IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, by his next friend and mother, Lillian Minor, *et al*.,

Plaintiffs,

v.

GREG ABBOTT, Governor of the State of Texas, *et al.*,

Defendants.

Case No. SA-5:10-CV-1025-OG

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

THE STATE OF TEXAS,

Defendant.

THE UNITED STATES' RESPONSE TO THE STATE OF TEXAS' MOTION TO DISMISS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

This Court granted the United States' motion to intervene in this case, and that ruling was correct. Once the Court granted the United States' motion to intervene, the United States became a party to this case. The State's current motion to dismiss the United States' claims is merely an effort to re-litigate the intervention issue that it previously lost. Accordingly, this Court need not consider the State's standing argument.

Nevertheless, as every court encountering the issue has held, and as the State itself has previously acknowledged in this case, Congress authorized the Attorney General to sue under Title II of the Americans with Disabilities Act ("ADA") and under the Rehabilitation Act. In arguing now to the contrary, the State challenges over a half-century of the federal government's anti-discrimination enforcement. The State's challenge is based on a clear misreading of Title II's enforcement mechanism. Moreover, the State's misreading of Title II implausibly and without support presumes that Congress sought to frustrate, rather than accomplish, the statute's basic purposes.

As noted, the State already conceded in this case that the Attorney General has authority to enforce Title II. *See* Defs.' Resp. to Mot. to Interv., Dkt. # 56, at ECF. 10; Order on Interv., Dkt. # 136. Subsequently, the State discovered an argument that the State of Florida advanced, and it copied Florida's argument, virtually word-for-word, as its motion to dismiss here. But the district court in Florida rightly rejected that argument and concluded that the United States has enforcement authority under Title II. *See A.R. ex. rel. Root v. Dudek*, 31 F. Supp. 3d 1363, 1368-70 (S.D. Fla. 2014).

As the district court in Florida found, the State's reading of the ADA is at odds with the statute's text, purpose, and history. Congress enacted the ADA to provide a clear and

comprehensive national mandate for eliminating discrimination against individuals with disabilities, including in state and local government programs and services, regardless of whether those services are federally funded. *See* 42 U.S.C. § 12101(b)(1). Among the statute's purposes was "to ensure that the Federal Government plays a central role in enforcing the standards" under the ADA. *Id.* § 12101(b)(3). Congress envisioned that the major enforcement mechanism under Title II is enforcement by the Attorney General through litigation. *See* H.R. Rep. No. 101-485(II), at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381. For this reason, when Congress enacted Title II of the ADA, it decided to make use of an existing enforcement framework, which comes from Title VI of the Civil Rights Act, that includes as a critical component Attorney General enforcement through litigation. The State's motion should be denied.

ARGUMENT

I. The State Cannot Re-litigate the United States' Intervention in this Case, and that Intervention Dictates Denial of the State's Motion.

More than three years ago, this Court granted the United States' motion to intervene in this case. This Court ruled that "[t]he United States clearly meets the requirements for permissive intervention under Rule 24(b)" and that it need not decide whether the United States would also meet the requirements for intervention as a matter of right under Rule 24(a). Order on Interv. at 1 & n.1. That ruling was correct. Once this Court granted the United States' motion to intervene, the United States became a party to this case. The current motion to dismiss the United States' claims in this case is merely an effort to re-litigate the intervention issue.

Even if this Court were inclined to consider Texas' argument on standing, this Court could deny it without reaching the "single, dispositive question of law" Texas asks this court to resolve. *See* Tex. Mot. at 7. That question – whether the Attorney General may enforce Title II

of the ADA and the Rehabilitation Act in litigation – is actually not dispositive. Binding Fifth Circuit precedent establishes that "there is no Article III requirement that intervenors have standing." *Newby v. Enron Corp.*, 443 F.3d 416, 422 (5th Cir. 2006); *see also Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) ("[W]e hold that Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so."). To be clear, the United States vigorously disputes the notion that Congress enabled the Attorney General to enforce protections for individuals with disabilities against private entities that provide public accommodations, but precluded the Attorney General from enforcing those protections against public entities. But even if that were true, it would not mean that this Court abused its discretion in allowing the United States to permissively intervene; a decision that is entirely consistent with other cases. *See, e.g.*, *Lane v. Kitzhaber*, No. 3:12-cv-138-ST, Dkt. # 105 (D. Or. May 22, 2013) (granting Department of Justice's motion to intervene in lawsuit alleging segregation resulting from discriminatory administration of employment services offered by the state); *Lynn E. v. Lynch*, No. 1:12-cv-53-LM (D.N.H. Apr. 4, 2012) (granting Department of Justice's motion for intervention in case regarding statewide violations of Title II of the ADA); *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209 (NGG), 2009 WL 4506301, at *2 (E.D.N.Y. Nov. 23, 2009) (granting permissive intervention to Department of Justice, which is required "to promulgate regulations to implement and enforce Title II").

Rule 24(b)(2) states that a government agency may intervene permissively where a claim in the case is based on a statute "administered by" the agency or "any regulation, order, requirement, or agreement issued or made under the statute." Courts have explained that "the

whole thrust of the amendment adding Rule 24(b)(2) 'is in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest . . . and courts have permitted intervention accordingly." *See Disability Advocates, Inc.*, 2009 WL 4506301, at *2 (quoting 7C Wright & Miller, *Federal Practice & Procedure* § 1912, at 471-72 (2007)). For example, the Third Circuit has explained that "Rule 24(b) makes specific provision for intervention by governmental agencies interested in statutes, regulations, or agreements relied upon by the parties in the action." *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 92 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *see also In re Estelle*, 516 F.2d 480, 487 (5th Cir. 1975) (separate opinion of Tuttle, J.) (concluding that the United States meets the requirements of Rule 24(b)(2) when it seeks to intervene in a private action to enforce a civil statutory claim of right, the redressing of which is also the aim of a federal criminal statute). Indeed, the language concerning government intervention in Rule 24(b)(2) was added after the Supreme Court allowed the Securities and Exchange Commission to intervene in a case "although it had no claim in the orthodox sense of being able to institute an independent action." Wright & Miller, Intervention by Governmental Agency or Officer, *7C Fed. Prac. & Proc. Civ.* § 1912 (3d ed.) (describing *Sec. & Exch. Comm'n v. U.S. Realty & Improvement Co.*, 310 U.S. 434 (1940)).

Moreover, although the Court declined to reach the issue, Rule 24(a)(2), under intervention as of right, allows the United States to intervene here. *See* Mot. to Interv., Dkt. # 53, at 6-12. Rule 24(a)(2) allows anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action" if "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The United States has an interest in the subject matter

of this suit, which is, in part, whether federal funds are being used to advance discrimination prohibited by Section 504. A decision by the Court here will, among other things, determine whether any federal agency can later allege that the use of federal funds by the State was discriminatory. Thus, the Department of Justice, representing the federal government, has an interest in the "property . . . that is the subject of the action." Rule 24(a)(2). Finally, the United States' interests with regard to the expenditure of federal funds are not adequately protected by the existing parties to the litigation.

Thus, under the plain language of Rule 24(a)(2) and (b)(2), the United States' intervention would be proper even if Texas were correct that the United States has no ability to enforce Title II or Section 504 in court. This fact, alone, warrants denial of the State's motion.

II. Under the Plain Language of Title II, the Attorney General has Authority to Enforce Title II's Protections in Litigation.

Independent of the foregoing grounds to deny Texas' motion, the United States certainly has standing to enforce Title II of the ADA. The State erroneously asserts that Title II does not enable the Attorney General to enforce the statute's requirements and the Attorney General's own regulations, and instead leaves enforcement exclusively to private citizens. But Title II's enforcement provision, 42 U.S.C. § 12133, expressly adopts an established enforcement structure in which litigation brought by the Attorney General plays a central role, a factor of which Congress was aware when passing Title II. As the State acknowledges, that enforcement provision incorporates enforcement provisions of the Rehabilitation Act of 1973, which in turn incorporate the enforcement provisions of Title VI of the Civil Rights Act of 1964. Tex. Mot. Dismiss Claims of the U.S. ("Tex. Mot."), Dkt. # 242, at 8; *see also Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) ("The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973, and Congress' intent was that Title II extend the

protections of the Rehabilitation Act 'to cover all programs of state or local governments, regardless of the receipt of federal financial assistance' and that it 'work in the same manner as Section 504.' In fact, the statute specifically provides that '[t]he remedies, procedures and rights' available under Section 504 shall be the same as those available under Title II. Jurisprudence interpreting either section is applicable to both.") (alteration in original) (footnotes omitted). Put simply, Title VI of the Civil Rights Act is "the ultimate source of the enforcement mechanisms available under Title II of the ADA," Tex. Mot. at 9, and those enforcement mechanisms include as a critical component *enforcement by the Attorney General through litigation*.

Congress enacted the ADA at a time when the Attorney General's ability to bring enforcement litigation to remedy violations of Title VI and the Rehabilitation Act was well-established, as shown in these statutes' implementing regulations and case law that repeatedly affirmed the Attorney General's authority with respect to those statutes and regulations. Rather than create an entirely new enforcement structure for Title II of the ADA, Congress incorporated the existing enforcement structure from Title VI of the Civil Rights Act, which it had also incorporated into the Rehabilitation Act (and other anti-discrimination statutes).

In particular, in Section 505 of the Rehabilitation Act, Congress approved as a statutory requirement the Title VI enforcement procedures, and Congress had known for over a decade that these procedures included Attorney General enforcement through litigation. 45 C.F.R. §§ 80.8; 84.61. The State too narrowly summarizes Section 505 of the Rehabilitation Act in claiming that it simply "authorizes litigation" by "any person aggrieved." Tex. Mot. at 15. The provision is much broader: Section 505 provides to "any person aggrieved" the "remedies, procedures, and rights" set forth under Title VI. 29 U.S.C. § 794a(a)(2). Those remedies

encompass all of the rights and remedies afforded under Title VI, including enforcement actions of the United States to remedy the alleged discrimination.[1]

The Title VI enforcement mechanism permits the federal government to remedy discrimination either by terminating federal financial assistance or "by any other means authorized by law." 42 U.S.C. § 2000d-1. As the State acknowledged earlier in this case, and as courts have consistently held, when Congress broadly authorized federal enforcement in Title VI through "any other means authorized by law" it authorized the United States to bring litigation, among other remedies. Defs.' Resp. to Mot. to Interv. at 10 (citing *United States v. Arkansas*, No. 4:10-CV-00327 JLH, 2011 WL 251107, at *2 (E.D. Ark. Jan. 24, 2011); *Smith v. City of Phila.*, 345 F.Supp.2d 482, 490 (E.D. Pa. 2004)) ("Courts interpret 'any other means provided by law' to authorize DOJ enforcement via federal court action."). Thus, because Title VI of the Civil Rights Act authorizes the Attorney General to bring enforcement litigation, Title II's and Section 505 of the Rehabilitation Act's incorporation of the Title VI rights and remedies authorize such litigation.

A. Title VI of the Civil Rights Act Provides Enforcement Authority to the Department of Justice.

The text of Title VI of the Civil Rights Act—the term "any other means authorized by law" in Section 602—has consistently been interpreted as providing enforcement authority to the Department of Justice. *See, e.g.*, *Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) (explaining that "Title VI clearly tolerates other enforcement schemes [besides

[1] The State's argument, if credited, would call into question the federal government's power to enforce other civil rights mandates that have been patterned after or that incorporate the remedial and enforcement provisions of Title VI, such as Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. Courts have long recognized that these statutes grant authority to the federal government to enforce their requirements through litigation. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704-05 n.38 (1979) (Title IX); *United States v. Miami Univ.*, 294 F.3d 797, 807-08 (6th Cir. 2002) (Federal Educational Rights and Privacy Act).

termination of federal funding]" including "referral of cases to the Attorney General, who may bring an action"); *United States v. Maricopa Cnty., Ariz.*, No. 12-CV-00981-ROS, Doc. 379, at 20-23 (D. Ariz. June 15, 2015) (finding that Title VI authorizes the United States to bring suit); *accord United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002) (interpreting the Family Educational Rights and Privacy Act: "We believe that the [statutory language 'take any other action authorized by law'] expressly permits the Secretary to bring suit to enforce the FERPA conditions in lieu of its administrative remedies."); *United States v. City & Cnty. of Denver*, 927 F.Supp.1396, 1400 (D. Colo. 1996) (stating that "[c]ourts have interpreted the words 'by any other means authorized by law' to mean that a funding agency . . . could refer a matter to the Department of Justice to enforce the statute's nondiscrimination requirements in court").[2]

Moreover, federal agencies tasked with issuing regulations under Title VI have recognized the Attorney General's authority to bring enforcement litigation. *See, e.g.*, 45 C.F.R. § 80.8(a); 34 C.F.R. § 100.8. And the Department of Justice, as the agency responsible for the review and approval of all other agencies' Title VI regulations and for the coordination of "the implementation and enforcement by Executive agencies" of the nondiscrimination provisions of Title VI, has interpreted the statute as providing such authority. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); *see also* 28 C.F.R. § 50.3 (providing Guidelines for agencies to enforce Title VI). Therefore, when Congress incorporated into Title II of the ADA the well-established enforcement mechanisms of Title VI (via the Rehabilitation Act), it indisputably (and

[2] Courts have also found that the Rehabilitation Act's remedies and procedures are coextensive with those of Title VI and similarly permit lawsuits by the federal government to enforce the requirements of Section 504. *See United States v. Baylor Univ.*, 736 F.2d 1039, 1049 (5th Cir. 1984) (stating that the university's receipt of Medicare and Medicaid payments "subjects it to appropriate federal action under Section 504 of the Rehabilitation Act"); *United States v. Univ. Hosp. of State Univ. of N.Y. at Stony Brook*, 575 F. Supp. 607, 613, 616 (E.D.N.Y. 1983), (same), *aff'd* 729 F.2d 144 (2d Cir. 1984).

rightly) believed that the Attorney General would have enforcement authority under the Act. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

The history of federal enforcement of Title VI is consistent with this reading. Soon after the passage of Title VI, President Johnson directed the Attorney General, as the "chief law officer . . . charged with the duty of enforcing the laws of the United States," to assist Federal departments and agencies to coordinate enforcement efforts under Title VI. *See* Exec. Order No. 11,247, 30 Fed. Reg. 12,327 (Sept. 24, 1965). In 1965, the Attorney General issued Guidelines for Enforcement of Title VI, which defined refusal or termination of federal funding to be the "ultimate sanction" and specified three alternative measures that could be undertaken to secure compliance: (1) court enforcement; (2) administrative action; and (3) other efforts to induce voluntary compliance. *See* 31 Fed. Reg. 5292 (Apr. 2, 1966) (now codified at 28 C.F.R. § 50.3). The Guidelines further specified that court enforcement may be obtained through the following:

> (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) *initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance*.

Id. (emphasis added).

These Guidelines were understood then, and are understood now, to authorize action by federal agencies, including suits in federal court by the Justice Department, to enforce Title VI's requirements. There is no basis for the State's reading of the third provision of this section of the Guidelines that, in authorizing an agency to "initiat[e] . . . a suit for other relief designed to secure compliance" of an entity's Title VI obligations, those guidelines do no more than call for agencies to exercise their pre-existing authority to enforce *other laws*. *See* Tex. Mot. at 28-29.

To the contrary, the State simply has invented the phrase "other laws," because its absence – and the plain language of the Guidelines – renders its entire argument untenable.

The coordination role of the Attorney General under Title VI was subsequently reinforced in 1974 by President Nixon. Exec. Order No. 11,764, 39 Fed. Reg. 2575 (Jan. 21, 1974).[3] Following this Executive Order, the Attorney General issued regulations in 1976 directing that each federal agency, upon failure to obtain voluntary compliance from a noncomplying program or activity, should "initiate appropriate enforcement procedures" in accordance with the 1965 Title VI guidelines. 41 Fed. Reg. 52,669 (Dec. 1, 1976) (now codified at 28 C.F.R. § 42.411).

Thus, Title VI, from its earliest days, was consistently construed to establish an enforcement regime in which the Attorney General may bring suit to remedy noncompliance with Title VI. By the late 1970s, the Attorney General's authority to sue under Title VI was beyond question, such that in litigation over whether private parties *also* could bring such suits, the Attorney General's authority to do so was simply assumed. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 722 (1979) (White, J., dissenting) ("The 'other means' provisions of § 602 include agency suits to enforce contractual antidiscrimination provisions and compliance with agency regulations[.]"). It is unsurprising that judicial recognition of this authority appears largely in dicta, *see* Tex. Mot. at 30, as the point was so well-established as to be beyond controversy. In light of the considerable deference an agency receives when construing the

[3] Executive Order 11764 was later superseded by Executive Order 12250, which delegated the coordination of a number of civil rights laws to the Attorney General. The Department of Justice is now the agency responsible for coordinating agency implementation of Title VI, Section 504, and a number of other civil rights laws, Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), including the Section 504 coordination regulations discussed below, *see* 28 C.F.R. Part 41.

statute it administers, *see, e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Department of Justice's permissible construction of the statute must control.

B. Section 504's Prohibition of Discrimination by Recipients of Federal Funds Is Also Enforceable by the Federal Government.

In Section 505 of the Rehabilitation Act, Congress approved, as a statutory requirement, the Title VI enforcement procedures, which Congress knew had included Attorney General enforcement through litigation for over a decade. Those enforcement procedures call on federal agencies to receive and investigate complaints, conduct compliance reviews, seek to negotiate compliance, and, if unsuccessful, either terminate federal financial assistance or refer the matter "to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking." 45 C.F.R. §§ 80.7; 80.8; 84.61.

In 1973, Congress passed Section 504 of the Rehabilitation Act, which, like Title VI of the Civil Rights Act, prohibits discrimination by programs and activities receiving federal financial assistance. Pub. L. No. 93-112, § 504, 87 Stat. 355 (1973) (codified at 29 U.S.C. § 794). Following its passage, the Department of Health Education and Welfare ("HEW"), predecessor of the Department of Health and Human Services, issued regulations consistent with the Department of Justice's Title VI coordination regulations. HEW's regulations directed each agency providing federal financial assistance to adopt, as part of its enforcement of Section 504, the "enforcement and hearing procedures that the agency has adopted for the enforcement of title VI of the Civil Rights Act of 1964." 28 C.F.R. § 41.5(a)(1).

In 1978, Congress amended the Rehabilitation Act to add Section 505, which explicitly provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act" in violation of

Section 504 of the Act. *See* Pub. L. No. 95-602, § 120(a), 92 Stat. 2955 (1978) (codified at 29 U.S.C. § 794a.) The 1978 amendment also added a provision in Section 504, which like Title VI and the Section 504 coordination regulation already promulgated by HEW, directs all federal agencies that provide federal financial assistance to promulgate "such regulations as may be necessary to carry out" Section 504. *Id.* at § 119. As the Senate Committee Report accompanying the 1978 amendment explained:

> It is the committee's understanding that the regulations promulgated by [HEW] with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies *existing practice* as a specific statutory requirement.

S. Rep. No. 95-890, at 19 (1978) (emphasis added); *see also Lane v. Pena*, 518 U.S. 187, 205-07 (1996) (Stevens, J. dissenting) ("Congress' intent to strengthen the Act's protections is clearly evident in § 505. . . . In enacting § 505(a)(2), Congress explicitly recognized and approved the application of Title VI's enforcement procedures to § 504."); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 635 & n.16 (1984) (Section 505 codifies HEW "complaint and enforcement procedures" that adopted HEW's Title VI enforcement procedures). The "existing practice" included enforcement action by the Attorney General.

Thus, Congress' 1978 amendments to the Rehabilitation Act incorporated the HEW Title VI enforcement regulations into the Rehabilitation Act as statutory requirements. Rather than creating a new enforcement structure for Section 504 of the Rehabilitation Act, Congress borrowed one with a well-established administrative and judicial construction. The established Title VI construction, as noted above, included the Justice Department's authority to bring an enforcement lawsuit in federal court. The text and the legislative history of the Rehabilitation Act amendment strongly indicate Congress' intent and clear directive to authorize enforcement of Title VI as well as Section 504 by the Attorney General through federal litigation.

III. Courts have Interpreted Title II to Include Attorney General Enforcement Authority.

Ever since the ADA's enactment, the Department of Justice has fulfilled its obligation to vigorously enforce Title II through litigation and compliance agreements that have provided and continue to provide relief for hundreds of thousands of individuals with disabilities.[4] And courts have routinely recognized the Department of Justice's authority under Title II to bring suit.

A. Addressing the Identical Arguments Made by the State Here, the District Court in Dudek Held that the United States Has Authority to Sue under Title II.

As discussed above, Texas copies nearly verbatim arguments made by the State of Florida in *A.R. ex rel. Root v. Dudek*. The district court in *Dudek* rejected those contentions and held that the relevant statutes, cases, and regulations support the conclusion that the United States "may initiate litigation under Title II." 31 F. Supp. 3d at 1369-71. The court found that many other courts have interpreted the phrase "by any other means authorized by law" in Title VI of the Civil Rights Act as authorizing the Department of Justice "to enforce the statute's nondiscrimination requirements in court." *Id.* at 1368-69. The court also examined one of the same cases that the State of Texas cited previously to demonstrate that the United States may enforce Title II through litigation. *Id.* at 1369 (citing *Smith*, 345 F. Supp. 2d at 489); *see also* Defs.' Resp. to Mot. to Interv. at 10. The court concluded that case law supports the "DOJ's [Department of Justice's] assertion that it has standing to bring suit under Title II of the ADA." *Dudek*, 31 F. Supp. 3d at 1369. The court further noted that "no court has denied [the Department of Justice] the right to litigate ADA Title II claims or to intervene in these types of lawsuits." *Id.* at 1370.

[4] *See ADA Enforcement Cases 2006-Present: Title II*, Dep't of Justice, http://www.ada.gov/enforce_current.htm#TitleII (last visited Dec. 19, 2015); *ADA Enforcement Cases 1992-2005: Title II*, Dep't of Justice, http://www.ada.gov/enforce_archive.htm#TitleII (last visited Dec. 19, 2015).

The court also looked to the Section 504 regulations and Title VI regulations and found that those regulations "further support the conclusion that DOJ may initiate litigation under Title II." *Id.* at 1369. And the court found that the Title II regulations appropriately authorize suit. *Id.* 1369-70. After this thoughtful analysis, the court held that "the Attorney General has authority to take action to secure an appropriate remedy, including by filing a lawsuit." *Id.* at 1371.

B. Courts have Consistently Interpreted Title II as Providing Attorney General Enforcement Authority.

The *Dudek* holding is not an outlier; it is supported by a litany of other cases that have found that the United States may sue to address discrimination. *See, e.g.*, *City & Cnty. of Denver*, 927 F. Supp. at 1399-1400 (finding that the Department of Justice had met the requirements necessary to bring a Title II claim); *Smith*, 345 F. Supp. 2d at 489-90 (dismissing private individual's Title II claim but retaining jurisdiction over United States' Title II claim because United States has "a separate and independent basis for jurisdiction under Title II of the ADA and Section 504 of the Rehabilitation Act") (internal quotation marks omitted); *United States v. N. Ill. Special Recreation Ass'n*, No. 12 C 7613, 2013 WL 1499034, at *5 (N.D. Ill. Apr. 11, 2013) (denying motion to dismiss United States' Title II complaint alleging that public athletic association discriminates against individuals with epilepsy); *United States v. Virginia*, No. 3:12cv59-JAG, Dkt. # 90, at 3-6 (E.D. Va. June 5, 2012) (rejecting argument that United States must rely on other statutory authority to bring enforcement action under ADA and stating that "the United States has the authority to initiate legal action to enforce Title II of the ADA"); *United States v. City of Balt.*, Civil Nos. JFM-09-1049 & JFM-09-1766, 2012 WL 662172, at *1 (D. Md. Feb. 29, 2012) (granting Department of Justice's motion for summary judgment in Title II claim).

The Department also has entered into numerous enforceable consent decrees and settlements to remedy public entities' Title II violations. The district courts that have approved these decrees, of necessity under Article III of the Constitution, had to determine that they had jurisdiction over these cases, and therefore, that the United States had standing to initiate these complaints under Title II of the ADA. *See, e.g.*, *United States v. Rhode Island*, No. 1:13-cv-442, Dkt. # 5 (D.R.I. July 11, 2013) (order retaining jurisdiction over settlement agreement resolving systemic claim of unnecessary placement of individuals with disabilities in segregated employment settings); *United States v. North Carolina*, No. 5:12-cv-557, Dkt. # 13 (E.D.N.C. Oct. 5, 2012) (order retaining jurisdiction over settlement agreement resolving systemic claim of unnecessary segregation of individuals with mental illness in private facilities); *United States v. Virginia*, No. 3:12-CV-059, Dkt. # 112 (E.D. Va. Aug. 23, 2012) (order entering settlement agreement resolving systemic claim of unnecessary segregation of individuals with developmental disabilities in state-run facilities); *United States v. Delaware*, No. 1:11-cv-00591, Dkts. # 6 & 7 (D. Del. July 18, 2011) (orders entering consent decree resolving systemic claim of discrimination against individuals with mental illness in or at risk of entry to state-run institutions); *United States v. Georgia*, No.1:10-cv-00249, Dkt. # 115 (N.D. Ga. Oct. 29, 2010) (order adopting settlement agreement resolving systemic claim of unnecessary institutionalization of individuals with mental illness and developmental disabilities in state-run institutions); *Crawford v. City of Jackson, Miss.*, No. 3:08-cv-00586, Dkt. # 42 (S.D. Miss. Mar. 30, 2010) (order entering consent decree between United States, private plaintiffs, and municipality in case alleging that municipality denied individuals with disabilities the benefits of public transit system); *Mich. Paralyzed Veterans of Am. v. Univ. of Mich.*, No. 2:07-cv-11702, Dkt. # 23 (E.D. Mich. Mar. 10, 2008) (order entering consent decree between United States,

private plaintiffs, and public university in case alleging that public entity failed to make venue accessible to individuals with disabilities); *Dilworth v. City of Detroit*, No. 2:04-cv-73152, Dkt. # 43 (E.D. Mich. Nov. 3, 2005) (order entering settlement between United States, private plaintiffs, and municipality in case alleging that municipality denied individuals with disabilities benefits of public transit system). Indeed, no court has ever found that Title II of the ADA did not authorize litigation by the United States.

IV. Attorney General Enforcement is Consistent with the ADA's Purpose.

Congress enacted the ADA twenty-five years ago to provide a clear and comprehensive national mandate for eliminating discrimination against individuals with disabilities, including in state and local government programs and services. 42 U.S.C. § 12101(b)(1). Before the ADA's passage, Section 504 of the Rehabilitation Act prohibited state and local government entities from discriminating against individuals with disabilities, but only to the extent that those entities received federal funding. 29 U.S.C. § 794. Congress found, however, that discrimination against such persons persisted in the provision of state and local government services, especially in the absence of federal funding or where federal funding could not be used to leverage compliance with anti-discrimination laws. *See* 42 U.S.C. § 12101(a)(2)-(3). In response it passed Title II of the ADA to extend the reach of federal anti-discrimination law to all state and local government entities, regardless of whether they receive federal funding. One of the stated purposes of the Act was "to ensure that the Federal Government plays a central role in *enforcing* the standards established [under the Act] on behalf of individuals with disabilities." *Id.* § 12101(b)(3) (emphasis added). Thus, it incorporated into the Act, well-established enforcement mechanisms that include Attorney General enforcement authority.

This congressional intent also was articulated in the report of the House Committee on Education and Labor on the bill that became the ADA. This report stated:

> Because the fund termination procedures of section 505 [of the Rehabilitation Act of 1973] are inapplicable to State and local government entities that do not receive Federal funds, the major enforcement sanction for the Federal government will be referral of cases by . . . Federal agencies to the Department of Justice. . . . The Department of Justice may then proceed to file suits in Federal district court.

H.R. Rep. No. 101-485(II), at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381. This statement is identical to the one that had previously been issued by the Senate Committee on Labor and Human Resources. S. Rep. No. 101-116, at 57-58 (1989); *see also id.* at 57 (expressing the Committee's "intent that enforcement of section 202 [Title II] of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973" and directing the Attorney General to "use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area"). Both of these committees reported their versions of the bill unanimously.

Additionally, since the ADA's enactment under President George H.W. Bush, and in every administration thereafter, the federal government has prioritized vigorous enforcement of Title II, resulting in numerous enforcement actions. *See supra* at n.5. Indeed, shortly after the Supreme Court's decision in *Olmstead*, President George W. Bush issued an executive order directing the Attorney General and the Secretary of Health and Human Services to "*fully enforce* Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization." *See* Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (Jun. 18, 2001) (emphasis added). This prioritization is consistent with the purpose of the ADA: "to ensure that the Federal Government plays a central role in *enforcing* the standards established" in the ADA. 42 U.S.C. § 12101(b)(3) (emphasis added). Thus, it is clear not only from the express language of the Act itself, but also

from stated Congressional purposes, that the Attorney General was intended to have enforcement authority under Title II of the ADA.

V. To the Extent that Title II is Ambiguous, this Court Must Defer to the Department of Justice's Regulations.

Even if Title II were ambiguous as to the ability of the Attorney General to bring enforcement litigation, which it is not, the State's construction conflicts with the interpretation adopted through regulation by the Department of Justice as the agency that Congress empowered to implement Title II of the ADA. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868-69 (2013) (applying *Chevron* deference to agency interpretation of statutory ambiguity that concerns the scope of agency's statutory authority).

Congress instructed the Attorney General to promulgate regulations "consistent with" the regulations implementing Section 504 of the Rehabilitation Act. 42 U.S.C. § 12134 ("[R]egulations . . . shall be consistent with . . . the coordination regulations under [Section 504 of the Rehabilitation Act] . . . applicable to recipients of Federal financial assistance under [Section 504]"). Accordingly, the Department of Justice adopted regulations implementing Title II by, *inter alia*, setting forth investigation and compliance procedures similar to those of Title VI and Section 504. *See* 28 C.F.R. §§ 35.170-.173. As detailed above, the Section 504 coordination regulations—as directed by Congress—incorporate the enforcement procedures adopted under Title VI of the Civil Rights Act. *See* 28 C.F.R. § 41.5. Those enforcement procedures include Attorney General enforcement through litigation. Consistent with those procedures, the Title II regulations also include Attorney General enforcement authority.

Pursuant to the Title II regulations, federal agencies, including the Department of Justice, are required to accept complaints of disability-based discrimination made against public entities, 28 C.F.R. § 35.171, may conduct an investigation or compliance review, and may resolve

noncompliance informally or issue a letter of findings, 28 C.F.R. § 35.172. Where an agency has issued a letter of findings, it must initiate negotiations to secure compliance by voluntary means. 28 C.F.R. §35.173. Where such efforts are not successful, the agency "shall refer the matter to the Attorney General with a recommendation for appropriate action," which may include initiation of litigation. *See* 28 C.F.R. § 35.174. This regulatory construction is entirely "consistent with" the Section 504 coordination regulations, which incorporate the enforcement procedures of Title VI. *See* 28 C.F.R. § 42.401 (stating that the purpose of the regulations is to properly enforce Title VI of the Civil Rights Act of 1964); 28 C.F.R. § 42.411 (if voluntary compliance is not achieved with respect to a Title VI violation, "the agency shall initiate appropriate enforcement procedures as set forth in the 1965 Attorney General Guidelines, 28 CFR § 50.3"); 28 C.F.R. § 50.3 (referencing court enforcement); 28 C.F.R. § 41.5 (regulations of the Section 504 of the Rehabilitation Act incorporate the enforcement and hearing procedures for the enforcement of Title VI). The Department of Justice's Title II regulations are "*within the bounds of its statutory authority*" and are certainly "a permissible construction of the statute." *City of Arlington*, 133 S. Ct. at 1868, 1874-75 (emphasis in original). Thus, "that is the end of the matter." *Id.* at 1874-75 (citing *Chevron*, 467 U.S. at 842).

VI. Texas Misconstrues the Text, Purpose, and Interpretive Case Law of Title II and the Statutes Upon Which it is Based.

In an effort to avoid facing federal enforcement of the ADA, Texas advances a series of speculative arguments about the ADA, Title VI of the Civil Rights Act, and the Rehabilitation Act. These arguments are erroneous: Title II authorizes suit by the Attorney General.

A. Title VI Is Enforceable Through Litigation by the Federal Government Even Though the Words "Attorney General" Are Not Explicitly Contained in the Act.

Noting that other provisions of the Civil Rights Act of 1964—generally those that speak to more specific areas of discrimination, such as education, housing, and employment—specify

the agency head with responsibility for that area as to the actions that should be taken in that area, the State contends that Title VI's failure to expressly invoke the Attorney General or the precise actions she may take means the Attorney General lacks any enforcement authority whatsoever. *See* Tex. Mot. at 20. But Title VI, unlike the other Titles of the Civil Rights Act, does not focus on one subject matter area, federal program, or *any* particular agency head. Rather, it bans discrimination in a wide range of contexts and is enforced by a variety of federal agencies. 42 U.S.C. § 2000d-1. It would be unnecessary and confusing for Congress to single out for identification the head of only one of the agencies responsible for enforcing Title VI. Similarly, it is unremarkable that Title VI does not specify or limit enforcement authority to agency lawsuits, because it grants a much broader and all encompassing enforcement mandate to effectuate Title VI's purposes and ensure compliance through "any other means authorized by law." *Id.* (funding agencies are "authorized and directed to effectuate" the non-discrimination mandate of Title VI "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute").

The faulty logic of the State's argument appears to be that: (1) in authorizing *every* agency head administering federal money to enforce the anti-discrimination mandate in every program area where they specifically operate, Title VI fails to authorize *any* of them, including the Attorney General, to enforce the general and all-encompassing prescriptions in that Title; and (2) in empowering agency heads to use "*any other* means authorized by law," it grants them no authority at all other than that specifically granted. To the contrary, while Title VI does not specify lawsuits by the Attorney General by name, its broad language includes that possibility among many others. At a minimum, such a reading is a reasonable one. *See* Section II., *supra*.

B. Title II of the ADA, Standing Alone, Confers Enforcement Authority on the Attorney General.

The State erroneously argues that, standing alone, Title VI of the Civil Rights Act and the Rehabilitation Act do not authorize federal enforcement actions; instead the United States needs "some other law" to enforce those statutes. And because Title II of the ADA incorporates those statutes, any action by the United States to enforce Title II of the ADA must find authorization in "some other law" other than any of these anti-discrimination statutes. Tex. Mot. at 31. Not only is this argument circular, it also misconstrues all three statutes—none of which require the Attorney General to turn to "other laws" in order to bring an enforcement action.

As a preliminary matter, Title VI and the Rehabilitation Act themselves do not condition agency and the Attorney General's enforcement authority on "assurances" or "contracts." Nor do they condition enforcement by the agency or the Attorney General on other existing laws. The statutes simply prohibit discrimination under any program or activity receiving Federal financial assistance, *see* 42 U.S.C. § 2000d; 29 U.S.C. § 794, and provide that compliance may be effected through fund termination or "by any other means authorized by law," 42 U.S.C. § 2000d-1; 29 U.S.C. § 794(a). As previously discussed, "any other means authorized by law," includes litigation by the Attorney General. *See* Section II *supra*. While the existence of federal funding is an essential part of a claim under those statutes, the enforcement authority granted under the statutes is not exclusively a contract claim or claim under some other already-existing right.

Additionally, neither the Title VI regulations nor the Rehabilitation Act regulations condition Attorney General or agency enforcement on "contractual assurances." As previously discussed, in issuing regulations and guidance pursuant to Title VI, the Department of Justice has interpreted the phrase "any other means authorized by law" to permit civil actions to gain

compliance and has not conditioned those actions on the existence of contracts or other existing authority.[5] 28 C.F.R. § 50.3 (broadly allowing "for other relief designed to secure compliance" with the nondiscrimination mandate of title VI).[6] Recently, the court in *United States v. Maricopa County* invoked long-standing precedent and the Department of Justice's own interpretation of Title VI as the agency charged with administering the Act, in concluding that the United States has authority to enforce Title VI irrespective of any contractual claim. *Maricopa Cnty, Ariz.*, 12-CV-00981, Doc. 379 at 20-23.

The State's construction would render meaningless the ADA's incorporation of Title VI's remedial provision, 42 U.S.C. § 2000d-1. "[O]ne of the most basic interpretive canons" is the rule against superfluities, which states that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Subsection (1) of Title VI's remedial provision would be wholly inapplicable to entities that are covered under Title II of the ADA but that are not federally funded, given that the federal government cannot terminate assistance that

[5] Citing to *United States v. Marion County School District*, 625 F.2d 607, 609, 612-13 (5th Cir.), the Department also states that assurances "provide *a basis* for the Federal government to sue to enforce compliance" with Title VI. U.S. Dep't of Justice, Title VI Legal Manual, at 73 (Jan. 11, 2001), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.pdf (emphasis added). The Department by no means suggests that those assurances are the *exclusive* basis for the federal government to sue.

[6] While the "assurances of compliance" required under the Title VI and Section 504 regulations, 28 C.F.R. § 41.5(a)(2), offer a basis under which the United States may sue to enforce compliance, that is not the only basis for suit. In fact, for many years it remained an open question whether the federal government could sue to enforce contractual assurances under Title VI. Other lawsuits directly under Title VI were a foregone conclusion. *See United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 612 (5th Cir. 1980) (holding "the 'any other means authorized by law' language in Title VI . . . *included* government suits to enforce contractual assurances" as one of many already established means by which the United States may sue to enforce compliance with Title VI).

it never provided. Therefore, subsection (2) of Title VI's remedial provision is the only portion of the provision that has any potential meaning for such entities because it broadly authorizes remedies that are irrespective of federal funding. Unlike Title VI, however, where there are—as the State acknowledges—"other means authorized by law" for the federal government to enforce the statute, *see* Tex. Mot. at 22 there are *no* "other means" to enforce Title II against these entities except through litigation under Title II itself. There are no contracts with funding recipients to enforce, because there is no funding. And there are no other federal civil rights statutes that could serve as an independent basis for federal litigation against these entities regarding disability-based discrimination. The State's construction is thus unworkable and would render meaningless Congress's incorporation of Title VI's and Section 504's enforcement scheme. This simply could not have been Congress's intent in enacting a law intended to "provide clear, strong, consistent, enforceable standards" addressing discrimination against people with disabilities that the "Federal Government plays a central role in enforcing." 42 U.S.C. § 12101(b)(2) & (b)(3). Rather, the only logical reading of Title II is one that confers authority upon the Attorney General to enforce the statute's terms. To decide otherwise would render Title II's reference to 42 U.S.C. § 2000d-1 "inoperative or superfluous, void or insignificant." *See Hibbs*, 542 U.S. at 101.

C. Title II's Enforcement Rights are Not Limited to Private Individuals.

The State contends that Congress could not have intended the Department of Justice to have authority to bring Title II enforcement litigation, because Title II's enforcement provision does not explicitly include the words "Attorney General", whereas provisions of Titles I and III of the ADA do.

In support of its argument, the State claims that this conclusion is compelled by the Supreme Court's decision in *Director, Office of Workers' Compensation Programs, Department*

of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995), as well as certain other non-binding circuit court cases. Tex. Mot. at 10-11. But *Newport News* does not support the proposition that Congress is always required to identify the Attorney General by name in any enforcement provision. There, the Court held that a statute governing standing to petition for review of an administrative agency's decisions, 33 U.S.C. § 921(c), which provided that "[a]ny person adversely affected or aggrieved by a final [administrative] order . . . may obtain a review of that order" in a federal court of appeals, did not thereby confer standing on the agency's director. 514 U.S. at 130. But the statute at issue did not incorporate any other statutory enforcement scheme, as the ADA plainly does, and it certainly did not incorporate a well-established enforcement structure that provided for agency and Attorney General enforcement, like Title II of the ADA does. Instead, the Court's reasoning centered on the specific meaning of the term of art "person adversely affected or aggrieved" in the context of that statute and reasonably excluded the agency that issued the administrative order from the phrase. *Newport News* certainly did not stand for the State's broad proposition that Congress must, in all circumstances, name the Attorney General in order to give enforcement authority to the Department of Justice, rather than simply incorporate that authority by reference.[7]

[7] The circuit court cases that the State cites in this section are similarly inapposite. *See In re Griffith*, 206 F.3d 1389, 1391 (11th Cir. 2000) (analyzing suit brought by private plaintiff related to whether certain types of debt were dischargeable in bankruptcy, not an enforcement action by the United States); *Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1570 (Fed. Cir. 1993) (considering whether an agency had authority to approve a federal employee's request related to retirement benefits, not whether it was empowered to litigate in federal court to enforce a statute); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 22 (2d Cir. 1989) (considering whether United States could seek the remedy of treble damages, not whether Congress conferred authority to bring a lawsuit); *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 673 (5th Cir. 1978) (holding that Secretary of Labor was not authorized to petition for an injunction compelling search of workplace, in part because relevant legislative history, unlike here, reflected congressional concerns related to warrantless searches). None of

Second, contrary to the State's claims, the presence of the words "Attorney General" in Titles I and III of the ADA does not show that Congress meant to deny standing to the Department of Justice to enforce Title II. The difference between these statutory references was not intended to limit Title II relative to Titles I and III, but rather to indicate that the Attorney General has distinct responsibilities and the right to seek broader remedies under those titles than private litigants. In contrast, the Attorney General's authority to sue under Title II is, to the extent possible under the Constitution,[8] coextensive with that of the general public, such that no specific statutory reference is necessary.

The Attorney General was expressly named in Title III's Section 12188(b) because the enforcement procedures provided therein may be exercised only by the Attorney General. For example, under the enforcement procedures created by 42 U.S.C. § 12188(b), the Department of Justice must conduct investigations of Title III violations and may seek damages and civil penalties in a Title III lawsuit.[9] These enforcement roles belong exclusively to the Attorney General and were not meant to be enforced by the general public (or any other agency).

these cases strip an agency of the right to sue to enforce the core provisions of a statute it is entrusted to administer.

[8] Although the Supreme Court has held that, in certain circumstances, private litigants may not have the ability to seek damages for violation of Title II against public entities due to the Eleventh Amendment, *United States v. Georgia*, 546 U.S. 151, 157-59 (2006), the Eleventh Amendment is inapplicable to the federal government when it brings suit against a state. *See, e.g.*, *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."). Otherwise, the remedies available to the United States are coextensive with those of private plaintiffs.

[9] Private parties, to be clear, do share certain other enforcement remedies under Title III, but these shared remedies are set forth in subsection (a) of 42 U.S.C. § 12188, not in subsection (b). Under subsection (a), private parties may seek preventive or injunctive relief for Title III violations.

Moreover, Congress was compelled to provide more detail regarding Title III's remedial scheme, because it was giving the Attorney General the authority to seek broader remedies than would be available if Congress simply incorporated by reference the remedies of Title II of the Civil Rights Act. Title III of the ADA establishes a private right of action by incorporating the remedies and procedures of Title II of the Civil Rights Act. 42 U.S.C. § 12188(a)(1). But in private actions under Title II of the Civil Rights Act, only injunctive relief, not monetary damages, is available. 42 U.S.C. § 2000a-3. A separate provision of Title II of the Civil Rights Act provides authority for actions by the Attorney General but similarly restricts the relief available to prospective injunctive relief. *See* 42 U.S.C. § 2000a-5(a). Thus, because Congress chose in Title III of the ADA to grant the Attorney General the authority to seek damages, which the Attorney General did not have under Title II of the Civil Rights Act, Congress needed to specifically refer to, and add new language specifically naming, the "Attorney General."

The same principles apply to Title I of the ADA, which adopted a series of enforcement powers, remedies, and procedures from several sections of Title VII of the Civil Rights Act of 1964. In order for the enforcement provision of Title I, 42 U.S.C. § 12117(a), to have the intended effect, Congress had to name "the Commission" (*i.e.*, the Equal Employment Opportunity Commission, or "EEOC") and "the Attorney General" explicitly. This is so because each of the provisions of Title VII of the Civil Rights Act cross-referenced in Title I of the ADA name different actors that can exercise particular enforcement powers, remedies, and procedures. For example, 42 U.S.C. § 2000e-5 describes the role of the EEOC, while § 2000e-6 describes the role of the Attorney General. "The Commission" and "the Attorney General" are, therefore, identified by necessity in Title I's enforcement provision to clarify the additional rights and responsibilities they held with respect to the Civil Rights Act. These rights and authorities are

not shared with the general public, but carry over to Title I of the ADA, necessitating distinct and specific references to the Commission and Attorney General. And, as with Title III of the ADA and in contrast with Title II of the ADA, there was not one portion of the Civil Rights Act of 1964 that Congress could have incorporated by reference, in order to give the various actors the enforcement powers it wished to grant with respect to Title I of the ADA.

Title II's enforcement provision lacks the words "Attorney "General" only because, unlike in Titles I and III, Congress did not need to give the Attorney General special authority to enforce Title II in ways that are inapplicable to anyone else. *See* H.R. Rep. No. 101-485(II), at 98 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381 (noting that, in addition to the Department of Justice's authority to file suits as sanction for noncompliance with Title II of the ADA, "there is *also* a private right of action for persons with disabilities, which includes the full panoply of remedies") (emphasis added).

D. The Presence of the Word "Person" in Section 12133 Does Not Preclude the United States from Enforcing its Requirements.

Taking the language of the statute out of context, the State further claims that the presence of the word "person" in 42 U.S.C. § 12133, as well as in Section 505 of the Rehabilitation Act, should be interpreted to deprive the government of standing because a government actor can never be a "person." Tex. Mot. at 11. Again, as explained above, the State's interpretation suffers from its failure to consider the relevant legislation as a whole.

Even if it were assumed *arguendo* that 42 U.S.C. § 12133 and Section 505, standing alone, could not be read to grant any authority to the government to enforce Title II and Section 504, respectively, Title II's intent to grant litigation authority to the Attorney General is evident from the rest of the title. Specifically, 42 U.S.C. § 12134 directed the Attorney General to promulgate regulations consistent with the 1978 HEW Rehabilitation Act regulations, which, in

turn, clearly contemplated that the government would enforce that statute. Likewise, the authority of the government to sue to enforce Section 504 is also found in Section 504 itself, as courts have long held. *United States v. Univ. Hosp. of State Univ. of N.Y. at Stony Brook*, 575 F. Supp. 607, 616 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984). Thus, the meaning of the word "person" in 42 U.S.C. § 12133 and Section 505 is not crucial to a proper understanding of Title II or the Rehabilitation Act.

Moreover, even if 42 U.S.C. § 12133 and Section 505 were read in isolation, they offer no support for the State's construction of the Act. Those provisions set forth certain remedies to persons alleging discrimination on the basis of disability. Section 12133 states that the remedies, procedures, and rights of Section 505 are "*provide[d] to* any person alleging discrimination," (emphasis added); and Section 505, in turn, states that the remedies, procedures, and rights of Title VI of the Civil Rights Act of 1964 are "*available to* any person aggrieved by any act or failure to act," 29 U.S.C. § 794a(a)(2) (emphasis added). Neither provision, however, states that only "persons" may exercise the remedies, procedures, and rights made available by those provisions. These statutes' language is most logically read to identify the intended beneficiaries of the specified remedies, procedures, and rights. They do not say these beneficiaries are the only actors who may enforce those remedies, procedures, and rights. Even if it is assumed *arguendo* that the Attorney General can never be a person, which is plainly an incorrect assumption not supported by Supreme Court precedent,[10] Title II and Section 505 do not say that

[10] The general interpretive presumption that "person" does not include the government, is not a "hard and fast rule of exclusion," *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941), and it can be overcome "upon some affirmative showing of statutory intent to the contrary,'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000). Federal courts have recognized multiple times that the federal government can be a "person" when supported by textual or contextual factors. *See, e.g.*, *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 981

only "persons" can enforce their respective terms. This is consistent with the overall purpose of the statute "to ensure that the Federal Government plays a central role in enforcing the standards established [in the statute] *on behalf of* individuals with disabilities." 42 U.S.C. § 12101(b)(3) (emphasis added).

E. Contrary to the State's Interpretation, the *Olmstead* Decision Underscores the Attorney General's Enforcement Authority.

The State's reliance on *Olmstead v. L.C.* to support its position is also misplaced. The State quotes a truncated passage from a footnote stating that "'a person alleging discrimination on the basis of disability in violation of Title II may seek to enforce its provisions by commencing a private lawsuit,'" Tex. Mot. at 14 (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591 n.5 (1999)), and argues that the *Olmstead* Court therefore interpreted Title II to grant enforcement authority only to private parties. But the Court, in its description of the procedural background of the case before it, simply notes that persons alleging discrimination under Title II can commence a private lawsuit; the Court did not address the question of whether enforcement by the federal government is available, which was not at issue in the case brought by two individuals. More fundamentally, the full text of the cited footnote observes that individuals may file a complaint with the Department of Justice, which would be useless if the Department had no enforcement authority.

There is also no indication that federalism concerns drove the *Olmstead* plurality's purported interpretation of Title II's enforcement avenues. While some passages in the concurring and dissenting opinions describe generalized concerns over federal courts treading on state decisions regarding programs for individuals with disabilities and the expenditure of state

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(9th Cir. 1994); *In re Republic of Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492, at *2 (N.D. Cal. Dec. 1, 2010).

funds, these concerns were noted in a private suit to enforce the ADA and without regard to whether the plaintiff is a private litigant or the federal government. And these concerns were addressed in the plurality's fundamental alteration defense, which requires states to modify programs to accommodate individuals determined to be appropriate for community-based placements, but only to the extent that such placements can be "reasonably accommodated, taking into account the resources available to the State and the needs of others with . . . disabilities." 527 U.S. at 607.

F. The State's Presumptions about Congressional Intent Are Belied by the History and Purpose of the Act.

The State's premise that Congress intended to restrict Attorney General enforcement authority under Title II is unsupported by either the text or the context of the ADA. Throughout its briefing, the State claims, based on its own inferences about Congress' deliberative process, that Congress implicitly extricated from Title II the Attorney General's litigation remedy, even though Congress explicitly incorporated into Title II civil rights statutes that have historically granted the Attorney General precisely that authority. This argument fails.

As discussed more fully above, the ADA was passed at a time when Congress recognized that discrimination against individuals with disabilities was pervasive and that it seeped into critical areas of society, including "institutionalization, health services, voting, and access to public services," 42 U.S.C. § 12101, all of which are governed by states. To eradicate such injustice, Congress passed this sweeping legislation that imposed further obligations on not only public entities that receive federal funding but *all* public entities. No public entity could now discriminate against people with disabilities. Particularly in light of this broad purpose, it makes no sense to think that Congress wanted to hamstring enforcement of this key protection by outsourcing it entirely to private litigants. Discrimination by public entities is discrimination in

its most pernicious form. *See United States v. Texas*, No. CIVA 6:71-CR-5281 WWJ, 2006 WL 2350013, at *13 (E.D. Tex. Aug. 11, 2006) (describing the history of state-sanctioned discrimination against women as "invidious" and justifying "Congress' passage of prophylactic legislation"). It would have been antithetical to Congress's clear recognition of this fact to deprive the Attorney General of the ability to enforce it.

A far more logical textual analysis is that Congress intended for the federal government to enforce Title II of the ADA through litigation, when necessary, to eradicate state-sanctioned discrimination. Congress intentionally incorporated into Title II of the ADA two statutes that historically focus on federal agency enforcement of anti-discrimination legislation. It also directed the Attorney General, the head of the litigating branch of the United States government, to issue regulations under Title II consistent with regulations that were statutorily approved by Congress and that expressly provide for enforcement by the Attorney General. The only reasonable interpretation of Title II's enforcement authority is one borne out by the Act itself: Congress intended Title II of the ADA to include Attorney General enforcement, consistent with the other well-established anti-discrimination laws that it incorporated into Title II and that the Attorney General had been enforcing for decades.

CONCLUSION

The State's attempt to re-litigate its response to intervention should fail.[11] The United States has standing to intervene in this case, as this Court already correctly decided. The

[11] The State's alternative request for certification for interlocutory appeal is untimely in predating the order from which it seeks to appeal and unsupported in presuming a controlling question exists as to which there is a substantial ground for difference of opinion, especially given the United States' status as an intervenor and that *no court* has ruled as the State advocates here. The United States will respond when the State makes a timely request upon issuance of the Court's order.

United States also may enforce Title II of the ADA through litigation as demonstrated by the statute's text, purpose, and history. The State's motion must be dismissed.

Dated: December 21, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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