NO. 25-140

IN THE

Supreme Court of the United States

NOVEMBER TERM 2025

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

Petitioners,

— versus —

Sarah KILBORN, et al.,

Respondents

And

UNITED STATES OF AMERICA

Intervenor-Respondents.

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

BRIEF FOR RESPONDENT

TEAM 3406

Attorneys for Respondents

QUESTIONS PRESENTED

I. Whether Respondents' risk of unnecessary segregation from the community due to the State's choice to provide medically necessary services only in an institutionalized setting is sufficient to maintain a claim for discrimination under Title II of the Americans with Disabilities Act.

II. Whether the United States has an interest in the action such that they should be allowed to intervene under Federal Rule of Civil Procedure 24(a)(2) and thus has the ability to enforce Title II of the Americans with Disabilities Act.

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The unreported Opinion of the United States District Court for the District of Franklin, *Kilborn v. Franklin Dep't of Soc. & Health Servs.*, Case No. 22-cv-00039 (June 29, 2022), is contained in the Record of Appeal at Pages 1-10 where the District Court GRANTED the United States' motion to intervene. The unreported Opinion of the United States District Court for the District of Franklin, *Kilborn v. Franklin Dep't of Soc. & Health Servs.*, Case No. 23-cv-00039 (March 22, 2024), is contained in the Record of Appeal at Pages 11-21 where the District Court GRANTED the motions for summary judgment by the United States and the Plaintiffs and DENIED the motion for summary judgment by the Defendants. The unreported Opinion of the United States Court of Appeals for the Twelfth Circuit, *Franklin Dep't of Soc. & Health Servs. v. Kilborn*, Case No. 24-892 (June 26, 2025), is contained in the Record of Appeal at Pages 22-38, where the Appellate Court AFFIRMED the judgment of the District Court.

STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Code are relevant in this proceeding: 42 U.S.C. § 12101 *et seq.,* 42 U.S.C. § 12133, 42 U.S.C. § 2000d-1. The following regulations are relevant in this proceeding: 28 CFR §§ 35.101, 35.130, 41.51. Also relevant is Federal Rule of Civil Procedure 24(a)(2).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Respondents Sarah Kilborn, Eliza Torrisi, and Malik Williamson have all suffered undue segregation as a consequence of their mental health disorders and seek

injunctive relief to ensure unnecessary institutionalization does not occur should they be readmitted to a state hospital for treatment of their disability.[1] R. at 11-12. This case revolves around Respondents' claims under Title II of the Americans with Disabilities Act (ADA or the Act) and the United States' motion to intervene in the action.

Sarah Kilborn. Kilborn has struggled with bipolar disorder since her diagnosis in 1997, experiencing severe depressive episodes that did not respond to psychopharmacological treatment. R. at 12. In 2002, after attempting self-harm, Kilborn voluntarily admitted herself to Southern Franklin Regional Hospital, a state-operated facility, for inpatient treatment on recommendation from her treating physician, where she remained until 2004. R. at 12. Kilborn continued to experience severe episodes of bipolar disorder that required inpatient treatment, resulting in her re-admission to Southern Franklin in 2011. R. at 12. In March 2013, Kilborn's treating physician recommended she be transferred to a community mental health facility to receive daily treatment services in a more integrated setting that would permit her to live at home and resume community life. R. at 13. Because there was no state-operated community health facility within three and a half hours of Kilborn's home and the sole privately-owned option in the area was beyond her resources, Kilborn's treating physician determined that she should remain institutionalized at Southern Franklin until well enough to be fully released. R. at 13. Due to the

[1] The United States, as an intervening plaintiff, seeks similar relief on behalf of all individuals similarly situated and not merely Respondents, which will be addressed by the intervening party in a separate brief.

unavailability of an affordable community health facility near her home, Kilborn remained institutionalized for over two more years before being released in May 2015. R. at 13. She experienced similar undue institutionalization in 2020; after voluntarily admitting herself to Southern Franklin in October 2018, Kilborn's treating physician recommended release to a community health facility in 2020, but a lack of available care meant she remained institutionalized until January 2021. R. at 13.

Eliza Torrisi. Torrisi has struggled with severe bipolar disorder since her diagnosis as a teenager in 2016, experiencing severe episodes even with a regimen of medication and therapy. R. at 14. In 2019, her parents admitted her to Newberry Memorial Hospital, a state-run facility, where she received inpatient treatment for manic episodes. R. at 14. In May 2020, Torrisi's treating physicians recommended she be transferred to a community mental health facility, where she could receive inpatient treatment in a setting that allowed for greater socialization, visitation, and community integration. R. at 14. Because there were no state or privately-run community mental health facilities within four hours of Torrisi's home and no state-operated community mental health facilities offering inpatient treatment at all, Torrisi was required to remain institutionalized until she no longer required inpatient care, resulting in an additional year of institutionalization prior to her release in May 2021. R. at 14.

Malik Williamson. Over the past fifty years, Williamson has received treatment from multiple hospitals in Franklin on both inpatient and outpatient bases as required for management of hallucinations and delusions secondary to a diagnosis of

schizophrenia received in 1972. R. at 14-15. In 2017, Williamson's daughter admitted him to Franklin State University Hospital, a state-run facility, chosen because of its location near the residence they shared, allowing her to visit him regularly. R. at 15. Two years later, his treating physicians recommended he be transferred to a community mental health facility for inpatient treatment, but there were no state-operated facilities available, and the nearest private option was over two hours away. R. at 15. Since Williamson's physician believed the support of his daughter was crucial to his recovery, he was forced to remain institutionalized until June 2021, when he had recovered enough to receive outpatient care. R. at 15.

Respondents' Fear of Repeated Isolation. Although Franklin used to operate three community mental health facilities, two were closed when funding for the Department of Health and Social Services was cut, and inpatient services were terminated at the remaining facility as a cost-saving measure. R. at 15-16. While the Department's budget has since increased, the state has not expanded services at the extant facility or reopened the closed ones. R. at 16. Respondents continue to experience severe episodes of mental illness and may in the future require treatment at a state-operated facility. R. at 12. Due to lack of access to state-run services in an integrated setting, Respondents fear repeated instances of extended institutionalization due to the state's choice to maintain only a single community mental health facility that does not offer inpatient services. R. at 12.

II. NATURE OF PROCEEDINGS

The District Court. In February 2022, Respondents individually or through guardians filed a complaint against Mackenzie Ortiz in her official capacity as

Secretary of the Department of Social and Health Services for the State of Franklin and the agency as an entity, alleging that the Department under Ortiz's leadership violated the nondiscrimination requirement in Title II of the ADA by placing Respondents at risk of undue segregation from other patients and the public due to the Department's failure to offer mental health services in a setting less restrictive than institutionalization. R. at 2. On May 27, 2022, the United States through the Attorney General, filed a motion to intervene on Respondents' behalf, stating that an investigation completed by the Civil Rights Division of the Department of Justice (DOJ) substantiated Respondents' claim. R. at 2. The United States concurrently filed a proposed complaint on behalf of all individuals at risk of undue institutionalization due to Petitioners' failure to provide services in the most integrated setting possible. R. at 2. Petitioners filed an opposition to the motion to intervene while Respondents consented. R. at 2. The district court GRANTED the United States' motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), finding that the motion was timely, the United States had an institutional interest in ensuring public entity compliance with the ADA that would be impaired by exclusion from the litigation, and Respondents did not fully represent the government's interest in public enforcement. R. at 3-9.

The parties next cross-motioned for summary judgment on the issue of whether a discrimination claim under Title II of the ADA can be sustained based on the risk of future institutionalization and segregation, as argued by Respondents and the United States, or whether discrimination claims are limited to those currently experiencing

institutionalization as argued by Petitioners. R. at 11. The district court GRANTED the motions by Respondents and the United States, and DENIED the motion by Petitioners, holding that its consideration of Title II, the integration mandate, *Olmstead*, and the guidance document created by the DOJ interpreting *Olmstead* supported the conclusion that institutionalization was not a prerequisite for a discrimination claim. R. at 11. Following a bench trial, the district court held that Respondents were at a risk of future institutionalization. R. at 24. In its order, the court gave Petitioners three months to submit a proposed plan to correct violations and ensure that Respondents would not be institutionalized if they met the *Olmstead* test in the future. R. at 24-25.

The Twelfth Circuit Court of Appeals. On appeal to the Twelfth Circuit, Petitioners argued that the district court erred in granting the United States' motion to intervene as of right and the motions for summary judgment by Respondents and the United States. R. at 23. Petitioners argued that the United States failed to meet the required elements for intervention of right under Rule 24(a)(2) because it lacked an interest in, and ability to enforce, Title II of the ADA. R. at 26. The circuit court AFFIRMED the district court's decision to grant the United States' motion to intervene, holding that there was no clear error in the district court's determination to grant the United States' motion as it was reasonable to interpret Title II of the ADA to grant the United States the power to enforce the law and therefore an interest in the proceedings. R. at 28.

Petitioners further argued that the district court erred in denying their motion for summary judgment because an individual with disabilities who was at risk of institutionalization but not currently segregated could not sustain a cause of action under Title II of the ADA. R. at 29. The circuit court AFFIRMED the district court's decision to grant summary judgment to Respondents and deny summary judgment to Petitioners, holding that the district court was correct in joining the majority of the other circuit courts to conclude that the risk of segregation was sufficient to sustain a cause of action under Title II of the ADA. R. at 29. The court reasoned that the DOJ's guidance regarding its integration mandate was entitled to deference because it was a reasonable interpretation of an ambiguous regulation promulgated by the agency in accordance with the grant of power received from Congress when the statute was enacted. R. at 29.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Twelfth Circuit Court of Appeals affirming the district court's decision to grant the United States' motion to intervene as of right, because the motion was timely and the United States' interest in enforcing the provisions of the ADA including Title II means it has an interest in this action that cannot be adequately represented by a private party. This Court should also affirm the appellate court's holding that an individual at risk of institutionalization and segregation may sustain a cause of action under Title II of the ADA because the DOJ's guidance is entitled to *Auer* deference or in the alternative is persuasive under

Skidmore and the arguments presented in the Twelfth Circuit dissent are not persuasive.

I.

The United States Court of Appeals for the Twelfth Circuit properly held that Respondents' risk of institutionalization was sufficient to sustain a discrimination claim under Title II of the ADA. This Court should affirm the appellate court's holding.

First, the guidance document published by the DOJ is entitled to *Auer* deference because it satisfies the factors established in Kisor. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019). After exhausting all traditional tools of construction in analyzing the integration mandate, it is genuinely ambiguous, and the DOJ's interpretation of the ambiguity is reasonable. Additionally, the character and context of the DOJ's interpretation entitle it to controlling weight because it reflects the official position of the agency and regards an issue within its specialized expertise that is consistent with the DOJ's view of undue institutionalization as expressed throughout its long tenure in enforcing the ADA and Section 504. Even if the guidance document were not entitled to *Auer* deference, the Court should find it persuasive under *Skidmore* due to the DOJ's thorough consideration of the issue, its grounding in the agency's expertise, and its consistency with other agency interpretations. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Finally, the arguments made by Petitioners and the Twelfth Circuit dissent are not persuasive. The dissent mischaracterizes the integration mandate in order to conclude that public entities lack any responsibility to provide services outside of an institutionalized setting, which is factually incorrect and provides additional evidence of the inherent ambiguity in the integration mandate. In contrast to the claims of the dissent, the DOJ's guidance contains specific factual grounding and supporting authority such that it is entitled to *Auer* deference as found by the majority.

For the foregoing reasons, the appellate court properly found that an individual with disabilities can sustain a cause of action under the nondiscrimination provision in Title II of the ADA based on the risk of future institutionalization. This Court should affirm the granting of summary judgment for Respondents on this basis.

II.

The United States Court of Appeals for the Twelfth Circuit properly held that that the United States may intervene as of right under Federal Rule of Civil Procedure 24(a)(2) and has the ability to enforce Title II of the ADA. The United States' motion to intervene was timely, they have an interest that would be impaired if not allowed in the lawsuit, and the three private plaintiffs cannot adequately represent the interest of the United States in providing relief for all those at risk of institutionalization. Congress gave the United States, on behalf of its citizens, the ability to enforce Title II of the ADA in a lawsuit, and therefore the district court was not clearly incorrect in allowing the United States to intervene in this action.

ARGUMENT

Standard of review. A motion to intervene that was denied as untimely is reviewed for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Although the Court has not ruled on the standard of review for a motion to intervene as of right that was granted or denied on other grounds, the abuse of discretion standard should apply. This standard of review applies because the district court's decision is based on facts determined by the district court. *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). "The reviewing court is to reverse a determination on a motion to intervene if the lower court 'has applied an improper legal standard or reached a decision that [the reviewing court is] confident is incorrect.'" *United States v. W.R. Grace & Co.*, 185 F.R.D. 184, 188 (D.N.J. 1999). (quoting *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 992 (2d Cir. 1984)). The issue of whether an individual at risk of institutionalization can sustain a Title II claim is a question of law and therefore reviewed *de novo*. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

I. A PERSON AT RISK OF FUTURE INSTITUTIONALIZATION CAN MAINTAIN A CLAIM FOR DISCRIMINATION UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT IN ACCORDANCE WITH *AUER* DEFERENCE OR, IN THE ALTERNATIVE, IS PERSUASIVE UNDER *SKIDMORE*.

This Court should affirm the summary judgment granted to Respondents for three reasons. First, the guidance propagated by the DOJ is entitled to *Auer* deference because the integration mandate is genuinely ambiguous and its guidance is entitled to controlling weight. Second, even if *Auer* deference is not warranted, the guidance is persuasive under *Skidmore*, because the guidance uses the agency's experience to

elaborate on the regulations required for a complex regulatory scheme. Finally, the dissent's arguments against deference toward the guidance document are not persuasive.

A. The DOJ's Guidance Is Entitled to *Auer* Deference Because the Regulation Is Genuinely Ambiguous and the Agency Guidance Is Entitled to Controlling Weight.

Ambiguity in agency regulations is "a familiar problem in administrative law," which "often . . . reflects the well-known limits of expression or knowledge." *Kisor*, 588 U.S. at 566. While continuing to recognize *Auer* deference, the Court recently "cabined . . . its scope." *Id.* at 563-64. In *Kisor*, the Court established the following "limits inherent in the *Auer* doctrine:" (1) a court must exhaust "all the 'traditional tools' of construction" in concluding that the regulation is genuinely ambiguous, (2) the agency's interpretation must be "reasonable," and (3) the court's "independent inquiry" must conclude that the "character and context of the agency interpretation entitles it to controlling weight." *Id.* at 574-76. To determine if the agency interpretation is entitled to such weight, the statement must (1) reflect "the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views," (2) "implicate its substantive expertise," and (3) "reflect 'fair and considered judgment.'" *Id.* at 577, 579. The DOJ's guidance is entitled to *Auer* deference because the integration mandate is genuinely ambiguous, and the guidance is both reasonable and "of the sort that Congress would want to receive deference." *Id.* at 590.

1. After exhausting the traditional tools of construction, the integration mandate is genuinely ambiguous.

The "'traditional tools' of construction," including the "text, structure, history, and purpose," must weigh in favor of ambiguity for an agency's interpretation to receive deference from the court. *Id.* at 575. If there is no ambiguity, there can be "only one reasonable construction of a regulation," leaving no room for a court to consider an alternative interpretation, "no matter how much the agency insists it would make more sense." *Id.* Here, a careful consideration of the tools of construction reflects a genuine ambiguity in the integration mandate.

The text and structure of the integration mandate are genuinely ambiguous. The text 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). A plain-text reading of the mandate requires interpretation of several ambiguous terms, including "administer," "most integrated setting," "appropriate to the needs," and "qualified individuals." The Supreme Court, in *Olmstead*, determined that "unjustified institutional isolation of persons with disabilities is a form of discrimination" that violates the integration mandate. *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 600 (1999). But this, too, has proven to be ambiguous. *Compare Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) ("[N]othing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements.") *with United States v. Mississippi*, 82 F.4th 387, 392 (5th Cir. 2023) ("Nothing in the text of Title II, its implementing regulations, or *Olmstead*

suggests that a risk of institutionalization, without actual institutionalization, constitutes actionable discrimination.").

The ADA, its regulations, and *Olmstead* combine to say that failing to provide services in "the most integrated setting" possible constitutes discriminatory segregation. But none of these sources define the word "setting." In cases interpreting these sources, the state tends to argue "that the mandate presents . . . a crabbed binary," where "'setting' refers only to two kinds of physical structures: an institution or a location in the community." *Steimel v. Wernert*, 823 F.3d 902, 911-12 (7th Cir. 2016). Here, the Twelfth Circuit dissent is so committed to this binary that it claims providing services anywhere else is outside the realm of the law. *See* R. at 35 (Hoffman, J., dissenting) ("[A] a public entity cannot 'administer' services, programs, and activities for those who are not currently institutionalized," and to require public entities to do so "is a job for Congress or the United States . . . not this Court."). But the ordinary meaning of "setting" "denotes an environment or situation rather than any particular physical structure," a definition that captures many possibilities beyond the home and the hospital. *Steimel*, 823 F.3d at 912 (collecting dictionary definitions of the term). The integration mandate could just as reasonably be interpreted to include "services in a community-based setting." *Fisher*, 335 F.3d at 1182. Therefore, the text and structure are genuinely ambiguous.

Additionally, ***the history and purpose*** of the integration mandate suggest genuine ambiguity. The legislative history of the ADA reflects a strong prioritization of increased inclusion for individuals with disabilities. *See, e.g.,* H.R. REP. 101-485,

49-50 (1990) ("The purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life. . . . While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole."). However, a public entity is not required to provide services that would "fundamentally alter the nature of the services [the entity] provides." *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003). The ADA does not delineate explicit guidelines for determining when integration is required and when it would constitute a fundamental alteration; rather, Congress delegated authority to the United States Attorney General to "promulgate regulations in an accessible format that implement this part." 42 U.S.C. § 12134(a).

The guidance propagated by the DOJ was issued pursuant to this delegation of authority. *See Olmstead*, 527 U.S. at 598 ("Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect.") (internal citations omitted). Appendix C to Part 35 of the DOJ guidance to the 2016 revisions of the ADA states that "the primary object of attention in ADA cases should be whether public or other covered entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity." 28 C.F.R. Pt. 35, App. C.

Thus, the legislative history reflects a conflict: Congress intended to prevent undue isolation or discrimination but also acknowledges the reality that an

individual's disability can substantially limit life activities without any wrongdoing. That conflict was built into the regulations the DOJ was tasked to promulgate and further encourages ambiguity. The historical context of *Auer* deference itself is grounded in "a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities," a premise the Court has recognized since the nineteenth century. *Kisor*, 588 U.S. at 569; *see also United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution ... is entitled to the greatest weight."). This intention is clear in the history of the ADA.

A careful review of the text, structure, history, and purpose of the integration mandate reveals the best of intentions wrapped in "'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Because alternative interpretations are available regarding when, where, and how services must be administered to avoid discrimination, the integration mandate is genuinely ambiguous.

2. The DOJ's guidance is entitled to controlling weight.

The DOJ's guidance is an elaboration of the integration mandate, one of its own regulations, and therefore reflects the official position of the agency. 28 C.F.R. § 35.130(d). The appellate court appropriately affirmed the district court's judgment that the DOJ's guidance is owed *Auer* deference. R. at 29. An interpretive rule propagated by a government agency is entitled to *Auer* deference when it is an

elaboration of the agency's own regulations rather than a mere restatement of statutory terms. *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006); *see also Auer*, 519 U.S. at 461.

In *Gonzales*, the Court declined to extend *Auer* deference to an interpretive rule propagated by the Attorney General regarding implementation and enforcement of the Controlled Substances Act (CSA) in conjunction with the Oregon Death With Dignity Act (ODWDA). *Gonzales*, 546 U.S. at 249. As discussed in *Kisor*, the Court began by reviewing the text and history of the statute and regulations. *Id. See also Kisor*, 588 U.S. at 575. The CSA was enacted to combat drug abuse by controlling the traffic of controlled substances in the country, in part by charging the Attorney General with issuing registrations to physicians that may be suspended or revoked if "inconsistent with the public interest" or any regulations promulgated by the agency in implementation and enforcement of the Act. *Gonzales*, 546 U.S. at 251 (quoting 21 U.S.C. § 824(a)(4)). One regulation required that every prescription issued under the Act be "for a legitimate medical purpose." *Id.* at 250 (quoting 21 C.F.R. § 1306.04(a)). After Oregon voters passed ODWDA legalizing physician-assisted suicide, the Attorney General, in response to concerns from Congress, issued an interpretive rule stating that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 C.F.R. 1306.04." *Id.* at 254 (quoting 66 Fed. Reg. 56608).

The Court held that although the phrase "legitimate medical purpose" was genuinely ambiguous, the interpretive rule at issue was not entitled to *Auer* deference. *Id.* at 255-56. The Court distinguished the case from the facts of *Auer*,

reasoning that unlike in *Auer* where the Secretary of Labor's "salary basis" test was "a creature of the Secretary's own regulations," giving "specificity to a statutory scheme" that Congress had charged the agency with implementing, here the regulation underlying the interpretive rule "does little more than restate the terms of the statute itself." *Id.* at 256-57 (quoting *Auer*, 519 U.S. at 454-55, 461). Because the language of the rule came from Congress, not the Attorney General, it could not represent the "considerable experience and expertise the [agency] had acquired over time with regards to the complexities of the [Act]." *Id.* at 256. Therefore, the rule was not entitled to *Auer* deference.

Unlike *Gonzales*, the integration mandate does far more than restate the language of the ADA. The integration mandate elaborates on the general discrimination provision of the ADA which 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 integration mandate "g[ives] specificity to [the] statutory scheme" by clarifying that exclusion is not merely denial of services but also a failure to administer them in the most integrated setting appropriate. *Gonzales*, 546 U.S. at 256; 28 C.F.R. § 35.130(d). Similarly, the DOJ's guidance interpreting the rule is "a creature of [its] own regulations," featuring further elaboration and expansion of the integration mandate through reasoned consideration of provisions of the ADA and *Olmstead*. 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 ("DOJ Guidance Statement"). Courts widely agree that the interpretation of the integration mandate propagated by the DOJ guidance is therefore reasonable and deserving of deference. *See Carpenter-Barker v. Ohio Dep't of Medicaid*, 752 Fed. App'x 215, 222 (6th Cir. 2018) (collecting cases making such a determination).

B. Even if the DOJ's Guidance Were Not Entitled to *Auer* Deference, It Is Persuasive Under *Skidmore*.

Where a regulatory scheme is highly detailed, requiring the implementing agency to "bring the benefit of specialized experience to bear on the subtle questions in [the] case," an agency's rule may be entitled to *Skidmore* deference "proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore*, 323 U.S. at 140). Here, although the circuit court did not consider *Skidmore* deference because it identified that the DOJ's guidance was entitled to *Auer* deference, similar arguments can be made for persuasion under *Skidmore*. *See, e.g., Turner v. U.S. Att'y Gen.*, 130 F.4th 1254, 1264-65 (11th Cir. 2025) (collecting cases to support the assertion that under *Skidmore*, courts can consider agency guidance in interpreting regulations, particularly "where Congress gives an agency the power to '"fill up the details" of a statutory scheme,' where an agency's 'specialized experience' and 'informed judgment' work to lend persuasive power to its interpretations, or where the term itself leaves the agency 'with flexibility'") (internal citations omitted). Even if the DOJ's guidance were not entitled to *Auer* deference,

examination of the *Skidmore* factors reveals the persuasive power available in its recommendations.

1. The DOJ's guidance is thorough and grounded in the agency's specialized experience.

When "the rulings, interpretations and opinions" of an agency are "not controlling upon the courts by reason of their authority," the courts may still rely on the "body of experience and informed judgment" for guidance in making a determination. *Skidmore*, 323 U.S. at 140. Under *Skidmore*, the court will consider "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" when weighing the persuasive power of the agency's interpretations. *Id.* "[C]ourts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position" when determining the "fair measure of deference." *Mead*, 533 U.S. at 228.

In *Mead*, the Court found that Customs regulations regarding the details of implementing a complex tariff scheme under the Harmonized Tariff Schedule of the United States, to be persuasive under *Skidmore* due to the agency's considerable experience in answering such "subtle questions" as could be found in implementing a "highly detailed" regulatory scheme. *Id.* at 235. Similarly, the ADA is a particularly detailed, complex regulatory scheme. As directed by Congress, the DOJ's enforcement of Title II required the promulgation of regulations in congruence with the language of the ADA and the Rehabilitation Act, with the goal of averting discrimination

against individuals with a plethora of varying disabilities and medical needs, requiring services from a host of different medical professionals across a spectrum of settings. *See, e.g., Olmstead*, 527 U.S. at 605-06 (discussing the need for latitude for states "[t]o maintain a range of facilities and to administer services with an even hand" as required for compliance with the statute). The DOJ's Technical Assistance Manual reorganizes the agency's regulations into a reader-friendly, 56-page manual, "mak[ing] liberal use of questions and answers and illustrations" to illustrate to the general public the complexity of the scheme. United States Department of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual (1993) (https://archive.ada.gov/taman2.html) ("TA Manual"). These illustrations demonstrate the DOJ's specialized experience and its informed judgment in applying its regulations to specific factual scenarios.

The Attorney General has a long history of propagating regulations intended to prevent discrimination against individuals with disabilities. Since 1982, the Attorney General has been responsible for implementation and enforcement of Section 504. *See Greater L.A. Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1357 (9th Cir. 1987). This means that the DOJ has over forty years of experience in maintaining "a system of administrative enforcement . . . [that] permits both individual complaints and federal agency oversight to lead to investigations that may end with federal enforcement actions." *United States v. Florida*, 938 F.3d 1221, 1236 (11th Cir. 2019). This history provides more evidence of the agency's specialized knowledge in this arena.

The DOJ's guidance statement regarding implementation of the integration mandate applies the agency's experience and specialized knowledge to the subtle questions arising from this regulation. DOJ Guidance Statement, (https://archive.ada.gov/olmstead/q&a_olmstead.htm). It provides eighteen questions and answers regarding *Olmstead* enforcement of the integration mandate that are all supported by citations to the ADA, the Rehabilitation Act, *Olmstead*, and the agency regulations that have been enacted following notice-and-comment periods. *Id.* The agency takes care to explain the fundamental alteration defense, explicitly noting that "[a] public entity's obligation under *Olmstead* to provide services in the most integrated setting is not unlimited." *Id.* By grounding its guidance in the relevant law and regulations, as well as taking care to inform entities of the limitations on the requirements placed on their services, the DOJ has demonstrated a thorough consideration of the issue in its guidance similar to that found in *Mead*.

2. The DOJ's guidance is consistent with earlier pronouncements from the agency.

As recognized by the Court, the DOJ has "consistently advocated" that "undue institutionalization qualifies as discrimination 'by reason of disability.'" *Olmstead*, 527 U.S. at 597; *see also id.* at n.9 (collecting statements in briefs from the United States arguing that "[i]nstitutionalization result[ing] in separation of mentally retarded persons for no permissible reason ... is 'discrimination'" in 1978; that institutionalizing individuals "without first making an individual reasoned professional judgment as to the appropriate placement for each such person among all available alternatives" violates Section 504 in 1981; and that "the unnecessary

segregation of individuals with disabilities in the provision of public services is itself a form of discrimination" in 1994). This consistency in agency interpretation "is a factor in assessing the weight that position is due." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

Overall, the DOJ's thorough examination of the issue, grounded in its immense specialized experience as the agency tasked to advocate for the rights of individuals with disabilities, and the consistency with which the agency has maintained its position, all suggest that the DOJ's guidance in this instance "has the power to persuade" even if deference is not warranted. *Kisor*, 588 U.S. at 573.

C. The Dissent's Criticism of the Majority Opinion Is Not Persuasive.

The dissent's argument against deference toward the DOJ's guidance document is not persuasive because it mischaracterizes and misinterprets the integration mandate, ignores the grounding provided by the agency, and applies the narrow holding of *Mississippi* inapposite to the facts of the case.

The ADA requires services in least restrictive environment. *See* 42 U.S.C. § 12132; *see also* Exec. Order No. 13217 Community-Based Alternatives for Individuals with Disabilities, 66 Fed. Reg. 33155 (June 18, 2001) (issuing an order including the principles that "America's community-based programs effectively foster independence and participation in the community for Americans with disabilities;" "[u]njustified isolation or segregation of qualified individuals with disabilities through institutionalization" constitutes discrimination under Title II and must be avoided by states unless doing so constitutes a fundamental alteration; and that *Olmstead* requires community placement rather than institutionalization when the

three-prong test is met). The integration mandate describes unnecessary institutionalization as discrimination. 28 C.F.R § 35.130.

The dissent states that "a public entity cannot 'administer' services, programs, and activities for those who are not currently institutionalized." R. at 35. This statement is clearly untrue. Taken at face value, this overrules *Olmstead*, which required that the plaintiffs be transferred to community-based services that the dissent is stating cannot be administered. *Olmstead*, 527 U.S. at 607. The dissent further states that Respondents "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." R. at 35. Again, Respondents request is consistent with *Olmstead*, which held that "States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." *Olmstead*, 527 U.S. at 603n.14. Petitioners are already providing mental health services in institutional settings; because the state has already chosen to provide these services, *Olmstead* requires those services to be administered in a "range of facilities" to avoid individuals suffering undue institutionalization in order to receive services. *Id.* at 605.

Furthermore, the dissent argues that Respondents' reliance on the DOJ's guidance document is misplaced because it fails to provide "legal 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," and such a failure removes any need for deference. R. at 36-37. As stated above, the

guidance document contains specific citations and is thoroughly grounded in relevant provisions of the ADA, agency regulations, and the holding in *Olmstead* as well as being consistent with the previous Title II Technical Manual containing numerous illustrations for practical justifications. *See* DOJ Guidance Statement, (https://archive.ada.gov/olmstead/q&a_olmstead.htm); *see also* TA Manual, https://archive.ada.gov/taman2.html. *See infra*, sections I.A.2 and I.B (discussing the grounds for *Auer* and *Skidmore* deference).

The dissent's argument that the use of the word "administer" in the integration mandate renders the provision unambiguous and therefore not entitled to *Auer* deference is similarly misplaced. R. at 37. As stated above, the dissent mischaracterizes this provision to argue that no services can ever be administered outside an institutional setting, which is evidence that the provision is in fact genuinely ambiguous since the dissent demonstrates an alternate interpretation of "administer" where it only means in one specific setting.

II. THE UNITED STATES HAS AN INTEREST RELATING TO THE SUBJECT MATTER UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(A)(2) AND THUS CAN FILE A LAWSUIT TO ENFORCE TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

This Court should affirm the Twelfth Circuit's holding that the United States may intervene as of right in a private ADA action specifically because it has an interest in the subject matter of the action and thus the United States can enforce Title II of the ADA. Therefore, the United States properly intervened as of right under Federal Rules of Civil Procedure 24(a)(2) and has the ability to bring an action to enforce Title II of the ADA under Title VI of the Civil Rights Act.

A. Intervention as of Right.

The United States properly intervened as of right under Federal Rule of Civil Procedure 24(a)(2). "On timely motion, the court must permit anyone to intervene who: (1) is 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). Since the ADA does not provide an unconditional right to intervene, the United States was proper in intervening as of right under Rule 24(a)(2).

To intervene under Rule 24(a)(2), a movant must satisfy four requirements: (1) the motion to intervene must be timely; (2) the movant must demonstrate a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the movant must be so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; and (4) the movant's interest must not be adequately represented by the existing parties. *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019).

Timeliness is evaluated by considering four primary factors: (1) the length of time the intervenor knew or should have known of their 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; and (4) any other unusual circumstances. *United States v. City of Chicago*, 796 F.2d 205, 209 (7th Cir. 1986). The United States filed its motion to intervene approximately three months after the Respondents filed their

complaint and shortly after the DOJ completed its investigation into the State of Franklin's compliance with Title II of the ADA. R. at 4. The completion of the investigation is when the United States became aware of their interest in the case. *Id.* The length of time between the United States becoming aware of their interest in the case and the filing of their motion to intervene, was less than one month.

Prejudice caused to the original parties by the delay is minimal to nonexistent. The Respondents, three private citizens who were the original plaintiffs, consented to the intervention of the United States. R. at 2. The Respondents' consent to the intervention, indicates their understanding that the litigation would be prolonged. This consent mitigates claims of prejudice. Prejudice to Petitioners due to the delay should not be considered because had the United States not intervened, the United States would have filed their own individual suit against Petitioners. Intervention by the United States likely prevented the Petitioners from facing two separate lawsuits, which would have been more time-consuming and costly than consolidated litigation. *United States v. City of Detroit*, 712 F.3d 925, 943 (6th Cir. 2013). By intervening in this lawsuit, the United States prevented Petitioners from having to undergo two different lawsuits which, in total, would have taken significantly more time than 26 months. R. at 33. Therefore, the delay caused by the intervention of the United States in the lawsuit did not result in significant prejudice to the Respondents or the Petitioners.

Furthermore, Petitioners' claim of prejudice due to prolonged proceedings and increased litigation costs is not substantiated. Courts have held that increased

litigation costs alone do not constitute prejudice, emphasizing that such costs are a natural consequence of litigation. *La Rouche v. FBI*, 677 F.2d 256, 258 (2d Cir. 1982). The court in *La Rouche* emphasized that intervention does not inherently interfere with the orderly processes of the court or prejudice the rights of the parties, particularly when little progress has been made in the underlying action, and intervention does not necessitate repetitive discovery or undue delay. *Id.* Here, little progress was made in the underlying action as the parties had only filed pleadings, submitted a proposed scheduling order to the court, and discovery had barely begun, indicating that the delay is not prejudicial. R. at 4.

Additionally, had the United States not intervened and filed their own action against Petitioners, there is no evidence to show that the costs of litigation would have be significantly less. So, while litigation was prolonged and Petitioners were required to spend an additional $273,000 in costs, R. at 33, there is no evidence to show that Petitioners would not have incurred the same costs, if not more, had the United States filed their own lawsuit. The Respondents' consent to the intervention and the lack of evidence showing that the costs or duration of litigation would have been significantly less in a separate lawsuit, support that the delay and litigation costs were not prejudicial to the Petitioners.

The United States will not be particularly prejudiced if not allowed to intervene in this action because they would be able to bring their own action. With that said, it is more efficient for the United States to join in on this litigation to align with the principle that intervention can serve to streamline litigation and reduce the potential

for duplicative proceedings. *United States v. City of Detroit*, 712 F.3d at 943. There are no unusual circumstances that make the United States' motion untimely. Therefore, since the United States filed a motion to intervene as soon as they reasonably were aware of their interest in the litigation and the lack of prejudice against the existing parties, the United States' motion to intervene was timely.

The interest relating to the subject matter of the action that the United States has is ensuring that Appellants are in compliance with Title II of the ADA. If the United States is not allowed to intervene, their interest in the action will be impaired. Furthermore, not only will the interest of the United States be impaired, the interests of all those who are at risk of being unnecessarily institutionalized and segregated would be impaired.

The Respondents cannot adequately represent the interests of the United States. The Respondents are three private citizens who are bringing this action for individual relief and not for the relief of all those that are at risk of being institutionalized. By consenting to the intervention of the United States, the Respondents recognize that they cannot adequately represent the United States in this action. Three private citizens cannot adequately enforce compliance of Title II of the ADA on behalf of all those that are at risk of being institutionalized and segregated in the future. Furthermore, if the Respondents are unable to adequately present the case, the interests of United States are at risk of being impaired. The United States is likely to have the proper and adequate resources to properly litigate

this action in a way that three private citizens may not. Therefore, the United States' interests in this litigation would be impaired if not allowed to intervene.

The United States filed a timely motion to intervene, demonstrated a significantly protectable 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 their ability to protect its interest, especially since the existing parties cannot adequately represent that interest. Therefore, the United States properly intervened as of right under Federal Rule of Civil Procedure 24(a)(2).

B. The United States Can Bring an Enforcement Action Under Title II of the ADA.

It has been established that the United States has an interest in the subject matter of the action which is enforcing compliance of Title II of the ADA. The United States has the authority to enforce compliance as an essential duty of the United States through the DOJ. The enforcement provision within Title II of the ADA states that "the remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act states "the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this

title." 29 U.S.C. § 794a(a)(2). Lastly, Title VI of the Civil Rights Act states "each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity… is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity... Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue [federal assistance] . . . or (2) by any other means authorized by law." 42 U.S.C. § 2000d-1. Courts have interpreted the phrase "by any other means authorized by law" to include the DOJ's authority to file enforcement actions in federal court. *Florida,* 938 F.3d at 1248. Therefore, Title II of the ADA permits the United States, through the DOJ, to effect compliance with any requirement by any other means authorized by law, including bringing a lawsuit.

Title II of the ADA incorporates the enforcement provisions of Section 505 of the Rehabilitation Act and Title VI of the Civil Rights Act. 42 U.S.C. § 12133. Title VI explicitly permits the United States to "effect" compliance with its provisions and regulations "by any other means authorized by law," which has been interpreted by courts to include filing enforcement actions in federal court through the DOJ. 42 U.S.C. § 2000d-1; *Florida*, 938 F.3d at 1248. Congress is presumed to have intended this enforcement mechanism to apply to the ADA as well. Congress explicitly stated 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 clear legislative intent indicates that Congress meant for the United States, through

the DOJ, and therefore the Attorney General, to be able to use the remedies, procedures, and rights available in the ADA, including the ability to file a lawsuit, to enforce the Act. *Florida*, 938 F.3d at 1227.

Title II mentions remedies provided "to any person alleging discrimination," and "any person" includes the Attorney General of the United States. The ordinary meaning of "person" does not automatically exclude governmental entities in legal contexts. The term "person" … shall have the same meaning given such terms in Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e). 42 USCS § 12111(7). "The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers." 42 USCS § 2000e(a). This definition is explicitly incorporated into the ADA under 42 USCS § 12111, which states that the term "person" in the ADA shall have the same meaning as in Title VII. *Shotz v. City of Plantation*, 344 F.3d 1161, 1168 (11th Cir. 2003). Therefore, the United States, through the DOJ, does constitute a "person" and thus can bring an enforcement action under Title II of the ADA.

The Northern District of Georgia relied on Eleventh Circuit precedent to affirm that the Attorney General has standing to sue for violations of Title II. *United States v. Georgia*, 461 F. Supp. 3d 1315, 1327 (N.D. Ga. May 13, 2020). The court explained that Title II adopts enforcement mechanisms from Title VI of the Civil Rights Act and

the Rehabilitation Act, which allow the Attorney General to bring civil actions. *Id.* The court emphasized that Congress created a system of federal enforcement under Title II, and the Attorney General's authority is consistent with this framework. *Id.*

If the United States does not have the ability to enforce Title II of the ADA, then the regulatory process would be largely ineffective. *United States v. Sec'y Fla. Agency Health Care Admin.*, 21 F.4th 730, 741 (11th Cir. 2021). The Attorney General of the United States has been recognized as having the authority to enforce Title II of the ADA on behalf of individuals who allege discrimination. *Id.* at 734. This authority is derived from the statutory framework of Title II, which incorporates enforcement mechanisms from other federal statutes. In *Sec'y Fla. Agency Health Care Admin.*, the Eleventh Circuit held that the Attorney General could bring a lawsuit to enforce Title II of the ADA on behalf of medically fragile children. *Id.* at 747. The court reasoned that the Attorney General acts on behalf of individuals alleging discrimination, and the statutory text permits such enforcement regardless of whether the public entity receives federal funding. *Id.* The court rejected arguments that the Attorney General does not qualify as a "person" under 42 USCS § 12133, emphasizing that the individual alleging discrimination is the "person" referred to in the statute. *Id.* at 737.

The United States has the authority to file lawsuits to enforce Title II of the ADA, as demonstrated by the statutory language, legislative intent, and case law. This authority establishes a substantial interest in the subject matter of private ADA actions, justifying intervention under Federal Rule of Civil Procedure 24(a)(2).

Considering the United States properly intervened as of right and has the authority to enforce Title II of the ADA, such that it has an interest in the subject matter of the action, the Twelfth Circuit's decision in affirming the district court is not clearly incorrect.

CONCLUSION

This Court should AFFIRM the Twelfth Circuit's holding that the district court did not err in granting the motions of intervention and summary judgment. The risk of institutionalization is sufficient to sustain a claim under Title II of the ADA because the DOJ's reasonable interpretation of the integration mandate is entitled to deference under *Auer* and *Skidmore* and the dissent's arguments are not persuasive. The United States is entitled to intervention of right because its motion was timely and its interest in enforcing the provisions of the ADA is not adequately represented by Respondents. The United States has been given the authority to enforce Title II of the ADA, by Congress. Respondents have proven their claim and are entitled to relief from the risk of undue, discriminatory institutionalization in the future.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS