No. 25-140

In The

SUPREME COURT OF THE UNITED STATES

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

v.

Sarah Kilborn, et. al., and The United States of America

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

BRIEF FOR THE PETITIONER

Team # 3407

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether individuals who are at-risk of future discrimination maintain a claim under Title II of the Americans with Disabilities Act while maintaining the equity balancing test this Court set out in *Olsmtead*.

2. Whether the United States has an interest in a private party's cause of action under Title II of the Americans with Disabilities Act United States sufficient to intervene.

TABLE OF CONTENTS

OPINIONS BELOW

The Twelfth Circuit's opinion regarding non-institutionalized parties and the United States' ability to intervene along with its order remanding the case for any further proceedings is unpublished. The district court's opinion and order regarding the same issues is unpublished. The district court's memorandum opinion and order on the United States' intervention is unpublished.

PARTIES TO THE PROCEEDINGS

Pursuant to the Official Rules, the parties to the proceedings section has been omitted.

JURISDICTION

Pursuant to the Official Rules, the jurisdictional statement has been omitted.

STATUTORY PROVISIONS INVOLVED

Title II of the Americans with Disabilities Act provides, in pertinent part:

> Subject to the provisions of this subchapter, 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.[1]
>
> The remedies, procedures, and rights set forth in section 794a of Title 29 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.[2]
>
> Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.[3]

Federal Rule of Civil Procedure 24(a) states that:

> On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or

---

[1] 42 U.S.C.A. § 12132.
[2] § 12133.
[3] § 12134.

> (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.[4]

INTRODUCTION

Congress has rightly recognized that individuals with mental disabilities have historically suffered from discrimination. In passing Title II of the Americans with Disabilities Act, Congress aimed to prevent such discrimination by directing that individuals with disabilities may not be excluded from or denied services of a public entity nor discriminated against by any such entity. In furtherance of this noble goal, the Attorney General promulgated regulations implementing the statute, and this Court has established precedent recognizing those regulations. More recently, the Department of Justice issued guidance stating that Title II, the implementing regulations, and this Court's precedent allow for individuals who are at risk of institutionalization—but who are not institutionalized—to file enforcement claims under Title II.

That interpretation is wrong. None of the listed authorities hold that at-risk individuals may file suit under Title II. The principles of ripeness and this Court's precedent lead to the conclusion that a suit based on the possibility of future institutionalization is unable to be adjudicated. Without the facts surrounding institutionalization, one cannot determine whether that institutionalization is unjust. Further, considerations such as the fundamental alteration defense and balancing between the individuals bringing the suit and the responsibility of the state to serve a diverse population cannot be properly considered if the circumstances of the individual plaintiffs' institutionalization is uncertain.

---

[4] Fed. R. Civ. P. 24(a)

Further complicating the state's ability to manage its own affairs is the United States' attempt to intervene in the suit despite the fact that Title II and its peripheral regulations only envision individual plaintiffs. Nothing in the statute or its regulations indicate that the United States may enforce them simply because they were federally created.

If the United States may sue to enforce a statute that only provides for individual plaintiffs as a general matter, the ability of the United States to control the actions of states may be unlimited. Such a notion is particularly problematic where, as in the present case, the state knows its own population, geography, and capabilities best.

There can be no doubt that Congress passed Title II to protect citizens of the United States. But being at-risk of a harm does not automatically allow one to maintain a cause of action seeking a remedy to that prospect. Neither does a suit allowing for a person to sue allow for the United States to circumvent such a provision by seeking to intervene, particularly where its only interest is in general enforcement of federally enacted statutes. To reinforce the balancing and equity test set forth in *Olmstead* and to protect the states' ability to govern themselves, this Court should rule that at-risk individuals who are not institutionalized may not maintain a claim under Title II, and neither may the United States intervene in such a suit.

STATEMENT

Petitioners are the Franklin Department of Social and Health Services and its Secretary, Mackenzie Ortiz. Franklin, at nearly 99,000 square miles, is one of the largest states in the United States. With a population of 692,381 according to the most recent census, it is also one of the most sparsely populated. Platinum Hills, a city with a population of nearly 150,000, lies near the center of the state and contains Franklin's only state community mental health facility. Much of the state's population lives more than two hours away from this community mental health facility.

Before Franklin's legislature reallocated 20% of its budget in 2011, the Department of Social and Health Services operated three community mental health facilities. The facilities that were closed upon the budgetary decrease were located closer to the Respondents. But the inpatient program in Platinum Hills was also closed after the budgetary decrease because it served the fewest patients while costing the most. In 2021, the legislature increased the Department of Social and Health Service's budget by 5%, but its budget remains significantly lower than it was in 2010.

Each individual plaintiff, Respondents herein, was at one point institutionalized in Franklin, but were not at the time of the filing of this cause of action. Shortly thereafter, the United States investigated the state of Franklin and filed a motion to intervene in the suit. The United States District Court for the District of Franklin granted the motion to intervene, and subsequently granted both the individual plaintiffs' and United States' motion for summary judgment.

Upon appeal, the Twelfth Circuit held that individuals who were at risk of institutionalization could maintain causes of action. The Twelfth Circuit also held that the motion to intervene should be reviewed under the abuse of discretion standard, and that the district court had not clearly erred. Chief Justice Hoffman filed a dissenting opinion stating that the United States should not have been allowed to intervene as of right and that at-risk individuals cannot maintain a cause of action alleging discrimination via institutionalization.

SUMMARY OF THE ARGUMENT

The Twelfth Circuit's ruling in favor of summary judgment for Respondents was improper because the District Court's finding that at-risk people who are not institutionalized can maintain a claim under as to discrimination via institutionalization under Title II of the ADA was incorrect

as a matter of law. Additionally, the Twelfth Circuit improperly granted the United States' motion to intervene both because the court applied the wrong standard of review and the United States cannot intervene as a matter of right under Rule 24(a)(2).

Individuals who are not institutionalized cannot maintain a claim as to discrimination via institutionalization under Title II of the ADA because such claims are not ripe for judgement, the language of Title II and the integration regulation do not allow for preemptive relief based on the possibility of future discrimination, and the Department of Justice's interpretation is not entitled to *Auer* deference because Title II's implementing regulations are unambiguous and the DOJ's interpretation is unreasonable.

The appropriate standard of review for a granted motion to intervene is de novo because the majority of Circuit Courts of Appeals and Justice Brennan agree that district courts have limited discretion of intervenors as a matter of right. Even under an abuse of discretion standard, the district court was clearly incorrect in determining that the United States may enforce Title II of the ADA because the United States' motion to intervene is untimely and the United States doesn't have an interest in the dispute. The United States' motion to intervene was untimely because the significant increases in cost and the delay the intervention caused were clearly prejudicial to the Petitioner. The United States does not have an interest in the dispute that is recognized by Rule 24(a)(2) because the United States does not have a cause of action under the ADA, and a blanket ruling that the United States has an interest in *any* dispute regarding a federal regulation is contrary to public policy.

ARGUMENT

I. Individuals who are not institutionalized cannot maintain a claim as to discrimination via institutionalization under Title II of the ADA.

A. Courts do not have subject-matter jurisdiction to hear cases brought under Title II by individuals who are not institutionalized because such claims are not ripe for judgment.

Whether an individual may maintain a claim is a question based in law, and therefore the appropriate standard of review is *de novo*.[5] Rule 12(b)(1) of the Federal Rules of Civil Procedure states that, in contrast to many other defenses, parties may assert a lack of subject-matter jurisdiction by motion after initial responsive pleadings have already been submitted.[6] This Court has held that litigants may raise a lack of subject-matter jurisdiction argument at any time, even initially in front of this Court.[7] Petitioners raise a defense of lack of subject-matter jurisdiction here, as Respondents have attempted to maintain a claim that is not ripe for judgment.

Cases must be justiciable via standing and ripeness.[8] For a plaintiff to show standing to sue, they must show a "concrete, particularized, and imminent" injury as opposed to a theoretical one.[9] While the word "imminent" may suggest that future harms are justiciable, this Court has explained the doctrine of ripeness to mean that cases cannot rely on "contingent future events that may not occur as anticipated, or indeed may not occur at all."[10] In *Trump v. New York*, for example, this Court held that the plaintiff's reliance on a "substantial risk" of injury based on the record involved too much guesswork and amounted to a mere prediction that future injury would occur.[11]

The undisputed facts in the record indicate that each of the individual plaintiffs have been out of treatment—and thus have not been institutionalized—since at least 2022.[12] The most recent

---

[5] *United States v. Mississippi*, 82 F.4th 387, 391 (5th Cir. 2023).
[6] Fed. R. Civ. P. 12(b)(1).
[7] *See Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576 (2004) (In which verdict was entered for the plaintiff, but the case was later dismissed for lack of subject-matter jurisdiction.); *Kontrick v. Ryan*, . ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.") (citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).
[8] *Trump v. New York*, 592 U.S. 125, 131 (2020).
[9] *Id.*
[10] *Id.* (Quoting *Texas v. United States,* 523 U.S. 296, 300 (1998)).
[11] *Id.* at 132–133.
[12] R. at 12–16.

of the individual petitioners to be de-institutionalized was released in January of 2022, a month before the case was filed.[13] There is no shortage of cases that seek to right past wrongs, for which statutes of limitations serve as a gatekeeping doctrine. But Respondents in this case are seeking injunctive relief against institutionalization "should they be readmitted to a Franklin hospital."[14]

Such a remedy is unworkable because the facts surrounding any readmission—which is not guaranteed—are unknown at present. This Court pointed out in *Olmstead* that "some individuals . . . may need institutional care from time to time" so that any acute psychological condition can be properly handled in a controlled environment.[15]

Respondents raised an unripe cause of action by seeking injunctive relief for an injury that may or may not occur in the future. Allowing such a claim to proceed without any inkling of whether institutionalization would occur, be justified, or even would run contrary to this Court's jurisprudence on ripeness.[16] While the threat of harm can satisfy the ripeness requirement,[17] there are simply too many unknowns regarding facts and remedies for the present question to be ripe for judicial review. As such, no court has subject-matter jurisdiction to consider a claim of discrimination via institutionalization by these petitioners who were and are not in fact institutionalized. But should this Court determine that it does have subject-matter jurisdiction to hear the case, petitioners would still be unable to maintain their claim because it is unsupported by the statutory text in question.

B. The language of Title II and the integration regulation do not allow for preemptive relief based on the possibility of future discrimination.

---

[13] R. at 2, 14.
[14] R. at 12.
[15] *Olmstead v. L.C.*, 527 U.S. 581, 604 (1999).
[16] *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (Fitness for judicial decision hinges partially on "whether the courts would benefit from further factual development from the issues presented."); *Nat'l Park Hosp. Ass'n v. Dept. of Interior*, 538 U.S. 803, 807–08 (2003) (Judicial review was not appropriate "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out.").
[17] *Nat'l Park Ass'n* at 808.

As this Court has long emphasized, statutory interpretation begins with the text.[18] Whether individuals at risk of institutionalization can maintain a claim for discrimination turns largely on Title II and its implementing regulations, as well as guidance issued by the Department of Justice.

Title II states, in pertinent part, that no individual with a mental disability "shall, by reason of such disability, be excluded from . . . or denied the benefits of services . . . of a public entity, or be subjected to discrimination by" the same.[19] Further, Title II provides the "failure to make modifications to existing facilities and practices" as one of the examples of the discrimination faced by individuals with disabilities.[20] To establish a claim under § 12132, a party must establish the following: 1) he or she "is a qualified individual with a disability;" 2) he or she "was excluded from participation in a public entity's services . . . or was otherwise discriminated against by a public entity; and 3) that such exclusion or discrimination was due to [his or] her disability."[21]

Congress directed the Attorney General to promulgate regulations to implement the ADA. The resulting integration regulation states that "public entit[ies] shall administer services . . . [and] programs . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[22]

The integration regulation is not absolute, however. This Court recognized the Attorney General's provision that states may avoid modifications to their treatment programs that would "fundamentally alter the nature of the . . . program."[23] That provision led this Court to rule that the

---

[18] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute of the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.").
[19] 42 U.S.C.A. § 12132.
[20] §§ 12101(a)(2)–(3).
[21] *Davis v. Shah*, 821 F.3d 231, 260 (2nd Cir. 2016) (Using phrasing from the statute and *Olmstead* decision, but enumerating the elements in a helpful way.).
[22] 28 C.F.R. § 35.130(d).
[23] *Olmstead*, 527 U.S. at 597.

obligation to provide community care when appropriate is *not* absolute.[24] States may be required to make reasonable modifications to programs to avoid discrimination, but they may escape liability if compliance with Title II would require a "fundamental alteration" of the state's programs.[25]

The contours of what constitutes a fundamental alteration have not been fully explored. This Court held in *Olmstead* that simply weighing the costs of providing community care to a few individuals versus the whole of a state's budget was too restrictive to provide an actual opportunity for the state to prove a fundamental alteration.[26] In *Olmstead*, the appropriate test was described as being closer to a balancing of equities between the individual petitioners and the responsibility of the state to care for all of its citizens with mental disabilities.[27]

There is one critical factor that *Olmstead* lays out as a gateway matter that itself precludes any ability of a non-institutionalized individual to bring a claim under Title II—an individual's institutionalization must be unjust. The following equity balancing described by the Court also suggests, if not outright precludes, that an individual must be institutionalized for the analysis to take place. Essentially if the facts necessary for a cause of action have yet to occur, no court can peer through its crystal ball to foretell the correct application of the law to the future-facts.

Allowing respondents, who are not institutionalized, to request modification to Petitioner's mental health programs would be inequitable when considering Petitioner's responsibilities to its citizens in light of its geography and budget. Franklin is a massive state with a widespread population.[28] The largest city, Platinum Hills, is located near the center of the state and contains

---

[24] *Id.* at 603.
[25] *Id.* at 604.
[26] *Id.*
[27] *Id.*
[28] R. at 15.

much of the state's mental health facilities—particularly community-based healthcare.[29] Each of the cities located around the edge of the state are several hours from Platinum Hills.[30] Any remedy reasonably calculated to help Respondents—reopening a facility closer to them, for example—would necessarily divert resources away from other individuals in the state. That diversion of budgetary resources would be particularly problematic here, where each of the Respondents have repeatedly required and benefited from intensive care provided by facilities closer to their homes.[31]

Further, allowing individuals who are at-risk of institutionalization to sue under Title II would open Petitioners up to massive amounts of litigation in regards to an issue that cannot effectively be litigated without concrete facts regarding the nature of the treatment and whether that treatment would be best to serve not only the plaintiffs, but the whole of Franklin. Under the superfluous remedy sought by the Respondents, other individuals who are currently unjustly institutionalized get short-handed because Respondents effectively "cut in line" and sued before any applicable facts entitle them to relief.

Sincerely, this is not a case in which the state is merely trying to get by without treating those in its care. Franklin is a massive, sparsely populated area.[32] Due to budget cuts, Petitioner was forced to alter its treatment services.[33] In accordance with *Olmstead*'s language regarding the state's responsibility to "maintain a range of facilities" for its citizens with "diverse mental disabilities" as well as its "obligation to administer services with an even hand,"[34] Franklin smartly cut the most expensive service that helped the fewest people and kept a community care center in

---

[29] R. at 15–16.
[30] R. at 15.
[31] R. at 12–15.
[32] R. at 15.
[33] R. at 15–16.
[34] *Olmstead*, 527 U.S. at 597.

a large metropolitan area near the geographical center of the state,[35] clearly prioritizing a maximization of renderable aid.

Expanding the parties entitled to sue to at-risk individuals completely negates both the type of discrimination described in *Olmstead* as well as the core balancing that this Court described—no court can determine whether an individual's institutionalization was unjust nor the level of the state's burden relative to the individual's institutionalization if the individual is *not currently institutionalized*.

Allowing such suits would go against the equity considerations that must be made when considering the fundamental alteration defense to Title II claims, both in terms of the budgetary limitations and geographical idiosyncrasies of Franklin. Despite this, the lower courts have relied upon the Department of Justice's guidance documents interpreting Title II and this Court's decision in *Olmstead*.

C. The Department of Justice's interpretation is not entitled to *Auer* deference because Title II's implementing regulations are unambiguous and the DOJ's interpretation is unreasonable.

a. Nothing in Title II, its implementing regulations, or *Olmstead* suggest that the Department of Justice's guidance is reasonable.

Other regulations by the Attorney General concluded that unjust institutionalization is a form of discrimination based on disability.[36] This Court recognized that in *Olmstead*, and Petitioners do not dispute that finding.[37] The Department of Justice has issued guidance as to whether the ADA and *Olmstead* apply to individuals who are not currently institutionalized but are at risk of institutionalization. That guidance states:

> [T]he ADA and the Olmstead decision extend to persons at serious risk of institutionalization or segregation and are not limited

[35] R. at 14.
[36] 28 C.F.R. § 35.130(d) (1998).
[37] *Olmstead*, 527 U.S. at 597.

> to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an Olmstead violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.

The first critical issue with the Department of Justice's guidance is that being at-risk of institutionalization at an unknown point in the future is simply not the same thing as being institutionalized.

This court will tend to defer to agency interpretations of regulations if those regulations are "genuinely ambiguous."[38] In *Kisor v. Wilkie*, this Court provided some helpful and colorful examples of regulations that were sufficiently ambiguous to satisfy that aspect of *Auer*, including whether the ADA requires wheelchair seating to have a line of sight when people are standing as opposed to sitting, whether a traveler had to pack a jar of truffle pâté in the manner prescribed for liquids and gels by the TSA, whether x-rays constitute a diagnosis to satisfy requirements for occupational diseases, and a complex question regarding chemical bonds for pharmaceutical regulations.[39]

As the Court noted, each scenario involved more than one reasonable reading, leading to the second aspect of *Auer* deference: agency interpretations of regulations should still be reasonable.[40] The DoJ's interpretation of the implementing regulations of Title II as explained in their guidance document is not reasonable.

---

[38] *Kisor v. Wilkie,* 588 U.S. 558, 563 (2019).
[39] *Id.* at 567.
[40] *Id.* at 563.

The Twelfth Circuit Court of Appeals stated that the Department of Justice's interpretation of the statute and *Olmstead* are entitled to *Auer* deference.[41] *Auer* deference is a legal doctrine that calls for judicial deference to agency interpretations of its own regulations.[42] While the courts generally defer in such situations, deference is inappropriate in where the interpretation is plainly erroneous or inconsistent with the regulation, or when the agency does not show fair and considered judgment on the issue.[43] But even if the DoJ's interpretation does warrant a level of deference, the facts of the case at present are sufficiently different from the precedent relied upon by the Twelfth Circuit to warrant different application.

b. Even if the Department of Justice's guidance is owed deference, the risk of institutionalization described in the present case is distinguishable from that described in other circuit court decisions.

Each of the cases cited by the Twelfth Circuit are distinguishable from the present case so as to be incomparable. In *Davis v. Shah*, coverage for plaintiffs' "medically necessary orthopedic footwear and compression stockings" was effectively denied wholecloth, which even defendant agreed "severely exeacerbate[d] their ailments."[44]

Pashby v. Delia contains multiple issues. In regard to ripeness, that case involved "an administrative decision [that] has been formalized and its effects felt in a concrete way by the" plaintiffs.[45] The case in *Pashby* was based on a statute that essentially revoked services from individuals who needed it,[46] something that is a more concrete and present harm than the case at present. The Fourth Circuit also relies on language from the Tenth Circuit, stating that "there is

---

[41] R. at 29.
[42] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *see Auer v. Robbins*, 519 U.S. 452 (1997).
[43] *Id.* (quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 295, 208 (2011); and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).
[44] *Davis v. Shah*, 821 F.3d 231, 263–64 (2nd Cir. 2016).
[45] *Pashby v. Delia*, 709 F.3d 307, 317 (4th Cir. 2013).
[46] *Id.* at 313.

nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized."[47] But statutes are not to be scoured for language allowing creative and incorrect readings that would enable individuals to sue despite having no facts on which to base a claim at the time of filing, and this Court has repeatedly held that Congress does not "hide elephants in mouseholes."[48]

Further, Petitioners believe the Fifth Circuit's interpretation is more appropriate: "Nothing in the text of Title II, its implementing regulations, or *Olmstead* suggests that a *risk of institutionalization*, without actual institutionalization, constitutes actionable discrimination."[49] When faced with a clear statute, this Court has held that "the sole function of the courts is to enforce it according to its terms."[50] In other words, the courts "are not free to rewrite the statutory text."[51] Circuit courts that would read a statute looking for a lack of prohibiting language are, in effect, trying to do just that.

In *Waskul v. Washtenaw County Community Mental Health* plaintiffs sought to challenge the budgetary process that prevented them from receiving care.[52] While that may sound similar to the present case, there are some factual considerations that fundamentally alter the question before this Court—each of the individual plaintiffs in *Waskul* require 24/7 care and supervision, and in spite of the fact that the individuals are not institutionalized, they still receive care from individuals such as family or other guardians.[53] The plaintiffs in *Waskul* were essentially already in a form of

---

[47] *Id.* at 322 (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003)).
[48] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing *MCI Telecommunications Corp. v. Am. Tel. and Tel. Co.*, 512 U.S. 218, 159–60, 218, 231 (1994) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (1994)).
[49] *United States v. Mississippi*, 82 F.4th at 391 (5th Cir. 2023).
[50] *Caminetti v. United States*, 242 U.S. 470, 485 (1917).
[51] *McNeil v. United States*, 508 U.S. 106, 111 (1993).
[52] *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 442 (6th Cir. 2020).
[53] *Id.* at 461–62.

community care that could break down at any time, forcing them into institutional care.[54] The plaintiff's son in *Radaszewsky ex rel. Radaszewski v. Maram* required similarly round-the-clock care in a private home.[55]

Each of the above fact patterns can be clearly distinguished from the present case. While each of the plaintiffs above were in need of constant care and were already receiving treatment of some type, the respondents at issue are not currently receiving treatment and do not know if or when they will need care again.[56] As such, it is perhaps more proper to frame *Waskul* as standing for the proposition that individuals receiving community care cannot, by reason of their disability, be forced into institutionalization against their needs. That is a vastly different question than whether an individual may sue who may or may not be institutionalized in the future, particularly when a critical part of the analysis is whether institutionalization is just or undue.

Plaintiffs needed "constant supervision" and the services provided by the state "have proved inadequate to prevent life-threatening gaps in care," and "seek access to existing benefits . . . that have been granted to some persons with disabilities, but not to them."[57]

M.R. v. Dreyfus raises a different concern with allowing at-risk individuals to sue under Title II: any potential injunctive relief that is granted prior to the establishment of facts—and by extension, merits—could also be used to create system-wide injunctive relief.[58] If respondents may seek and receive injunctive relief prior to actual institutionalization, nothing prevents any other individuals from seeking and receiving the same.

---

[54] *Id.*
[55] *Radaszewsky ex rel. Radaszewski v. Maram*, 383 F.3d 599, 600–01 (7th Cir. 2004).
[56] *See* R. at 12–15.
[57] *Steimel v. Wernert*, 823 F.3d 902, 913 (7th Cir. 2016).
[58] *M.R. v. Dreyfus*, 697 F.3d 706, 738 (9th Cir. 2012).

Plaintiffs were actually in community-based programs.[59] A new regulation limited the prescriptions they could receive that, paired with the plaintiffs' "precarious medical and financial services," significantly increased the risk that they would *be forced out of their community care centers and into institutions*.[60] This is a fundamental distinction between the present case and each of the cases relied upon by the Twelfth Circuit.

Respondents brought a claim of discrimination without currently being treated or institutionalized in contrast to this Court's precedent in *Olmstead* and the plethora of cases cited by the Twelfth Circuit. Respondents are seeking an unclear remedy based upon facts that do not yet exist. If allowed to continue, Petitioner would not be allowed to effectively put forward the fundamental alteration defense and equity balancing described in *Olmstead*.[61] For the foregoing reasons, this Court should reverse the decision of the Twelfth Circuit and dismiss the case if the Court finds that the cause of action is not ripe, or alternatively should remand the case.

II. The appellate court erred in granting the United States' motion to intervene both because the court applied the wrong standard of review and the United States cannot intervene as a matter of right under Rule 24(a)(2).

A. The appropriate standard of review for a granted motion to intervene is de novo because the majority of Circuit Courts of Appeals and Justice Brennan agree that district courts have limited discretion of intervenors as a matter of right.

Before discussing whether the United States has a right to intervene, the appropriate standard of review should be clearly established. Although the appellate court majority haphazardly sides with the First, Second, Third, and Fourth Circuit Courts of Appeals on the issue, this Supreme Court's decision on the issue will be decisive and should be ultimately rule with the more well-rounded Fifth, Sixth, Eight, Ninth, Tenth, and Eleventh Circuit Courts of Appeals that

---

[59] *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1177 (10th Cir. 2003).
[60] *Id.* at 1177–78.
[61] *Olmstead 527 U.S.* at 584.

the standard of review for granted motions to intervene should be de novo.[62] In fact, Justice Brennan advocated for de novo review in his concurring opinion in *Strongfellow v. Concerned Neighbors in Action*. In that case Justice Brennan artfully expressed that "the intervenor of right has an interest in the litigation that it cannot fully protect without joining the litigation, while the permissive intervenor does not. Accordingly, a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor."[63] The majority of Circuit Courts of Appeals, as well as a well-respected Justice of this Supreme Court, William J. Brennan, are of the position that granted motions to intervene should be reviewed de novo, and this Supreme Court should take that position as well.

Although de novo is the appropriate standard of review, the remainder of the brief will operate under the abuse of discretion standard since meeting that standard sufficiently meets the de novo standard of review as a matter of course.

B. Even under an abuse of discretion standard, the district court was clearly incorrect in determining that the United States may enforce Title II of the ADA because the United States cannot meet the requirements of Rule 24(a)(2).

To intervene, the United States must "claim 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" under Rule 24(a)(2).[64]

To satisfy Rule 24(a)(2), the United States must show: (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

---

[62] *See, e.g., Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 (5th Cir. 1992); *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989); *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997); *DeJulius v. New Eng. Health Care Emples. Pension Fund*, 429 F.3d 935, 942–943 (10th Cir. 2005); *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 n.16 (11th Cir. 1986).
[63] *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382–83 (1987).
[64] Fed. R. Civ. P. 24(a)(2).

of this action may potential impair its interests; and (4) its interest is adequately represented by existing parties in the action.[65]

The district court was clearly incorrect in determining that the United States could intervene as of right because the motion to intervene was untimely, the United States does not have an interest in the action, and the United States lacks standing to bring an ADA claim such that any interest they do have would not be impaired by prohibiting them from intervening.

a. The United States' Motion to Intervene is untimely because the significant increases in cost and the delay the intervention caused were clearly prejudicial to the Petitioner.

To begin, for the appellate court to assert that there is no prejudice caused by the delay in allowing the United States to intervene completely neglects the undisputed facts of the case and minimizes the serious time and monetary consequences of intervention.

The Court looks to four factors to determine whether a motion is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances."[66]

The district and appellate courts have held that factor (1) weighs in favor of timeliness, factor (2) weighs in favor of timeliness, factor (3) is neutral, and factor (4) is irrelevant to the facts at hand.[67] It is the second factor that both the district court and the appellate majority get clearly incorrect. Importantly, the second factor should also receive the greatest weight.[68] As Judge Hoffman noted in their dissent, simply noting that the intervention is happening early in the

---

[65] *See, e.g., Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016).
[66] *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797-98 (7th Cir. 2013) (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000)).
[67] R. at 4–5, 26–27.
[68] *Rotstain v. Mendez*, 986 F.3d 931 (5th Cir. 2021) (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970).

litigation is not sufficient to ameliorate any prejudice to Petitioner. R. at 32–33. Allowing the United States to intervene led to the one year scheduling order being reset, the dispute ultimately taking twenty-six months, a significant expansion of the scope and length of discovery, and costs associated only with the United States totaling more than $273,000 to date.[69] Both the appellate and district courts gloss over these severe delays and increases in costs without as much as a word of discussion. Neglecting this prejudice to Petitioner is not simply irresponsible but clearly incorrect, demonstrating an abuse of discretion and justifying reversal.

b. The United States does not have an interest in the dispute that is recognized by Rule 24(a)(2) because the United States does not have a cause of action under the ADA, and a blanket ruling that the United States has an interest in *any* dispute regarding a federal regulation is contrary to public policy.

i. The United States does not have a cause of action under the ADA because it is not a person and cannot allege discrimination against itself as contemplated by the statute.

Section II of the ADA affords the remedies, procedures, and rights set forth in the relevant portions of the Civil Rights Act "to any person alleging discrimination on the basis of disability in violation of section 12132 of [the] title."[70] The United States argues that it can maintain a cause of action under this title. Per the language of the statute, this is clearly an erroneous assertion, negating the United States' assertion of interest accepted by the district court.

The district court in its memorandum opinion accurately embraced historically established precedents requiring that a court "must presume that a legislature says in a statute what it means and means in a statute what it says[,]"[71] Though the district court correctly reiterates a string of statutes contained within the Civil Rights Acts, admittedly with notable shorthandings, it failed to note the most obvious distinction contained in the binding statute. Clearly, the remedies applicable

[69] R. at 33.
[70] 42 U.S.C.A. § 12133.
[71] R. at 6 (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

under Section 12133, and pursuant to the relevant provisions of the Civil Rights Act, are narrowed to apply to "any person *alleging discrimination on the basis of disability*."[72]

This congressional language choice modifies and qualifies the person who may seek remedies, rights, and relief described in the Civil Rights Act for alleged ADA violation. In section 12133), the emphasized "*alleging discrimination on the basis of disability*" acts as a qualifier and limitation for the immediately preceding noun, "any person." The inclusion of this phrasing specifies the meaning of the provision. This reading of the statute is aligned with intuitive grammatical principles and canonical readings of a variety of federal statutes employed across circuits, most specifically the "last antecedent canon," which demands that "[a] limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows."[73] Thus, the type of person afforded the protections detailed in section 12133 is limited to persons alleging discrimination on the basis of disability.

Ultimately, the reading of this statute that the United States proposes and which the district court adopted would render this limitation virtually meaningless. Canonical precedents work in conjunction to avoid nonsensical interpretations, exemplified by the Ninth Circuit Court of Appeals in an opinion that employs both the last antecedent and the principle that "requires [its courts] to 'strive to "giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."'"[74] Following such canons and using grammatical intuition, a reading which gives

---

[72] 42 U.S.C.A. § 12133 (emphasis added).

[73] *See, e.g., United States v. Mateen*, 764 F.3d 627, 631 (6th Cir. 2014) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)) (applying the last antecedent canon to a federal criminal statute); *e.g., see also, United States v. Paulson*, 68 F.4th 528 (9th Cir. 2023), cert. denied, 144 S. Ct. 1029, 218 L. Ed. 2d 186 (2024), and cert. denied sub nom. *Pickens v. United States*, 144 S. Ct. 1030, 218 L. Ed. 2d 186 (2024).

[74] *United States v. Paulson*, 68 F.4th 528 (9th Cir. 2023), cert. denied, 144 S. Ct. 1029, 218 L. Ed. 2d 186 (2024), and cert. denied sub nom. *Pickens v. United States*, 144 S. Ct. 1030, 218 L. Ed. 2d 186 (2024).

weight to "any person"—which the United States strenuously asserts includes governmental bodies—but not the subsequent limiting language ultimately render such language meaningless.

Not only, as our prior position has noted, does the United States government not constitute a "person," but they have no basis tying them to the narrowed criteria which affords a person Civil Rights Act rights and remedies under Title II. Thus, the "person" status upon which the United States hangs its hat on and which is endorsed by the district court is a baseless and deficient argument defeated by historically applied principles of interpretation. Thus, the acceptance of this argument as creating "interest" sufficient for intervention was clearly erroneous.

ii. Even the United States alternative argument that they necessarily have an interest in enforcing federal regulations is contrary to public policy and an impermissible extension of federal power.

The United States and the district court alike assert that even without an interest pursuant to the ADA itself, an interest nevertheless exists because there are "institutional interests."[75] Essentially, the United States hinges its alternative argument on the vague idea that by creating federal standards for which they are responsible for enforcement, they have an interest in this litigation. Under this principle, the United States can ride the coattails of any plaintiffs that assert a violation of any federally employed standard.

Further, allowing the United States to intervene in a suit brought by individuals who are at risk of institutionalization creates a dangerous precedent vastly expanding the control of the federal government—and indeed the courts—over states. If the United States can intervene as of right on behalf of the rights of individuals who are at risk of institutionalization, the only remedy that could reasonably be sought is federal oversight or control over the mental health facilities in each state.[76]

---

[75] R. at 5.

[76] A remedy which is already practically afforded to agencies providing funding under the Title IV of the Civil Rights Act Section 42 U.S.C. § 2000d-1 (1), as noted by the district court: "Agencies may 'effect' '[c]ompliance with any requirement adopted pursuant to this section . . . (1) *by the termination of or refusal to grant or to continue*

Essentially, Congress does not try to hide massive changes or powers in relatively simple or minor provisions. Applied to the present question, it is unlikely that Congress would grant the United States the ability to intervene as of right in any discrimination suit based on a disability in the language of §§ 12132–13133. This is particularly true where, like in §§12132—13133, the statute clearly includes the term "individual" and not "United States."[77]

Discerning the true intent of Congress can be a herculean task. That is not the case here. Petitioners urge this Court to adopt the Twelfth Circuit dissenting opinion's position, which echoes dissents from several other Circuits, that the language of Title II shows that the ADA "contemplates enforcement by individual persons rather than the United States."[78]

CONCLUSION

Ultimately, the district court's conclusion to include "at-risk" individuals as protected under the ADA and to permit intervention on behalf of the United States is erroneous, resulting in an inaccurate and baseless rendering of summary judgment. Basing relief on the possibility of a future circumstance, such as future institutionalization, not only works against the fundamental principles of proper adjudication pervasive in our justice system's history, but also disregards recent precedent and the principles of fairness. Additionally, allowing the United States to intervene is erroneous in its own right. The United States can hardly claim an interest in this suit with a basis in statutory authority, let alone establish an at-best tenuous connection through its involvement in legislating the ADA (a role it plays for nearly all laws and regulations) sufficient to establish a right to intervene.

---

assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law . . .." R. at 27.

[77] 42 U.S.C.A. §§13132–13133.

[78] R. at 32.

Ultimately, the rendition of summary judgment in favor of respondents was based on an erroneous application of the law and an impermissible allowance of intervention, which must be remedied in light of principles of fairness and justice, policy, and procedure.