SOUTHERN ILLINOIS UNIVERSITY
2025 INTRAMURAL MOOT COURT COMPETITION

Docket No. 25-140

THE STATE OF FRANKLIN DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et. al.,

Petitioners

v.

Sarah KILBORN, et. al.

Respondents

and

THE UNITED STATES OF AMERICA

Intervenor-Respondents.

Transcript of Record

In conjunction with the
National Health Law Moot Court Competition
which is supported by
The American College of Legal Medicine

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FRANKLIN

SARAH KILBORN; ELIZA TORRISI, by her guardians, Joseph and Marina Torrisi; and MALIK WILLIAMSON, by his guardian, Laila Thomas, Plaintiffs, v. THE STATE OF FRANKLIN DEPARTMENT OF SOCIAL AND HEALTH SERVICES and MACKENZIE ORTIZ, in her official capacity as Secretary of the State of Franklin Department of Social and Health Services, Defendants.	Case No. 1:22-cv-00039

MEMORANDUM OPINION AND ORDER ON THE UNITED STATES' MOTION TO INTERVENE

I. Introduction

Plaintiffs Sarah Kilborn, Eliza Torrisi, and Malik Williamson allege that they have mental health disorders that have required inpatient treatment at State of Franklin hospitals that all receive federal funding. Plaintiffs claim that their treating physicians determined during their institutionalization that they could be transferred to a community mental health facility rather than remaining at the Franklin hospitals. However, Plaintiffs state that they remained institutionalized at Franklin hospitals because the only state-operated community mental health facility in the entire State of Franklin is hours away from their homes (Kilborn and Torrisi) and/or did not offer inpatient treatment that their physicians recommended (Torrisi and Williamson). None of the Plaintiffs are currently receiving inpatient treatment at Franklin hospitals.

Kilborn, Torrisi (through her guardians), and Williamson (through his guardian), filed a complaint against the State of Franklin Department of Social and Health Services and Mackenzie Ortiz, in her official capacity as Secretary of that agency, in February 2022. The complaint alleges that Defendants have discriminated against Plaintiffs in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. In short, Plaintiffs argue that they are at risk of being institutionalized in Franklin hospitals in the future and may be unnecessarily segregated from other similar patients and the public due to Defendants' failure to provide adequate state-operated community health care facilities.

Shortly after Plaintiffs filed their complaint, the United States Department of Justice Civil Rights Division announced an investigation of the State of Franklin Department of Social and Health Service's compliance with Title II. On May 27, 2022, the United States, through the Attorney General of the United States Department of Justice, filed a motion to intervene on Plaintiffs' behalf stating that it has found Plaintiffs' claim that Defendants violated Title II of the ADA to be substantiated. Along with its motion, the United States included a proposed complaint against Defendants alleging a claim under Title II of the ADA that is similar to Plaintiffs' but requests broader relief. The United States alleges that Defendants have violated Title II of the ADA by failing to provide adequate community mental health facilities for *all* those who are at risk of being unnecessarily institutionalized and segregated at a Franklin hospital in the future. Plaintiffs consented to the motion to intervene. Defendants, on the other hand, filed an opposition to the motion, arguing in part that the United States cannot maintain a cause of action under Title II and thus can have no interest in this litigation that warrants intervention.

II. Discussion

The Federal Rules of Civil Procedure provide two avenues for a potential intervenor in a lawsuit: intervention as of right and permissive intervention. Fed. R. Civ. P. 24(a)-(b).

A. Intervention as of Right

A court "must" permit someone to intervene as of right who is either: (1) given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that 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. Fed. R. Civ. P. 24(a)(1)-(2). There is no unconditional right to intervene in the ADA. *See* 42 U.S.C. § 12101 *et seq.* Therefore, the United States seeks intervention as of right under Rule 24(a)(2).

To satisfy Rule 24(a)(2), a proposed intervenor must show that: (1) its motion to intervene is timely; (2) it has an interest relating to the subject matter of the action; (3) it is situated so that disposition of this action may potentially impair its interests; and (4) its interest is inadequately represented by existing parties in the action. *See, e.g.*, *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016).

1. Timeliness

The Court looks to four factors to determine whether a motion is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797-98 (7th Cir. 2013) (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000)).

As to the first factor, Plaintiffs filed their complaint on February 22, 2022, and the United States filed its motion to intervene a little over three months later on May 27, 2022. The motion was filed soon after the Department of Justice completed its investigation in early May of 2022—which is when it would have been clear to the United States that it had an interest in the outcome of this litigation.

Regarding the second factor, admitting the United States to this case will not result in an unreasonable delay. This case is at an early phase; the parties have only filed pleadings, submitted a proposed scheduling order to the Court, and discovery has barely begun. The Court's existing Scheduling Order will need to be modified so that Defendants may respond to the United States' complaint and to ensure that all parties, including the United States, have sufficient time to engage in discovery; but this delay is not prejudicial. Plaintiffs consented to this motion, knowing that the United States' intervention could cause a delay, even though they are seeking to vindicate rights they believe are being denied to them. As for Defendants, the United States' intervention in this case is likely to save Defendants time. Defendants can litigate the United States' and Plaintiffs' claims together rather than in two separate lawsuits. This likely explains why Defendants do not allege that they will be prejudiced by any delay that results from the United States intervening in this action.

The third factor is largely neutral. The United States could bring a separate lawsuit against Defendants for allegedly violating Title II of the ADA and thus would not be prejudiced if its motion to intervene was denied. However, it may be more efficient for the United States to simply join a similar lawsuit that already exists.

Finally, there is also nothing unusual about the case which would necessitate finding the United States' motion untimely. The parties have not filed substantive motions, requested preliminary injunctive relief, or asked for expedited briefing.

For these reasons, the Court finds that the United States' motion to intervene is timely.

2. Interest Relating to the Subject Matter of the Action

Defendants and the United States disagree as to whether the United States has an interest relating to the subject matter of the action. Defendants assert that the United States cannot file a cause of action under Title II of the ADA and therefore cannot intervene as a plaintiff in this litigation (or file a separate lawsuit against Defendants for that matter). Defendants argue that if the United States lacks the ability to file a lawsuit to enforce Title II, it cannot possibly have an interest in this litigation—which relates solely to whether Defendants are in violation of Title II. The United States asserts the opposite: it can maintain a cause of action under Title II and it has institutional interests in ensuring that Defendants, and others who receive federal funding, comply with Title II and the Department of Justice's regulations interpreting Title II.

This debate stems from language in Title II stating that the "remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act which, in turn, references Title VI of the Civil Rights Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability . . .." 42 U.S.C. § 12133. The question is whether the United States can avail itself of those remedies, procedures, and rights—including the ability to file a lawsuit. The Twelfth Circuit has not ruled on this issue, and it is one of first impression in this Court. However, a divided panel of the Eleventh Circuit decided that the United States may file actions to enforce Title II. *See United States v. Florida*, 938 F.3d 1221, 1248 (11th Cir. 2019), *reh'g denied United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730 (11th Cir. 2021).

The Court will begin its analysis with the text of the statute. Title II of the ADA does not specify exactly what "remedies, procedures, and rights" are available or otherwise define those terms. 42 U.S.C. §§ 12103, 12133. Rather, it incorporates the "remedies, procedures, and rights" in Section 505 of the Rehabilitation Act, which then incorporates those in Title VI of the Civil Rights Act.

Title VI of the Civil Rights Act prohibits discrimination based on race, color, or national origin by "any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d. Agencies that provide financial assistance "effectuate" this provision by issuing rules and regulations. 42 U.S.C. § 2000d-1. Agencies may "effect" "[c]ompliance with any requirement adopted pursuant to this section . . . (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law . . .." *Id.* In short, the Civil Rights Act permits the United States to sue those who receive federal funding and are in violation of Title VI of the Civil Rights Act and/or the rules and regulations adopted by agencies to ensure compliance with the Act.

Because we "must presume that a legislature says in a statute what it means and means in a statute what it says[,]" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), it is presumed that Congress intentionally incorporated the Civil Rights Act into the ADA, including its enforcement provisions. These provisions clearly authorize suit by the United States against recipients of federal funds—a category into which Defendants clearly fall.

Defendants counter that the remedies, procedures, and rights in Title II of the ADA are only "provide[d] to *any person* alleging discrimination on the basis of disability" and therefore do not encompass the United States. *See* 42 U.S.C. § 12133 (emphasis added). In Defendants' view, the United States may enforce the Civil Rights Act because that Act does not limit enforcement to a

"person". However, Title II of the ADA does contain that limitation. In sum, Defendants argue that because United States is not a "person" in the plain meaning of the word, the United States cannot file a lawsuit to enforce Title II of the ADA.

The Court is more persuaded by the United States' argument. The United States has institutional interests in ensuring that public entities comply with, and are held appropriately accountable for, violating the ADA and its implementing regulations. 42 U.S.C. § 12132; 28 C.F.R. § 35.130. In fact, Congress stated in the ADA that the United States plays "a central role in enforcing the standards established in this chapter *on behalf* of individuals with disabilities[.]" 42 U.S.C. § 12101(b)(3) (emphasis added)). This language indicates that Congress intended for the United States to be able to use the remedies, procedures, and rights available in the ADA—including the ability to file a lawsuit—to enforce the ADA. *See id.* Given this context, Congress' use of "any person" in Title II includes the Attorney General of the United States, and the United States can file suit to enforce Title II.

Accordingly, the Court will recognize the inherent and substantial interests of the United States in seeking to intervene in this case, namely, to act in its sovereign capacity to ensure compliance with federal civil rights and disability laws throughout the United States, as well as to protect the rights of Plaintiffs and similarly situated persons in Franklin.

These interests would alone suffice to allow intervention by the United States as of right, but the Court also notes additional interests for thoroughness, namely that this action concerns ADA regulations that the Attorney General of the United States promulgates, administers, and enforces. *See* 42 U.S.C. § 12134(a) (directing the Attorney General to promulgate ADA regulations); *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 750-51 (7th Cir. 2006) (describing the Attorney General's role in promulgating Title II regulations). It seems plain

to this Court that the United States, through the Department of Justice, has a clear interest in intervening in a case where its own regulations are at issue. Accordingly, the Court finds that the United States has an interest in the subject matter of this action.

3. Potential Impairment of the Interest

The United States has substantial interests in enforcing compliance with the ADA. Accordingly, it is apparent that such interests would be necessarily impaired by the exclusion of the United States from this litigation. As noted above, there is no question that the United States has been explicitly tasked by Congress with enforcing the ADA. *See* 42 U.S.C. § 12132. And that is exactly what the United States is attempting to do here. Indeed, Defendants' opposition to the motion to intervene focused solely only whether the United States had an interest in the subject matter of this action, not on whether any such interest would be impaired. The Court agrees with the United States that its interests in enforcing Title II of the ADA may be impaired if its motion to intervene were denied.

4. Inadequate Representation by Existing Parties

The final consideration for intervention as of right is whether the United States' interests are already adequately represented by Plaintiffs. The Court agrees with the United States that Plaintiffs do not fully represent the United States' interests. First, private parties cannot adequately represent the United States regarding the proper interpretation and application of the ADA and the Department of Justice's implementing regulations. As discussed previously, Congress has directed the United States to enforce the ADA and has directed the Department of Justice to promulgate and enforce ADA regulations. *See, e.g.*, *Ne. Ohio Coal. for Homeless and Serv. Emp. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (governmental interests in statutes and regulations may be impaired because of stare decisis considerations).

Second, the United States now seeks more systemic relief than Plaintiffs. Should the United States prevail in this litigation, it may obtain relief for all of those who are or may be institutionalized in Franklin hospitals in the future. This Court is not persuaded by Defendants' argument that these three Plaintiffs can adequately represent the United States' interest. Plaintiffs are not seeking class or injunctive relief as to others, only individual relief. Moreover, each Plaintiff's claim may be dismissed through a potential settlement, leaving the United States' institutional and larger enforcement concerns unrepresented.

In sum, the Court finds that the United States is entitled to intervention as of right under Rule 24(a)(2).

B. Permissive Intervention

Because the Court finds that the United States is entitled to intervene as of right, the Court will neither discuss nor rule on its request to permissively intervene under Federal Rule of Civil Procedure 24(b).

III. Order

For the above reasons, IT IS ORDERED that:

1. The United States' motion to intervene is GRANTED.
2. The United States will file its complaint and serve it upon Defendants in accordance with the Federal Rules of Civil Procedure.
3. The parties are directed to confer and submit a new proposed scheduling order within 14 days of this Order.
4. The Court's current Scheduling Order is hereby stayed pending further order of this Court.

Dated: June 29, 2022

/s/ Preeda Sathi
Hon. Preeda Sathi
U.S. District Court for the District of Franklin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF FRANKLIN

SARAH KILBORN; ELIZA TORRISI, by her guardians, Joseph and Marina Torrisi; and MALIK WILLIAMSON, by his guardian, Laila Thomas, Plaintiffs, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF FRANKLIN DEPARTMENT OF SOCIAL AND HEALTH SERVICES and MACKENZIE ORTIZ, in her official capacity as Secretary of the State of Franklin Department of Social and Health Services, Defendants.	Case No. 1:23-cv-00039

OPINION AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

III. Introduction

Under consideration is the parties' cross-motions for summary judgement. Plaintiffs move for summary judgement on their claim that Defendants have discriminated against Plaintiffs in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. Plaintiffs assert that they are at risk of being institutionalized in Franklin hospitals in the future and may be unnecessarily segregated from other similar patients and the public due to Defendants' failure to provide adequate state-operated community health care facilities. Plaintiffs seek injunctive relief

to ensure that this perceived violation does not recur should they be readmitted to a Franklin hospital. The United States has moved for summary judgment on a similar claim, although the United States requests relief for *all* those who are at risk of being unnecessarily institutionalized and segregated at Franklin hospitals, not just for the three named Plaintiffs.[1] Defendants oppose these motions and cross-move for summary judgement.

For the reasons set forth below, Plaintiffs' and the United States' motions for summary judgment are granted. Defendants' motion for summary judgment is denied.

IV. Factual Background

The following facts are undisputed by the parties. Plaintiffs Sarah Kilborn, Eliza Torrisi, and Malik Williamson all have mental health disorders. Kilborn and Torrisi have been diagnosed with bipolar disorder, while Williamson suffers from schizophrenia. Plaintiffs have a long history of receiving inpatient treatment in hospitals due to their mental health issues.

Kilborn was diagnosed with bipolar disorder in 1997 and prescribed medication to help treat her condition; however, the treatment was not effective at treating her severe depressive episodes. After Kilborn attempted to harm herself during one of these episodes, Kilborn's physician recommended that she receive inpatient treatment at a mental health facility. Kilborn voluntarily admitted herself to Southern Franklin Regional Hospital (a state-operated facility) in Silver City, Franklin, in 2002. She remained at Southern Franklin Regional Hospital until 2004 when her treating physician determined that she was no longer at risk of harming herself. Unfortunately, Kilborn has continued to have severe bipolar disorder episodes, particularly depressive episodes, requiring inpatient treatment.

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[1] For purposes of this problem, competitors are to assume that: (1) *Trump v. CASA, Inc.*, No. 24A884, 2025 U.S. LEXIS 2501 (2025), does not exist in any way; and (2) the United States will not argue before the Supreme Court

Kilborn was re-admitted to Southern Franklin Regional Hospital in 2011. In March 2013, Kilborn's treating physician determined that she could benefit from being transferred to a community mental health facility. A community mental health facility provides mental health services in a setting that allows patients to integrate into the community far more than patients that are institutionalized at hospitals. *See Community Mental Health Center*, American Psychological Association Dictionary of Psychology (Apr. 19, 2018), https://dictionary.apa.org/community-mental-health-center. Community mental health facilities typically offer a variety of mental health services, including inpatient treatment, outpatient treatment, and daily treatment. Kilborn's physician recommended that she use daily treatment services at a community mental health facility. Daily treatment provides intensive mental health treatment for several hours per day, multiple days per week. Unlike hospitalization, daily treatment allows patients to live at home, work, and otherwise go about their daily lives. However, there was no state-operated community health facility within three and a half hours of Kilborn's home in Silver City, and she could not afford the only privately operated community mental health facility in the area. Without an option for alternative care that would meet Kilborn's needs, her physician advised that she remain institutionalized at Southern Franklin Regional Hospital until she was well enough to be released. Kilborn was released in May 2015, more than two years after her physician initially recommended alternative treatment.

Kilborn voluntarily admitted herself to Southern Franklin Regional Hospital again in October 2018. A little less than two years later, Kilborn's physician stated that she could be released to a community mental health facility. But the situation in 2020 was no different from that in 2013: there were no state-operated community health facilities within three and half hours of Kilborn's home. Kilborn was ultimately released from Southern Franklin Regional Hospital in January 2021.

Torrisi was diagnosed with bipolar disorder as a teenager in 2016. Although Torrisi took medication and used psychotherapy to help treat her condition, her bipolar episodes were still severe. Torrisi often had manic episodes for days at a time, during which she engaged in highly erratic behavior. During these episodes, she was often a danger to both herself and others. Torrisi's parents decided to admit her to Newberry Memorial Hospital (a state-operated facility) in Golden Lakes, Franklin, in 2019 for inpatient treatment. During her inpatient treatment, Torrisi's manic episodes became less frequent. Her treating physicians determined in May 2020 that she could be released to a community mental health facility for inpatient treatment. Inpatient treatment at a hospital and inpatient treatment at a community mental health facility are similar in that they require patients to remain at the facility for 24 hours per day. However, community mental health facilities frequently allow patients a greater degree of socialization. Patients may receive visitors often and for prolonged periods of time, go on supervised outings in the community, and interact more freely with other patients.

There are no state or privately-operated community mental health facilities within four hours of Torrisi's home. Moreover, the only state-operated community mental health facility in Franklin (located in the state capital of Platinum Hills) does not offer inpatient treatment. For these reasons, Torrisi's physicians recommended that she remain at Newberry Memorial Hospital until her mental health issues could be managed without inpatient care. Torrisi was released from Newberry in May 2021 after she had gone without having a manic episode for several months. However, she returned just a few months later in August 2021 for additional inpatient care after a manic episode. Torrisi was released from Newberry again in January 2022.

Williamson was diagnosed with schizophrenia in 1972. Williamson has received inpatient and outpatient treatment at several hospitals in the State of Franklin over the past 50 years due to

hallucinations and delusions that have caused him to threaten himself and others, including family members. Most recently, Williamson's daughter and guardian admitted him to Franklin State University Hospital (a state-operated facility) in Platinum Hills in 2017. Williamson's daughter chose Franklin State University Hospital because it is within just a few miles of the home she shares with Williamson, and she could visit him regularly. After two years of intensive treatment at the hospital, including being prescribed new medications, Williamson's physician told him that he could be transferred to a community mental health facility for inpatient treatment. However, the state-operated community mental health facility in Platinum Hills does not offer inpatient treatment, and the nearest private facility is over two hours away. Because his physician believed it to be critical for Williamson to have a nearby support system while receiving treatment, Williamson remained at Franklin State University Hospital. Williamson left the hospital in June 2021 when his physician determined he was well enough to receive outpatient care at the State's community mental health facility.

Franklin is one of the largest states in the United States, covering almost 99,000 square miles. Platinum Hills is located near the center of the state, and it takes several hours to travel from Platinum Hills to towns that are near neighboring states. Franklin is also one of the most sparsely populated states. According to the latest census, 692,381 people live in Franklin. Approximately 550,000 of those residents live more than two hours away from the State's community mental health facility in Platinum Hills.

Franklin had three community mental health facilities until 2011 when Franklin's legislature slashed funding for the Department of Health and Social Services by 20 percent. Defendants were forced to close the facilities located in Mercury and Bronze. The facility in Mercury was significantly closer to Kilborn's and Torrisi's homes (20 minutes and 1 hour,

respectively) than the Platinum Hills facility. Defendants also eliminated the inpatient program at the Platinum Hills facility for budget reasons. The inpatient program was selected for elimination because it was the most expensive program at the Platinum Hills facility to operate and served the fewest people. Franklin's legislature increased the Department of Health and Social Service's budget by five percent in 2021, but the agency has not utilized those funds to re-open the Mercury or Bronze community mental health facilities.

III. Procedural History

Plaintiffs filed a complaint for injunctive relief against Defendants in February 2022. The United States filed a motion to intervene on Plaintiffs' behalf in May 2022, which the Court granted. The parties have completed discovery, and the substantive issues can now be resolved.

The substantive issues in this case have been bifurcated into two phases. In the first phase, the Court will determine whether someone who is at risk of being institutionalized or segregated, but is not actually institutionalized or segregated, can maintain a claim for discrimination under the ADA and its regulations. The Court will make this determination by examining the parties' cross-motions for summary judgment. If the Court rules on this issue in the affirmative, the case will proceed to the second phase which will involve a trial as to whether these Plaintiffs are at risk of institutionalization or segregation and have been discriminated against under the ADA and what relief, if any, may be appropriate.

IV. Standard of Review

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

V. Discussion

The Court will briefly discuss the pertinent statutory and regulatory provisions as well as the seminal case on this issue: *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999).

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In the ADA, Congress instructed the Attorney General of the United States to issue regulations implementing provisions in Title II. *Id.* § 12134(a). The regulations "shall be consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under [§ 504 of the Rehabilitation Act]." *Id.* § 12134(b). One of the regulations promulgated in accordance with § 504 of the Rehabilitation Act requires recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(d).

The Attorney General issued regulations in 1991 for Title II of the ADA, one of which is modeled after the § 504 of the Rehabilitation Act; it, in pertinent part, states that "a public entity shall 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). This regulation is referred to as the "integration mandate" and is still in effect.

In 1999, the Supreme Court heard a case brought by two plaintiffs institutionalized in state-operated hospitals for mental illness. *Olmstead*, 527 U.S. 581. The plaintiffs' physicians determined that they could be discharged to state-run community care facilities. However, they

were not transferred until years later. *Id.* at 593. Plaintiffs argued that the State's failure to transfer them was a violation of the ADA and the regulation's integration mandate. *Id.* at 593-94. The State, on the other hand, argued the plaintiffs were not transferred due to lack of funding and that immediate transfers in cases like plaintiffs would fundamentally alter their operation of the facilities. *Id.* at 594-595; *see* 28 C.F.R. § 35.130(b)(7)(i) ("[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

The Supreme Court held that a person has been discriminated against under 42 U.S.C. § 12132 when he is "unjustifi[ably]" institutionalized and denied the benefit of the most "integrated setting" available in the community for which his treating professionals deem him suited. *Olmstead*, 527 U.S. at 599-600. As the Court observed, the "unjustified institutional isolation" of disabled persons both "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and "severely diminishes [their] everyday life activities." *Id*. at 600-01. To avoid such damaging repercussions, the integration mandate thus requires a state to provide community-based treatment for disabled persons when (1) "the State's treatment professionals determine that such placement is appropriate"; (2) "the affected persons do not oppose such treatment"; and (3) "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with [similar] disabilities." *Id*. at 607.

After the *Olmstead* decision, the United States Department of Justice issued a guidance document stating that the ADA and *Olmstead* "extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or

other segregated settings." United States Department of Justice, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, https://archive.ada.gov/olmstead/q&a_olmstead.htm. The Department of Justice reasoned that a plaintiff "need not wait until the harm of institutionalization or segregation occurs or is imminent" in order to bring a claim under the ADA. *Id*. Rather, a plaintiff establishes a "sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services . . . will *likely* cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." *Id*. (emphasis added).

Having considered Title II of the ADA, the integration mandate, and *Olmstead*, the Court is persuaded that a person at risk of institutionalization and segregation, but who is not currently institutionalized or segregated, can succeed on a discrimination claim. Nothing in the aforementioned documents "supports a conclusion that institutionalization is a prerequisite to enforcement." *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003). To the contrary, the ADA's protections "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy." *Id*. This is especially true since "[i]nstitutionalization sometimes proves irreversible." *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012). Six Circuit Courts of Appeals who have considered this same issue are in agreement. *See Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426 (6th Cir. 2020); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004); *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016); *Dreyfus*, 697 F.3d 706; *Fisher*, 335 F.3d at 1181.

Moreover, the Department of Justice reached the same conclusion in its guidance document and that conclusion is entitled to deference. Because the integration mandate "is a creature of the [Department of Justice's] own regulations," its interpretation of that provision in the guidance document is "controlling unless plainly erroneous or inconsistent with the regulation" provided the regulation is ambiguous. *Kisor v. Wilkie*, 588 U.S. 558, 565 (2019); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). This Court finds that the integration mandate is ambiguous. One interpretation of the mandate is that the public entity is required—whether a specific person is institutionalized or not—to administer services, programs, and activities. 28 C.F.R. § 35.130(d). Another reading of the mandate is that a public entity is only required to administer services when a person is in fact institutionalized.[2] *Id.* Given this ambiguity, and the fact that the United States reasonably resolved that ambiguity in the guidance document by choosing one of the two possible interpretations, the Court will give the document *Auer* deference.

In short, someone who is at risk of institutionalization or segregation, but not actually institutionalized or segregated, can maintain a claim for discrimination under the ADA and its regulations. Therefore, the Court will schedule a trial regarding whether the Plaintiffs or others who are similarly situated are at risk of institutionalization and, if so, what corrective action should be taken to prevent such discrimination under the ADA.

VI. Order

For the above reasons, IT IS ORDERED that:

[2] This reading is espoused by Defendants, who argue that they cannot "administer" services, programs, or activities for those who are not currently institutionalized. But the Court agrees with Plaintiffs that because they are currently at risk of institutionalization, Defendants have a duty under the ADA—at this moment—to act and ensure they are able to administer those services, programs, or activities as soon as they are needed.

1. Plaintiffs' motion for summary judgment is GRANTED.
2. The United States' motion for summary judgment is GRANTED.
3. Defendants' motion for summary judgment is DENIED.
4. The parties are directed to confer and submit a notice to the court within 14 days estimating how long a trial on the above issues may take.

Dated: March 22, 2024

/s/ Preeda Sathi
Hon. Preeda Sathi
U.S. District Court for the District of Franklin

United States Court of Appeals
For the Twelfth Circuit

No. 24-892

The State of Franklin Department of Social and Health Services, et. al.,

Appellants

v.

Sarah Kilborn, et. al.,

Appellee

and

The United States of America

Intervenor-Appellee

Appeal from the United States District Court
for the District of Franklin

Submitted: December 12, 2024
Filed: June 26, 2025

Before OKPARA, Chief Judge, HOFFMAN and PARKS, Circuit Judges.

OKPARA, Chief Judge, delivered the opinion of the Court in which PARKS, C.J., joined. HOFFMAN, C.J., filed a dissenting opinion.

OPINION

I. Introduction

This case raises important and interesting questions regarding Title II of the Americans with Disabilities Act ("ADA"). The first is whether the United States may intervene as of right in an ADA case between two parties. To be more specific, can the United States enforce Title II of the ADA such that it has an interest in the subject matter of an ADA case for purposes of intervention? The second is whether individuals who are at risk of being institutionalized and segregated in the future may maintain a cause of action under Title II. The answer to both questions is yes and so we affirm.

II. Background

A. Factual Background

We assume the parties' familiarity with the factual background of this case. Briefly, Appellees Sarah Kilborn, Eliza Torrisi, and Malik Williamson have mental health disorders that required inpatient treatment at hospitals within the State of Franklin in the past. During Appellees' prior institutionalizations, their treating physicians determined that they could be transferred to a community mental health facility. Nonetheless, they remained institutionalized because there is only one state-operated community mental health facility in Franklin, it is located hours away from their homes, and/or it does not offer inpatient treatment. Appellees are no longer institutionalized at Franklin hospitals, but the district court has determined that they are at risk of being institutionalized in the future.

All the hospitals at issue are state-operated, thus they are subject to the requirements of the ADA. 42 U.S.C. §§ 12131-32.

B. Procedural History

Appellees filed a complaint in February 2022 alleging that Appellants are violating Title II of the ADA, 42 U.S.C. § 12132. Shortly after Appellants filed their complaint, the United States Department of Justice Civil Rights Division announced an investigation of the State of Franklin Department of Social and Health Service's compliance with Title II and determined that it was in violation. The United States filed a motion to intervene on Appellees' behalf, which was granted by the district court. The United States' complaint is similar to Appellees' with one notable change: it requests injunctive relief for all those in Franklin who are at risk of being unnecessarily institutionalized and segregated at a Franklin hospital in the future, not just relief for the three Appellees.

The district court bifurcated the case into two parts. First, the parties would file cross-motions for summary judgment on the issue of whether a person at risk of institutionalization and segregation in a Franklin hospital in the future, but who is not currently institutionalized or segregated, can maintain a claim for discrimination under Title II of the ADA. If Appellees' and/or the United States' motion for summary judgment was granted, then the district court would hold a trial to decide whether the Appellees and similarly situated persons were in fact at risk in the future and, if so, what relief was appropriate.

After considering the parties' summary judgment briefs and hearing oral argument, the district court granted Appellees' and the United States' motions for summary judgment and denied Appellants' motion for summary judgment. The court then held a four-week bench trial on the remaining issues. After hearing from nineteen witnesses, including medical experts and State agency employees, the court ruled that Appellees were at risk of future institutionalization and segregation. The court issued an order requiring Appellants to: (1) submit a proposed plan within

three months explaining how it would correct its violations; and (2) ensure that the Appellees would not be institutionalized if the three-part test outlined in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) is met in the future.

Appellants timely appealed and the district court stayed its order pending appeal.

III. Discussion

A. Intervention

Before discussing the district court's decision to grant the United States' motion to intervene as of right, we must address the appropriate standard of review. The Supreme Court has held that a court's denial of a motion to intervene is untimely is reviewed for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 366 (1973). However, the Supreme Court has not ruled on the standard of review that applies if the district court has granted a motion to intervene under Federal Rule of Civil Procedure 24(a)(2) or denied it for a reason other than timeliness. The Circuit Courts of Appeals disagree on this issue. *See* 2 Moore's Manual: Federal Practice and Procedure, § 14.124 [5][b].

Like the First, Second, Third, and Fourth Circuit Court of Appeals, we will review a district court's decision to grant or deny a motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) for abuse of discretion. *See, e.g.*, *Int'l Paper Co. v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir. 1989); *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992); *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). This standard of review is appropriate because the district court's decision to grant or deny such a motion is ultimately based on facts that are best determined by the district court—whether the motion is timely, if the proposed intervenor has an interest in the subject matter of the action that could be impaired, and if the interest is inadequately represented by existing parties. *See* Fed. R. Civ. P. 24(a)(2); *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). Under this standard,

a district court's decision will be upheld unless it has applied an improper legal standard or has reached a decision that is clearly incorrect. *See Brody*, 957 F.2d at 1115. The district court in this case has done neither of those things.

First, the district court applied the correct legal standard to determine whether a proposed intervenor can intervene as of right: Federal Rule of Civil Procedure 24(a). Federal Rule of Civil Procedure 24(a) states that a court must permit someone to intervene as of right who is either (1) given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that 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. Fed. R. Civ. P. 24(a)(1), (2). The district court properly focused on the second provision of Rule 24(a) because the ADA does not contain an unconditional right to intervene. *See* 42 U.S.C. § 12101 *et seq.* The district court then explained that a proposed intervenor must show that: "(1) its motion to intervene is timely; (2) it has an interest relating to the subject matter of the action; (3) it is situated so that disposition of this action may potentially impair its interests; and (4) its interest is inadequately represented by existing parties in the action." *Kilborn v. State of Franklin Dep't of Social & Health Servs.*, 38 F.5th 281, 283 (D. Franklin 2022). (citing *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016)). The court went on to analyze each of these elements in turn. *Id.* at 3-6. In sum, the district court undoubtedly applied the correct legal standard.

Second, the district court's decision that the United States had met each of the necessary elements to satisfy Rule 24(a)(2) is not clearly incorrect. As for the first element, the district court—as the court that deals with case management and scheduling on a daily basis—is in a better

position than us to determine whether the United States' motion was timely. *See NAACP*, 431 U.S. at 366. But it is difficult to believe that a motion to intervene filed at the beginning stages of a case, well before discovery is complete, could cause such a delay that it will result in prejudice to existing parties.

The second and third elements for intervention as of right are interrelated in this case. If the United States has an interest in enforcing Title II of the ADA (in other words, an interest in the subject matter of the action) then that interest would surely be impaired if it could not participate in the lawsuit. Appellants contend that the district court was clearly incorrect in holding that the United States has an interest in, and the ability to enforce, Title II of the ADA as a matter of law. However, as explained below, we cannot agree.

Title II of the ADA states that the "remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act, which then refers to Title VI of the Civil Rights Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability . . .." 42 U.S.C. § 12133. Skipping straight to Title VI of the Civil Rights Act, it states that the United States may "effect" compliance with the Act and regulations implemented pursuant to the Act "by any other means authorized by law." 42 U.S.C. § 2000d-1. "[A]ny other means authorized by law" certainly includes the ability to file an enforcement action in federal court. *See United States v. City & Cnty. of Denver*, 927 F. Supp. 1396, 1400 (D. Colo. 1996) (stating in a case involving Title II of the ADA that "[c]ourts have interpreted the words 'by any other means authorized by law' to mean that a funding agency, after finding a violation and determining that voluntary compliance is not forthcoming, could refer a matter to the Department of Justice to enforce the statute's nondiscrimination requirements in court"). Thus, when examining this series of statutory cross-references in Title II of the ADA, the Rehabilitation Act,

and Title VI of the Civil Rights Act, it would be reasonable for a court to conclude that Congress intended for the United States to be able to file enforcement actions under Title II. In fact, the Eleventh Circuit has reached the same conclusion as the district court did in this case. *See United States v. Florida*, 938 F.3d 1221, 1248 (11th Cir. 2019), *reh'g denied United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730 (11th Cir. 2021), *cert. denied Florida v. United States*, 143 S. Ct. 89 (2022).

For this reason, we cannot say that the district court was clearly incorrect when it determined that the United States may enforce Title II if it chooses and so has an interest relating to the subject matter of this action. Whether we would have reached the same conclusion after analyzing this element if we were in the district court's shoes is irrelevant. The district court's interpretation of Title II of the ADA is not clearly incorrect, which is all that is required for its determination to be upheld.

Finally, taking the district court's determination that the United States has an interest in enforcing Title II into account, we agree that no private party could adequately represent that interest. If Congress gave the United States the ability to enforce Title II, then its interests in filing enforcement actions in Title II cases are inevitably distinct from private persons. The United States represents the interests of all persons in this country, not merely the plaintiffs in a particular action. So, the United States might ask for different or more comprehensive relief than private plaintiffs who can only obtain relief for themselves or have a different interpretation of the ADA than private plaintiffs given its broader considerations.

The district court's order granting the United States' motion to intervene is not clearly incorrect. Therefore, we affirm.

B. "At Risk"

The question of whether those who are simply at risk of institutionalization and segregation may sustain a cause of action under Title II of the ADA for discrimination is a legal one that will be reviewed *de novo*. *United States v. Mississippi*, 82 F.4th 387, 391 (2023). It is also a simple one to answer.

As the dissent correctly notes, the Supreme Court's recently ruling in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) is not applicable to the Department of Justice's guidance document. But the deference afforded to departments and agencies by the Supreme Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997) is. The Department of Justice, which is specifically empowered by Congress to promulgate regulations to interpret the ADA, is owed deference on the guidance document because it offers a reasonable interpretation of an ambiguous regulation. *See id.* at 461; *Kisor v. Wilkie*, 588 U.S. 558, 561 (2019). Given the deference owed to the guidance document, the district court was correct in joining the Second, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits in concluding that a cause of action may be brought under Title II of the ADA for those who may be at risk of segregation. *See Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426 (6th Cir. 2020); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004); *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016); *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2012).; *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003). We see no reason to depart from such a well-established rule.

IV. Conclusion

Accordingly, we affirm the judgement of the District Court and remand for any further proceedings consistent with this opinion and order. The clerk is directed to issue a mandate in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

HOFFMAN, C.J., dissenting.

I write separately on both issues presented for our review and, because the majority errs in both, I must respectfully dissent.

I. The District Court erred in granting the United States' motion to intervene as of right.

The United States has failed to establish that it can intervene as of right in this case under Federal Rule of Civil Procedure 24(a)(2). Indeed, it is likely that the United States could never make such a showing. As a matter of law, the United States cannot enforce Title II of the ADA, and therefore, has no interest in the subject matter of such an action between two other parties.

I agree with Appellants that the United States is not a "person" for purposes of Title II of the ADA. Under 42 U.S.C. § 12133, the "remedies, procedures, and rights set forth in [the Rehabilitation Act, which then references the Civil Rights 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." *Id.* (emphasis added). The word "person" is not defined in the ADA; other provisions in Title II, however, provide helpful clues.

42 U.S.C. § 12132, the statute immediately preceding the enforcement provision outlined above and the heart of Title II, states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA's definition of "qualified individual with a disability" makes clear that it means an "individual." 42 U.S.C. § 12131(2). It is only sensible that Congress intended for a qualified individual with a disability to be the "person" that can allege discrimination on the basis of a disability and be afforded the remedies, procedures, and rights referenced in 42 U.S.C. § 12133. In other words, "qualified individual with a disability" in 42 U.S.C. § 12131-32 is

synonymous with "person" in 42 U.S.C. § 12133. This interpretation is supported by the plain meaning of the word "person." The word "person" does not encompass an entire government or country. Rather, the word "person" typically means a human being. *Person*, *Black's Law Dictionary* (12th ed. 2024).

Thus, like my colleagues in the Eleventh Circuit and the Northern District of Illinois, I am persuaded that the ADA contemplates enforcement by individual persons rather than the United States. *See United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730, 747 (11th Cir. 2021) (C.J. Newsom, dissenting); *Haymarket DuPage, LLC v. Vill. of Itasca*, Case No. 22-cv-160, 2025 U.S. Dist. LEXIS 60493 (N.D. Ill. Mar. 31, 2025). For this reason, I would hold that the district court was clearly incorrect in deciding that the United States has an interest in the subject matter of this action under Rule 24(a)(2).

The majority's opinion does not address the United States' alternative argument that, because the Department of Justice promulgates the regulations that interpret or provide for enforcement of the ADA, this necessarily creates an interest in ADA litigation. But this argument would establish a de facto right of the United States to intervene in any case involving any regulation drafted by any federal agency. Such an interpretation of Rule 24(a) would obviate any individualized assessment of the United States' interests in a particular case. Because I cannot agree that the United States has any interest in ADA enforcement (much less an interest in every case involving federal regulations), as the statute itself only provides for enforcement by individuals, I would also find the district court was clearly incorrect when it stated that the United States had an interest in the subject matter of this action based on this alternative theory.

Finally, I find it necessary to rebuke Appellants' argument that, even if the United States cannot intervene as of right, the district court's decision did not prejudice the existing parties. I see

clear prejudice here. It is true that at the time the United States' motion to intervene was filed, the case had only just begun. But the parties had already submitted a scheduling order that was granted by the district court outlining how the litigation was to proceed. Even with the district court's very busy docket, the case would have proceeded through discovery, any necessary settlement negotiations, cross-motions for summary judgment, and a trial (if necessary) in less than one year.

However, once the United States' motion to intervene was granted, the district court stayed its existing scheduling order. The parties submitted a new proposed scheduling order, which the district court granted, that significantly prolonged the litigation. Discovery ballooned to include 31 depositions and 48 subpoenas (including two separate hearings at which Appellants successfully quashed 17 of those subpoenas). The summary judgment briefing schedule took approximately four months longer than was previously scheduled. The trial lasted four weeks and involved 19 witnesses.

In the end, from the date the United States intervened to the conclusion of the trial, the litigation lasted just over 26 months. Appellants estimate that the United States' involvement required it to spend more than $273,000 in additional attorneys' fees and costs thus far. I am inclined to agree, as any reasonable person must, that such significant delay and costs were clearly prejudicial to Appellants.

Although Appellants have provided little in the way of specifics, I am further inclined to note that the United States' involvement is prejudicial in that it may have suppressed any opportunity for an alternative resolution. In essence, this case involves the medical and mental health care of three people. Even assuming Appellees' merits arguments are correct (although they are not, *see infra*), it still seems reasonable that the costs to Appellants for defending this action have greatly outweighed the costs of any corrective action they might have taken to address the

medical care of these three individuals. But the record reflects that once the United States intervened—and essentially took over the case—settlement was no longer an option. For all these reasons, I would agree with Appellants that intervention of the United States was clearly prejudicial.

However, the district court did not consider whether permissive intervention under Rule 24(b) is appropriate, so that issue is not ripe for review. If the district court determines that permissive intervention is appropriate, then it does not matter that the district court erred nor that this error resulted in prejudice. Accordingly, I would remand to the district court to determine whether the United States should have been permitted to permissively intervene, even though the United States does not have the ability to bring a legal action under Title II of the ADA.

II. Those who are "at risk" of institutionalization cannot maintain a claim under Title II of the ADA.

As explained fully below, I agree with the conclusion of my colleagues of the Fifth Circuit Court of Appeals that those who are at risk of institutionalization, but who are not actually institutionalized, cannot maintain a claim for discrimination under Title II of the ADA. *See United States v. Mississippi*, 82 F.4th 387, 391 (5th Cir. 2023).

The facts of this case are now undisputed or have been otherwise resolved at trial: Appellees have been voluntarily institutionalized in the past for mental health treatment at Franklin hospitals. None of them are currently institutionalized, but all three established to the satisfaction of the district court that they were at risk of being institutionalized and segregated in the future by being unable to be transferred to a community mental health facility with inpatient treatment. With these factual findings, I agree with the majority that I can find no clear error. *See Mississippi*, 82 F.4th at 391 (findings of fact are reviewed for clear error).

However, the district court's legal determination that Appellees have been discriminated

against under Title II of the ADA is reviewed de novo. *See id.* This is where the district court erred. There is nothing in Title II of the ADA suggesting that the potential for institutionalization and segregation in the future constitutes discrimination. *See* 42 U.S.C. § 12132. As the Fifth Circuit correctly noted, "the ADA does not define discrimination in terms of a prospective risk to qualified disabled individuals. In stating that no individual shall be 'excluded,' 'denied,' or 'subjected to discrimination,' the statute refers to the actual, not hypothetical administration of public programs." *Mississippi*, 82 F.4th at 392 (quoting 42 U.S.C. § 12132).

Nor is there anything in the regulations created by the Attorney General of the United States hinting that those at risk of institutionalization can maintain a claim under Title II. *See* 28 C.F.R. Pt. 35. The regulation at issue, known as the integration mandate, states that "a public entity shall 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). But a public entity cannot "administer" services, programs, and activities for those who are not currently institutionalized. Appellees are essentially asking the Court to read language into this regulation requiring the public entity to "be prepared to" administer services, programs, and activities in the most integrated setting appropriate. That is a job for Congress or the United States (who is involved in this litigation), not this Court.

The seminal case on Title II and institutionalization, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), also does not require integration for those who are just at risk of institutionalization. In that case, the Supreme Court held that Title II requires States to transfer those who *are* institutionalized in hospitals for mental health issues to community mental health facilities when: (1) the State's treatment professionals have determined that community placement is appropriate for the individual; (2) the transfer is not opposed by the affective individual; and (3)

the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. *Id.* at 562. But nowhere in that opinion does it address what a State is required to do under Title II for those who are at risk of future institutionalization. *See generally id.*

In short, Appellees have no statute, regulation, or Supreme Court precedent to rely on in support of their argument that those at risk of institutionalization can file, and succeed on, a claim under Title II. The only support Appellees have—that has not been generated for the purposes of this litigation anyway[3]—is a guidance document on the United States Department of Justice's website stating that *Olmstead* "extend[s] to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings" and court opinions relying almost exclusively on that document. United States Department of Justice, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, https://archive.ada.gov/olmstead/q&a_olmstead.htm.; *see Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426 (6th Cir. 2020); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004); *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016); *M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g*, 697 F.3d 706 (9th Cir. 2012).

The guidance document on the Department of Justice's website is of no help to Appellees for two related reasons. First, it does not explain *why* the United States believes that the ADA, the integration mandate, or *Olmstead* extend to those at risk of institutionalization. There is no legal

[3] The United States explained the Department of Justice's current thinking on this issue in its briefs and at oral argument. However, the Court cannot consider such post hoc rationalizations. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 21 (2020).

reasoning, specific citation to legal authority (other than generally referring to the ADA, the integration mandate, and *Olmstead*), or practical justifications for its guidance document. *See* United States Department of Justice, https://archive.ada.gov/olmstead/q&a_olmstead.htm.

Second, the United States' failure to explain its reasoning means that the guidance document is not entitled to deference. If the document is an attempt to interpret the ADA, the Supreme Court recently determined that agency interpretations of ambiguous statutes are not entitled to deference. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 468 U.S. 837 (1984)). Moreover, the document would not have been entitled to *Chevron* deference even before *Loper Bright* as it has not undergone notice and comment rulemaking as required by the Administrative Procedure Act. *See* United States Department of Justice, https://archive.ada.gov/olmstead/q&a_olmstead.htm (stating that it is "not intended to be final agency action, [and] has no legally binding effect")

If the guidance document is the Department of Justice's attempt to interpret its regulations implementing the ADA, it still is not entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The Supreme Court limited the application of *Auer* deference by specifying that an agency's interpretation of its own regulation "can arise only if a regulation is genuinely ambiguous." *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019). Here, the integration mandate is not ambiguous. 28 C.F.R. § 35.130(d). If anything, the use of the word "administer" plainly demonstrates that it does not apply to those who are at risk of being institutionalized, and segregated, in the future.

At best, the guidance document could only be entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But the level of deference would be dependent on factors such as the thoroughness evident in the Department of Justice's consideration and the validity of its reasoning.

Id. at 140. As discussed previously, the document is well short of thorough and its reasoning cannot be discerned, much less analyzed. *See* United States Department of Justice, https://archive.ada.gov/olmstead/q&a_olmstead.htm.

I would reverse on this issue and remand to the district court with instructions to enter judgment in Defendants' favor.

Supreme Court of the United States

No. 25-140

The State of Franklin Department of Social and Health Services, et. al.,

Petitioners

v.

Sarah Kilborn, et. al.,

Respondents

and

The United States of America

Intervenor-Respondents

Petition for writ of certiorari to the Twelfth Circuit Court of Appeals is GRANTED, but is limited to the following questions presented:

1. Whether a person at risk of institutionalization and segregation in a hospital in the future, but who is not currently institutionalized or segregated, can maintain a claim for discrimination under Title II of the Americans with Disabilities Act.

2. Whether the United States can file a lawsuit to enforce Title II of the Americans with Disabilities Act and thus has an interest relating to the subject matter of a private Americans with Disabilities Act action under Federal Rule of Civil Procedure 24(a)(2).[4]

[4] For purposes of this Problem, assume that both Petitioner and Respondent have standing to brief and argue this issue.