No. 25-140

IN THE

Supreme Court of the United States

OCTOBER TERM 2025

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 RESPONDENTS

Team 3417
Attorneys for Respondents

QUESTIONS PRESENTED

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

II. 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES CIRCUIT COURT OF APPEALS CASES:

UNITED STATES DISTRICT COURT CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS:

FEDERAL REGULATIONS:

OTHER AUTHORITIES:

OPINIONS BELOW

The opinion and order of the United States District Court for the District of Franklin is unreported and appears in the record at pages 1-10, where the District Court GRANTED the United States' motion to intervene. The opinion and order on the parties' cross-motions for summary judgment is unreported and appears in the record at pages 11-21, where the District Court GRANTED the plaintiffs' motion and the United States' motion for summary judgment and DENIED the defendant's motion for summary judgment. The opinion of the United States Court of Appeals for the Twelfth Circuit is unreported and appears in the record at pages 22-38, where the Twelfth Circuit 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. § 12101(b)(2) and 42 U.S.C. § 12131-33.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The State of Franklin is geographically large, covering almost 99,000 square miles, but is sparsely populated with approximately 692,381 residents. R. at 15. Roughly 550,000 of Franklin's residents live more than two hours away from the State's only community mental health facility in Platinum Hills, which does not offer inpatient treatment. *Id.* Until 2011, Franklin operated three community mental health facilities in Mercury, Bronze, and Platinum Hills. R. at 16. All three facilities

received federal funding. R. at 12. After a twenty percent budget cut to the State Department of Health and Social Services in 2011, the facilities in Mercury and Bronze closed, and the inpatient program at the Platinum Hills facility was eliminated. *Id.* In 2021, the legislature increased the agency's budget by five percent, but the Bronze and Mercury facilities have not reopened. *Id.*

Community inpatient care resembles hospitalization but generally provides greater socialization. Patients may receive longer visits, participate in supervised outings, and enjoy more interactions and greater opportunities to bond with their fellow patients. R. at 14. Respondents, Sarah Kilborn, Eliza Torrisi, and Malik Williamson, each have mental health disorders requiring inpatient treatment at times, and they have been admitted numerous times or for excessive periods of time to inpatient care at state-operated hospitals. R. at 13-15.

Sarah Kilborn ("Kilborn"). Kilborn was diagnosed with bipolar disorder in 1997. R. at 12. After she attempted to harm herself during a severe depressive episode, her physician recommended inpatient treatment at a mental health facility. *Id.* She voluntarily admitted herself to Southern Franklin Regional Hospital in 2002 and remained there until 2004. *Id.* Kilborn was readmitted in 2011. R. at 13. In March 2013, her physician recommended her transfer to a community mental health facility for daily treatment, but the State offered no facility within three and a half hours of her home, and she could not afford the only private facility within reasonable distance of her home. *Id.* Kilborn therefore remained institutionalized until May of 2015 – more than two years after her physician recommended integration in a community

mental health facility. *Id.* She was again admitted in October of 2018 and, less than two years later, her physician again recommended release to a community facility. R. at 13–14. Because no state-operated community mental health facilities were reasonably accessible to her, she remained hospitalized until her release in January 2021. R. at 14.

Eliza Torrisi ("Torrisi"). Torrisi was diagnosed with bipolar disorder in 2016. R. at 14. Due to her often dangerous manic episodes, her parents admitted her to Newberry Memorial Hospital in 2019. *Id.* In 2020, her physicians recommended release to a community mental health facility for inpatient treatment. R. at 14–15. The only state-operated community facility, however, did not provide inpatient treatment, and no private facilities were available within four hours of her home. *Id.* Torrisi, therefore, remained institutionalized until May 2021. R. at 15. She was readmitted in August 2021 following another manic episode and released in January 2022. *Id.*

Malik Williamson ("Williamson"). Williamson received a diagnosis of schizophrenia disorder in 1972 and has undergone inpatient and outpatient care for decades. R. at 15. In 2017, his guardian admitted him to Franklin State University Hospital in Platinum Hills. *Id.* After two years, his physician recommended his transfer to a community mental health facility for inpatient care. *Id.* The state-operated facility in Platinum Hills, however, did not provide inpatient treatment, and the nearest private facility was more than two hours away. *Id.* Williamson's physician advised continued hospitalization to maintain a nearby support system. *Id.*

Williamson was discharged in June 2021 once his physician determined outpatient care was sufficient – two years after his physician recommended integration at a community mental health facility. R. at 16.

Respondents filed a complaint in February 2022 against the State of Franklin Department of Social and Health Services and its Secretary, Mackenzie Ortiz, alleging violations of Title II of the Americans with Disabilities Act ("ADA"). R. at 2. The United States Department of Justice ("DOJ") investigated and, in May 2022, moved to intervene, filing a complaint alleging similar violations and seeking broader relief. R. at 2–3. The District Court granted the motion to intervene. R. at 9.

II. NATURE OF PROCEEDINGS

This appeal arises from an order of the United States District Court for the Eastern District of Franklin granting the United States' motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). R. at 3. Plaintiffs, three private individuals, sued the State of Franklin alleging discrimination under Title II of the ADA. *Id.* Three months later, the United States moved to intervene, asserting a sovereign interest in enforcing implicated federal laws to protect all the citizens of the State of Franklin. *Id.*

The District Court granted the motion, finding that the United States' application was timely, the case was at an early stage, and the intervention caused no substantial prejudice to the original parties. R. at 4–5. The court emphasized that intervention would promote efficiency by consolidating overlapping claims and avoiding duplicative litigation. *Id.*

On appeal, the Twelfth Circuit affirmed. R. at 23–29. The majority found no clear error in the district court's grant of the motion to intervene and upheld their ruling. *Id.* It further held that the federal government has authority to enforce Title II of the ADA through Section 505 of the Rehabilitation Act's civil rights enforcement provisions, and that the three private plaintiffs had standing to pursue their claims. *Id.*

Chief Judge Hoffman of the Twelfth Circuit dissented. R. at 31–38. He first argued that the United States lacked statutory authority to enforce Title II because ADA litigation was limited to individuals under the ADA's "any person" language, and the federal government is not a "person" as defined by the dictionary. *Id.* Second, he contended that the United States' intervention in the case prejudiced defendants such that the United States should not have been allowed to intervene. R. at 33–34. Lastly, he asserted that individuals who have not yet been institutionalized lacked standing to sue under the ADA. *Id.*

This Court granted review to consider these arguments. R. at 39.

SUMMARY OF THE ARGUMENT

This Court should (1) affirm the holding of the Twelfth Circuit Court of Appeals, which held that the United States may intervene as of right under Federal Rule of Civil Procedure 24(a)(2) to enforce Title II of the ADA; (2) uphold the district court's grant of the United States' motion to intervene, as the intervention did not introduce cognizable prejudice to the original parties; and (3) affirm the Twelfth Circuit's

holding that Respondents, as persons at risk of unjustified institutionalization in the future, may prevail on a claim under Title II of the ADA.

I.

The United States Court of Appeals for the Twelfth Circuit correctly found that Congress deliberately incorporated Title VI of the Civil Rights Act's enforcement scheme into Title II. That incorporation preserved the Attorney General's longstanding authority to litigate on behalf of individuals with disabilities when voluntary compliance fails. Courts have consistently recognized that Title VI's "any other means authorized by law" language includes DOJ enforcement actions, and Congress expressly envisioned that this power would transfer to Title II via its adoption of the remedies available under Title VI. Limiting enforcement to private actions would contradict this statutory design, leave many public entities effectively beyond federal oversight, and undermine Congress's mandate that the federal government play a "central role" in ADA enforcement.

Judge Hoffman's dissent adopts an unduly narrow reading of § 12133, treating "any person" as excluding DOJ. Legislative history and decades of consistent DOJ enforcement reject this understanding. This narrow interpretation would eliminate every federal enforcement tool under Title II, including funding termination, and leave private suits as the sole mechanism for compliance. The Eleventh Circuit in *United States v. Florida* rightly rejected that view, holding that the "person" at issue is the individual with a disability, and DOJ litigation is one of the remedies available to that individual. *United States v. Florida,* 938 F.3d 1221, 1248 (11th Cir. 2019).

This Court should affirm the district court's decision allowing the United States to intervene as of right under Rule 24(a)(2). Excluding the government would impair its ability to vindicate its legally protected interest in enforcing Title II of the ADA, an interest the original parties cannot adequately represent. Contrary to the dissent's emphasis on alleged prejudice, courts have consistently held that added costs, delay, or diminished settlement prospects do not constitute cognizable prejudice under Rule 24 where the motion is deemed timely. Because district courts are best positioned to assess timeliness in light of the proceedings before them, intervention was properly granted.

II.

The Twelfth Circuit properly affirmed the District Court's finding that the Respondents may bring a claim for unjustified institutionalization under Title II of the ADA since they suffer mental disabilities that create a serious risk of future institutionalization. This Court's statutory interpretation of the ADA should conclude that the meaning, based on its text and purpose, extends to individuals posing a serious risk of future institutionalization. Further, the Integration Mandate requires public entities to integrate individuals suffering from disabilities in the most appropriate setting, which the State of Franklin is failing to do. Last, the Court should consider the DOJ's Guidance Document to support its conclusion that the ADA extends to those who are not currently institutionalized.

ARGUMENT

Standard of review. This case presents questions of statutory interpretation and intervention under Federal Rule of Civil Procedure 24(a)(2). Questions of law, including whether individuals at risk of institutionalization may sue under Title II of the ADA, are reviewed de novo. *See United States v. Mississippi*, 82 F.4th 387, 391 (5th Cir. 2023). Factual findings are reviewed for clear error. *See NAACP v. New York*, 413 U.S. 345, 366 (1973). Although this Court has not ruled on the standard of review for a district court's grant of a motion to intervene under Rule 24(a)(2), the First, Second, Third, and Fourth Circuits apply abuse of discretion. *See Int'l Paper Co. v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir. 1989); *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992); *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). That standard is appropriate because decisions to grant or deny such motions are rooted in fact-based assessments best determined by the district court.

I. TITLE II OF THE ADA PROVIDES FOR DOJ ENFORCEMENT THROUGH ITS INCORPORATION OF THE TITLE VI ENFORCEMENT MECHANISM, ESTABLISHING A LEGALLY PROTECTED INTEREST THAT CANNOT BE DEFEATED BY CLAIMS OF PREJUDICE

This Court should affirm the ruling of the Appeals Court that the United States has a legally protectable interest sufficient to intervene as of right under Rule 24(a)(2). Congress embedded the established regulatory scheme of Title VI of the Civil Rights Act into Title II of the ADA. In doing so, it intentionally vested the Government with the authority to litigate on behalf of disabled Americans.

A. Congress Intentionally Anchored Title II's Enforcement Authority in Title VI of the Civil Rights Act.

The Court should recognize that Title II derives its enforcement authority through a deliberate statutory incorporation chain that reflects Congress's consistent approach to civil rights enforcement. Section 12133 of the ADA adopts the "remedies, procedures, and rights" of Section 505 of the Rehabilitation Act, which in turn incorporates Title VI's enforcement framework. 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 2000d-1.

This three-tier incorporation reflects Congress's practice of modeling disability rights legislation on the proven framework of the Civil Rights Act of 1964. When Congress enacted the Rehabilitation Act of 1973, it deliberately drew from Title VI's enforcement structure, incorporating those provisions wholesale into Section 505. *Id.* Congress repeated this approach when it enacted the ADA in 1990, which again tied disability rights enforcement to Title VI's established remedial framework. *Id.*

Title VI was designed to ensure that federal funds would not subsidize discrimination based on race, color, or national origin. 42 U.S.C. § 2000d. Its enforcement provision, 42 U.S.C. § 2000d-1, provides agencies with two avenues when voluntary compliance fails: (1) terminating federal funding or (2) enforcing compliance "by any other means authorized by law." 42 U.S.C. § 2000d-1. Since Title VI's enactment, federal courts have consistently interpreted the phrase "by any other means authorized by law" as authorizing agencies to effect compliance through various means not explicitly outlined in the act, including referral to DOJ for litigation.

In *National Black Police Ass'n v. Velde*, the D.C. Circuit explained "[t]he choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination," and that this flexibility expressly includes referral to DOJ for judicial enforcement. 712 F.2d 569, 575 (D.C. Cir. 1983). The Fourth Circuit reached the same conclusion in *United States v. Marion County School District*, where the DOJ sought to combat racial discrimination in a South Carolina school district under Title VI. 625 F.2d 607, 612 (4th Cir. 1980). The Circuit Court held that Title VI's enforcement scheme ensures DOJ litigation is available when agency efforts at voluntary compliance fail. *Id.* The court noted that Title XI of the Civil Rights Act includes the wording "[n]othing in this act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing laws to institute or intervene in any action or proceeding". *Id.*; *see also* 42 U.S.C. § 2000h-3. The court held that this provision demonstrates Congress's "stated intent to preserve other means of action which were not expressly set out in the Act," and legislative history confirms that "it was Congress' specific understanding that the 'any other means authorized by law' language in Title VI . . . included government suits to enforce contractual assurances of compliance with Title VI." *Id.* at 612.

Both the D.C. and Fifth Circuit found that "any other means authorized by law" provides the Government with significant flexibility when deciding how to best effect compliance with the Civil Rights Act. This flexibility serves an important public policy purpose. Terminating funding is seen by the federal government as the

"ultimate sanction," a nuclear option which in many cases may not be available or productive for the government to employ. 28 C.F.R. § 50.3. As in the instant action, federal agencies may not want to dismantle public entities through draconian funding cuts. Often, as in *Marion,* funding cuts may lead to more harm than good, pinching services which the federal government merely intended to bring in line with statutory standards. The DOJ's guidelines reflect this dilemma and urge agencies to seek alternate means of achieving compliance "so that needed Federal assistance may commence or continue." 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.*

B. The Attorney General Has Authority To Enforce Title II Compliance Through Litigation, As Title VI Provisions Carry Forward To Title II.

This Court should affirm the Twelfth Circuit's holding that Title VI's remedial provisions are incorporated into Title II, including the right to enforce Title II through litigation. In applying *Marion* and *Velde* to the context of the ADA, other courts have also confirmed that the enforcement schemes of the Rehabilitation Act and Title VI provide the federal government with a statutory interest in litigating ADA claims. *See Smith v. City of Philadelphia,* 345 F. Supp. 2d 482, 484–85 (E.D. Pa. 2004); *United States v. City & County of Denver*, 927 F. Supp. 1396, 1400 (D. Colo. 1996); *United States v. Florida,* 938 F.3d 1221, 1248 (11th Cir. 2019)). This means that the remedial options of cutting federal funding or "any other means authorized by law" are the remedies available to the government under Title II of the ADA.

In *U.S. v. City & County of Denver*, the County of Denver argued the Attorney General lacked authority to bring an enforcement action under Title II while a related private litigation was pending. 927 F. Supp. at 1400. The court correctly rejected that argument, holding that by incorporating Title VI's remedial framework into Title II, Congress carried forward the government's authority to secure compliance "by any other means authorized by law". *Id.* Consistent with that authority, the Attorney General has an independent right to initiate litigation under Title II, even when a private right of action is pending. *Id.* In *United States v. Florida*, the United States sought to enjoin Florida from unnecessarily institutionalizing children with complex medical needs rather than providing community-based care. 938 F.3d 1225 (11th Cir. 2019). The Eleventh Circuit held that the Attorney General may enforce Title II in court because Congress intentionally created the remedial chain linking § 12133 to the remedies available under Title VI. *Id* at 1242-43.

Reading those statutory cross-references as a single remedial package, the court explained that Congress knew Title VI permits referral to the DOJ for litigation. It then chose to import that scheme into Title II and directed the Attorney General to issue consistent implementing regulations under § 12134. *Id.* The court held that "Congress should be taken at their word" *Id.*; *see also Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there". *Id.* The Eleventh Circuit further noted that Title II of the ADA, 42 U.S.C. § 12131, prohibits public entities, including state and local governments,

from discriminating based on disability, *regardless* of whether they receive federal funds. *U.S. v. Florida*, 938 F.3d at 1242. Because the government may either terminate funding or proceed "by any other means authorized by law", stripping the DOJ of litigation authority under Title II would, in cases involving unfunded public entities, leave the government with no remedy at all. *Id.*

In drafting the ADA, Congress also showed its intent for the new bill to allow the DOJ to litigate. The House Committee on Education and Labor set forth their vision as follows:

> The Committee envisions that… [f]ederal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a federal agency is unable to resolve a complaint by voluntary means, . . . the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

S.Rep. No. 101-116, at 57 (1989). The report continues "Because . . . fund termination procedures . . . are inapplicable to State and local government entities that do not receive Federal funds, the major enforcement sanction for the Federal government [for ADA violations] will be referral of cases by Federal agencies to the Department of Justice". *Id.* In other words, if voluntary compliance fails or is unavailable, Congress envisioned judicial enforcement by the Attorney General.

Breaking with congressional intent and the precedent set by the Eleventh Circuit in *United States v. Florida* would hamstring Title II of the ADA. Congress enacted the ADA to establish "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and to "ensure

that the Federal Government plays a central role in enforcing [those] standards." 42 U.S.C. § 12101(b)(1)-(2). It was an Act which built on the success of earlier civil rights bills, and its cross-reference of the Rehabilitation Act and the Civil Rights Act are clear evidence of this preventive intent.

As many public entities covered by Title II do not receive federal funding, the funding-termination remedy provided under Title VI is often unavailable to the Government. If this Court were to remove the Attorney General's authority to litigate in such circumstances, Title II's mandate would be stifled, leaving public entities free to disregard their obligations with impunity. The only remaining remedy to enforce Title II would be via a private right of action, which courts in the Fifth and D.C. Circuits have already established are not substitutes for federal action; see Velde, 712 F.2d at 575; see also *Marion County School District*, 625 F.2d at 612.

Congress's consistent incorporation of Title VI's enforcement scheme across other civil rights statutes confirms that it did not intend to leave Title II uniquely without a federal enforcement mechanism. Section 1557 of the Affordable Care Act ("ACA"), for example, incorporates these provisions wholesale, and both courts and agencies have recognized that federal enforcement authority travels with the statutes when they were incorporated into their new regulatory structure under the ACA. *See C.P. v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791, 794–95 (W.D. Wash. 2021)

Moreover, the dangers of leaving the United States without flexibility in its pursuit of Title II compliance are illustrated in both this action and in *United States v. Florida*, in which the plaintiffs were among the most vulnerable members of society.

In both cases, cutting funding to municipal and state agencies which serve vulnerable populations could result in widespread and completely avoidable collateral damage. The federal government does not wish to disrupt the valuable services which the Franklin Department of Health and Social Services provides. It wishes to ensure these services comply with federal statute. Where cutting funding would be a hammer in this case, litigation can be seen as a scalpel, allowing for compliance with minimal effect on Franklin's crucial public health operations. The Government seeks only to exercise the flexibility it has been granted both by Congress and by caselaw such as *Marion* and *Velde.*

Even if the Attorney General's authority under Title II were limited solely to enforcing contract principles through the Spending Clause, a premise we do not concede and which this Court should reject, the present case would still fall squarely within that authority. The state-run hospitals and facilities operated by Petitioners are direct recipients of federal funding. Because § 12133 of the ADA incorporates the Rehabilitation Act, which in turn incorporates Title VI, the Attorney General's power to enforce nondiscrimination obligations attaches to those federally funded programs under contract principles. Thus, even under the narrowest view of enforcement authority, the United States retains the right to bring this action.

C. The United States May Intervene Because the Reference To "Any Person" in Section 12133 Encompasses DOJ Enforcement on Behalf of Disabled Individuals, Consistent with Title VI's Established Framework.

The Attorney General may intervene in ADA Title II cases because § 12133 references "any person alleging discrimination," authorizing DOJ enforcement on

behalf of such persons and is properly understood to not exclude federal authority. 42 U.S.C § 12133. The statute reads the "remedies, procedures, and rights set forth in [the Rehabilitation Act, and ultimately the Civil Rights Act] shall be the remedies, procedures, and rights this subchapter provides to any *person* alleging discrimination on the basis of disability in violation of section 12132 of this title." *Id.* (emphasis added).

Petitioners and dissenting judges in the court below take the position that "person" cannot include the government. *See Haymarket DuPage, LLC v. Vill. of Itasca*, No. 22-cv-160, 2025 U.S. Dist. LEXIS 60493 (N.D. Ill. Mar. 31, 2025); *United States v. Sec'y, Fla. Agency for Health Care Admin.*, 21 F.4th 730, 747–48 (11th Cir. 2021) (Newsom, J., dissenting); R. at 31, (Hoffman, C.J., dissenting). They invoke the Dictionary Act, contending that the plain meaning of the word "person" as an individual narrows the enforcement provisions of Title II to exclude government interest in enforcing Title II. *Id.*

Adopting the dissent's narrow view of "person" would gut Title II. Section 12133 is the statute's only enforcement provision. If "any person" means only private plaintiffs, the federal government loses every remedy Congress carried forward from the Rehabilitation Act and Title VI. The government would be unable to terminate funding, unable to litigate, and unable to pursue any remedy whatsoever. That would leave only private suits to enforce a statute Congress expressly designed to ensure that "the Federal Government plays a central role in enforcing."42 U.S.C. § 12101(b)(3).

Instead of dismantling the Government's ability to enforce Title II, the ambiguity created by the word "person" can best be resolved by examining judicial precedent and legislative intent. The Eleventh Circuit panel in U.S. v. *Florida* recognized that when the Attorney General brings suit, the "person alleging discrimination" in § 12133 is the individual with a disability, whose remedies include enforcement by the Attorney General. 938 F.3d at 1244-45. The same reasoning applies to the instant action – the United States is not intervening on its own behalf, but as part of the remedial structure Congress designed to secure the rights of disabled individuals. Congress intentionally legislated the ADA in light of the existing remedial structures of the Rehabilitation Act and the Civil Rights Act. Analyzed independently and as a cohesive enforcement framework, these acts are clearly intended to provide the government with the means of enforcing compliance under Title II. *See* 42 U.S.C. § 2000d-1 ("by any other means authorized by law"); *National Black Police Ass'n v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983); *United States v. Marion County School District*, 625 F.2d 607, 612 (4th Cir. 1980); 29 U.S.C. § 794a(a)(2) (incorporating Title VI enforcement provisions); *United States v. City & County of Denver*, 927 F. Supp. 1396, 1400 (D. Colo. 1996) (recognizing DOJ authority under incorporated framework).

Legislative history confirms the interpretation that the House Committee Report explicitly stated that "the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice." S.Rep. No. 101-116, at 57 (1989). Congress could not have simultaneously

intended DOJ enforcement to be the "major" federal sanction while using "person" language to exclude DOJ entirely.

The incorporation of Section 505 and Title VI resolves the ambiguity introduced by the word "person". When Congress incorporates Title VI's enforcement framework, it incorporates the entire framework, including DOJ's established role. DOJ has enforced Title II for more than thirty years with Congressional knowledge. Congress has amended the ADA multiple times without changing Section 12133, constituting legislative acquiescence to the notion that "person" does not exclude the government from compliance actions under Title II.

The "person" language describes who can benefit from the remedies, not who can provide them. Congress expressly mentioned the Attorney General in Titles I and III because those Titles regulate private actors – employers and public accommodations – where no preexisting federal enforcement mechanism existed. By contrast, Title II regulates public entities, and Congress deliberately tied its enforcement to Title VI where DOJ's enforcement role was long established. Silence in this context reflects reliance on the existing structure, not the exclusion of the federal government.

In light of legislative intent and decades of DOJ enforcement, this Court should find that Congress intended the "person" in § 12133 to be the individual with a disability, and one of the remedies available to that individual is enforcement by the Attorney General on their behalf. More evidence beyond the word "person" should be

required to disrupt the well-established regulatory chain which Congress established over the course of more than half a century.

D. The District Court Properly Granted the United States' Motion to Intervene, and This Court Should Affirm the District Court's Ruling Because Judge Hoffman Misapprehends Legally Cognizable Prejudice Under 24(a)(2)

Given that the United States may bring suit to enforce Title II of the ADA, it necessarily possesses an interest in this litigation. Judge Hoffman of the Twelfth Circuit nonetheless argues in his dissent that this interest should be outweighed by the alleged prejudice brought by the United States' intervention, which reasoning is mistaken. The Twelfth Circuit's majority properly affirmed the District Court's grant of intervention because the court applied the correct legal standard, and its decision was not clearly erroneous. *See Brody v. Spang,* 957 F.2d 1108, 1115 (3d Cir. 1992) (requiring abuse of discretion review for a denial of a motion to intervene). Because Judge Hoffman specifically challenged the District Court's discretion in assessing prejudice, his arguments warrant a direct response.

Under Federal Rule of Civil Procedure 24(a)(2), a movant must be permitted to intervene if: (1) its motion is timely; (2) it has an interest relating to the subject matter of the action; (3) disposition may impair its ability to protect that interest; and (4) existing parties do not adequately represent it. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Courts evaluate the timeliness of a motion by considering: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances."

Grochocinski v. Mayer Brown Roe & Maw, LLP, 719 F.3d 785, 797-98 (7th Cir. 2013). Because Judge Hoffmann's argument rests entirely on alleged prejudice to the original parties, only the second factor of the timeliness test is implicated. He identifies three supposed prejudicial effects of the United States' participation – delay, costs, and reduced settlement opportunities, none of which is legally sufficient to bar intervention.

E. Courts Do Not Treat Routine Delay Caused by the Addition of New Parties as Prejudice, Particularly Where Parties Move to Intervene Promptly After Recognizing Their Interest In The Ongoing Litigation

While Judge Hoffman correctly notes that intervention-based delays can, in some circumstances, prejudice the original parties to a case, his application of that principle mirrors the mistaken approach taken by the district court in *Smith v. L.A. Unified School District*, 830 F.3d 843 (9th Cir. 2016). In *Smith*, a group of parents sought to intervene nine months after litigation had commenced and after a remedial plan had already been negotiated. *Id.* At 858. The district court denied intervention, reasoning that it would "prolong the litigation" and upset the "delicate balance" the parties had achieved. *Id.* The Ninth Circuit reversed, clarifying that prejudice tied to timeliness is limited to harms caused by an intervenor's failure to act once it became aware that its interests were unprotected—not by the mere fact that participation might prolong resolution. *Id.* Because the parents lacked notice of their interest and moved promptly once they became aware, the court held that the routine delays caused by their inclusion did not constitute prejudice. *Id.*

That reasoning contrasts sharply with *Illinois v. City of Chicago*, where the Seventh Circuit affirmed denial of intervention because the proposed intervenors learned of their interest in the litigation and nonetheless waited nine months to file an intervention request. 912 F.3d 979, 987 (7th Cir. 2019). The court emphasized that they should have acted promptly after discovering their interest, thereby allowing discovery and other proceedings to move forward concurrently. *Id.* But because they offered no reasonable explanation for the nine month delay, the court found their inaction created inefficiencies that would have unfairly prejudiced the existing parties. *Id.*

These two cases highlight that the key factor in assessing prejudice under the timeliness inquiry is not whether existing parties become inconvenienced by the ordinary delays that result from adding new parties, but whether existing parties become harmed by the proposed intervenor's *delay* in seeking intervention. *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970). The Ninth Circuit highlighted this crucial distinction in *W. Watersheds Project v. Haaland*, in which the Court reversed a district court's denial of a motion to intervene on the sole basis that the intervention would result in additional briefings and arguments, thereby prejudicing the plaintiffs. 22 F.4th 828, 838-39 (9th Cir. 2022). Because the appellants intervened soon after learning their interests were not adequately protected by the original parties, the Court found their intervention to be timely, despite the inevitable delays inherent to the addition of new parties. *Id.*

Here, Judge Hoffman points to a 26-month litigation extension and added depositions caused by the United States' intervention as "clear prejudice." R. at 33. But as the court in *Smith* highlighted, prejudice must stem from an intervenor's delay after it became aware that its interests were not represented, and routine delay caused by the addition of new parties simply is not enough. The original Plaintiffs filed their complaint in February 2022. R. at 2. Shortly thereafter, the DOJ's Civil Rights Division announced an investigation to determine the State of Franklin's compliance with Title II of the ADA. *Id.* That investigation concluded in May 2022, and within the same month, the DOJ moved to intervene once it established its interest in the litigation's outcome. At that point, the case was still in its infancy. The District Court did not find the schedule modification to be prejudicial, and as the Twelfth Circuit correctly highlighted, district courts are consistently recognized as best positioned to assess schedule modifications, since they deal with case management and scheduling on a daily basis. R. at 4. Hoffman's reliance on the extension of overall case length caused by intervention conflates ordinary litigation delays with delay-based prejudice. R. at 33. Because the DOJ acted promptly after learning that they possessed an interest in the outcome of the ongoing litigation, there is no delay-based prejudice that could defeat intervention.

F. Ordinary Litigation Costs are the Inevitable Incidents of Intervention and Cannot Override a Party's Ability to Protect a Legally Cognizable Interest, Particularly When The Party Moved to Intervene in a Timely Fashion

Judge Hoffman's assertion that costs from increased litigation should constitute prejudice is baseless and inconsistent with precedent. As the Fifth Circuit

explained in *Stallworth v. Monsanto Co.*, prejudice relevant to Rule 24(a) turns only on harms caused by a would-be intervenor's delay after learning of their interest in the litigation, not on ordinary burdens caused by the inclusion of additional parties to a case. 558 F.2d 257 (5th Cir. 1977); s*ee also Smith,* 830 F.3d 843 at 858 (rejecting increased expenditure as prejudicial where appellants promptly moved to intervene once their interest became apparent). Treating routine costs as cognizable prejudice would effectively "rewrite Rule 24 by creating an additional prerequisite to intervention as of right." *Id.* at 265.

The Fifth Circuit explored this distinction in *Rotstain v. Mendez,* where the court affirmed the district court's denial of intervention eighteen months after appellants became aware that their interests were not adequately protected by existing parties. 986 F.3d 931, 938-39 (5th Cir. 2021). Because of that unjustified delay, intervention would have forced a second round of discovery, risked duplicative litigation, created inefficiencies, and significantly increased litigation costs. *Id.* The court emphasized that under those circumstances, the additional costs constituted prejudice. The court also stressed, that had prospective intervenors moved when they first learned of their interest, then any extra costs tethered to additional discovery and litigation would have been proper, since the parties could have coordinated a single discovery plan and avoided duplicative litigation. *Id.* This distinction reflects the principle recognized by this Court, in *American Pipe & Construction Co. v. Utah,* that one of the principal functions of representative litigation is "to avoid, rather than

encourage, unnecessary filing of repetitious papers and motions," thereby avoiding increased costs tied to inefficiency. 414 U.S. 538, 550 (1974).

Here, the United States intervened at the outset, enabling joint discovery and preventing duplicative litigation. Judge Hoffman emphasized the thirty-one depositions, forty-eight subpoenas, and $273,000 in additional expenses after the DOJ intervened as prejudice. R. at 33. But under *Rotstain,* those are ordinary byproducts of intervention – not costs arising from delay-based prejudice. The DOJ moved to intervene early, at a stage when a court schedule had just been approved and discovery had barely begun. R. at 4. While petitioners ultimately incurred greater costs due to the United States's intervention, the costs did not result from duplicative or second-round proceedings caused by delayed intervention. R. at 33. Rather, any additional expenses reflected the normal incidents of federal participation in litigation affecting national interests. As the district court recognized, consolidating the DOJ's intervention likely saved resources in the long run by preventing parallel proceedings and the potential for future litigation brought by private plaintiffs. R. at 4. Rule 24(a)(2) simply does not allow excluding a party with a legally protected interest because its participation increases litigation costs.

G. Courts Consistently Reject Claims That Intervention Prejudices Settlement Prospects, and Because the Parties in This Case Were Nowhere Near Settlement Negotiations, Judge Hoffman's Argument Cannot Stand

While courts certainly acknowledge that intervention may affect the parties' settlement prospects, they have consistently held that such influence only becomes prejudicial once a settlement has actually been reached. *See County of Orange v. Air*

California, 799 F.2d 535, 538 (9th Cir. 1986) (denying a motion for intervention where the case settled after five years of litigation, publicized negotiations, and clear notice to applicant of a possible affect on its interests). Notably, courts have even permitted post-settlement intervention in cases where the would-be intervenors could not reasonably have known of their interests. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9th Cir. 1995). While there do exist some cases in which courts denied intervention at pretrial stages out of concern for ongoing settlement negotiations, such instances are rare and usually involve cases in which extensive discovery had already transpired. *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999) (denying intervention because "a lot of water [had] passed under [the] litigation bridge"). There, the parties had already engaged in more than nine months of discovery, and the prospective intervenors had ample opportunity to act earlier. *Id.* at 1051. Thus, courts rarely regard threats to settlement as prejudicial unless the parties have already reached a settlement or consent decree. As the Ninth Circuit made clear in *Western Watersheds*, the risk that "additional arguments might make resolution more difficult" is "a poor reason to deny intervention" and does not amount to prejudice. 22 F.4th 828 at 839. The court's reasoning applies with even greater force here, where Congress expressly assigned the United States a central role in enforcing federal ADA statutes, and broad systemic remedies may extend well beyond the confines of individual settlements.

Judge Hoffman's reliance on delay, increased expenses, and diminished settlement posture misapprehends the meaning of prejudice under Rule 24. Courts

have consistently held that the *only* relevant "prejudice" is "that which flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented." *Smith*, 830 F.3d 843 at 858. *Stated* differently, "prejudice" does not arise merely "from the fact that including another party in the case might make resolution more difficult." *Id.* This is the bedrock principle that defines prejudice under Rule 24(a)(2), and courts consistently reject claims regarding routine litigation concerns where a party intervened promptly once their interests became apparent. Because the United States did so here, there is simply no reasonable basis to argue that their intervention prejudiced the original parties in any way that could override its ability to safeguard its legally protected interest. While it is true that the private plaintiffs' settlements interests originally differed from those of the United States, they never objected to federal intervention. R. at 4. More importantly, petitioners themselves never claimed they would suffer prejudice from the United States' participation. *Id.* Accordingly, Judge Hoffman's contention that prejudice should outweigh the United States' right to intervene is incorrect. This Court should affirm both the United States' legally protected interest and its ability to safeguard that interest through intervention as of right under Rule 24(a)(2).

II. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT THE RESPONDENTS, WHO ARE AT RISK OF INSTITUTIONALIZATION, CAN BRING A CLAIM FOR DISCRIMINATION UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

This Court should affirm the District Court's finding that the Respondents are protected individuals under Title II of the ADA because they are at high risk of

readmission to a hospital for their mental disabilities. R. at 23. The ADA prohibits "subject[ing]" individuals with a qualified disability to discrimination by any public entity through excluding individuals from services, programs, activities, or the benefits thereof. *See* 42 U.S. Code § 12132. A qualified individual with a disability is defined in Title II of the ADA as a person meeting the minimum eligibility standard to receive services from a public entity. *See* 42 U.S. Code § 12131. A person with a physical or mental impairment that substantially impairs a major life activity is classified as a person with a disability under the ADA. Equal Employment Opportunity Commission. *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*. 1992.

With the court's exercise of independent judgment under *Loper Bright*, it should conclude that the language of the ADA prohibiting public entities from "subject[ing]" individuals with disabilities to discrimination includes persons at risk of unjustified institutionalization and, therefore, discrimination. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Under the Integration Mandate's decree to protect qualified individuals with a disability, the State of Franklin is required to "administer" services in the most integrated setting appropriate to the needs of the Respondents. Accordingly, it is failing to follow this directive by not offering a community mental health facility to the Respondents. 28 CFR § 35.130(d) (hereinafter, "Integration Mandate"). The DOJ Guidance Document, extending the ADA and *Olmstead* case to individuals at serious risk of institutionalization, warrants respect because the Integration Mandate and 28 C.F.R. § 35.130(a) are

ambiguous regulations that require the court to consider the regulating agency's interpretations. *See Olmstead v. L.C.*, 527 U.S. 581 (1999). The DOJ's Guidance Document also warrants *Skidmore* persuasiveness because of its thorough considerations and reasoning for its interpretations.

A. The Court Should Affirm the District Court's finding, After Exercising its Independent Judgment as Required by Loper Bright, that the ADA's Prohibition of "Subject[ing]" Individuals with a Qualified Disability to Discrimination Includes Persons at Risk of Institutionalization as Evident by its Plain, Everyday Meaning.

Exercising the independent judgment required by *Loper Bright*, this Court should hold that "subject to" includes individuals at risk of discrimination, not only those already institutionalized. The ADA prohibits "subject[ing]" individuals with a qualified disability to discrimination by any public entity through its exclusion of individuals from services, programs, activities, or the benefits thereof. *See* 42 U.S. Code § 12132. As a statute, 42 U.S. Code § 12132 is subject to *Loper Bright*, which requires, under the Administrative Procedure Act, a court to exercise its independent judgment to interpret an ambiguity in a statute by using the traditional tools of interpretation, including the analysis of the text, structure, history, and purpose of the statute. See *Loper Bright*, 603 U.S. at 369; see also *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984); see also *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). Courts may, however, consider the interpretation by the agency which implemented the statute in making its own independent interpretation. *Loper Bright*, 603 U.S. at 394.

In interpreting a statutory term, a court must first begin with the term's plain meaning. *Loper Bright*, at 369, 394; see also *Kisor*, 558 U.S. at 575. It then applies the traditional tools of interpretation of construction by examining the text, structure, history, and purpose of the statute, while also considering agency interpretations where appropriate. *Id.* The American Heritage Dictionary defined the term "subject to" as "prone; disposed" and provides an example of "a child who is subject to colds." American Heritage Dictionary 1788 (3d ed. 1992) (def. 2). Webster's New International Dictionary defined the term as "affected by or possibly affected by (something)" or "likely to do, have or suffer from (something). Webster's New International Dictionary, 2509 (2d ed. 1950) (def. 3), "subject to," Merriam-Webster.com, 2025, https://www.merriam-webster.com/dictionary/subject%20to [1, 2], emphasis added (hereinafter, "Webster: 'subject to'"); see also *Auer v. Robbins*, 519 U.S. 452, 453, 459 (1997) (applying the term "subject to" where there exists a significant likelihood of something rather than a theoretical possibility). The purpose of Title II of the ADA is to "ensure equal opportunity for people with disabilities." ADA, Guide to Disability Rights Laws (2020), retrieved from https://www.ada.gov/resources/disability-rights-guide/.

The text, structure, history, and purpose of the ADA support a conclusion that the statute is intended to extend to persons at risk of discrimination and therefore unjustifiable institutionalization. Like in the American Heritage Dictionary's and Webster's New International Dictionary's definition, the plain language of the term extends to those "prone" and "likely to suffer from" something. If individuals with

disabilities are "subject to" discrimination then, under its plain meaning, they are "likely to suffer from" discrimination. The District Court found that the three Respondents are likely to face another admission to the hospital and suffer from unjustified institutionalization again. R. at 23. Congress enacted the ADA for the purpose of establishing clear and consistent standards to prohibit discrimination and ensure the federal government's enforcement of such standards. 42 U.S.C. § 12101(b)(2). At the time of its enactment, the ADA was an ambitious civil rights statute modeled on the Rehabilitation Act of 1973 and the Civil Rights Act of 1964. See D.C. Attorney General, *Celebrating 30 Years of the Americans with Disabilities Act* (July 26, 2020), https://oag.dc.gov/blog/celebrating-30-years-americans-disabilities-act. Therefore, the court's use of traditional tools of interpretation should warrant the conclusion that the term 'subject to' encompasses the Respondents because the purpose and text of the ADA support the conclusion that individuals "likely to suffer" and "prone" to institutionalization are protected.

B. The State of Franklin's Failure to "Administer" Services in the Most Integrated Setting Appropriate to the Needs of the Respondents and its "Subject[ing]" Respondents to Discrimination are Violations of Federal Regulations, Because Respondents are Qualified Individuals Protected by the Integration Mandate and 28 C.F.R. § 35.130(a).

The Court should recognize that the terms "administer" and "subject to" in the Integration Mandate and 28 C.F.R. § 35.130(a), respectively, are ambiguous and the court should, therefore, affirm the District Court's decision to grant the DOJ Guidance Document respect. The DOJ's guidance document notes that the ADA and *Olmstead* case "extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated

settings." United States Department of Justice, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, https://archive.ada.gov/olmstead/q&a_olmstead.htm. When a regulation has more than one reasonable interpretation, a court must first look to its text, structure, history, and purpose "with a view to the place in the overall [regulatory] scheme." *United States v. Boler*, 115 F.4th 316, 325 (4th Cir. 2024), quoting *Lynch v. Jackson*, 853 F.3d 116, 121 (4th Cir. 2017). If an ambiguity still exists, the Court should determine whether its regulating agency's interpretation is entitled to respect based upon its "character and context." *Kisor*, 588 U.S. at 559. Last, the agency's interpretation must fall "within the bounds of reasonable interpretation." *Kisor*, 588 U.S. at 559, 576.

i. The Court Should Adopt the Plain Meaning of the Term "Administer," as Used in the Integration Mandate, to Conclude that Individuals at Risk of Institutionalization are Protected by the Integration Mandate or Should Find the Term Ambiguous, Warranting *Auer* Persuasiveness Under *Kisor*.

The Court must first evaluate the text, structure, history, and purpose of the regulations to determine the extent of the term "administer" and "subject to" in the Integration Mandate and 28 C.F.R. § 35.130(a), respectively. *Kisor*, 588 U.S. at 559. The Integration Mandate requires public entities to "administer" services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Integration Mandate. When a state's treating professionals deem appropriate a community mental health facility or other means of integrating an individual with a disability into the community, the State is required to provide

treatment in a setting that poses the least restrictions on his or her personal liberties. *Olmstead*, 527 U.S. at 559, 592, quoting 89 Stat. 502, 42 U.S.C. § 6010(2) (1976 ed.). The State is only able to avoid providing integrative services when a "fundamental alteration" would occur after considering its resources available and the needs of other individuals with disabilities. C.F.R. § 35.130(b)(7)(i) ("Reasonable Modifications Regulation"); see also *Olmstead*, 527 U.S. at 592. *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 267 (E.D.N.Y 2009) (noting that the burden of proof rests with the defendant, likely the State, to establish a fundamental alteration). A fundamental alteration exists when it changes the basic nature of the service, program, or activity. For example, in *PGA Tour, Inc. v. Martin*, this Court held that permitting a golf cart during a tournament for a disabled person was not a fundamental alteration, but another court held that allowing a disabled person at a track meet to qualify with a lower minimum time would be a fundamental alteration of the nature of competition. Ensuring Equal Access to Public Services, Programs, and Activities, LRID MA-CLE 7-1, § 7.5.3; see *PGA Tour, Inc. V. Martin*, 532 U.S. 661 (2001); see A.*H. by Holzmueller v. Illinois High School Ass'n*, 881 F.3d 587 (7th Cir. 2018).

The Integration Mandate's text and purpose demonstrate the DOJ's intent for the term "administer" to encompass persons at risk of unjustified institutionalization. First, the text of the regulation does not state that the individual must be currently institutionalized for the Integration Mandate to apply. It notes that a public entity shall administer services to all qualified individuals with disabilities. Integration

Mandate. The purpose of the regulation is based on two findings: (1) that unjustified institutionalization creates an assumption that the persons are "incapable or unworthy of participating in community life" by segregating them when they otherwise can "handle and benefit from community settings," and (2) that institutionalization unjustifiably diminishes the quality of the everyday aspects of the person's life by forcing them to sacrifice a community experience to receive their necessary medical treatment. *Olmstead*, 527 U.S. at 583. Although the Petitioners argue that being forced to place the Respondents in community mental health facilities would fundamentally alter their operations, the Petitioners failed to meet their burden of proof by providing no evidence of such alterations. R. at 18. In fact, the State of Franklin granted the Department of Health and Social Services funding by an additional five percent, and the agency has failed to use those resources properly by re-opening a community mental health facility. R. at 16. Like in *Olmstead*, the cost to the state to integrate individuals into community settings may be "considerably less" than the cost for them to remain in a hospital. *Olmstead*, 527 U.S. at 584, 592.

ii. The Court Should Adopt the Plain Meaning of the Term "Subject To," as Used in C.F.R. § 35.130(a), to Conclude that the Regulation Protects Individuals at Serious Risk of Unjustified Institutionalization or Should, Otherwise, at Least Conclude that the Term is Ambiguous, Warranting *Auer* Persuasiveness Under the *Kisor* Standard.

The Court must also look to the text, structure, history, and purpose of 28 C.F.R. § 35.130(a) to evaluate whether an ambiguity exists. The ADA's *General Prohibitions Against Discrimination* state that a public entity may not discriminate

against qualified individuals with a disability by excluding them from services, programs, activities, or the benefits thereof nor may a public entity subject an individual with a qualified disability to discrimination. 28 C.F.R. § 35.130(a). Historically, states could segregate persons with disabilities which ultimately led to the lack of integration into the community for disabled persons. ADA Action Guide, *ADA Title II Action Guide for State and Local Governments*. The text, structure, history, and purpose of 28 C.F.R. § 35.130(a) suggests that the term "subject to" extends to persons at risk of discrimination. In *Auer v. Robbins*, the court grappled with the term "subject to" in relation to employees who could possibly, but not probably, experience a reduction in pay based on performance. *Auer v. Robbins*, 519 U.S. 452, 452-453 (1997). The plaintiffs argued that they did not qualify for an overtime pay exemption since their compensation could theoretically be reduced, although not common practice, per the employee manual. *Id.* The Secretary of Labor then defined "subject to" to mean that a "significant likelihood" exists rather than a theoretical possibility of a reduction in pay. *Id.*

The Court should hold, in its analysis of 28 C.F.R. § 35.130(a), that the text, structure, history, and purpose demonstrate the DOJ's intent for the regulation to encompass individuals at risk of institutionalization, and, in the least, the court should find that an ambiguity exists. The text of the regulation prohibits public entities from "subject[ing]" qualified individuals with disabilities to discrimination in denying them services, programs, or activities. 28 C.F.R. § 35.130(a). Like in *Auer*, where the court adopted the Secretary of Labor's meaning of "subject to" to mean

instances that pose a significant likelihood of a particular occurrence, the regulation uses the same language of "subject to," and the court should therefore determine the meaning of "subject to" in the context of discrimination to mean a person who has a significant likelihood of experiencing discrimination. The District Court found that the Respondents have a significant likelihood of being institutionalized again in the future and are therefore subject to discrimination. R. at 23. The purpose of the regulation is to ensure that persons with disabilities have an equal opportunity to all the state's programs, services, and activities. New England ADA Center, *ADA Title II Action Guide for State and Local Governments*, retrieved from: https://www.adaactionguide.org/ada-title-ii-requirements.

Kisor outlines that an agency's interpretation must satisfy three requirements regarding its "character and context" to warrant respect. *Kisor*, 588 U.S. at 559. First, it must not be an ad hoc statement written for the purpose of litigation. *Id.* Second, the agency must have substantive expertise on the matter, which can often be shown when the agency is the entity that wrote the regulation. *Id.* The Court in *Kisor* reasoned that a person generally consults an author to find the meaning when a piece of writing contains an ambiguity or is ambiguous, such as a memorandum or an e-mail, and Congress would likely do the same. *Id.* at 570. The court also noted the strong preference for ambiguities to be interpreted through a "uniform administrative decision, rather than piecemeal by litigation," especially when the issues regard complex and technical regulatory programs. *Kisor*, 588 U.S. at 572. Third, the interpretation should reflect the agency's "fair and considered judgment." *Id.* If these

three requirements are satisfied, the court must then ensure that the agency's interpretation of the regulation is "within the bounds of reasonable interpretation." *Kisor*, 558 U.S. at 559, quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Six circuits have agreed with the interpretation that the right to not be subject to unjustified institutionalization extends to persons at risk of future institutionalization. See *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426 (6th Cir. 2020); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004); *Steimel v. Wernert*, 823 F.3d 902 (7th Cir. 2016); *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2012); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003). Although the Petitioners will likely argue that the Fifth Circuit disagreed with this interpretation, the Fifth Circuit did not directly address this issue. See *United States v. Mississippi*, 82 F.4th 387, 391 (5th Cir. 2023). The Fifth Circuit takes issue with the district court finding the state liable for discrimination under the ADA based on a study that only surveyed 154 people in a population of nearly 4,000 people who are institutionalized in a two-year period. *Id.* It concluded that the risk of institutionalization was insufficient to prove discrimination based on unreliability and lack of evidence to prove that the plaintiffs would be institutionalized in the future. and acknowledges that it is not deeming the cases after Olmstead in other circuits wrong because they are all distinguishable. *Id.* at 396. The Tenth Circuit held that the regulations are meaningless if a plaintiff is required to wait until they are institutionalized to bring a cause of action. Kimberly A. Opsahl,

Using Integrated Care to Meet the Challenge of the ADA's Integration Mandate: Is Managed Long-Term Care the Key to Addressing Access to Services?, 10 Ind. Health L. Rev. 211, 225 (2013); see *Fisher*, 335 F.3d at 1181.

The DOJ's interpretation is entitled to respect based upon its "character and context" and the reasonableness of the interpretation. *Kisor*, 558 U.S. at 559. First, the DOJ's interpretation is not an ad hoc statement written in anticipation of litigation and is rather an official position of the agency. Second, the DOJ has substantive expertise on the matter, as Congress has assigned the DOJ to regulate the ADA and are therefore in a "'better position [to] reconstruct' its original meaning" because of their "unique expertise" in applying a regulation "to complex or changing circumstances." See *Kisor*, 558 U.S. at 560, quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991); see *Olmstead*, 527 U.S. at 582-583. Third, the interpretation reflects the DOJ's "fair and considered judgment" through its reasoning that a plaintiff should not need to wait for the "harm [or imminence] of institutionalization" when the state's "failure to provide community services . . . will *likely* cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." 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.* (emphasis added). Therefore, the interpretation by the DOJ falls within the reasonable bounds of interpretation, as shown by its consistency with six other circuits.

C. Skidmore Persuasiveness is Warranted Under Loper Bright's Three Criteria of Thorough Considerations, Valid Reasoning, and Consistent Interpretations, so the Court Should Therefore Grant the Guidance Document Respect and Consideration.

Skidmore persuasiveness, as reaffirmed in *Loper Bright*, recognizes that agencies possess the expertise and informed judgment to write regulations. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *Loper Bright*, 603 U.S. at 371. Courts may therefore properly consider agency guidance when interpreting statutory terms. *Id.* Skidmore persuasiveness should be granted when the agency's considerations are thorough, the agency has valid reasoning, and the interpretation is consistent with prior and subsequent statements. *Id.* The Court in Skidmore reasoned that it is justified for courts and litigants to resort to agency interpretation because of their experience and informed judgment with the issue. *Id.*

Although the Petitioners argue that the Guidance Document does not explain its reasoning thoroughly within its text, the thoroughness requirement can either involve the explanation of the interpretation or the formality in the interpretation's adoption. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1281-1282 (2007). The DOJ has been thorough in considering this statement in both methods of satisfying the requirement – it explained its reasoning that a plaintiff should not have to wait until actually institutionalized to bring a claim because the purpose is to prevent a decline in health, safety, and welfare, and guidance documents are formal memorandum, unlike an opinion letter or handbook. Goelz, C., et al., *B. Review in Agency Proceedings*, Rutter Group Prac. Guide Fed. Ninth Cir. Civ. App. Prac. Ch. 14-B, 568-569. It is also

consistent with the Title VII employment discrimination that applies to future discrimination. Since the Guidance Document meets the requirements to apply Skidmore persuasiveness, the Court should consider the interpretations of the Guidance Document in its expansion of the ADA to protect individuals at risk of institutionalization in the future.

CONCLUSION

This Court should AFFIRM the Twelfth Circuit's holding on the basis that Title II allows federal enforcement through litigation, thus creating a legally protectable interest in the instant action. Further, this Court should hold that the United States' intervention did not constitute cognizable prejudice under Rule 24(a)(2), and therefore does not impair its ability to protect its legally protected interest. Finally, the Court should hold that persons posing a serious risk of future institutionalization may prevail on a claim under Title II of the ADA and therefore affirm the Appeals Court's holding that the State of Franklin violated Title II of the ADA.

Respectfully submitted,

Team 3417
Attorneys for Respondents