NO. 25-140

IN THE

Supreme Court of the United States

OCTOBER TERM 2025

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

Petitioners,

— versus —

Sarah KILBORN, et. al.,

Respondents,

and

The United States of America,

Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Twelfth Circuit

BRIEF FOR PETITIONER

TEAM 3401

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether those at risk of institutionalization in the future can sue under Title II of the Americans with Disabilities Act when nothing in the plain text of Title II and the Attorney General's integration mandate indicates that those at risk of future discrimination can sue under Title II.

II. Whether the Attorney General can intervene in a Title II action via Federal Rule of Civil Procedure 24(a)(2) when Title II unambiguously states that "any person" can bring a private action.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following provisions of the United States Code are relevant in this proceeding: 42 U.S.C. § 12131; 42 U.S.C. § 12134. Also relevant is the Attorney General's regulations in 28 C.F.R. § 35.130.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case involves Sarah Kilborn, Eliza Torrisi, and Malik Williamson's (Plaintiffs) claims under Title II of the Americans with Disabilities Act and the United States' motion to intervene in the action.

The State of Franklin. Franklin is one of the largest in the United States, with nearly 99,000 square miles of land mass. R. at 15. It is also one of the most sparsely populated states, with roughly 692,400 people. R. at 15. Franklin's population is scattered across the state with the capital, Platinum Hills, located in the center. R. at 15. Roughly 550,000 people live more than two hours away from Platinum Hills. R. at 15.

Franklin has experienced several budgetary challenges in recent years. R. at 15. In 2011, the Franklin legislature slashed funding for the Department of Health and Social Services ("the Department") by 20 percent, a fifth of its budget. R. at 15. As an unfortunate result, the Department was forced to close two mental health facilities, one located in Mercury, and the other in Bronze. R. at 15. These two facilities were community mental health facilities. R. at 16. A community mental health facility is less restrictive than a hospital and allows patients to integrate into the community more than in a traditional institutionalized hospital setting. R. at 13. Traditional hospitals usually only have the means to institutionalize and stabilize patients. R. at 13.

In 2021, Franklin's legislature was able to increase the budget of the Department by five percent. R. at 16. This modest improvement was not enough. The Department has still not reopened the community mental health facilities in Mercury and Bronze. R. at 16. The only community mental health facility is in Platinum Hills. R. at 15. The State's lack of community mental health facilities is central to this case.

The Plaintiffs bring claims against the Department and Secretary Mackenzie Ortiz due to the lack of community mental health facilities. R. at 1. Plaintiffs are patients with longstanding mental health disorders. Kilborn and Torrisi have been diagnosed with bipolar disorder, while Williamson suffers from schizophrenia. R. at 12.

Sarah Kilborn was diagnosed with bipolar disorder in 1997 and uses medication to manage her condition. R. at 12. However, even with medication, she suffers from severe depressive episodes and sometimes requires inpatient treatment. R. at 12. Her first inpatient admission occurred in 2002 at a state-operated facility in Silver City, Franklin, after threatening to harm herself. R. at 12. She remained at this facility (Southern Franklin Regional Hospital) until 2004 when her treating physician determined she was no longer at risk of harming herself. R. at 12. Kilborn remained stable for six years before being re-admitted to the same facility in 2011. R. at 13. In 2013, Kilborn's treating physician determined that she could benefit from being transferred to a community mental health facility. R. at 13. Unfortunately, there were no state-operated community health facilities within three and a half hours of Kilborn's home, and she could not afford private care. R. at 13. Kilborn remained at

Southern Franklin Regional Hospital receiving institutionalized state care until she was released in 2015. R. at 13.

Kilborn voluntarily re-admitted herself to Southern Franklin Regional Hospital in late 2018. R. at 13. Roughly two years later, Kilborn stabilized enough for her physician to recommend a community mental health facility once again. R. at 13. However, there were still no state-operated community health facilities close enough to Kilborn's home. R. at 13. Kilborn was released in early 2021 and has not been institutionalized since. R. at 13.

Plaintiff Eliza Torrisi's plight is similar to Kilborn's. Torrisi was diagnosed with bipolar disorder as a teenager in 2016. R. at 14. Like Kilborn, Torrisi manages her condition with medication and psychotherapy, but her episodes still interfere with her life. R. at 14. Torrisi has manic episodes for days at a time, where she can be a danger to herself and others. R. at 14. In 2019, her parents decided to admit her to Newberry Memorial Hospital, a state-operated facility, for inpatient treatment. R. at 14. Treatment was successful, and her treating physicians determined that she could be released to a community mental health facility. R. at 14. This would still allow her to have the inpatient treatment that she requires while allowing her to have a greater degree of socialization. R. at 14. However, there were, and still are, no state or privately-operated facilities within four hours of Torrisi's home. R. at 14. Additionally, the only state operated community mental health facility in Franklin does not offer inpatient treatment. R. at 14. Torrisi was released from Newberry Memorial Hospital in May 2021 but returned months later in August 2021 for

additional inpatient care after a manic episode. R. at 14. Torrisi was then released in January 2022. R. at 14.

The third plaintiff suffers from schizophrenia. R. at 14. Malik Williamson was diagnosed with schizophrenia in 1972 and has received inpatient and outpatient treatment at several hospitals in Franklin over the past 50 years. R. at 14. Recently, Williamson's daughter admitted him to Franklin State University Hospital in Platinum Hills in 2017. R. at 15. After two years of intensive treatment and new medications, Williamson's physician determined that Williamson could be transferred to an inpatient community mental health facility. R. at 15. 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. R. at. 15. Because his physician believed it was critical to receive inpatient care and be close to his support system, Williamson remained at Franklin State University Hospital. R. at. 15. Williamson was discharged from the facility in 2021 when his physician determined he was well enough to receive outpatient care at the State's community mental health facility. R. at 15.

II. NATURE OF PROCEEDINGS

The District Court. In February 2022, Plaintiffs filed a complaint for injunctive relief against the Department and Secretary of the Department, Mackenzie Ortiz. R. at 16. Plaintiffs allege that Defendants have discriminated against Plaintiffs in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. Plaintiffs' theory is that Title II protects not only those who have been or are presently

being discriminated against, but those who *may* be discriminated against in the future. Plaintiffs allege that they are at risk of being institutionalized in the future, which may unnecessarily deprive them of the most integrated care setting, and therefore the State must begin building community health care facilities within a fair distance of them. R. at 2.

After the Plaintiffs filed their complaint, the United States Department of Justice Civil Rights Division announced an investigation of the Department's compliance with Title II. R. at 2. Months later, the United States filed a motion to intervene on Plaintiffs' behalf through the Attorney General of the United States Department of Justice, which the District Court of Franklin granted. R. at 16.

The Plaintiffs filed a motion for summary judgment in the United States District Court for the District of Franklin. R. at 11. The District Court granted the motion, finding that people at risk of institutionalization can maintain a discrimination claim under Title II. R. at 19. The District Court relies on the interpretations of six Circuit Courts of Appeals who have considered the same issues.[1] R. at 19. The District Court found the Attorney General's integration mandate ambiguous and therefore referred to the DOJ's guidance document to interpret it. R. at 20. The District Court granted the Plaintiffs' motion for summary judgment. R. at 20.

[1] *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 (10th Cir. 2003).

The Twelfth Circuit Court of Appeals. The Defendants timely appealed to the Twelfth Circuit Court of Appeals. In a two to three decision, the Appellate Court affirmed the District Court's ruling. The Appellate Court found the United States' motion to intervene persuasive. They deemed that Tile II does give the United States the authority to bring suit under a Title II claim and further determined that the United States has an interest in enforcing Title II of the ADA. Furthermore, the Appellate Court found Title II of ADA is ambiguous and therefore deferred to the DOJ's guidance document.

Judge Hoffman issued a dissent stating that the United States does not qualify as a person for purposes of Title II of the ADA and thus the United States does not have the authority to bring suit under the act. Judge Hoffman also found that Title II's protections are only applicable to those who have been actually experienced discriminated against, not those that might experience discrimination in the future.

SUMMARY OF THE ARGUMENT

The Department seeks to establish two things: (1) that Plaintiffs motion for summary judgment was erroneously granted and must be reversed, and (2) that the United States cannot intervene.

I

The Twelfth Circuit Court of Appeals erred in granting Plaintiffs' motion for summary judgment. The question before this Court is narrow—whether persons at risk of institutionalization, but who are not currently institutionalized, can maintain a claim for discrimination under Title II of the ADA. The question is not whether the

state of Franklin should have opened more community mental health facilities, or whether Franklin handled its budget properly, or whether the Plaintiffs are entitled to better care. The question is whether Congress drafted Title II of the ADA to allow non-institutionalized parties a mechanism to sue for an injunction. The answer to that question is no.

The crux of this issue rests in proper statutory interpretation. The lower courts erred in finding Title II and the integration mandate ambiguous. The courts should have applied the plain text of the statute and held that Title II and the integration mandate do not include at risk parties. This interpretation would be most in line with the intentions of Congress, as the intentions of Congress are clear from the text. Congress did not intend to include those at risk of institutionalization under Title II and drafted Title II accordingly.

The lower courts also erroneously applied the *Auer* doctrine and granted deference to DOJ's guidance document. The lowers courts erred in interpretating Title II and the integration mandate based on extrinsic evidence when the plain text of both is unambiguous. The lower courts did not make this mistake alone—they made this mistake along with six Circuit Courts of Appeals. If these courts had applied the heightened *Auer* requirements under *Kisor*, these courts would have determined that the DOJ document lacks the reasoning, authority, and thoroughness to be granted deference.

This Court's goal is not to determine what is good policy, or what each individual member of Congress was thinking when passing this statute, or even what is best for society. The role of this Court is to interpret the law–that is all.

This Court should REVERSE the lower courts' grant of summary judgment.

II

The Twelfth Circuit Court of Appeals erred in granting the United States' motion to intervene. The question before this Court is fully a legal question rather than a factual one. There is currently a circuit split on what review standard to apply when a motion to intervene on appeal, however, this Court can and should apply a de novo standard to clear the confusion and set a precedent that will provide a clear answer to the lower courts.

As it whether the United States can file a lawsuit to enforce Title II of the ADA and thus has an interest relating to the subject matter of a private ADA action under Federal Rule of Civil Procedure 24(a)(2), the District Court errored and this Court should reverse the judgment. First, Title II states that only a "person alleging discrimination" can seek relief under this section of the ADA. Unlike Title I and Title III, which explicitly state that the Attorney General can bring suit under the section of the act, Title I makes no such distinction and therefore is not granted the authority to bring an action under Title II.

Second, Title II of the ADA does not specify what "remedies, procedures, and rights" are available. Rather, the statute incorporates the "remedies, procedures, and rights" found in Section 505 of the Rehabilitation Act, which then incorporates those

in Title VI of the Civil Rights Act. The District Court found that, because Title VI of the Civil Rights Act states "by *any other means* authorized by law," this implies that the sections vest the Attorney General with authority to sue those who receive federal funding and are in violation of Title VI of the Civil Rights Act, and thus, in turn, sue under Title II of the ADA. However, "*by any other means"* implies means that are granted through statute or common law. There is no such mention of those other alternatives here. Thus, the Attorney General of the United States is not granted the right to sue under Title VI of the Civil Rights Act, and they in turn are not granted the power to bring a suit under Title II of the Americans with Disability Act.

Finally, Congress recognizes that the United States plays a central role in the ADA; however, this only extends to where Congress has expressly authorized the United States. The United States has the right to bring an action under Title I and Title III but not under Title II because this is meant for private individuals. Further, a private citizen does not have the right to bring a public federal enforcement action. Since a federal enforcement action is not a right that a private citizen can use, it is not a right that they are entitled to under Title II. Thus, even if the Attorney General qualifies as a "person" they would not have this right to enforce an action under title II because it's not even given to the "person" under Title II. The United States fails to meet the second element of Rule 24(a)(2) because they do not have a *private* Americans with Disabilities Act action and thus cannot intervene in the suit against the Department.

This Court should REVERSE the lower court's grant of the United States' motion to intervene.

ARGUMENT AND AUTHORITIES

Standard of Review. These claims are brought under Title II of the ADA, 42 U.S.C. § 12132. R. at 11. This Court reviews the lower courts' findings of fact for clear error and legal determinations de novo. *United States v. Mississippi*, 82 F.4th 387, 391 (5th Cir. 2023) (citing *Deloach Marine Servs., L.LC. v. Marquette Transp. Co.*, 974 F.3d 601, 606 (5th Cir. 2020)). The facts in this case are stipulated by the parties and there is only a question of law before this Court. Therefore, the only questions before this Court are questions of law, which should be reviewed de novo. *Id.*

I. THOSE WHO ARE MERELY AT RISK OF INSTITUTIONALIZATION BUT NOT CURRENTLY INSTITUTIONALIZED CANNOT MAINTAIN A CLAIM UNDER TITLE II OF THE ADA AND THE ATTORNEY GENERAL'S INTEGRATION MANDATE.

The first issue before the Court hinges on proper statutory interpretation. While statutory interpretation can be a difficult process, there are certain principles that have guided this Court for centuries and ensured a stable rule of law. The proper process begins with the plain text of the statute. *See Barnhard v. Sigmon Coal Co.*, 534 U.S. 438, 442 (2002). Within this process, the Court employs different statutory canons to interpret the text. If the statute is still ambiguous after employing these techniques, the Court is free to explore extrinsic evidence to best interpret the statute's meaning. But if the plain text of the statute is unambiguous, the Court should apply the plain meaning of the statute to the facts.

This argument will be divided into two parts. First, the Petitioners will guide this Court through this process of statutory interpretation by first showing that the plain meaning of the statute is unambiguous and requires no extrinsic evidence to derive meaning. Petitioners will show that neither the Attorney General's integration mandate nor this Court's precedent in *Olmstead* expanded the limited applicability of the statute.

Second, Petitioners will show that because the ADA is unambiguous as to whether people at risk of institutionalization may bring a claim, the DOJ's guidance document should not be afforded any deference under this Court's precedent. The DOJ's guidance document includes no legal theory, appeal to legal authority, or practical justifications, meaning the document should be afforded no deference.

A. Title II of the ADA Unambiguously Does Not Apply to Those Who Are At Risk of Institutionalization.

All three branches of government have previously interpreted the statute to have the same scope, and there is no compelling reason to judicially expand the scope of the statute now. While there may be a close debate over whether the ADA *should* include persons "at risk" of institutionalization, Congress is the proper party to address that issue, not the judiciary. It is not within the role of the judiciary to create law, only the legislative branch may do so. The proper method of statutory interpretation will show this Court that only those people currently institutionalized may maintain an action under Title II of the ADA.

1. The plain text of Title II establishes that only those who are presently institutionalized may maintain a claim.

The ADA unambiguously applies to those who are presently facing institutionalization, not those that may experience it in the future. When attempting to properly apply the law, the Court first looks to the text of the statute. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020). Several portions of the ADA are key to interpreting the law properly.

First, the protections at issue apply to "qualified individuals with a disability." 42 U.S.C. § 12131(2). A "qualified individual with a disability" means an individual who, with or without reasonable accommodations, "*meets* the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id*. (emphasis added). The use of the present tense word "meets" indicates that those with a qualified disability is present for those who are currently disabled. This portion is drafted for those who *presently* have a disability, not those who may experience disabilities in the future.

Next, the critical portion of the statute indicates that only those who are currently institutionalized may maintain a suit against the state. The provision states

> [N]o 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 statute does not say those who *might* be excluded, denied benefits, or be subjected to discrimination can maintain a cause of action; the statute says those who *shall* be excluded, denied, or subjected to discrimination. *See id*. Nothing in the text above

encompasses those experiencing future cases of discrimination, it only applies to those who are actually harmed.[2] No plain reading of the text alone would lead one to conclude that people who *might* be discriminated against in the future to sue under Title II. The Fifth Circuit was correct to note that, "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).

The text of the statute unambiguously omits those merely at risk of discrimination and this Court should not add them, no matter how noble the addition might seem. This Court should treat Congress's omissions as purposeful and not assume Congress's intentions. "Nothing is to be added to what the text states or reasonably implies. That is, a matter not covered is to be treated as not covered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). Judges should not assume that "every statute answers every question, the answer to be discovered through interpretation." *Id.* If Congress intended to include those at risk of institutionalization under Title II, Congress would have said so. The ADA is premised on actual abuses, not statistical risks.

[2] Petitioners recognize that within the plain text of the statute, the Respondents can sue the Department for past harms because the statute encompasses harms that have *actually happened*. However, this ability to sue for past harms does not help Respondents in this case, as Respondents have chosen to sue the Department for an injunction against potential future harms and not damages for any discrimination Respondents might have experienced in the past. R. at 16.

2. The Attorney General's integration mandate does not provide that those at risk may sue under the ADA.

The integration mandate has the same limited application as Title II. 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). This language faces a similar interpretive outcome as Title II itself because the language only applies to parties that actively experience discrimination, not those who *may* experience discrimination. For example, the language says that "a public entity *shall administer* services…" *Id.* A public entity cannot administer services for those who are not currently institutionalized. By interpreting the language more expansively to include those that are "at risk" of institutionalization, the Appellees are asking this 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." R. at 35 (J. Hoffman, dissenting). Once again, it is not the judiciary's role to create law; "that is a job for Congress… not this Court." *Id.*

3. This Court's precedent in *Olmstead* only provides relief for those presently institutionalized.

Respondents may attempt to expand this Court's holding in *Olmstead v. L.C. ex. Rel. Zimring* to include those at risk of institutionalization. *Olmstead v. L.C. ex. Rel. Zimring*, 527 U.S. 581 (1999). In *Olmstead,* this Court held that Title II requires States to transfer institutionalized patients 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 of the State and the needs of others with mental disabilities. *Id*. at 607.

The crucial detail in *Olmstead* is that the patients were institutionalized when they sued. *Id.* at 594. Therefore, the State was *actively* preventing the patients from getting the most integrated care available as required by the integration mandate. The plaintiffs in *Olmstead* were not suing over potential future harm, they sued over present harm. When the Court agreed with those plaintiffs in *Olmstead*, its holding was narrowly tailored to the particular circumstances of the plaintiffs. The Court rightfully did not include any language in the opinion explaining that the holding should be expanded to those who are in a different circumstance from the plaintiffs. The Court did not create a broad, sweeping, overinclusive rule that anything that might potentially arise to future discrimination is illegal under Title II and the integration mandate.

4. The policy reasons for expanding Title II and the integration mandate's application are not compelling enough to depart from the plain text of the statute.

All three branches of government, the legislative, executive, and judiciary have all interpreted and applied the law consistently in the past. In these three seminal legal works, the law has consistently only applied to those who are *presently* institutionalized. Nothing in the legislature's Title II, the executive's integration

mandate, or the judiciary's holding in *Olmstead* necessitates expanding Title II's protections to those at risk of institutionalization.

Still, some courts interpreted the statutes, regulations, and *Olmstead* more broadly. For example, the court in *Fisher v. Okla Health Care Auth* stated that people at risk of institutionalization should be able to sue under Title II because nothing in Title II, the integration mandate, and *Olmstead* "supports a conclusion that institutionalization is a prerequisite to enforcement." *Fisher v. Okla Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003). The Tenth Circuit reasoned that 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*.

The Tenth Circuit was mistaken for two main reasons. First, the Tenth Circuit found the lack of institutionalization as an explicit requirement persuasive in holding that institutionalization was not required. This reading is not in line with the most faithful interpretation. It is not the lack of an explicit bar of people at risk of institutionalization that grants at risk parties statutory standing.[3] In fact, the opposite is true—Congress did not say that at risk parties can maintain a suit, so they cannot. The Tenth Circuits reasoning seems to be "well Congress did not say plaintiffs *could not* sue under Title II, so let's assume they can." This method of

[3] Petitioners recognize that Respondents have constitutional standing to argue this matter before the Supreme Court. By "statutory standing," Petitioners are referring to the ability to maintain a suit under Title II for merely being at risk of institutionalization rather than presently institutionalized parties. Petitioners do not dispute that Respondents have constitutional standing to argue whether they have statutory standing.

statutory interpretation would be very unwieldy, as Congress would have to predict all possible interpretations and explicitly list all. It is Title II's lack of at risk parties shows that Congress meant to exclude patients at risk from maintaining a suit under Title II.

Second, the Tenth Circuit oversteps when basing its decision based on policy considerations when the text of the law is clear. The Tenth Circuit's concern for mentally ill patients, while admirable, is irrelevant to statutory analysis. This Court has stated that, "When the express terms of a statute give a court one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law…" *Bostock*, 590 U.S. at 653. Because the statute is explicitly geared towards past and present harms, the written word of Title II gives a clear answer, and no extrapolation is necessary.

This is not to deny the Tenth Circuit's concerns. The lower courts in this case expressed similar concerns with the institutionalization prerequisite to obtain an injunction. R. at 19. These courts are concerned that if institutionalization is required before suit, then the patients may never receive relief. *Id.* While this desire to protect and provide for the mentally ill is virtuous, this policy reasoning is not relevant because Title II is unambiguous. It is inappropriate for courts to base their decisions on policy grounds when the text of the law is clear. *Bostock,* 590 U.S. at 653.

But even if this Court considers the policy in its decision in this case, there are compelling reasons to agree with Petitioners. Finding that "at risk" parties may sue for injunctive relief subjects the State to limitless liability. The moment this Court

affirms the ruling of the lower courts and finds that at risk parties may sue under Title II, all States immediately fall under massive financial risk. All States must scramble to identify all parties at risk of future institutionalization, an impossible task as mental illness can be unpredictable. The state must therefore use millions upon millions of dollars to build facilities that *might* be used if they are to comply with the Respondent's proposed rule.

This level of financial risk to the states is intolerable and not what Congress intended. Congress's purpose is to be derived from the text of the statute, and Congress unequivocally intended to limit the proper parties to those who are actually harmed, not those who face a risk of harm that might never happen. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("the purpose must be derived from the text"). Where there are competing policy interests, this Court must refrain from gap-filling. Whenever a court tries to fill a perceived statutory gap, the judge inevitably fills the gap with whatever policy the judge believes is desirable, "so gap-filling ultimately comes down to the assertion of an inherent judicial power to write the law." *See, e.g.*, Joseph Raz, *The Authority of Law* 48-50, 197 (1979). This level of judicial power flatly contradicts the American ideals of self-governance, and that is why this Court should not add a class of Plaintiffs to what Congress has unambiguously drafted.

B. The DOJ's Guidance Document is Not Entitled to Deference Under this Court's Precedent in *Auer* or *Skidmore* in Interpreting the Scope of Title II and the Integration Mandate.

The question naturally arises then, if the statute is so unambiguous, why did two courts agree with Respondents? The answer is that the lower courts mistakenly applied the *Auer* doctrine when it is inapplicable and granted deference to guidance from the Department of Justice ("DOJ"). R. at 20; R. at 29. The DOJ's guidance states that the protections of the integration mandate and the *Olmstead* decision "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. Faced with a straightforward answer from a seemingly authoritative source, the lower courts adopted the view of the DOJ under *Auer* deference. R. at 20; R. at 29.

However, the lower courts should have never applied *Auer*, as the proper methods of statutory interpretation prove Title II and the integration mandate as unambiguous. But even if this Court were to apply the *Auer* doctrine, the DOJ's guidance is entitled to no deference because it does not meet the heightened *Auer* requirements under *Kisor v. Wilkie*. *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019). Even though *Auer* deference retains an "important role," the *Auer* doctrine was heavily qualified by *Kisor*. *Id.* Instead *Auer* deference applying to all ambiguous statutes, *Kisor* deference is "sometimes appropriate and sometimes not." *Id.* at 563.

In support of their erroneous reliance on *Auer*, the Twelfth Circuit Court of Appeals cites seven cases.[4] R. at 19. But six of these seven cases were decided prior to the 2019 *Kisor* decision and therefore do not meet the heightened *Kisor* requirements. The only case decided after the 2019 *Kisor* decision is *Waskul*, and *Waskul* mistakenly skips over the five steps necessary to afford the DOJ's guidance document deference. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 461 (6th Cir. 2020). If the *Waskul* court had gone through *Kisor's* five steps, they would have known that the DOJ document fails the *Kisor* analysis and should therefore be granted no authoritative weight. Therefore, the DOJ's interpretation is not binding on this Court's decision.

If the DOJ's guidance document cannot be given deference under *Auer*, this Court may still afford the guidance persuasive authority under *Skidmore v. Swift*. *See generally Skidmore v. Swift*, 323 U.S. 134 (1944). However, *Skidmore* deference is only granted as much weight as the document's thoroughness, reasoning and consistency with earlier interpretations allows. *Id.* at 140. This argument will further explain that the DOJ's three sentence guidance lacks the analysis and consistency necessary to be given persuasive power under *Skidmore*.

Reliance on the DOJ's guidance is tempting, as the DOJ unambiguously answers the Court's question. But the DOJ's guidance provides a very simple answer

[4] *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 (10th Cir. 2003).

to the Court's question, the DOJ's answer is only simple because it is wrong. The DOJ guidance document includes no legal foundation, analysis, or policy reasons supporting *why* those at risk of institutionalization should be included under Title II of the ADA. Even if this Court were to determine that the statute and integration mandate are ambiguous, the DOJ's guidance should still be afforded no deference.

1. The DOJ's guidance should be given no deference under *Auer*.

Under *Auer*, an agency that promulgated an ambiguous regulation may provide a reasonable interpretation of its own regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In *Kisor*, this Court expanded the previously thin *Auer* doctrine. There are five requirements that the judiciary must consider before deferring to an agency determination: (1) the regulatory provision must be genuinely ambiguous, (2) the agency regulatory interpretation must be reasonable, (3) the agency regulatory interpretation must be the agency authoritative or official position, (4) the agency regulatory interpretation must implicate the agency's substantive expertise, and (5) the agency regulation must reflect fair and considered judgment. *See generally Kisor*, 588 U.S. 558.

a. There is no genuine ambiguity that the DOJ's guidance document interprets.

Ambiguity is a high bar. To be genuinely ambiguous, the interpretive question must have no single right answer even after exhausting all legal tools. *Id.* at 575 ("Only when the legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than of law"). If the

judiciary cannot solve an interpretive question, then the question is likely one of policy and not law. Courts may not "wave the ambiguity flag just because it has found the regulation impenetrable to read." *Id.* at 575.

As demonstrated in the preceding portions of this brief, the Title II and integration mandate raise no questions over whether those "at risk" of institutionalization are included as proper plaintiffs. Neither document mentions those "at risk" of possible institutionalization; the language purely addresses those presently institutionalized. While Respondents may argue that this absence of an explicit bar against plaintiffs merely "at risk" of institutionalization means that at risk plaintiffs can sue under Title II, this interpretation is impermissible under the omitted-case canon. The judiciary should not "presume that every statute answers every question, the answer to be discovered through interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). Lawmakers should not, and indeed do not, have to draft every statute explicitly stating every possible party that might arise and whether or not they have statutory standing. This would be an impossible task, as the legislature cannot possibly predict every possible plaintiff that might claim to have a case under the statute.

Further, the only Circuit Court decision in the record that recognizes the heightened *Kisor* requirements does not analyze the requirements. *Waskul*, 979 F.3d at 461. Instead, the *Waskul* court unmistakably misstates *Kisor* requirements. The court writes, "And we need not decide whether the integration mandate is 'genuinely ambiguous' as to whether it protects those at serious risk of institutionalization such

that the Department of Justice's interpretation of that regulation is entitled to deference under *Auer v. Robbins*." *Id.* at 461. This is in direct contradiction with the guidance of the Supreme Court, as the Court states that courts must analyze whether statutes are "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor*, 588 U.S. at 573.

This is not to say that there is never a situation in which agency guidance might be appropriate, as agency guidance might be useful to help explain a term in the statute. For example, the DOJ guidance is useful in interpreting what the phrase "integrated setting" means from the integration mandate. *Compare* 28 C.F.R. § 35.130(d) (explaining that individuals should receive care in the "most integrated setting"), *with* DOJ Guidance (defining what constitutes an "[i]ntegrated setting"). However, the DOJ guidance is simply inapplicable here because the phrase "at risk" is nowhere to be found in the ADA or the accompanying integration mandate.

b. The DOJ's interpretation is not reasonable because it disregards the text of the statute and offers no analytical support for its interpretation.

If there is a genuine ambiguity, then the agency's reasoning must still be reasonable. *Kisor*, 588 U.S. at 575-76 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)). By "reasonable," the Court means that the agency reading must come within the "zone of ambiguity" identified by the Court. *Id.* Here, the DOJ's interpretation does not come within the zone of ambiguity because the text makes no mention of "at risk" institutionalized patients. There is nothing the DOJ guidance is

interpreting. Instead, the DOJ guidance is explicitly *adding* to the statute an entire class of plaintiffs not mentioned in the statute.

There is no statutory canon that supports the addition of a term entirely absent from a statute. The fact that Congress omitted a class of potential plaintiffs is not an ambiguity. This Court should trust that Congress meant the words that it wrote and competently drafted it to match its intended purpose.

c. The DOJ's interpretation is not within the agency's authority because the interpretation exceeded its congressionally granted authority.

Even if a statute is ambiguous and the agency's interpretation is reasonable, "not all reasonable agency constructions of those truly ambiguous rules are entitled to deference." *Kisor*. at 573. The agency's interpretation must emanate from an authoritative or official position. *Id*. at 577. When the members of Congress passed Title II of the ADA, they granted the Attorney General's office the power to issue regulations related to the enforcement of the law for one year after the law was passed. 42 U.S.C. § 12134(a). The statute states, "Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle." *Id*.

The Attorney General, following the instructions of Congress, issued the integration mandate in 1991. *See generally* 28 C.F.R. 35.130. Once again, nowhere in the Attorney General's integration mandate were "at risk" patients included. It was only after this Court's ruling in *Olmstead* in 1999 did the DOJ spontaneously promulgate its guidance unilaterally including "at risk" patients as proper parties

under Title II. The DOJ's guidance comes eight years after the proscribed window that Congress granted the DOJ for comments. Congress explicitly limited the timeframe in which agencies could comment, so this Court cannot claim that it was Congress' intent for this Court to defer to all agency guidance. They allowed one year for comment, and no more.

Moreover, the DOJ even recognizes its own lack of authority in the guidance document. The end of the document contains a disclaimer that states that it is "not intended to be a final agency action" and "has no legally binding effect." *See* United States Department of Justice, https://archive.ada.gov/olmstead/q&a_olmstead.htm. The DOJ's guidance document has also not gone through a notice and comment rulemaking as required by the Administrative Procedure Act, which also shows its lack of authority. R. at 37.

Congress explicitly prescribed a one-year window for agency comment in Title II. The DOJ exceeded this congressional constraint on agency deference when they promulgated unfounded and unexamined regulatory guidance out of nowhere.

d. The content and character of the DOJ's interpretation deserves little weight because it does not involve expertise-based judgment.

To give an agency interpretation deference, the interpretation "must in some way implicate its substantive expertise." *Kisor*, 588 U.S. at 577. The DOJ has vast and valuable expertise in law enforcement and interpretation. The DOJ is the chief legal enforcement agency of the United States and employs over 10,000 attorneys

nationwide.[5] Even with the DOJ's thousands of attorneys, the DOJ's expertise is not implicated in any way through the guidance document. The portion in question offers no legal reasoning, case citations, or practical justifications as to why those "at risk" are also included under Title II. *See generally* United States Department of Justice, https://archive.ada.gov/olmstead/q&a_olmstead.htm. Nothing in the guidance appeals to any of the DOJ's legal expertise. Instead, the document flippantly states that "Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent" with no explanation. *Id.* If one were to ask the DOJ why this is, the answer appears to be a flat "because I said so." The DOJ has more than enough resources to properly explain its reasoning and has simply decided not to.

e. The DOJ's regulation does not show fair judgment and subjects state and local governments to unfair surprises.

Finally, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference." *Kisor*, 588 U.S. at 579. By this, the Court was concerned with agencies giving *post hoc* rationalizations to new problems. *Id*. Therefore, this Court rarely gives *Auer* deference to an agency interpretation that conflicts with a prior agency interpretation. *Id.*

In this case, the DOJ's guidance document does not give fair and considered judgment to the governmental bodies affected by the rule. First, the interpretation came out of the blue and with little support and explanation. The DOJ does not explain how to determine who might be considered "at risk" in their guidance and

[5] OFF. OF ATT'Y MGMT, ABOUT THE OFFICE, https://www.justice.gov/oarm/about-office.

opens the door to further ambiguity. With the click of a few keyboard keys, the DOJ expanded an easily discernable class of potential litigants to a limitless pool of liability. This is precisely the "unfair surprise" to regulated parties that *Kisor* is concerned with. *Id.* at 579 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

Second, the DOJ guidance interpretation once again conflicts with the Attorney General's previous interpretation. No agency interpretation prior to the DOJ's includes patients at risk of institutionalization as a proper party under Title II. The DOJ's interpretation, adding those at risk of institutionalization, is in direct conflict with the Attorney General's prior guidance in 28 C.F.R 35.130, and should therefore be disregarded.

Because the DOJ guidance meets none of the requirements under *Kisor*, the DOJ guidance document should be afforded no deference under *Auer*.

2. The DOJ's guidance cannot be given any deference under *Skidmore*.

Because *Auer* deference is inapplicable to the DOJ guidance document under the heightened *Kisor* requirements, this Court should analyze to see if the guidance is entitled to any deference under the older *Skidmore* framework. *Skidmore* deference predates *Auer* and calls the Court to consider agency interpretation of agency rules when supported by adequate reasoning. The *Skidmore* and *Auer* doctrines have become more similar in the wake of *Kisor,* but their requirements remain distinct.

In *Skidmore*, this Court promulgated three factors when considering the persuasive power of an agency's regulation. These three factors are, "the

thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements…" *Skidmore*, 323 U.S. at 140. These factors are used to determine what weight the courts should grant the agency's interpretation when the agency does not have the authority to compel the courts to follow their guidance. *Id.* Applied to the circumstances of this case, none of these factors have sufficient support to entitle the DOJ's guidance to deference.

First, the DOJ's guidance is not thorough. If anything, the DOJ's guidance is cursory and abrupt. The DOJ flippantly states that Title II protections extend to people at risk of institutionalization with no support, explanation, or analysis. Further, the DOJ guidance does not explain its rule, it merely promulgates it. The DOJ's promulgation is a mere three sentences rife with legal conclusions, and nothing more.

Second, it is impossible to determine the validity of the DOJ's reasoning, because the DOJ provides none. The DOJ does not analyze the text of the integration mandate or appeal to different interpretive philosophies, legislative history, or Congress's intent in writing the statute. In fact, the guidance document does not even *mention* these things. Rather, the DOJ guidance document is structured to answer a question, and it does so with no explanation. Therefore, the reasoning is invalid on its face because there is no reasoning.

Third, the DOJ's guidance document is not consistent with earlier pronouncements. First, the DOJ once again adds something that was not included in the original statute or integration mandate. By adding language that is not there, the

DOJ inappropriately steps into the role of the legislature, when the legislature explicitly limited the interpretive power of outside agencies in Title II. 42 U.S.C. 12134(a).

Judges should not presume that statutes can answer every question that might arise under them, and that flexible interpretation can be used to answer every question. Congress is competent enough to pass laws that mean what Congress intends for them to mean. This Court should not undermine Congress's expertise by intentionally broadening statutes to what the Courts *think* Congress meant. Such a position patronizes the legislature. Justice Blackmun wisely critiqued this notion, writing "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting).

The separation of powers requires the Court to resist the temptation to create policy that is not firmly grounded in law, no matter how wise those policies may seem. No matter how noble the goal, judges must refrain from stepping into the legislature's shoes to right some perceived wrong. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) ("Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. [The judge] must not read in by way of creation.").

The judicial branch is not the elected body of the people—Congress is. And if the judiciary were to usurp the legislature's role and create new law out of well-intentioned expansive interpretation, the judiciary loses credibility as a fair and

neutral arbitrator of the law. Congress writes the law, and the judiciary's role is to interpret it.

Therefore, this Court must REVERSE the summary judgment of the lower courts.

II. THE UNITED STATES IS NOT GRANTED AUTHORITY UNDER TITLE II OF THE ADA TO FILE ENFORCEMENT ACTIONS BECAUSE THEY ARE NOT A PERSON.

This Court should review this appeal under a de novo standard and reverse the lower courts' ruling, which granted the United States' motion to intervene as of right. To successfully prevail on a motion to intervene as a right, Rule 24(a)(2) of the Federal Rules of Civil Procedures states that the 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.*, *State 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). However, the United States does not have an interest relating to the subject matter of a private ADA action. Thus, it fails under the second prong.

A. The Standard of Review for a Motion to Intervene as a Right Should be De Novo.

The Supreme Court has not adopted a standard of review for the denial or granting of a motion to intervene of right under Federal Rules of Civil Procedure 24(a)(2), except for when the timeliness requirement is at issue. *NAACP v. New York*,

413 U.S. 345, 369 (1973). When timeliness is the sole issue, this Court has stated that abuse of discretion is the appropriate standard because timeliness is a question of fact. *Id*. However, the remaining three elements of Rule 24(a)(2) are in question, and a split among the Circuit Courts of Appeals has arisen in regards to the other three elements. Central to this case is the second element.

It is suggested that when courts need to expand on the law, particularly to elaborate on a legal standard which will and could be used in other cases, the appellate courts typically review the decision before it de novo. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396, (2018). This is because appellate courts have an institutional advantage to give legal guidance to the lower courts. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). In the instant case, there is currently a circuit split on two issues: 1) what standard of review applies when reviewing a motion to intervene, and 2) whether the Attorney General has an interest relating to the subject matter of a private Americans with Disabilities Act action. This Court has the ability to clear these circuit splits and provide clear guidance on what should be followed.

This Court should apply the de novo standard in regards to the remaining three elements because the remaining elements of intervention involve making a legal determination. [6] Therefore, the courts are ultimately reviewing a question of law, which is typically reviewed under a de novo standard. *Highmark Inc. v. Allcare*

[6] *See* § 1902 Distinction Between Intervention of Right and Permissive Intervention, 7C Fed. Prac. & Proc. Civ. § 1902 (3d ed.) *(*differentiating the differences between right and permissive intervention and stating that intervention of right poses only a question of law).

Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014). This standard allows appellate courts to review the issue being presented without deference to the lower court's decisions, as appellate courts are in a better position to provide guidance and develop legal principles for future cases. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018).

Absent a Supreme Court ruling to provide guidance on what standard to apply when reviewing a motion to intervene as of right, the circuit split will continue to result in an uneven application of law. While the Appellate Court stated that the standard of review involving the granting or denial of a motion to intervene as of right should be abuse of discretion, Petitioners urge this Court to consider the reasons to adopt the de novo standard, which is in line with the majority of Circuit Courts of Appeals.[7]

De novo is the proper standard of review in regards to the second element of Rule 24(a)—that the intervenor has an interest relating to the subject matter of the action—because this is a substantive requirement that requires a legal determination. Specifically, these elements require the making of a legal determination as to 1) whether the intervener has an interest relating to the subject matter of the action; 2) whether the disposition of this action may potentially impair

[7] *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) (applying the de novo standard on all Rule 24(a) district court rulings, except when timeliness is at question); *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008) (stating that the court reviews the denial of a motion to intervene of right de novo); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005) (holding that when the question is whether the intervenor has satisfied the elements required for intervention the court applies the de novo standard[7]); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020)(applying the de novo standard to denials of intervention as a right).

the intervener's interests; and 3) whether the intervener is inadequately represented by existing parties in the action. *Wal-Mart Stores, Inc.*, 834 F.3d at 565. The only issue under dispute is whether the United States has an interest relating to the subject matter of the action, making only a legal question the current and only dispute.

Because there are only legal questions and principles that need to be resolved, this Court should review this appeal under a de novo standard. However, most importantly, deciding to apply a de novo standard will set a precedent that will allow appellate courts going forward to review motions to intervene for legal sufficiency to ensure that the trial court correctly granted or denied a motion to intervene.

B. The United States Cannot File an Enforcement Lawsuit under Title II of the ADA Because They do not Have an Interest Relating to the Subject Matter of a Private Americans with Disabilities Act Action.

Under the Rule 24(a)(2) of the Federal Rules of Civil Procedures, a court can permit someone to intervene as of right when (1) the proposed intervener's motion to intervene is timely; (2) proposed intervener has an interest relating to the subject matter of the action; (3) disposition of the action may potentially impair their interests; and (4) their interest is inadequately represented by existing parties in the action. *See, e.g.*, *City of Chicago*, 912 F.3d at 984; *Wal-Mart Stores, Inc.*, 834 F.3d at 565; Fed. R. Civ. P. 24(a)(1)-(2). Because the United States fails to meet the second element of Rule 24(a)(2), it cannot intervene in the suit against the State of Franklin Department of Social Health Services.

1. The United States is not a "person alleging discrimination" under Title II of the Americans with Disability Act

Title II of the Americans with Disability Act clearly states that "[t]he remedies, procedures, and rights outlined in section 794a of Title 29 [Section 505 of the Rehabilitation Act, which refers to Title IV 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 (emphasis added). This language unambiguously provides rights to people, not governments. Even when presented under an individual officer of the government, like the Attorney General, the officer is still acting *as* the government, and not an individual person.

There is a longstanding presumption that "person" does not include the sovereign. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). This presumption reflects the common usage of the word "person." When ordinary speakers use the word "person," this does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. *United States v. Mine Workers*, 330 U.S. 258, 275 (1947). This assertion was also explicitly stated by Congress. The Dictionary Act provides that the definition of "person" that courts use "includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C § 1. Among this list, the federal government is not listed.

Further, in *Return Mail, Inc. v. United States Postal Service,* the Court held that when statutes do not define the term person, courts apply the longstanding

interpretive presumption that person does not include the sovereign and thus excludes federal agencies. *Return Mail, Inc. v. United States Postal Serv.*, 587 U.S. 618, 626 (2019). This Court has even gone as far as to state that when statutes include the word "person" it is done purposely to explicitly exclude the sovereign. *Int'l Primate Prot. League v. Adm'r of Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) ("the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.")

This principle and presumption that "person" does not include the United States can clearly be seen in the construct of the ADA. The text in the enforcement sections of Title I and Title III of the ADA both include the words "person" and "the Attorney General" 42 U.S.C. § 12117(a); 42 U.S.C. § 12188(a)(1). Specifically, Title I's enforcement section states, "this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the *Attorney General*, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter" 42 U.S.C. § 12117 (emphasis added).

Similarly, Title III explicitly mentions the Attorney General in the enforcement section. It reads, "[i]f the *Attorney General* has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter…the *Attorney General* may commence a civil action in any appropriate United States district court." 42 U.S.C § 12188 (emphasis added). Under Title I and Title III Congress explicitly granted the Attorney General the authority to bring suit under these provisions by naming the Attorney General in the statute.

In contrast, Congress intentionally omitted the Attorney General from Title II. This is no accident—Congress meant what it wrote. Congress *wrote* "any person," and Congress *meant* any person—purposefully excluding the government.

In summary, Title I, Title II, and Title III each use different language within the enforcement section. Both Title I and Title II explicitly mention the Attorney General and thus vest them with the enforcement power to bring a cause of action under these sections. However, Title II's enforcement provision only confers a right of action on any "person alleging discrimination." The only reasoning for this is that Congress intended the Attorney General to have authority to sue under Titles I and III, but not under Title II.

2. Title VI of the Civil Rights Act and Section 505 of the Rehabilitation Act do not imply an independent right of action for the United States

In determining if the United States had a right to intervene in the case, the District Court looked to the construction of Title II. The District Court found that Title II of the ADA does not specify what "remedies, procedures, and rights" are available. 42 U.S.C. § 12103; 42 U.S.C § 12133. Rather, the statute incorporates the "remedies, procedures, and rights" found 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. Federal agencies that give out funding may have rules and regulations to ensure that the agencies that receive federal funding comply with such

provisions provided under this section. 42 U.S.C. § 2000d-1. If the department that receives funding violates the rules provided to them, the agency that provides the funding has two options: they can (1) terminate or refuse to grant continued assistance under such program or (2) enforce the agency's regulations by any other means authorized by law. *Id.*

The District Court found that, because Title VI of the Civil Rights Act states "by *any other means* authorized by law," this implies that the sections vest the Attorney General with authority to sue those who receive federal funding and are in violation of Title VI of the Civil Rights Act, and thus, in turn, sue under Title II of the ADA. 42 U.S.C. § 2000d-1(2) (emphasis added), R. at 7. However, this interpretation is misplaced.

Section 2000d1(2) of Title VI of the Civil Rights Act does not create an implied cause of action. "Any other means authorized by law" indicates that the "means" are authorized by some other law. These "means" must have power conferred to it by some law outside of Title VI, such as by another statute or other means provided through common law. Thus, when the Attorney General can bring suit under a Title IV claim, it is because they are authorized to do so under another law that gives them the authority to do so. Here, there was no other law or governing statute that allowed the Attorney General to bring suit. Applying this logic to the issue present, because the Attorney General is not given the authority to bring suit under Title VI of the Civil Rights Act, they, in turn, are not given the authority to bring suit under Title II of the ADA.

To further establish this point that the Attorney General does not have the authority to bring suit under Title VI of the Civil Rights Act, Petitioners urge this Court to look to the Civil Rights Act's Titles II, III, IV, and VII. Each title contains enforcement provisions that explicitly give the Attorney General the authority to bring a civil action in federal court. Title II states, "the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint." 42 U.S.C. § 2000a-5. Title III states, "the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties." 42 U.S.C § 2000b. Title IV states "the Attorney General is authorized…to institute for or in the name of the United States a civil action in any appropriate district court of the United States." 42 U.S.C § 2000c-6. Title VII states that "the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint." 42 U.S.C § 2000c-6.

It is evident by the way that the statutes are constructed that where Congress intended for the Attorney General to have the authority to bring suit on behalf of the United States under the Civil Rights Act Action, they made it a point to include that provision explicitly in the respective titles. Title VI, as shown, does not have this explicit authorization. It is therefore a rational conclusion that Congress did not want to grant power to bring suit to the Attorney General under Title VI of the Civil Rights Act Action.

Additionally, while the District Court stated that "it is presumed that Congress intentionally incorporated the Civil Rights Act into the ADA, including its enforcement provisions," this assertion is not correct because "[t]he question… is not what Congress 'would have wanted' but what Congress enacted." *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (per Scalia, J.). The District Court should have applied what Congress actually wrote, rather than guess what Congress intended. Congress is competent enough to write what they mean. Because Congress never granted the Attorney General enforcement authority under Title VI, and courts must apply what Congress enacted rather than presume what they would have wanted, the trial court erred in reading such authority into the ADA. *See Bostock*, 590 U.S. at 654–55 ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.")

Finally, the Rehabilitation Act does not create a cause of action for the government. The act states that "any person aggrieved by any act or failure to act by any recipient of Federal assistance" is the only party who can bring suit under this title. 29 U.S.C. § 794a. Once again, this limited language makes the "remedies, procedures, and rights outlined in Title VI of the Civil Rights Act" unavailable to the Attorney General. *Id*.

Thus, because the Attorney General is not explicitly given the power to bring a claim under Title VI of the Civil Rights Act or the Rehabilitation Act, they are not granted the power to bring a suit under Title II of the ADA.

3. The United States' institutional interests in ensuring that public entities comply with the ADA does not grant them an independent right of action.

The District Court was persuaded by the notion that the United States has an institutional interest in ensuring that public entities comply with the ADA and its implementing regulations. The court concluded that the Attorney General has a right to pursue a claim against these entities if they are not in compliance. R. at. 7. However, this interest alone does not grant the Attorney General the authority to bring suit against these institutions.

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). This language indicates that Congress intended for the United States to be able to use the remedies, procedures, and rights available in the ADA where that right is granted to the Attorney General. Petitioners agree with this but contend that these enforcement provisions are limited only to Title I and Title III violations because the Attorney General is explicitly given the power to do so under these sections. Where the Attorney is not granted the exclusive right to bring suit, such as under Title II, they are not allowed to under that specific section.

However, the United States argues that the DOJ's role in drafting regulations is enough to create an interest. However, if this were true, then the United States

could intervene in *any* lawsuit involving *any* federal regulation. That would give the government a blanket right to intervene in countless cases. To grant them that authority simply because they have an overall interest in ADA compliance is to grant them a de facto right to intervene in any case involving a regulation drafted by any federal agency.

Congress intentionally added both "person" and "Attorney General" to Title I and Title III of the ADA so that the United States has a specific granting of power to bring suit if there is ever a violation under those titles. Congress intentionally did not add the same provisions to Title II of the ADA. This Court has stated that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *See Dep't of Homeland Security v. MacLean*, 574 U.S. 383, 391 (2015). If Congress expressly wanted the United States to have a right to intervene and pursue a claim against agencies that violate Title II, Congress would have expressly given them that right. *See Russello v. United States,* 464 U.S. 16, 23 (1983) (stating that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

While the United States has an interest in ensuring compliance with federal disability laws, the United States must be given the right and the authority to bring these suits. The United States has the right to bring an action under Title I and Title III but not under Title II. Thus, because the government is not given this right, they do not have a right to sue, and the judiciary cannot grant it this right. *See, Alexander*

v. Sandoval, 532 U.S. 275, 286–87 (2001) (explaining that "a cause of action does not exist, and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute"). The inquiry here for the Court should not be whether Title II of the ADA *should* authorize the Attorney General to sue to enforce its terms but rather, whether it does. *See, United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730, 758 (11th Cir. 2021).

Taking the United States' argument and implementing the rationale, the government would have a blanket right to intervene in countless cases where it would have no authority to do so. This rule would eliminate the need for Rule 24(a). Rule 24(a) is assessed on a case-by-case basis to determine if the proposed intervener has an interest in the litigation. If the Court takes the argument and implements the right de facto, there would be no *need* for Rule 24(a), as the United States would have an automatic right to intervene simply because the DOJ drafted the regulations. It is clear that Congress did not intend for this to be the case.

The District Court erroneously stated that the text "*any person*" in Title II also includes the Attorney General of the United States. They reasoned this by stating that under the ADA, the United States has a "central role in enforcing the standards established in this chapter on behalf of individuals with disabilities" and therefore is granted the ability to pursue a claim under Title II. 42 U.S.C. § 12101(b)(3). However, a *person* cannot be considered the federal government.

Title II was intended to only serve *private* individuals to sue a discriminating institution. *See Frame v. City of Arlington*, 657 F.3d 215, 231 (5th Cir. 2011) (holding

that Title II's discrimination is enforceable through a private right of action). A private citizen, however, does not have the right to bring a public federal enforcement action. See *Delancey v. City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009) (holding that "state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government"). Since a federal enforcement action is not a right that a private citizen can use, it is not a right that they are entitled to under Title II. Therefore, even if the Attorney General qualifies as a "person," they would not have this right to enforce an action under Title II because the right is purely private, and by nature, the Attorney General can only enforce public actions.

The United States does not have an interest in this action because they do not have a private right of action, and it cannot bring the action because they are not authorized to do so by Congress. Thus, should be barred from joining the suit. For example, there are instances where Congress has explicitly included the United States in the definition of "person" within statutes so that the United States can bring a claim. The Lanham Act explicitly states that the term "person" includes the United States. 15 U.S.C. § 1127. If Congress wanted to give the United States the right under Title II, they would have done so, but they did not and thus should not be included in this claim.

In broadly interpreting Congress' clear language, the lower courts expanded the rights that an individual has under Title II. This level of judicial power flatly contradicts the American ideals of self-governance, and that is why this Court should

not add a class of Plaintiffs to what Congress has unambiguously drafted. By exercising judicial restraint in this matter and adhering closely to the plain text of the ADA and Federal Rules of Civil Procedure, this Court ensures an even application of the law. It is only when the law is applied evenly and consistently that there is liberty and justice for all.

Therefore, this Court should REVERSE the lower courts' judgment in all respects.

CONCLUSION

This Court should REVERSE the Fifteenth Circuit Court of Appeals' judgment in all respects. The plain text of Title II of the ADA only provides relief for discrimination that has actually occurred, not the chance that discrimination might occur in the future. Title II does not allow parties that might experience discrimination in the future to maintain a cause of action. Moreover, the United States cannot intervene in the action because they were not granted the express authority to do so under Title II. A mere interest in the action does not grant the Attorney General the authority to intervene in the suit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER