No. 24-140

IN THE

Supreme Court of the United States

THE STATE OF FRANKLIN DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET. AL.,

Petitioners,

-versus-

SARAH Kilborn, ET. AL.,

Respondents,

and

THE UNITED STATES OF AMERICA

Intervenor-Respondents.

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

BRIEF FOR THE APPELLANT

Team 3414

Attorneys for the Appellant

QUESTIONS PRESENTED

I. Whether a person at risk of institutionalization and segregation in a hospital in the future, but who is not currently institutionalized or segregated, can maintain a claim for discrimination under Title II of the Americans with Disabilities Act, despite the fact that the integration mandate applies only to individuals who are currently qualified for services?

II. Whether the United States can file an original lawsuit against a state under Title II of the Americans with Disabilities Act and thus has an interest relating to the subject matter of the private action at hand under the Federal Rule of Civil Procedure 24(a)(2)?

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The unreported Opinion of the United States District Court for the District of Franklin, *In re United States Ex rel. Kilborn et al., Kilborn et al v. State of Franklin Dep't. Social & Health Servs.*, Case No. 1:22-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 et al v. State of Franklin Dep't. Social & Health Servs., Intervenor United States*, Case No. 1:23-cv-00039 (March 22, 2024), is contained in the Record of Appeal at Pages 11-21 where the District Court GRANTED Plaintiff's motion for summary judgment, GRANTED the United States motion for summary judgment and DENIED Defendant's motion for summary judgment. The unreported Opinion of the United States Court of Appeals for the Twelfth Circuit, *State of Franklin Dep't of Social & Health Servs. v. Kilborn et al, Intervenor-Appellee United States*, Case No. 24-892 (June 26, 2025), is contained in the Record of Appeal at Pages 22-30. The Appellate Court AFFIRMED the District Court's decision.

STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Code are relevant in this proceeding: 42 U.S.C. § 12131-12134; 29 U.S.C. § 794(a); and 42 U.S.C. § 2000e-5.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Until 2011, the State of Franklin operated three community mental health facilities, servicing its population of 692,381. R. at 15. Franklin is one of the largest states in the United States; however, due to its low population, it has the third lowest population density of the 50 states (approximately seven people per square mile). *Id.*

In 2011, budget cuts slashed funding for Franklin's Department of Health and Human Services by 20%. *Id.* This forced the state to close two of its community mental health facilities and the inpatient program at the Platinum Hills community mental health facility. R. at 16. In 2021, the Department's budget was increased by 5%; however, given inflation over time, the current budget has just over half the buying power of the budget prior to the budget cuts. *Id.* As a result, the Department has been unable to reopen the closed facilities and programs. *Id.*

The three named appellees, Sarah Kilborn, Eliza Torrisi, and Malik Williamson all have mental health disorders that have required inpatient treatment in hospitals in the past. R. at 12. Kilborn resides in Silver City, Franklin, and is diagnosed with bipolar disorder. Id. Torrisi, also diagnosed with bipolar disorder, resides approximately four hours from Franklin's state-operated community mental health facility. R. at 14. Williamson is diagnosed with schizophrenia, and lives in Platinum Hills. R. at 15. None of the three named appellees are currently receiving inpatient treatment at hospitals; however, the district court found that they are at risk of future institutionalization. R. at 23.

Due to severe bipolar disorder episodes, Kilborn was admitted to a state-operated hospital for inpatient treatment in 2011. R. at 13. In 2013, her physician recommended a transfer to a community mental health facility in order to utilize daily treatment services rather than inpatient services. *Id.* Kilborn resides over three hours away from the state-owned community mental health facility and could not afford the privately-operated facility in her area. *Id.* In order to remain in Silver City, she chose to remain institutionalized until she was released in 2015. *Id.* The same situation reoccurred in 2020 after she had been institutionalized for two years. Id. She was ultimately released in 2021. R. at 12.

For similar reasons, Torrisi was admitted to inpatient care at a state-operated hospital in 2019. R. at 14. In 2020, her treating physicians recommended admission to an inpatient program at a community mental health facility; however, no community mental health facilities existed within four hours of her home. *Id.* Instead, she remained in the hospital and was released in 2021. *Id.*

Williamson was admitted to a hospital for inpatient mental health treatment in Platinum Hills in 2017. R. at 15. In 2019, his physician determined that he could receive inpatient care at a community mental health facility. *Id.* Unfortunately, due to budget cuts, the community mental health facility in Platinum Hills no longer had an inpatient program. *Id.* Williamson remained in the hospital until 2021 when he was released to pursue outpatient care at the community mental health facility. *Id.*

II. NATURE OF PROCEEDINGS

The District Court. In February 2022, Appellees Kilborn, Torrisi, and Williamson filed a complaint against the State of Franklin Department of Social and Health Services and Mackenzie Ortiz in her official capacity. R. at 2. The complaint alleged discrimination against Appellants in violation of Title II of the Americans with Disabilities Act ("ADA"). *Id.* Appellees claimed they were at risk of future institutionalization due to Defendant's failure to provide adequate state-operated community health care facilities. *Id.* After the complaint was filed, the United States Department of Justice Civil Rights Division began an investigation of the State of Franklin that culminated in a finding against the state and a motion to intervene in the original lawsuit on May 27, 2022. Finding Appellee's claims to be substantiated, the federal government moved to intervene. They requested broader relief than the originally filed complaint. *Id.* The federal government claimed the State of Franklin was in violation of Title II of the ADA ("Title II") for failing to provide *all* those at risk of segregation with adequate mental health treatment facilities. *Id.* Franklin filed an opposition arguing the federal government could not maintain an original cause of action against a state under Title II and could have no interest in the litigation as required by Federal Rules of Civil Procedure 24(a)(2). R. at 2. On June 29, 2022, the District Court GRANTED the federal government's motion to intervene, finding the four factors of permissive intervention were met, including the right of the federal government to bring suit under Title II against a state. R. at 5-8. On March 22, 2024, the District Court GRANTED original plaintiff's and the federal government's motions for summary judgment, finding

Franklin had violated Title II. The District Court DENIED Franklin's motion for summary judgment, finding that persons at risk of institutionalization or segregation can maintain claims for discrimination under Title II of the ADA. R. at 20.

The Twelfth Circuit Court of Appeals. On appeal to the United States Court of Appeals for the Twelfth Circuit, the State of Franklin argued the district court erred in holding that the United States had a right to intervene and that Plaintiffs had a claim under Title II of the ADA. R. at 25. The Court of Appeals AFFIRMED the district court's decision to allow the federal government to intervene. R. at 29. The Twelfth Circuit found that a contextual reading of Title II incorporated the procedures of the Civil Rights Act, including the ability of the federal government to enforce the act "by any other means authorized by law." R. at 27. The Court of Appeals also AFFIRMED the district court's finding that Plaintiffs had a cause of action under Title II for discrimination due to risk of future segregation. R. at 27. The Twelfth Circuit concluded that the Department of Justice's guiding document was determinative in deciding whether a claim of risk of segregation may be sustained under Title II. R. at 29.

SUMMARY OF THE ARGUMENT

I.

The Twelfth Circuit Court incorrectly affirmed the District Court's determination that individuals who are at risk of being institutionalized in the future can maintain a cause of action under Title II of the ADA. In coming to this

conclusion, the lower courts improperly applied *Auer* deference to an opinion letter written by the Department of Justice that posited that the integration mandate in the ADA applied to individuals at risk of being institutionalized. However, since the integration mandate is not genuinely ambiguous, nor is the DOJ interpretation reasonable, *Auer* deference cannot be applied. Similarly, *Skidmore* deference also does not apply. Further, even if the DOJ's interpretation was accepted by the Court, persons attempting to state claims for risk of institutionalization are categorically unable to allege facts sufficient to maintain the claim.

Auer deference can only be considered when a regulation is genuinely ambiguous. Both plain reading and a further statutory analysis of the integration mandate reveal that it is not genuinely ambiguous regarding actionable discrimination. This same fact is evidenced by the legislative intention and stated intention of Title II, which focuses on current action and also states that the individual must be qualified for services. Multiple canons of statutory interpretation also demonstrate the proper interpretation of the integration mandate, included *expressio unius est exclusio alterus* and the principle that favors interpretations that do not conflict with settled law. Because the integration mandate cannot be read to include individuals at risk of institutionalization, the lower courts were incorrect to deem it genuinely ambiguous.

The lower courts erred in applying *Auer* deference without considering the reasonableness of the DOJ's interpretation. The DOJ's interpretation violates many settled canons of interpretation and is not within the potential zone of ambiguity of

the regulation. It renders the phrase "qualified individuals with disabilities" meaningless and superfluous. In order to arrive at the DOJ's interpretation, one must conduct statutory interpretation backwards, a process which would result in a complete re-interpretation of the entire ADA. The DOJ did not attempt to interpret a regulation in their guidance document. Rather, they attempted to evade the process of rulemaking by disguising an entirely new regulation as an interpretation. This action cannot be upheld by the Court.

Regardless of whether persons at risk of institutionalization have standing before this Court under Title II, they remain unable to state a claim for discrimination. The second element of a prima facie claim under Title II requires past harm and discrimination, which a person merely at risk cannot state sufficient facts to allege. Given these reasons, the determination of the lower court should be overturned.

II.

The Twelfth Circuit Court incorrectly affirmed the District Court's holding on the federal government's right to intervene and motion for summary judgment. Under a plain reading of Title II, the federal government does not qualify as a "person" entitled to bring suit. Under the textual and contextual definition of person, Title II has been expressly limited to excluding the federal government as party to its remedies. The lower courts found incorrectly in expanding the definition of person to include the Attorney General as it contravenes the meaning of the text. Further, though Congress included the right of the federal government to sue in

Title's I & III, it neglected to extend that right in Title II. To presume that Congress intended the federal government to possess a right to sue the states under Title II would contradict its clear intent.

Where it will limit constitutional problems and preserve the separation of powers, the Court requires an express allowance of Congress sue states over their sovereign rights. The enforcement of this action would intercede in Franklin's right to decide its state's budget and priorities. According to the Court's plain statement rule, which maintains the balance and separation of powers, Congress is required to expressly assert the federal government's right to sue the states for Title II violations. It has not done so. A review of legislative history will run against the Twelfth's Circuit's finding that Congress intended Title II to join the Rehabilitation Act and the Civil Rights Act's procedural remedy scheme.

Under the Rehabilitation Act and the Civil Rights Act, the federal government has power to sue the states in two distinct ways; (1) through the Spending Clause powers, or (2) "by any other means authorized" having followed a procedural requirement for seeking voluntary resolution. The ADA, though a Commerce Clause statute, falls under a canon of Spending Clause precedent that requires Congress expressly outline attachments to funding, including the right of the federal government to sue. Title II includes no such outline. It would be a violation of Spending Clause precedent to find, as the Twelfth Circuit did, that because Franklin receives federal funding for ADA programs, it is subject to suit from the federal government.

Finally, even if the Court finds all incorporations made and the federal government has the right to sue, this case must be demanded for the federal government's material failure to seek voluntary resolution. The second means of authorized federal suit require the federal government to determine compliance cannot be secured through voluntary means. The federal government made no attempt at voluntary resolution, which the Twelfth Circuit failed to acknowledge. Should the Court find against Appellants in all other manner, this case must still be remanded to resolve the federal government's material procedural failure in enforcing the ADA.

ARGUMENT

Standard of review. This appeal raises two issues that warrant *de novo* review as questions of law: statutory interpretation and regulatory interpretation. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385, (2024) ("When the meaning of a statute was at issue, the judicial role was to 'interpret the act of Congress, in order to ascertain the rights of the parties.') (*citing Decatur v. Paulding*, 39 U.S. 497(1890)); *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province of the judicial department to say what the law is.")

I. TITLE II OF THE ADA DOES NOT ALLOW A PERSON AT FISK OF INSTITUTIONALIZATION AND SEGREGATION IN A HOSPITAL IN THE FUTURE TO MAINTAIN A CLAIM FOR DISCRIMINATION RELATED TO THE RISK OF INSTITUTIONALIZATION.

The Court should reverse the decision of the Twelfth Circuit Court and hold that individuals who are at risk of being institutionalized and segregated in the

future cannot maintain a cause of action under Title II of the Americans with Disabilities Act ("Title II" and "ADA"). *Auer* deference does not apply to the Department of Justice's interpretation of the integration mandate because the integration mandate is neither genuinely ambiguous nor is the DOJ interpretation reasonable, and a *Skidmore* analysis reveals no persuasive tendency in the interpretation. Additionally, even if a person at risk of institutionalization were able to satisfy the first element of the prima facie claim under Title II, the person is categorically unable to allege facts sufficient to show the second element.

A. *Auer* Deference is Not Owed to the DOJ's Interpretation of the Integration Mandate Because the Mandate is Not Genuinely Ambiguous nor is the Interpretation Reasonable.

Auer deference is not owed to the Department of Justice's ("DOJ") interpretation of the integration mandate. Although *Auer* deference applies to agency interpretations of regulations, the Supreme Court has recently made clear its limits in *Kisor v. Wilkie*. *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, 558 U.S. 588 (2019). *Auer* deference only applies in a very limited set of circumstances: when the regulation is both genuinely ambiguous and the agency interpretation is reasonable. *Kisor*, 558 U.S. at 573. "Genuinely ambiguous" refers to regulations that are still entirely ambiguous "even after a court has resorted to all the standard tools of interpretation". *Id.* By making this ruling, *Kisor* overturned a long line of cases claiming that agency interpretations are automatically guaranteed *Auer* deference and relying on that claim to allow at-risk plaintiffs to make discrimination claims under Title II. *See Pashby v. Delia*, 709 F.3d 307 (4th

Cir. 2013); *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016); *M.R. v. Dreyfus*, 663 F.3d 1100 (9th Cir. 2011); *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016).

If, in using the standard tools of interpretation, there are not two or more equally plausible readings, "then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Kisor*, 558 U.S. at 575. *Auer* deference fills the gap when the court has completely exhausted its law-interpreting abilities, allowing courts to defer only when the resolution of ambiguity in a text becomes entirely a question of policy. *Id.*; *Pauley v. Bethenergy Mines*, 501 U.S. 680, 696 (1991). Deferring to an agency's reading in any other circumstance would frustrate the separation between interpretation of the law and creation of law, "[permitting] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (declining to extend *Auer* deference to a Department of Labor opinion letter upon determining that the language of a regulation was not plainly ambiguous).

A *Kisor* inquiry does not stop upon finding that the regulation is genuinely ambiguous. Instead, the court must conduct a second inquiry to determine if the agency's reading is reasonable. *Kisor*, 558 U.S. at 576. The district court improperly describes *Kisor* as standing for the holding that the DOJ's interpretation is "'controlling unless plainly erroneous or inconsistent with the regulation' provided the regulation is ambiguous." Deferring to *any* agency interpretation unless it is plainly erroneous would allow an agency to create new regulations under the guise

of interpretation. Rather, *Kisor* held that the "*possibility* of deference can arise only if a regulation is genuinely ambiguous." *Kisor*, 558 U.S. at 573 (emphasis added). Deference is "undoubtedly inappropriate" when the agency's reading is "erroneous or inconsistent with the regulation." *Christopher v. SmithKline Beecham Corp.* 567 U.S. 142, 155 (2012) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). To be granted deference, an agency's reading must still come within the "zone of ambiguity" identified by the court. *Kisor*, 558 U.S. at 576; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). The inquiry is not whether the interpretation is plainly erroneous, but rather, whether the interpretation is within the set of equally likely interpretations identified by the court.

1. **The integration mandate is not genuinely ambiguous.**

    a) **A plain reading of the integration mandate makes clear that it does not afford a cause of action for individuals at risk of discrimination.**

The integration mandate is not genuinely ambiguous with regard to what gives rise to actionable discrimination. A plain reading of the regulation in the context of the statute it implements is fairly clear. The integration mandate requires that, "with regard to the services [public entities] do in fact provide," public entities must not unnecessarily segregate the "qualified individuals with disabilities" who utilize the service. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 603 (1999); 28 C.F.R. § 35.130(d). Title II defines a "qualified individual with a disability" as "an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C.S. § 12131(2). It is a settled canon of statutory

interpretation that statutes and regulations should be interpreted using the ordinary rules of grammar. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Forward: Law as Equilibrium*, 108 Harv. L. Rev. 26 (1994). By using the present tense form of "meet," this statute makes clear that it only applies to individuals who are *currently* eligible for the services in question. Reading this definition into the integration mandate, a public entity may not administer services in a less integrated setting than is appropriate for the individuals currently using the service. Individuals not currently using or eligible for the service in question need not be considered. Actionable discrimination, then, under the integration mandate, requires an individual to be currently eligible for services and either currently unnecessarily segregated or currently resisting required treatment due to a certainty of unnecessary segregation. The ADA does not define discrimination "in terms of a prospective risk." *U.S. v. Mississippi*, 82 F.4th 387, 392 (5th Cir. 2023). Rather, by using terms like "excluded," "denied," and "subjected to discrimination," the ADA makes clear that it refers "to the actual, not hypothetical administration of public programs." *Id.*; 42 U.S.C.S. § 12132. Mere risk of possible segregation does not and can not, under the plain reading of the statute and regulations, give rise to a private cause of action.

b) An evaluation of the purpose of the integration mandate and relevant canons of interpretation demonstrates that the integration mandate does not afford a cause of action for individuals at risk of discrimination.

If the plain reading is not sufficient, the court must turn to other canons of statutory interpretation. *Kisor*, 558 U.S. at 575. The first task is to evaluate the

validity of regulations based on the justification invoked by the issuing agency. *SEC v. Chenery Corp.* 332 U.S. 194, 196 (1947). This is done by evaluating the regulation's statement of basis and purpose and its statement of applicability. *Id.* In this case, the statement of purpose does little to clarify the reading of the integration mandate. 28 C.F.R. § 35.101.

However, Title II also integrates Title V of the Rehabilitation Act of 1973 ("Title V"), requiring that all regulations created in connection with Title II be consistent with Title V. 42 U.S.C.S. § 12134(b); 29 U.S.C.S. § 794(a). Title II's implementing regulations additionally note that they are not intended to provide lesser protection than that provided by Title V. 28 C.F.R. § 35.103. As such, it is reasonable to turn to the statement of purpose of implementing regulations of Title V to provide persuasive evidence as to the meaning of the integration mandate. These implementing regulations declare that they are intended to ensure that no "otherwise qualified" person with a disability is "excluded" from participation, "denied" benefits, or "subjected to discrimination" solely by reason of disability. 24 C.F.R. § 8.1(a). These regulations focus on current action, and state clearly that the individual must be "otherwise qualified" for the services in question. *Id.* Thus, an individual who is not qualified for the services in the first place, or who is excluded for reasons other than disability, cannot bring a claim under Title V. An individual, then, who is merely at risk of exclusion, denial, or discrimination, could not bring a claim under the Rehabilitation Act. A claim requires both a currently eligible individual and an affirmative action on the part of the program or activity. The

legislative intention and purpose cannot be read to imply that Congress and the DOJ intended individuals at risk of exclusion to fall within the scope of the Rehabilitation Act. When given clear language, it is in fact "improper to conclude that what Congress omitted from [a] statute is nevertheless within its scope." *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (citing *Gardner v. Collins*, 27 U.S. 58, 93 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of those words.")). Because Title II explicitly integrates the Rehabilitation Act and employs almost identical language throughout its provisions, it is reasonable to conclude that the integration mandate, like the implementing regulations of the Rehabilitation Act, does not afford a cause of action to individuals at risk of discrimination. *Smith v. United States*, 508 U.S. 223, 225 (1993) (describing the canon of statutory interpretation that Congress should be presumed to mean the same thing when the same term is used in different statutes).

Individuals at risk of segregation are not covered at all in the implementing regulations of the ADA. Certainly, they are a category of individuals who may desire to bring claims, yet the ADA and its regulations omit them. It is a well-settled canon of interpretation that a matter that is not covered is to be treated as not covered (*expressio unius est exclusio alterus*). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012); *Haaland v. Brackeen*, 599 U.S. 255, 350 (2023). The legislature explicitly stated to whom the integration mandate applies (qualified individuals with disabilities) and

subsequently defined that term to mean individuals who are currently qualified for the service in question. Qualified individuals with disabilities could, absent a definition, logically include those at risk. Thus, by explicitly defining the term as those individuals currently qualified, the legislature is to be interpreted as having excluded the possible interpretation that includes individuals at risk of segregation.

If the Court still finds the regulation ambiguous, it should turn to the canon of interpretation that favors interpretations that do not conflict with settled law. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Forward: Law as Equilibrium*, 108 Harv. L. Rev. 26 (1994). Petitioner would have the Court affirm an interpretation that conflicts with settled law. Namely, Petitioner's interpretation that at-risk individuals can bring claims under the integration mandate would allow for nonjusticiable claims to be brought before the court. Very few, if any, at-risk plaintiffs can satisfy the elements of standing. Standing under Article III of the United States Constitution ("Article III") requires a party show actual injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must be "threatened with 'imminent' injury in fact." *Id.* Injury in fact requires an invasion of a legally protected interest which is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.*; *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Even in cases where material risk of future harm is sufficient to satisfy the concrete-harm requirement, the risk must be "sufficiently imminent." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 415 (2021). Yet, the very nature of the at-risk claim is in fact conjectural, not imminent. In certain

cases, as when a plaintiff is to be segregated within a week, and is aware of that fact, the claim is imminent; however, this has yet to be the case in the existing at-risk line of cases. *See Pashby*, 709 F.3d; *Davis*, 821 F.3d; *M.R. v. Dreyfus*, 663 F.3d; *Steimel*, 823 F.3d. Thus, most of the claims brought under the DOJ's interpretation both have been nonjusticiable and would be nonjusticiable in the future. Because this interpretation conflicts with settled law, the Court should conclude that this is not a possible interpretation and that the mandate is not ambiguous.

It is clear from both a plain reading and a more extensive evaluation that the integration mandate is not genuinely ambiguous.

2. The DOJ's interpretation is not reasonable because it violates traditional canons of interpretation and is not within the potential zone of ambiguity of the regulation.

Even if the integration mandate were found to be genuinely ambiguous, the Department of Justice's interpretation does not fall within any "zone of ambiguity" the court could find. *Kisor*, 558 U.S. at 576; *Thomas Jefferson Univ.*, 512 U.S. If the integration mandate or Title II are to be held to apply to individuals at risk of institutionalization, one of two possible interpretations must be reasonable. Either the potential for institutionalization and segregation in the future must constitute present discrimination, or potential future discrimination must be held to be a justiciable injury. In other words, the statute must be read to mean that a public entity must always "be prepared to" administer integrative services to any potential individual who becomes qualified for services. Rather than considering its actual pool of people who receive services and creating the most integrative situations for

those people, the DOJ's interpretation would require a public entity to be capable of providing for effectively anyone.

On the most fundamental level, either interpretation is unreasonable because they render the phrase "qualified individuals with disabilities" meaningless and superfluous in the regulations. 28 C.F.R. § 35.130(d). As a rule, statutes and regulations "ought, upon the whole, to be so construed that, if it can be prevented," no clause or phrase is rendered "superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 (1986). However, the only way for either reading of the integration mandate to stand would be if the ADA definition of "qualified individuals with disabilities" did not apply, since the term excludes individuals who are not currently qualified for the service. At-risk individuals are not currently qualified for the service. As such, the DOJ's reading violates the canon of textual integrity that one should avoid interpreting a provision in a way that renders other provisions of the act, statute, or regulation superfluous or unnecessary.

Requiring a state to constantly be prepared to offer services to certain individuals also contravenes the actual requirements *Olmstead* places on states. The ADA neither requires states to provide a certain level of benefits to individuals with disabilities nor imposes a standard of care on states. Rather, *Olmstead* actually requires states to administer services with an even hand and maintain a range of facilities, with regard to the care they already provide. 527 U.S. at 587.

To read the DOJ's interpretation into the integration mandate, one must conduct statutory interpretation backwards, as the Tenth Circuit does in *Fisher v. Okla. Health Care Auth.*. 335 F.3d 1175 (10th Cir. 2003). The *Fisher* court promoted the at-risk theory of interpretation based on the claim that there is "nothing in the plain language of the regulations" that *prohibits* the at-risk theory. *Id.* at 1181. However, even if the *Fisher* court is correct that nothing directly prohibits that interpretation, the court is incorrect that that is sufficient to lead to the claim that the interpretation is reasonable. It is not sufficient for an interpretation to merely be *possible* or uncontradictory. Rather, for an interpretation to be reasonable, it must be *likely* and justified by the language of the regulation. *Kisor*, 558 U.S. at 576. It cannot merely be justified by a lack of language in the regulation. *Id.* The *Fisher* court contravened *expressio unius est exclusio alterus* with this interpretation, adding to the text, rather than recognizing that a matter not covered is to be treated as not covered.

If the *Fisher* interpretation (and thus, the DOJ interpretation) is correct, it does not cease with merely interpreting the integration mandate. Instead, the DOJ interpretation results in the reading that nearly every implementing regulation in 28 C.F.R. § 35.130 affords a cause of action for individuals who are merely at some risk of being the target of the discrimination at issue in each regulation. The *Fisher* theory relies on the inclusion of at-risk individuals in the definition of "qualified individuals with disabilities." However, the integration mandate is not the only implementing regulation to use that same term. Nearly every provision in the

implementing regulations is stated to apply to "a qualified individual with a disability." 28 C.F.R. § 35.130(d). Among other provisions, these individuals may not be "[denied] . . . the opportunity to participate in or benefit from [an] aid, benefit, or service" or "[afforded] . . . an opportunity to participate in or benefit from [an] aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130 (b). Every statutory or regulatory provision must be read by reference to the whole act. Additionally, the Court abides by a general presumption that the same term is used consistently in different statutes. *Smith v. United States*, 508 U.S. 223, 225 (1993). This presumption is even more applicable in a situation where the same term is used across the same chapter and part of the Code of Federal Regulations ("CFR"). Abiding by these canons, the DOJ interpretation of the integration mandate implies the same interpretation and cause of action for the rest of the regulations. This reading–that individuals who are at any risk of being discriminated against have a cause of action under the CFR–is plainly unreasonable.

Adequacy of notice is an additional factor relevant to analyzing the reasonableness of an agency's interpretation. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991). Deference to the DOJ's requirement that states be constantly prepared to offer services to anyone who may be at risk of institutionalization would create "unfair surprise" for states, and thus entirely undermines the requirement for agencies to provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires." *Christopher*, 567 U.S. at 156 (quoting *Gates & Fox Co. v.*

Occupational Safety and Health Review Comm'n, 790 F.2d 154 (CADC 1986)). In 1990, Congress enacted the ADA and authorized the Attorney General of the United States to create regulations. 42 U.S.C. § 12134(a). These regulations, including the integration mandate, were passed in 1991. 28 C.F.R. § 35.130. However, the DOJ did not issue its opinion letter until 2011. 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. There is nothing in the integration mandate to indicate the DOJ interpretation as a possible reading of the regulation. Notably, the DOJ did not attempt to bring action against states in violation of its interpretation until well after the *Fisher* court concluded that the statute applied to at-risk individuals in 2003. 335 F.3d. Despite this interpretation, many states still lacked state-run community-based mental healthcare as of 2021. U.S. Department of Health and Human Services, *National Directory of Mental Health Treatment Facilities 2021* (2021), https://www.samhsa.gov/data§ites/default/files/reports/rpt34657/National_Directory_MH_facilities_2021.pdf. These states, which are still in violation of the opinion letter, were in violation of the DOJ's interpretation for 20 years before the DOJ ever issued its opinion letter. This is similar to the situation in *Christopher v. SmithKline Beecham Corp.* in which, after decades of the pharmaceutical industry treating detailers as exempt outside salesmen, the Department of Labor issued a legal brief taking the position that detailers are not exempt outside salesmen. 567 U.S. at 157. During those decades, the Department of Labor never initiated any

enforcement actions supporting its future interpretation. *Id.* The Court concluded that when "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *Id.* Further, the Court noted that while it is "'possible for an entire industry to be in violation . . . for a long time without the Labor Department noticing,' the 'more plausible hypothesis' is that the Department did not think the industry's practice was unlawful." *Id.* (quoting *Dong Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (2007)). As in *Christopher*, the DOJ's actions imply that it did not believe the integration mandate applied to at-risk individuals until 2011. In the DOJ's own words, the opinion letter provides "informal guidance" and "[does] not establish legally enforceable responsibilities beyond what is required by the terms of the applicable statutes, regulations, or binding judicial precedent;" however, in reality, it provides entirely new prohibited conduct for those with obligations under the ADA. 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. This is inadequate notice and enforces entirely new obligations on states without utilizing the formal way in which obligations are to be placed on states.

The DOJ's interpretation may be wise policy; however, attempting to enforce an interpretation of a regulation that is not consistent with the regulation's text is not the way to create policy. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015). The DOJ is not without recourse here. It has methods by which to create and

enforce new regulations and amend old regulations: formal adjudication and notice-and-comment rulemaking. The United States may not utilize informal guidelines and *Auer* deference to create new regulations simply to avoid the more formal and arduous process of rulemaking under the Administrative Procedure Act. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); 5 U.S.C. § 553(b)(A).

B. *Skidmore* Deference is Not Applicable.

An agency interpretation that cannot be given *Auer* deference should be analyzed under *Skidmore* to determine what weight, if any, it should be given in providing guidance to the Court. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The weight of an interpretation in a particular case depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade." *Id.* at 140. In other words, "persuasive force . . . is a necessary precondition to deference under *Skidmore*." *Univ. of Tex. Southwestern Med. Ctr.*, 570 U.S. at 361 (citing *Skidmore*, 323 U.S. at 140); *see also, e.g., Vance v. Ball State Univ.*, 570 U.S. 421, 462 (2013).

There is no thoroughness evident in the DOJ's interpretation of the integration mandate and *Olmstead*. Despite distributing a document claiming to "assist . . . in understanding the ADA and the Department's regulations," the DOJ explains nothing of its reasoning beyond claiming that "[i]ndividuals need not wait until the harm of institutionalization or segregation occurs." 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. Additionally, the DOJ has promulgated no documents or further attempts to explain its reasoning. In *Young v. UPS*, the Court declined to grant *Skidmore* deference to an EEOC guidance document for precisely this reason: the EEOC failed to "explain the basis of its latest guidance." 575 U.S. 206, 225 (2015). In failing to explain the basis of this interpretation of the integration mandate, the DOJ demonstrates no thoroughness in its interpretation.

Additionally, the DOJ document is inconsistent. In question 3, it discusses whether the integration mandate requires a showing of facial discrimination. 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. Within this discussion, it states that to sustain a claim, the state must "*currently* provide [plaintiffs] services in an institutional setting that [is] not the most integrated setting appropriate." (emphasis added). To sustain a claim, the DOJ posits that the state must be currently providing services to the person making a claim. However, the DOJ also contradictorily claims in this same document that an individual who is at risk of segregation, and thus, an individual who is *not* currently receiving services, can maintain a claim. These two claims are irreconcilable.

Without any evidence of reasoning, it is impossible to conclude that the DOJ guidance document has any power to persuade. The document consists solely of asserted conclusions with no propositions or alternate reasoning for support. As

such, the Court should not grant any weight to the DOJ's interpretation when determining if at-risk individuals can sustain a cause of action under the integration mandate.

C. Persons at Risk of Institutionalization are Categorically Unable to State Facts Sufficient to Fulfill the Discrimination Element of a Title II Claim.

A prima facie claim under Title II requires facts sufficient to show three things: that an individual was a qualified individual with a disability, that they were excluded from participation or otherwise discriminated against by a public entity, and that the exclusion or discrimination was due to their disability. *See, e.g., Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003). However, in cases made under the integration mandate, *Olmstead* concluded that undue institutionalization automatically qualifies as "discrimination 'by reason of . . . disability.'" 527 U.S. at 598. As such, if a plaintiff can show sufficient facts demonstrating undue institutionalization under the second element, the plaintiff has sufficiently shown the third element as well.

To state a prima facie cause of action under Title II, one must state facts showing that one was "either excluded from participating in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity." *Townsend*, 328 F.3d at 516; *see also, e.g., Reinhart v. City of Birmingham*, 2025 U.S. App. LEXIS 21617, 5 (6th Cir. 2025); *Melton v. Dall. Area Rapid Transit*, 391 F.3d 669, 671 (5th Cir. 2004). In other words, one must state facts demonstrating that discrimination occurred. In *Olmstead*, the Supreme

Court concluded that a showing of unjustified segregation of a person with disabilities constitutes a form of discrimination. 527 U.S. 581, 581 (1999).

Although the Court has recognized that "material risk of future harm" is sufficient to satisfy the concrete-harm requirement of standing when requesting injunctive relief, the Court has also held that the risk of future harm must have "materialized." *TransUnion LLC*, 594 U.S. at 415. However, this holding does not apply to making out a prima facie claim. If a plaintiff can demonstrate that the risk of future harm has materialized, the plaintiff may in fact have standing, but that has no impact on whether the plaintiff has sufficiently alleged facts to make out a prima facie claim under Title II.

It is notable that every attempt to explain the second element of the prima facie claim utilizes past tense language. An individual must have been "excluded" *already*, "denied" benefits *already*, or "segregated" *already*. *Townsend*, 328 U.S.; *Olmstead*, 527 U.S. The second element leaves no room for harm that has not already occurred. Thus, an individual merely at risk of segregation simply cannot present facts to satisfy that element of a prima facie claim. As such, an individual at risk of institutionalization or segregation cannot maintain a claim for discrimination based on the integration mandate.

II. THE FEDERAL GOVERNMENT IS NOT PERMITTED, BY STATUTE, TO BRING LAWSUITS AGAINST A STATE UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

The United States claims a right to intervene in this lawsuit under Federal Rule of Civil Procedure 24(a)(2) ("FRCP"). FRCP 24(a)(2) requires that an intervenor

must have an interest relating to the subject matter of the action. *Id.* Courts have found that to have subject matter interest; a party must be able to bring a claim independent of the intervening action. If the intervenor does not have an original standing on which to bring the case, they cannot possess a right of intervention. The District Court of Franklin and the Twelfth Circuit Court of Appeals both held the United States is a party authorized by Title II to sue states. R. at 7; R. at 28. The Court should reverse the lower courts because the ADA does not expressly authorize the federal government to sue states, and therefore the United States has no standing to intervene as a matter of right in this case.

A. The United States is Not a Person Entitled to Bring Suit Under Title II.

The Twelfth Circuit Court of Appeals found that because Title II incorporates the "remedies, procedures, and rights" of the Rehabilitation Act, which in turn incorporates the "remedies, rights and procedures" of the Civil Rights Act, procedural rights must be consistent throughout. R. at 28. This finding disregarded Title II's full text, which limits remedies to "any *person* alleging discrimination." 42 U.S.C. §12133 (emphasis added). The ADA offers no clear definition for "person" in statute; therefore, the Court must determine what Congress intended by limiting remedies to 'a person'. *See Return Mail, Inc. v. United States Postal Service*, 587 U.S. 618 (2019) (In which the Court determined the meaning of person where it was not defined by statute.)

"In the absence of an express definition of the term 'person' . . . the Court applies a 'longstanding interpretative presumption that "person" does not include

the sovereign.'" *Return Mail*, 587 U.S. at 618 (citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000). The presumption of the sovereign as a person is not a hard and fast rule. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 780, 781 (2000). However, the presumption is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* at 781. The government argues here that Congress has subjected states to liability of suit wherever it supposes Title II is violated. Because this reading of Title II would subject states to new liability, the presumption lies against inclusion. The presumption may only be overcome by "some affirmative showing of statutory intent to the contrary." *Id.* at 781. The Court should follow the presumption that "person" does not extend to the federal government unless Appellees affirmatively shows statutory intent.

1. The federal government cannot be defined as a person under Title II of the ADA.

In *Loper Bright v. Raimondo* the Supreme Court opined that "statutes can be sensibly understood only "'by reviewing text in context.'" 603 U.S. 369, 392 n.4 (2024). The plain meaning interpretation of a person is "a human being." PERSON, Black's Law Dictionary (12th ed. 2024). But the definition of a word often extends beyond its plain meaning. The Court may also look to Congress for its definition of person. In the Dictionary Act, Congress provides definitions for "determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C.A. § 1. Under the Act, persons may include "corporations, companies, associations,

firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C.A. § 1. As the Dictionary Act stipulates, the plain meaning of a term may be expanded only when context explicitly indicates an expanded meaning. The lower courts have failed to demonstrate the contextual justification or expanding the definition of "person" to the federal government.

When interpreting statutes, the court may look not only to the plain meaning and other Congressional acts, but also to legislative history. *See United States v. Florida*, 938 F.3d 1221, 1245 (11th Cir. 2019) (opining courts may look to the legislative history of a statute where its meaning is not plain). In this case, the legislative history of the ADA sheds further light on the fact that the federal government should not be included in the definition of person. In its amendment process, the House sought to expand the enforcement section of the ADA through reference to the Attorney General and their right to sue. H.R. CONF. REP. 101-596, 66, 1990 U.S.C.C.A.N. 565, 575 ("The House amendment adds a reference to 'the Attorney General.'") The Senate receded, declining to expand the enforcement provision. *Id.* Further, while Congress specifically outlined the Attorney General's right to sue the states in Title I and Title III, Title II contains no such provision. *See* 42 U.S.C. § 12117 and 12188.

Reading the ADA makes it clear that, in context, "a person" cannot mean the federal government. The enforcement provision of Title II expressly states remedies are available under Title II "to any person alleging discrimination on the basis of a disability in violation of section 202." 42 U.S.C. § 12133. Section 202 further

provides that "subject to the provisions of this title, **no qualified individual** with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). This section clarifies that it is solely individuals who can be the subjects of discrimination. Read in connection with the enforcement provision of Title II, individuals experiencing discrimination, then, are the only ones who can bring suit. Sections 201-203 make no reference to anyone, beyond an *individual alleging discrimination* possessing a right to sue states. There is no justification under the plain meaning of the statute that would allow the federal government to file suit against a state.

2. The ADA expressly limits the rights and remedies incorporated which cannot be judicially expanded.

The twin powers of the state and federal government will be at risk if the Court reads in provisions into the statute unwritten by Congress. The plain statement rule, which the Court has used to maintain the balance and separation of powers, holds that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)) (internal quotations omitted). The modern plain statement rule arose from a history of case precedent that holds the plain statement rule be applied where statutory intent is ambiguous, so as not to intrude upon state governmental functions. *Id.* at 470 (citing *EEOC v. Wyoming*, 460 U.S. 226 (1982) (interpreting *Penhurst State School and Hospital v. Halderman*, 465 U.S. 89, (1984))). The Court should apply a

plain statement rule because: (1) the federal government seeks to upset the vertical separation of powers, and (2) application will avoid constitutional problems. *See Gregory v. Ashcroft,* 501 U.S. 452, 452 (1991) (Wherein the plain statement rule was applied to read the statute as narrowly and prevent the federal government from breaching the horizontal separation of power and creating a constitutional problem.)

In *Gregory v. Ashcroft*, Missouri had enacted age limitations on state judgeship. Two judges responded by suing the state for violation of the Age Discrimination in Employment Act. *Id.* at 456. The Court held that the Missouri provision defined the structure of government by creating rules for elected officials. *Id.* at 460. The Court opined the state's right to structure its own government "should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Id.* The Court further found that application of the plain statement rule requires the Court to "not attribute to Congress an intent to intrude on state governmental functions." *Id.* at 470. In so holding, the Court recognized the principal benefit of a federalist system is checks and balances on power. *Id.* at 458. This includes the horizontal balance of powers between the state and federal government that "reduce[s] the risk of tyranny and abuse from either front." *Id.*

The case at hand challenges the State of Franklin's sovereign right to govern. The suit makes a specific challenge regarding Franklin's decisions regarding it's own budget which is a hallmark of traditional state legislation. *See Church v.*

Missouri, 913 F.3d 736, 751 (8th Cir. 2019) ("[D]iscretionary policymaking decision implicating the budgetary priorities of the [government] and the services the [government] provides to its constituents' is a 'hallmark' of traditional legislation.") (interpreting *Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998)). If the federal government has a right to intervene here, regardless of the lack of clear statutory provision, it will create precedent for the federal government's right to sue under any circumstances in which it disagrees with a state's budgetary decisions. Just as regulating the age of state officials goes to a state's fundamental right to choose its own officials, funding provisions are central to the function of a state's structure. Because allowing intervention would intrude on state functions, the Court must apply the plain statement rule of *Gregory v. Ashcroft.*

At best, through its broad incorporation of the Rehabilitation Act and the Civil Rights Act there may have been an intention to include the ADA in a broader regulatory scheme. However, the Senate specifically receded language that would have made its inclusion in that scheme express.

> "The House amendment, **but not the Senate bill,** directs administrative agencies to develop procedures and coordinating mechanisms to ensure that ADA and Rehabilitation Act of 1973 administrative complaints are handled without duplication or inconsistent, conflicting standards." H.R. CONF. REP. 101-596, 66, 1990 U.S.C.C.A.N. 565, 575 (emphasis added).

Although the legislative history supports a conclusion against a broader incorporation of the regulatory scheme, if the Court finds ambiguity, it is required to apply the plain statement rule. Because finding the federal government has the right to sue would interfere with the constitutional balance of powers, the Court should limit application of Title II to remedies expressly written. The only

enforcement provisions expressly outlined are the remedies, procedures and rights reserved to the **persons** suing for violation.

At best, Title II of the ADA is ambiguous as to who it empowers to bring a lawsuit. The plain and contextual meaning of "person" would indicate that only individual persons facing discrimination have a right to sue. Appellees may argue the statutory history and context of the ADA expands the definition of "person" to the Attorney General, as the Eleventh Circuit found. *United States v. Florida,* 938 F.3d 1221, 1244. This finding, however, would run contrary to the contextual interpretation of the statute and the plain statement rule which requires an unmistakable statutory right of the federal government to upset Constitutional boundaries. To protect the rights of states to self-govern, as the Court did in *Gregory v. Ashcroft,* the Court must find the federal government has no statutory right to intervene.

B. If Incorporated, the Rehabilitation Act and Civil Rights Acts Still Fail to Provide Remedy for the Federal Government in This Case.

The ADA's enforcement provision incorporates the "remedies, procedures and rights" of section 505 0f the Rehabilitation Act. 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act subsequently incorporates 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)." 29 U.S.C. § 794a. 42 Appellees argue the ADA incorporates the **unlimited** "remedies, procedures and rights" of the Rehabilitation Act and the Civil Rights Act. They claim that the ADA joined a broader federal scheme of agency enforcement. This claim fails in two ways:

(1) it misunderstands the relation of the Spending Clause and the ADA; and (2) even if incorporated, the federal government has failed to follow procedure required to possess the right to a cause of action.

Title VI of the Civil Rights Act has two enforcement mechanisms: a cause for private action and a direction to federal agencies to enforce Title IV on any state recipient of federal funding "through regulation, fund termination, and 'by any other means authorized by law'". *See United States v. Florida*, 938 F.3d 1221 (Eleventh Cir. Ct. App. Sept. 17, 2019); *See also* 42 U.S.C. § 2000d-1. Thus, if the broader administration scheme applies, there are two possible ways the federal government may have sued states for the enforcement of the ADA: as an attachment to funding, or through the incorporation of "any other means authorized by law". 42 U.S.C. § 2000d-1. The federal government here has failed to do either.

1. Enforcement under the incorporated Rehabilitation Act, and funding mechanisms of the Civil Rights Act, relies on express funding attachments not included in the ADA.

The Civil Rights Act is a Spending Clause statute. *See Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (The Civil Rights Act invokes legislative "power under the Spending Clause to place conditions on the grant of federal funds.") The conditions placed on funding are what allow the federal government to sue states, or, in other words, enforce "by any other means authorized by law." 42 U.S.C. § 2000d-1. In this way, the federal funding provided by the Civil Rights Act acts as a contractual obligation. If a state receives funding, it must not violate the Act, or the federal government may sue to enforce it. Because enforcement under the Spending Clause

acts as contract law does, all requirements of funding must be expressly imposed. *See Barnes v. Gorman*, 536 U.S. 181, 186 (2002) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.") Though the Rehabilitation Act is a Commerce Clause, not Spending Clause, statute, its remedies for the federal government are still incorporated through federal funding. 29 U.S.C. § 794a ("The remedies, procedures, and rights set forth . . . shall be available . . . by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance."). Thus, the Rehabilitation Act is subject to the same obligations as the Civil Rights Act, including expressly outlined attachments to funding such as the right of the federal government to sue. States or programs not federally funded cannot be subject to suit by the federal government under the Rehabilitation Act. *See Manecke v. School Bd.*, 762 F.2d 912 (11th Cir. 1985), cert. denied 474 U.S. 1062 (1986) (Where plaintiff fails to connect discrimination to a federally funding program, plaintiff fails to allege violation of Rehabilitation Act.)

Like the Rehabilitation Act, the ADA is a Commerce Clause statute. *See* 42 U.S.C. 126 § 12101(b)(4) (The ADA is enforceable by the power "to enforce the fourteenth amendment and to regulate commerce.") However, the District Court of Franklin still found the government had standing to sue under the ADA because "Congress intentionally incorporated the Civil Rights Act into the ADA, including its enforcement provisions. [Which] clearly authorize suit by the United States against recipients of federal funds." R. at 6. The District Court erred because it failed to recognize precedent that demanding attachments to funding be expressed.

When the federal government is authorized to sue a state by statute because the state accepts federal funding, the state is entitled to expressly know the conditions of funding. "[T]he legitimacy of Congress' power to legislate. . . rests on whether the recipient voluntarily and knowingly accepted the terms of the contract." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). The ADA does not expressly outline the right of the federal government to sue the state as an attachment to funding. The ADA only specifically outlines the rights of a "person" to sue. 42 U.S.C. § 12133. The federal government cannot both claim the rights and remedies of the Civil Rights Act and avoid its obligations for express terms.

The District Court claims that the federal government is entitled to sue the State of Franklin because it accepts federal funds, but the ADA does not expressly authorize a suit by the federal government. To read here what Congress has not written would require that the Court overturn decades of precedent outlining the contractual nature of Spending Clause enforcement. Appellees advocate for a world in which the federal government has unlimited right to sue states, without statutory provision of such right, if a penny of federal money is used to meet social needs.

2. The Motion to Intervene Must Still be Overruled Because the Federal government Failed to Follow Incorporated Administrative Procedure.

The other 'incorporated' mechanism of suit by the federal government against the state is outlined in the Civil Rights Act. Title IV of the Civil Rights act allows the federal government to pursue enforcement "by any other means authorized by law." 42 U.S.C. § 2000d-1. If the Court accepts that the ADA sufficiently

incorporates the enforcement provisions of the Rehabilitation Act and the Civil Rights Act, the ADA must also incorporate their broader administrative scheme. While the Civil Rights Act allows the federal government to sue states to enforce statues, it in full it stipulates,

> "[b]y any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has *determined that compliance cannot be secured by voluntary means."* 42 U.S.C.S. § 2000d-1 (emphasis added).

The Twelfth Circuit Court recognized "'any other means authorized by law' includes the ability to file an enforcement action in federal court." R. at 27 (citing *United States v. Cnty. Of Denver*, 927 F.Supp. 1396, 1400 (D. Colo. June 7, 1996). The federal government has not, in this case, fulfilled their procedural obligation to bring suit under this provision. Even if it accepts the Twelfth Circuit's ruling, the Court would be obligated to remand for further proceedings regarding the procedural failing of the government to seek voluntary resolution.

Neither the legislature nor Supreme Court has stipulated what is required make the determination that compliance cannot be secured by voluntary means. The Guidelines for the enforcement of Title VI, Civil Rights Act of 1964, provided by the DOJ, stipulated that,

> "Title VI requires that **a concerted effort** be made to persuade any noncomplying applicant or recipient voluntarily to comply with title VI. Efforts to secure voluntary compliance should be undertaken **at the outset in every noncompliance situation** and should be **pursued through each stage of enforcement action**." 28 C.F.R. § 50.3.

Appellees assume that the unlimited rights of the Civil Rights Act are incorporated into the ADA and imbue the federal government with the power to sue states for

non-compliance. If so, incorporation also requires the federal government to make a concerted effort to obtain voluntary compliance before suing. Even if the federal government here had a right to sue and found Franklin to be noncompliant with the ADA, incorporated procedures deny the federal government the right to sue without pursuing voluntary resolution.

Enforcement provisions of the ADA support the conclusion that if the federal government were to attempt enforcement through litigation, it must first seek voluntary resolution. *See* 28 C.F.R. §§ 35.173 and 35.174; *See also United States v. Arkansas*, 2011 U.S. Dist. LEXIS 7231 (E.D. Ark. June 24, 2011) (characterizing the ADA enforcement provisions as requiring a complaint to an agency, attempted informal resolution and a formal letter of noncompliance.) In *United States v. Arkansas*, the DOJ conceded that it was required to comply with the statutory prerequisites of 42 U.S.C. § 2000d-1 before filing an ADA violation suit against the state. 2011 U.S. Dist. LEXIS 7231 at *11. In this case the DOJ claimed to have complied with the statutory requirements by showing three communications between the DOJ and state officials regarding supposed violations. 2011 U.S. Dist. LEXIS 7231, at*13. The court found, however, no mention of specific violations or attempts at voluntary resolution in these communications. Further the court found that there was "no indication the Department of Justice had advised any person with responsibility . . . of the alleged failure to comply with the ADA. And determined that compliance cannot be secured by voluntary means." *Id.* at *19. The

court dismissed the claim because there was insufficient showing that the DOJ complied with the statutory prerequisites to bring the suit. *Id.* at *21.

In the present case, there has been even less of an attempt to satisfy the procedural requirements of 42 U.S.C. 2000d-1. The original complaint was filed in February of 2022. R. at 2. Shortly afterwards the DOJ announced an investigation of the State of Franklin Department of Social and Human Services. R. at 2. The record makes no further mention of attempted extra-judicial resolution. Rather, on May 27, 2022, the DOJ filed a motion to intervene on Plaintiff's behalf, ballooning the original case in size and cost. R. at 33. The Court may conclude that the ADA incorporated the right of the federal government to sue the state "by any other means". It should not, however, conclude Appellees have followed statutory prerequisites to maintain a claim. Thus, even if the Court agrees the federal government can maintain suit against state under Title II, this case must still be remanded to the lower courts to resolve the federal government's procedural failing.

CONCLUSION

This Court should REVERSE the Twelfth Circuit's holding on the basis that the integration is not genuinely ambiguous and deference should not be granted to the DOJ's guiding document. Additionally, the federal government lacks subject matter interest to intervene because no such right was expressly outlined in Title as required by the Court's plain statement rule and Spending Clause precedent. Finally, even should this Court find in Appellants favor, this case must be

REMANDED for the federal government's material procedural failure to seek voluntary resolution from the State of Franklin.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

APPENDIX

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

APPENDIX A

42 U.S.C. § 12131. Definition.

As used in this title:

(1) Public entity. The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act [49 USCS § 24102(4)].

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination.

Subject to the provisions of this title, 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. § 12133. Enforcement.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

42 U.S.C. § 12133. Regulations.

(a) In general. Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244 [42 USCS § 12143, 12149, or 12164].

(b) Relationship to other regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) Standards. Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act [42 USCS § 12204(a)].

APPENDIX B

29 U.S.C. § 794a. Remedies and attorney fees.

(a)

(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 501 of this Act [29 USCS § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) 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 504 of this Act [29 USCS § 794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX C

42 U.C.S. § 20000e-5. Enforcement provisions.

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection

shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title [42 USCS §§ 2000e et seq.] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)

(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title [42 USCS §§ 2000e et seq.], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a

government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such

district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)

(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(B) On a claim in which an individual proves a violation under section 703(m) [42 USCS § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42 USCS § 2000e-2(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of 29 USCS §§ 101 et seq. not applicable to civil actions for prevention of unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) Attorney's fee, liability of Commission and United States for costs. In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the

Commission and the United States shall be liable for costs the same as a private person.