arapahoe.htm

Settlement Agreement Among the United States of America; City of Englewood, CO; and Plaintiffs in *Lawrence, et al.* v. *City of Englewood, et al.*, ¶ 37 (Mar. 22, 2013), available at https://www.ada.gov/englewood.htm

Settlement Agreement Among the United States of America; [Redacted]; City of Harford, CT.; Connecticut Innovations, Inc.; AEG Management CT LLC; Northland Trumbull Block LLC; Northland Tower Block LLC; and the University of Connecticut, ¶ S (June 28, 2013),
available at https://www.ada.gov/xl-center.htm

Settlement Agreement Between the United States of America and City of Henderson, NV, ¶ 46 (Aug. 5, 2013), available at https://www.ada.gov/henderson-nv-sa/henderson-nv-sa.htm

Settlement Agreement Between the United States of America and Delran Township School Dist., NJ, ¶ 33 (June 24, 2014), available at https://www.ada.gov/delran-sa.htm

Settlement Agreement Between the United States of America and Orange Cty. Clerk of Cts., FL, ¶¶ 18, 22 (July 17, 2014), available at https://www.ada.gov/occ.htm

Settlement Agreement Between the United States of America and the Louisiana Supreme Court, ¶¶ 21-23 (Aug. 15, 2014), available at https://www.ada.gov/louisiana-supreme-court_sa.htm
Settlement Agreement Between the United States of America and DeKalb Regional Crisis Center, ¶ 42 (Aug. 11, 2015), available at https://www.ada.gov/dekalb_crisis_ctr_sa.html

Settlement Agreement Between the United States of America and the Virgin Islands Bureau of Motor Vehicles, ¶¶ 9-10, 16 (Nov. 2, 2015), available at https://www.ada.gov/bmv_vi_sa.html

Settlement Agreement Between the United States of America and the School Dist. of City of Detroit, MI, ¶ 32 (Nov. 2, 2015), available at https://www.ada.gov/detroit_sa.html

Settlement Agreement between the United States of America and Elizabeth F. Arthur, in her Official Capacity as Arlington County Sheriff, VA, ¶ 58 (Nov. 16, 2016), available at https://www.ada.gov/arlington_co_sheriff_sa.html

Voluntary Resolution Agreement Between the United States of America and John Dempsey Hospital (Univ. of Conn.), ¶ 61 (Jan. 3, 2017), available at https://www.ada.gov/jdh_sa.html