
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

STATE OF FLORIDA,

Defendant-Appellee

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

OPPOSITION OF THE UNITED STATES TO THE
PETITION FOR REHEARING EN BANC

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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:

1. All interested persons listed in Appellee's amended certificate of interested persons and corporate disclosure statement as filed in its petition for rehearing en banc (filed October 29, 2019);
2. All interested persons listed in the certificate of interested persons and corporate disclosure statement as filed by the States of Texas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, and South Dakota as Amici Curiae in support of Appellees (filed March 27, 2018);
3. All interested persons listed in the supplemental certificate of interested persons and corporate disclosure statement as filed by the States of Texas, Alabama, Alaska, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Dakota, and Utah as Amici Curiae in support of Appellee's petition for rehearing en banc (filed Nov. 5, 2019);
4. Davis, Elliott M., Counsel for the United States;
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Date: March 20, 2020

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INTRODUCTION

Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, applies to “any State or local government.” 42 U.S.C. 12131(1)(A). Florida does not (because it cannot) dispute that it is subject to Title II’s requirements or that private parties may sue Florida to enforce them. The only question presented by this appeal is whether Title II may *also* be enforced by the Attorney General. After a painstaking textual analysis, a panel of this Court concluded that “[t]he express statutory language” in Title II adopted the remedial schemes of two federal statutes that permit the Attorney General to sue. Op. 58 (citing the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964 (Title VI)). Therefore, “[t]he same is true here.” Op. 58.

The panel’s decision does not merit en banc consideration. En banc review is “not favored” and is generally warranted only when a panel’s decision conflicts with a decision of the Supreme Court or this Court, or involves “a precedent-setting error of exceptional importance.” Fed. R. App. P. 35; 11th Cir. R. 35-3. Florida’s petition presents neither circumstance.¹ Indeed, other than the district

¹ The amicus brief for several States likewise does not set forth a basis for en banc review, as it advances the same two basic arguments as Florida. See States Amicus Br. 2.

court here, all courts to consider the question have recognized the Attorney General's authority to enforce Title II.

Florida first argues that the panel's decision conflicts with *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853 (2019), which reaffirmed that a statutory reference to a "person" presumptively does not include the government. Pet. i, 1-2, 8-14. No such conflict exists. As the panel recognized, the United States explicitly *disclaimed* the position that the Attorney General is a "person alleging discrimination" under Title II's enforcement provision, 42 U.S.C. 12133. Op. 9. Instead, the United States argued that Title II provides to "person[s]" alleging discrimination (*i.e.*, victims) the "remedies, procedures, and rights" that are provided to persons under the Rehabilitation Act and Title VI. Op. 9-10; see Appellant's Br. 25. As the panel extensively documented, for over 50 years, those "remedies, procedures, and rights" have included a federal administrative process that involves the receipt and investigation of complaints, negotiation to achieve voluntary compliance, and, if necessary, enforcement through "any other means authorized by law"—including Attorney General enforcement. Op. 12-58.

Florida also argues that the panel's ruling raises important "federalism concerns." Pet. 3, 18-20. But the ruling raises no such concern, let alone one of "exceptional importance." Florida does not dispute that it is subject to Title II. And nothing in 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). At bottom, Florida's "federalism" quarrel is with the scope of Title II's legal requirements. Recognizing that Title II grants the same authority to the Attorney General as it does to private persons to enforce those requirements does not reallocate power within the federal system. The panel's thorough opinion accords with the statutory text and settled law, and no question of exceptional importance justifies revisiting it.

STATEMENT

1. Title II of the ADA prohibits public entities, such as States and state agencies, from discriminating based on disability. 42 U.S.C. 12131(1)(A)-(B). Congress enacted Title II to expand the reach of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794(a), which forbids disability discrimination by public and private programs or activities that receive federal financial assistance. *Shotz v. City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003).

a. Title II prohibits disability discrimination in general terms. 42 U.S.C. 12132. It directs the Attorney General to implement this prohibition by promulgating regulations consistent with the statute and the Section 504 regulations set forth in 28 C.F.R. Pt. 41. 42 U.S.C. 12134(a)-(b).

Title II's enforcement section states that "[t]he remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act] 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." 42 U.S.C. 12133. Section 505 of the Rehabilitation Act provides, as relevant, that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 * * * shall be available to any person aggrieved by" recipients of federal funds. 29 U.S.C. 794a(a)(2). And Title VI provides that compliance with its nondiscrimination mandate may be effected by (1) administrative termination of federal funds to a recipient, or (2) "by any other means authorized by law." 42 U.S.C. 2000d-1.

b. As Congress directed, the Department of Justice (DOJ) issued Title II regulations, 28 C.F.R. Pt. 35, including one provision, modeled on a Section 504 regulation, that requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d); see *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591-592 (1999). The Title II regulations also establish an administrative enforcement process similar to the schemes established under the Rehabilitation Act and Title VI. See 28 C.F.R. 35.170-178, 35.190. In the event a federal agency finds a Title II violation and cannot obtain voluntary compliance, it

may refer the matter to DOJ for possible enforcement action. 28 C.F.R. 35.174; see also *Olmstead*, 527 U.S. at 591 n.5 (recognizing, under the regulations, that a person alleging discrimination may enforce Title II “by commencing a private lawsuit, *or* by filing a complaint” with a federal agency) (emphasis added).

2. Florida administers a system of services for children with complex medical needs. Doc. 1, at 3-5 (D. Ct. No. 13-cv-61576). On July 22, 2013, following an investigation, DOJ sued Florida in the Southern District of Florida, alleging that the State was violating Title II and its implementing regulations by unnecessarily serving hundreds of children with disabilities in institutions rather than integrated settings. Doc. 1.

Florida moved for judgment on the pleadings, arguing that the ADA did not authorize the Attorney General to sue to enforce Title II. Doc. 28. On May 30, 2014, the district court denied Florida’s motion and held that the Attorney General could enforce Title II by filing a lawsuit. *A.R. v. Dudek*, 31 F. Supp. 3d 1363, 1371 (S.D. Fla.). That same day, the case was reassigned to a different judge.

Over two years later, the district court sua sponte dismissed the case, holding that the Attorney General had no “standing” to sue under Title II. *C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1282, 1295 (S.D. Fla. 2016). According to the court, Title II “speaks only of ‘person[s] alleging discrimination,’” which the Attorney General is

not, while Titles I and III expressly authorize the Attorney General to initiate litigation. *Id.* at 1282-1284. The United States appealed.

3. In a split decision written by visiting Judge Danny Boggs and joined by Judge Jill Pryor, the panel reversed and held that the Attorney General could bring suit to enforce Title II. Op. 2-58.

a. The panel recognized that Section 12133 provides the “remedies, procedures, and rights” of the Rehabilitation Act (and those of Title VI) to a “person alleging discrimination.” Op. 8-10. It acknowledged that the United States did not claim that the Attorney General was such a “person”; instead, the United States argued that Congress made available to a person alleging discrimination the package of “remedies, procedures, and rights” available under the cross-referenced statutes, which may include enforcement by the Attorney General. Op. 9-10; see also Appellant’s Br. 9-18, 25-26; Appellant’s Reply Br. 3-7, 18-26. Given Congress’s express incorporation of the Rehabilitation Act and Title VI, the panel believed it “especially justified” to conclude that “Congress was aware of prior interpretations, as well as the operation of, both Acts.” Op. 10. Accordingly, instead of ignoring the meaning of the “remedies, procedures, and rights” provided to a person in Section 12133, as Florida urged (Op. 9), the panel evaluated the entire provision in its textual analysis.

Based on express statutory cross-references, the panel determined that the enforcement mechanism for Title II is Title VI. Op. 7. After an exhaustive survey of Title VI regulations and case law (Op. 12-21), the panel concluded that “the United States has consistently used [enforcement] litigation to enforce its provisions” (Op. 19), and that Section 602’s phrase “any other means authorized by law” has been “routinely interpreted to permit suit by the Department of Justice” (Op. 20 (citing cases)). Turning to the Rehabilitation Act, the panel determined that its legislative and regulatory background, existing regulations, and legal precedent likewise “demonstrate that the Act incorporated a system of administrative procedures” that included a complaint, investigation, and potential “enforcement action by the Attorney General.” Op. 31; see Op. 21-31. The panel emphasized that in Title II Congress also directed the Attorney General to issue regulations adopting administrative procedures similar to those in the Rehabilitation Act and Title VI and that those procedures contemplate federal enforcement. Op. 33-40; 42 U.S.C. 12134(a)-(b).

The panel reasoned that by choosing to use Section 505(a)(2) of the Rehabilitation Act as Title II’s enforcement mechanism—“with full knowledge” that the provision established administrative enforcement in accordance with Title VI—Congress intended to incorporate into Title II that same federal enforcement authority. Op. 39-45. Moreover, by the time Congress enacted the

ADA, various federal investigations under Title VI and the Rehabilitation Act had culminated in Attorney General enforcement. Op. 45-46. Noting that other courts “routinely concluded” that the Attorney General is empowered to enforce Title II “by any other means authorized by law,” including by “initiating a civil action,” the panel pronounced the district court’s decision “an outlier.” Op. 51, 54.

b. Judge Branch dissented. In her view, because the United States is not a “person alleging discrimination,” Title II does not provide the Attorney General a cause of action. Op. 59. She also believed that the references to the Attorney General in Titles I and III indicated that Title II did not authorize federal enforcement. Op. 61-63.

ARGUMENT

THIS CASE DOES NOT MERIT EN BANC CONSIDERATION

A. The Panel’s Ruling Does Not Conflict With A Supreme Court Decision And Is Firmly Grounded In Title II’s Text

1. The panel did not hold—and the United States did not argue—that the Attorney General was a “person alleging discrimination” under 42 U.S.C. 12133. Florida nevertheless insists that the panel’s decision is irreconcilable with the Supreme Court’s decision in *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853 (2019). Pet. 1. Florida is wrong.

The statute in *Return Mail* permitted “a person” other than a patent owner to petition for review and cancellation of a patent. 139 S. Ct. at 1860-1861. The

Court held that the Postal Service was not such a “person,” given the presumption that a statutory reference to a “person” does not include the government and the Postal Service’s failure to overcome that presumption. *Id.* at 1863-1867. *Return Mail* announced no new principle; it is simply the latest Supreme Court decision to apply the “longstanding interpretive presumption that ‘person’ does not include the sovereign.” *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000).

The panel here did not hold that the Attorney General is a “person alleging discrimination.” Rather, the panel correctly recognized that Title II’s “complex” enforcement provision “differ[ed] significantly” from the simpler one in *Return Mail*. Op. 9 n.5. The *Return Mail* statute permitted only “a person” to petition for review. 139 S. Ct. at 1861. In stark contrast, Section 12133 “provides” to “person[s] alleging discrimination” the “remedies, procedures, and rights” of the Rehabilitation Act and Title VI, which, as the panel explained, involve federal administrative procedures that include the possibility of Attorney General enforcement. Op. 12-31.

This interpretation, the panel noted (Op. 46), accords with the ADA’s express statutory purpose of “ensur[ing] that the Federal Government plays a central role in enforcing the standards established in *this chapter*”—that is, the entire ADA—“on behalf of individuals with disabilities.” 42 U.S.C. 12101(b)(3)

(emphasis added). And this Court “favor[s] an interpretation that furthers the manifest purpose of a statute so long as the interpretation is”—as it is here—“textually permissible.” *United States v. Spoor*, 838 F.3d 1197, 1204 (11th Cir. 2016) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012)). The panel noted that its interpretation is similarly supported by Title II’s legislative history (Op. 46-49), which described government suits as the final step of a process initiated by the victim’s filing of an administrative complaint. See Appellant’s Br. 16-18 (discussing legislative history). Though legislative history cannot supersede statutory text, it may—as it does here—“help[] us learn what Congress meant by what it said.” *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.).

Florida accuses the panel of adopting an “atextual reading” of Section 12133. Pet. 2. But by focusing on one word—“person”—to the exclusion of the provision’s remaining text, it is *Florida* that urges an atextual reading. “In textual interpretation, context is everything.” Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A Matter of Interpretation* 3, 37 (Amy Gutmann ed., 1997); accord, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). The panel understood this full well. If Congress had intended to create only a private right of action under Title II, then its incorporation of the other statutory schemes was, as the panel put it, “mystifying.” Op. 40.

Ultimately, the question here is not *who* is the “person alleging discrimination” under the statute, but *what* are the “remedies, procedures, and rights” that the statute provides that person. Florida tellingly fails to engage the panel’s determination that the “express statutory language” of Title II incorporates federal statutes that, as Congress knew, give a person alleging discrimination access to a federal administrative scheme that ultimately may lead to Attorney General enforcement. Op. 58. That conclusion does not conflict—or have anything to do—with *Return Mail*.

2. Perhaps recognizing the absence of a conflict with Supreme Court precedent, the petition takes issue with other aspects of the panel’s reasoning. Pet. 9-14. This type of ordinary disagreement with a panel’s legal analysis cannot serve as the basis for en banc review. Fed. R. App. P. 35; 11th Cir. R. 35-3. In all events, the panel was correct.

a. Florida argues that differences in Titles I, II, and III of the ADA show that Congress did not intend the Attorney General to have authority to enforce Title II. Pet. 9-11. The panel correctly rejected that argument. Op. 11. The enforcement sections of Titles I and III are different because, unlike Title II, they could not have conveyed their intended meanings without explicit references to particular government actors, including the Attorney General. See Appellant’s Br. 27-30.

In contrast, Congress patterned Title II's enforcement section, 42 U.S.C. 12133, after the Rehabilitation Act's decades-old enforcement provision, 29 U.S.C. 794a(a)(2), repeating its "remedies, procedures, and rights" formulation. Congress had no need to reinvent the wheel in doing so, especially given that "an integral purpose" of Title II was to extend the Rehabilitation Act to all public entities, regardless of federal funding. *Shotz*, 344 F.3d at 1174. The panel's careful review of the incorporated statutes led it to conclude that "[i]n the other referenced statutes, the Attorney General may sue," and that "[t]he same is true here." Op. 58.

b. Florida contends that the panel misunderstood Title II's cross-references because Title VI, which empowers the government to enforce its nondiscrimination requirement by "any other means authorized by law," 42 U.S.C. 2000d-1, does not—in Florida's view—include authority to sue. Pet. 14. Brushing aside the panel's assessment that the Attorney General has filed lawsuits enforcing Title VI's nondiscrimination mandate for more than half a century (Op. 19-20 & n.10 (citing cases)), Florida maintains these lawsuits must have relied on other legal theories, such as breach of contract. Pet. 17. Indeed, Florida attaches great significance to its claim that courts purportedly did not address whether the government brought those actions under the statutes or other legal principles. Pet. 15, 17. But see Appellant's Reply Br. 22-24 & nn.4-5 (citing Title VI and

Rehabilitation Act cases, many of which held that the statutes authorized the United States to sue).

It is hardly surprising, though, that some courts would not have thought it necessary to address whether the United States was proceeding in contract, directly under the statutes, or both. Either way, the Attorney General's authority to enforce the nondiscrimination requirements of Title VI and the Rehabilitation Act was clear. In any event, this argument is beside the point. For purposes of determining Congress's intent in enacting *Title II of the ADA*, it makes no difference which legal theories underpinned the federal government's Title VI and Rehabilitation Act lawsuits. What matters is that Congress knew when it enacted the ADA that Attorney General enforcement is available under Title VI and the Rehabilitation Act if a federal agency is unable to resolve a meritorious administrative complaint through voluntary means. By importing the "remedies, procedures, and rights" language from the Rehabilitation Act into Section 12133, Congress ratified and incorporated into Title II the longstanding interpretation that those "remedies, procedures, and rights" include possible enforcement action by the Attorney General. See *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general

matter, the intent to incorporate its administrative and judicial interpretations as well.”); see also Op. 10.

As the panel recognized, the Supreme Court’s decision in *Barnes v. Gorman*, 536 U.S. 181 (2002), reinforces that 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. Op. 40-42. Because the Court determined in *Barnes* that punitive damages were not available in private Title VI suits, 536 U.S. at 187-189, it held that it “follows” that they may not be awarded in suits under Title II or Section 504, *id.* at 189. Three concurring Justices contended, as Florida does here, that the Court’s Title VI analysis did not carry over to the ADA because the latter was not Spending Clause legislation. *Id.* at 189 n.3; see *id.* at 192-193 (Stevens, J., concurring). But the Court rejected that distinction because Congress had “unequivocally” directed that the “remedies, procedures, and rights” *be the “same” under all three statutes.* *Id.* at 189 n.3 (emphasis added); see Op. 41. Applying that same logic here, Congress intended the remedies it “expressly adopted” from those Spending Clause statutes “to be the available remedies for Title II.” Op. 42 (emphasis omitted).

B. The Petition's Invocation Of "Federalism" Is Misplaced: The Panel's Decision Does Not Involve A Question Of Exceptional Importance

For nearly 30 years, the Attorney General has enforced Title II through the federal administrative process, entering into settlements and bringing lawsuits to remedy public entities' violations of Title II. See Appellant's Reply Br. 15-19; Appellant's Br. 20 & n.8. Other than the district court's second ruling here, all courts to consider the question have recognized the Attorney General's authority to do so. Op. 51-54. The panel's meticulous decision comports with settled law and practice, and presents no question of exceptional importance.

According to Florida, however, the panel's decision merits en banc review because it runs afoul of federalism doctrine. Pet. 3, 18-20. Florida similarly contends throughout its petition that, under *Gregory v. Ashcroft*, 501 U.S. 452 (1991), Congress must make its intention "unmistakably clear" before it authorizes a suit by the federal government against a State. Pet. 3, 7, 9, 14, 16. The panel correctly rejected both points. Op. 54-57.

1. Florida admits that "Title II regulates every service, program, or activity administered by every State in the Nation." Pet. 13-14. Florida protests that Title II "wrest[s] from States their control over healthcare policy and administration" (Pet. 20), but that complaint is properly directed to Congress, not this Court. Florida is subject to Title II's requirements whether or not the Attorney General can sue; indeed, the State concedes that Title II provides a private right of

action. Pet. i. Florida can readily defend the merits of any lawsuit, including this one, if it has satisfied (or exceeded) its substantive obligations under Title II. Accordingly, this Court should reject Florida’s federalism objection for what it is: a policy-based dispute unfit for judicial resolution.

Florida’s contention that it somehow presents *greater* federalism concerns for Congress to authorize the *Attorney General* to enforce federal law stands federalism on its head. A settled feature of our constitutional plan is that, under our federal system, “States retain no sovereign immunity as against the Federal Government.” *West Virginia v. United States*, 479 U.S. 305, 311 n.4 (1987). “In ratifying the Constitution, the States consented to suits brought * * * by the Federal Government.” *Alden v. Maine*, 527 U.S. 706, 755 (1999). As the Supreme Court explained, unlike suits by private individuals, a federal government action against a State “does no violence to the inherent nature of sovereignty.” *United States v. Texas*, 143 U.S. 621, 645-646 (1892); see also *Mississippi*, 380 U.S. at 140; Op. 56-57; Appellants’ Reply Br. 8-9. And it is not the exception—but the rule—that the United States has power to enforce civil rights laws against the States.

Florida’s outrage at so-called federal interference in “spheres traditionally left to the States” (Pet. 3), is particularly misplaced here, given the *billions* of federal dollars Florida accepts annually through the Medicaid program. In Fiscal

Year 2018 alone, Florida accepted over \$14.7 billion in federal Medicaid funds, well over half its total Medicaid budget. See <https://www.macpac.gov/wp-content/uploads/2015/01/EXHIBIT-16.-Medicaid-Spending-by-State-Category-and-Source-of-Funds-FY-2018-millions.pdf>.

In short, that the United States sued Florida to put an end to its unnecessary segregation of medically fragile children in violation of federal law does not “expand federal enforcement” (Pet. 7), rework the federal-state balance, or, for that matter, present any question of exceptional importance.

2. Because a lawsuit by the Attorney General against Florida does not “upset the balance of power under Our Federalism” (Pet. 7), the State’s persistent invocation of *Gregory*’s “clear statement” rule also lacks merit. That rule’s purpose is to require Congress to “make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States.” *Gregory*, 501 U.S. at 461 (citation omitted). Title II patently includes a clear statement that it applies to state functions. *Op.* 55-56 (citing *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 208-210 (1998)). There is no requirement that Congress provide an *additional* clear statement regarding *who* may enforce a statute that indisputably applies to the States.

Nonetheless, given the longstanding, settled interpretation of Title VI and the Rehabilitation Act by the time of the ADA’s enactment, Congress’s decision to

incorporate those same remedies, procedures, and rights *did* make clear that federal enforcement is available under Title II. The panel's opinion cogently explains why that is so, and there is no reason to revisit the matter en banc.

CONCLUSION

This Court should deny the petition for rehearing en banc.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) and the Court's order dated February 27, 2020, because it contains 3898 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

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 Microsoft Word 2019 in a 14-point Times New Roman font.

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