No. 17-13595

In the United States Court of Appeals for the Eleventh Circuit

A.R., *ET AL.*,

Plaintiffs-Appellants,

v.

SECRETARY, FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR THE STATES OF TEXAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, OKLAHOMA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

SCOTT A. KELLER
Solicitor General
scott.keller@oag.texas.gov

J. CAMPBELL BARKER
Deputy Solicitor General

ANDREW B. DAVIS
Assistant Solicitor General

TABLE OF CONTENTS

PAGE

Table of Authorities

Page(s)

Cases

Statutes

Regulations

Other Authorities

Interest of Amici Curiae

Amici curiae are the States of Texas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, and South Dakota.[1] The States have a significant interest in administering their services, programs, and activities. The United States' argument that it is permitted to sue States directly under Title II of the Americans with Disabilities Act undermines this interest by intruding on the States' autonomy over their own programs and services in a way that Congress never intended.

[1] As States, amici are entitled as of right to file this merits brief under Federal Rule of Appellate Procedure 29(a)(2).

Summary of the Argument

The plain text of Title II of the American with Disabilities Act ("ADA") dictates that the United States cannot raise claims under that title. The United States' carefully guided tour through the legislative history of not only the ADA but of two separate statutes not at issue—Title VI of the Civil Rights Act ("CRA") and the Rehabilitation Act—is therefore entirely unnecessary. This appeal can and should be resolved based on the text of ADA.

Title II of the ADA provides rights, remedies, and procedures only "to any *person* alleging discrimination"—no one else. 42 U.S.C. § 12133 (emphasis added). It is a longstanding presumption in statutory interpretation that the term "person" does not include the sovereign. And the ADA's text repeatedly affirms this presumption by referring to "persons" separately from the Attorney General and other public entities. Because an action brought by the United States is plainly not a right, remedy, or procedure that a "person" can exercise, the statute is unambiguous: The United States through the Attorney General cannot bring a claim under Title II.

Moreover, the text of Title VI of the CRA independently defeats the United States' position. In the CRA, Congress omitted any language authorizing the Attorney General to sue to enforce Title VI, despite explicitly authorizing him to sue to enforce Titles II, III, IV, and VII. Accordingly, there is no statutory authority for the Attorney General to sue under Title VI of the CRA, and thus no basis to the United States' argument that it may sue to enforce Title II of the ADA because Title II incorporates the Rehabilitation Act, which itself incorporates Title VI's remedies.

ARGUMENT

I. THE ATTORNEY GENERAL IS NOT A "PERSON" AUTHORIZED TO BRING SUIT UNDER TITLE II OF THE ADA.

The district court's dismissal of the United States' claims under Title II of the ADA should be affirmed for one simple reason: Title II permits *only* a "person" to sue, and the United States is not a person as Title II uses that term.

A. A "Person Alleging Discrimination" Under Title II Does Not Include the Attorney General.

Title II's enforcement provision specifically states that it provides "remedies, procedures, and rights" only to a "*person* alleging discrimination." 42 U.S.C. § 12133 (emphasis added). There is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). This presumption rests upon the plain and ordinary meaning of the word "person": "As [the Supreme Court has] often noted, in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Int'l Primate Prot. League v. Adm'r of Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991) (internal quotation marks omitted). *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-65 (1989) (holding that "person" as used in 42 U.S.C. § 1983 does not include the State).

This presumption applies across the board, including when the question at issue is who is authorized to bring suit under a particular statute. For example, in *United States v. Cooper Corporation*, the Supreme Court held that the United States was not a "person" and therefore was not authorized to sue for treble damages under

the Sherman Act. 312 U.S. 600, 606 (1941). Likewise, the United States lacks authority to bring a civil claim under the Racketeer Influenced and Corrupt Organizations Act because the civil remedies provision of that act entitles "person[s]" to sue, not the United States. *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 22 (2d Cir. 1989).

The text of the ADA confirms the presumption that the term "person" in Title II's enforcement provision does not include the United States. Throughout both Title II and Title III of the ADA, Congress juxtaposed "persons" and sovereign entities, demonstrating that the former does not include the latter. For example, Title III's enforcement provision explicitly authorizes suit by "any person" *and* by "the Attorney General." 42 U.S.C. § 12188(a)(1) (remedies are available "to any *person* who is being subjected to discrimination on the basis of disability" (emphasis added)); *id.* § 12188(b)(1)(B) ("the *Attorney General* [has authority to] commence a civil action in any appropriate United States district court" (emphasis added)). Similarly, one of Title II's substantive provisions refers to "any person or other public entity." *Id.* § 12143(c)(8)(A) (requiring that "a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity" that provides certain services). Because the ADA consistently uses the term "person" not to include the sovereign, and the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning," *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342 (1994)), it is clear that the

United States is not a "person" under Title II's enforcement provision, *Cooper*, 312 U.S. at 607 ("fair to assume" that the United States is not a "person").

The United States cannot bring itself to argue the contrary. *See* U.S. Br. 24-25. Other amici, however, contend that the United States is a "person" because *Title I* explicitly defines that term to include "governments" and "government agencies." Brief of Amici Curiae Former Members of Congress Involved in the Passage of the Americans with Disabilities Act of 1990 at 5-18 (hereinafter "Former Members") (citing 42 U.S.C. § 12111(7)). There is no basis, however, to import Title I's broader definition of "person" into other sections of the ADA.[2] Not only do Titles II and III have their own definition sections, neither of which defines "person," 42 U.S.C. § 12131 (definitions specific to Title II); *id.* § 12181 (definitions specific to Title III), but Title I's definition section explicitly states that it applies *only* "in this subchapter"—that is, only in Title I, *id.* § 12111.

What is more, even if Title I's expanded definition of "person" somehow applied outside of Title I—and it does not—the ADA's enforcement provisions affirmatively abandon that definition. Although statutory definitions ordinarily control,

[2] The decision to expand the definition of "person" for Title I, but not Titles II and III makes sense. Because Congress intended to prohibit employment discrimination across the economy, and defined "covered entities" subject to Title I's prohibitions to include all "persons" with a sufficient number of employees, it had to define "person" broadly to expressly include, among other things, "individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, [and] corporations," *id.* § 12111(7) (incorporating 42 U.S.C. § 2000e(a)). Titles II and III, by contrast, are narrower in scope, and thus leave the term "person" to its common understanding, which does not include the sovereign.

they "may yield to context." *United States v. Olson*, 856 F.3d 1216, 1223 (9th Cir. 2017) (citing *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law* 228 (2012) (Statutory "[d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications."). That is the case in Title I and Title III's enforcement provisions, where Congress plainly did not understand "person" to bear an expanded meaning, or else there would have been no need to provide a cause of action to "persons" *and* to "the Attorney General." 42 U.S.C. § 12117; 42 U.S.C. § 12188; *see Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."). Applying the Title I definition of "person" to any of the ADA's enforcement provisions would lead to the absurd result that labor unions, corporations, and mutual companies, 42 U.S.C. § 12111(7) (incorporating 42 U.S.C. § 2000e(a)), have authority to bring suit. Context thus confirms that Title I's artificially broad definition of "person" does not apply to Title II's enforcement provision.

Finally, Title II's enforcement provision confers a right of action on any "person alleging discrimination," a phrase that the Supreme Court has understood not to include the Attorney General. In its seminal interpretation of Title II, the Supreme Court stated that "a person alleging discrimination on the basis of disability in violation of Title II may seek to enforce its provisions by commencing a *private* lawsuit." *Olmstead v. Zimring*, 527 U.S. 581, 591 n.5 (1999) (emphasis added). The Court then proceeded to review the enforcement provisions of Title I and Title III, explaining that "the EEOC, the Attorney General, and persons alleging discrimination on

the basis of disability in violation of Title I may enforce its provisions," and that "the Attorney General and persons alleging discrimination on the basis of disability in violation of Title III may enforce its provisions." *Id.* In this exhaustive review of the ADA's enforcement provisions, the Court distinguished between "the Attorney General" and "persons alleging discrimination." It equated the phrase "person alleging discrimination" with private lawsuits, and never hinted that the Attorney General may sue under Title II. *Id.*

B. Only a "Person Alleging Discrimination" Is Entitled to Bring Suit Under Title II.

That the Attorney General is not a "person" is dispositive. Title II's enforcement provision authorizes *only* a "person alleging discrimination" to bring suit; it mentions no one else. By expressly providing only "one method of enforcing" Title II, Congress evinced its intent "to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *see Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."). And this intent is particularly clear here, where Congress specifically provided different remedies—namely, suits by the Attorney General—for different rights under Titles I and III.

The United States nevertheless argues that the grant of authority only to "persons" is immaterial because Title II provides "persons" "the 'remedies, procedures, and rights'—including the prospect of Attorney General enforcement—that are provided to persons under the Rehabilitation Act and Title VI." U.S. Br. at 25.

That is nonsensical. Even if a federal enforcement action could somehow be considered the right of a private citizen—and it cannot, *see Salvador v. Bennett*, 800 F.2d 97, 100 (7th Cir. 1986) ("A private party has no legal interest in public enforcement.")—it is certainly not a right "provide[d] to" a person alleging discrimination. 42 U.S.C. § 12133. *Provided* means "available for use." New Oxford American Dictionary at 1406 (3d ed. 2010) (defining "provide"). A private person does not "use" an enforcement action that he or she cannot bring and cannot control.

The United States argues that "provided to" simply means "available" in some ephemeral sense. But "available" itself means "[p]resent and ready for use" or "at hand." The American Heritage Dictionary of the English Language at 123 (5th ed. 2016). Thus, a right, remedy, or procedure "provided *to*" a person is a right, remedy, or procedure that the person can *use*. Since a federal enforcement action is not a right that a private citizen can use, it is not a right "provided to" him or her.

Congress knew this. That is why Title I's enforcement provision does not simply "provide" the powers, remedies, and procedures of Title VII of the Civil Rights Act to *persons* alleging discrimination; it "provides" those powers, remedies, and procedures "to the [EEOC], to the Attorney General, or to any person alleging discrimination." 42 U.S.C. § 12117(a). Consistently reading "provides to" as the United States proposes would render the references to the EEOC and the Attorney General in Title I's enforcement provision superfluous because federal action was already "provided to" private persons.

Recognizing this, the United States argues that "the explicit reference[] to the Attorney General in Title[] I," which incorporates Title VII of the CRA, is "easy to

explain" on other grounds: it is to "avoid confusion by specifying the actors among whom the authority is divided." U.S. Br. at 28-29. But there is no confusion here, as Title VII of the CRA already clearly defines the actors and their authority. And the United States never explains how simply listing the EEOC, the Attorney General, and "any person alleging discrimination" in the enforcement provision would resolve any hypothetical confusion. In any event, because the same confusion would exist in Title II's enforcement provision, the same linguistic remedy would be necessary there as well. The United States disagrees, contending that Title II "cross-references only a single section of another statute to incorporate a single well-established enforcement mechanism—a federal administrative process that includes the prospect of DOJ civil actions." U.S. Br. at 29-30. But this is not true. If the "single section" incorporated by Title II (29 U.S.C. § 794a) provided the "single" enforcement mechanism of federal action, then a person alleging discrimination would not have a private right of action—and he or she plainly does. *See Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990) (Section 794a "created a private right of action." (internal quotation marks omitted)); U.S. Br. at 8 (agreeing that Rehabilitation Act and CRA Title VI create private causes of action). The only explanation for referencing the "Attorney General" in Title I, but not Title II, is that Congress intended the Attorney General to have authority to sue under the former but not the latter.

C. Many of the United States' and Other Amici's Arguments Ignore the Clear Statutory Text.

1. Because there is no statutory ambiguity, recourse to legislative history, the remedial purpose of the ADA, and *Chevron* deference is unnecessary.

It is a fundamental principle of statutory interpretation that a court "must first determine whether the statutory text is plain and unambiguous," and "[i]f it is, [the court] must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))). Because the text of Title II unambiguously provides a right of action only to a "person alleging discrimination," and not to the Attorney General, this Court can disregard the United States' and other amici's arguments regarding legislative history, the ADA's supposed remedial purpose, and the purported need to defer to Department of Justice regulations.

Legislative history. Both the United States and other amici focus on legislative history. *See, e.g.*, U.S. Br. at 16-18; Former Members at 6-8. But because the plain text of Title II is unambiguous, there is no need to reference legislative history. *Harris v. Garner*, 216 F.3d 970, 971 (11th Cir. 2000) (en banc) ("When the import of words Congress has used is clear . . . [the court] need not resort to legislative history."); *see also Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring) ("By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only

what the statute means.'" (quoting Holmes, Collected Legal Papers, 207)). This is so regardless of what the legislative history shows, because "legislative history may not be used to create an ambiguity" in the text. *Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 916 (11th Cir. 2013) (per curiam).

Regardless, the ADA's legislative history is far from illuminating. This Court has cautioned that "severe problems attend the use of legislative history in statutory interpretation; its analysis is a practice that [this Court] seek[s] regularly to avoid," *Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217, 1224 (11th Cir. 2010) (per curiam), because it "is not always a reliable indicator of congressional intent," *United States v. Fields*, 500 F.3d 1327, 1333-34 (11th Cir. 2007) (Carnes, J., concurring). Yet the United States relies on committee reports that "are written by staff and rarely read" and "may be the work of people who couldn't get a majority for their statutory language . . . . After all, Congress votes on the bill, not on the reports. No one can vote against a report, and the President cannot veto the language of a report." Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 60 (1988). As Judge Kethledge recently put it, "Senators approve legislation, and staff write and approve reports." Hon. Raymond Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 318 (2017). Even if they spoke to the issue here, which they do not, the committee reports cited by the United States therefore could not clarify the text. *See, e.g.*, Appellees' Br. 47-49 (explaining how Title II's legislative history does not support the United States' position).

Remedial purpose. The lack of ambiguity also makes irrelevant other amici's argument that this Court should permit the United States' claim in order to give full effect to the ADA as a remedial statute. Former Members Br. at 11-14. To start, the canon that remedial statutes should be liberally construed arguably lacks any substance in modern statutory interpretation. "[A]lmost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014). And the canon originated to prevent the application of strict construction when statutes intentionally altered the common law—a wholly inapposite concern here. Scalia & Garner, *Reading Law*, at 366 (describing the canon "today [as] either incomprehensible or superfluous"). But even if the canon is still in operation and the ADA is a remedial statute, for the canon "to apply, the statute must contain an actual ambiguity to construe." *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 58 (2d Cir. 2017), as amended (Aug. 21, 2017). "The fact that legislation has a remedial purpose . . . does not give the judiciary license, in interpreting a provision, to disregard entirely the plain meaning of the words used by Congress." *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981).

Chevron *deference*. As with the request for this Court to resort to legislative history and the remedial statute canon, other amici's argument that this Court must apply *Chevron* deference to regulations promulgated under Title II—an argument that the United States waives—rings hollow because the statute is not ambiguous. *Cf.* Brief of Amici Curiae the Bazelon Center for Mental Health Law, et al. at 7-10 (hereinafter "Bazelon"). Under *Chevron*, a court must determine after applying the

ordinary tools of statutory construction "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013) (quotation marks omitted).[3] There is no ambiguity, so no deference is appropriate.

The United States and other amici also incorrectly read the regulations as authorizing the Attorney General to file suit under Title II. In fact, those regulations authorize an agency to investigate an administrative complaint against a public entity alleging violations of Title II in order to determine whether the complaint has merit, 28 C.F.R. § 35.172; and then, if appropriate, they authorize the agency to attempt to negotiate a resolution with that entity, *id.* § 35.173. Often, this will result in a negotiated resolution, but "[i]f negotiations are unsuccessful, the . . . agency shall refer the matter to the Attorney General with a recommendation for appropriate action." *Id.* § 35.174. That is all the regulations say: "*appropriate* action." The regulations therefore beg the question. In any event, as the Supreme Court has recognized, agency regulations cannot give rise to new enforcement authority not authorized by the statute. *Sandoval*, 532 U.S. at 291 ("But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.").

[3] For the same reasons, no regulations purporting to provide the Attorney General with authority to sue under CRA Title VI would be entitled to *Chevron* deference. *See infra* II.A.

2. Congress did not implicitly ratify the United States' interpretation of Title II.

Other amici argue that, whatever the textual infirmities of the United States' position, Congress endorsed that position when, in 2008, it amended the ADA without altering Title II's enforcement provision. Former Members Br. at 9. This argument quickly falls apart.

Courts, on rare occasions, have found Congress's decision not to alter a specific provision when otherwise amending a statute to be a tacit endorsement of an existing interpretation of that provision. But they have done so only when the existing interpretation is well-known, wide-spread, and settled. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, for example, the Supreme Court found relevant Congress's decision not to revise the Fair Housing Act's liability standards when otherwise amending the act, because at the time of the amendments, "all nine Courts of Appeals to have addressed the question had" reached the same conclusion. 135 S. Ct. 2507, 2519-20 (2015) (citing records demonstrating Congress's knowledge of these decisions). In *Cannon v. University of Chicago*, the Supreme Court likewise held that Title VI of the CRA provides a private right of action where the assumption of this right was "persisten[t]" and the Supreme Court itself twice assumed a private right of action existed. 441 U.S. 677, 702-03 (1979).

No similar consensus existed here. Far from any consensus among the courts of appeals or assumptions by the Supreme Court, other amici can point only to two

near-decade-distant district court opinions prior to the 2008 amendments that arguably support the United States' position. Former Members Br. at 9-10 (citing *Smith v. City of Phila.*, 345 F. Supp. 2d 482, 489-90 (E.D. Pa. 2004) (United States as intervenor); *United States v. City & Cty. of Denver*, 927 F. Supp. 1396, 1399-1400 (D. Colo. 1996)). This is a woefully insufficient basis on which to assert implicit ratification.

3. Policy concerns cannot rewrite statutory text.

Disregarding the fact that "policy arguments come into play only"—if at all—"to the extent that the [statutory text] is ambiguous," *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (quotation marks omitted), the United States and other amici insist that the purposes of the ADA are better achieved if Title II is interpreted to permit the Attorney General to bring suit. U.S. Br. at 18-21; Bazelon Br. at 12-22. But "[e]very statute has a stopping point, beyond which, [the legislative branch] concluded, the costs of doing more are excessive—or beyond which the interest groups opposed to the law were able to block further progress. A court must determine not only the direction in which a law points but also how far to go in that direction." *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1160 n.6 (10th Cir. 2016) (quoting *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 320 (7th Cir. 1994)); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage."). The "how far" question is answered by Congress through

the statutory text, which in this case provides authority only to "persons"—not the sovereign—to sue to enforce Title II.

Congress's decision under Title II to draw the line at individual enforcement is eminently reasonable given the federalism costs associated with Title II. As both the district court and the United States recognize, Title II already imposes significant federalism costs by providing "persons" the ability to seek and obtain review of state-run public services in federal courts. *C.V. v. Dudek*, 209 F. Supp. 3d 1279, 1288 (S.D. Fla. 2016); U.S. Br. at 31-32. Allowing the United States to bring suit would significantly add to these already substantial federalism costs by introducing into litigation against the State a separate branch of the federal government. And these additional costs would be especially intrusive if, as other amici contend, the United States could seek broader relief than could an individual plaintiff. *See* Bazelon Br. at 17 (arguing that "[b]ecause the federal government has standing to enforce federal laws, the DOJ does not face the same limitations in seeking injunctive relief that an individual does"). The United States argues that these additional costs are beside the point because Title II plainly intended to impose some federalism costs. U.S. Br. at 31. But this "in for a dime, in for a dollar" approach cannot be squared with the Supreme Court's admonition that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

Moreover, federal enforcement directly under Title II is not indispensable to achieving the ADA's antidiscrimination purposes. For one, Congress had every reason to believe that federal enforcement was not necessary because "every State in the Union" has a history of protecting disabled individuals from discrimination that

pre-dates the ADA. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001). For another, Title II does not lack for enforcement. Individual recourse through the federal Judiciary is, by itself, a substantial enforcement procedure. *See Fox v. Vice*, 563 U.S. 826, 833 (2011) ("When a plaintiff succeeds in remedying a civil rights violation . . . , he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority." (internal quotation marks omitted)). And that individual recourse is especially powerful where, as here, Congress has enacted a fee-shifting statute to fuel private suits. *See* 42 U.S.C. § 12205.

There are also means outside of Title II through which the United States may enforce particular violations of Title II. Most significantly, the Civil Rights of Institutionalized Persons Act (CRIPA) authorizes the United States to initiate civil law suits where there is reasonable cause to believe that conditions for disabled persons in confinement at State and local government institutions are part of a "pattern or practice" of depriving institutionalized persons of the "full enjoyment" of constitutional or Federal rights, including their rights under Title II of the ADA. 42 U.S.C. § 1997a(a).

Finally, and perhaps most importantly, the fact that the United States does not appear to have filed more than one enforcement action during the first eighteen years of the ADA's existence, *see* Appellee's Br. 15-16, demonstrates that compliance can be achieved without the United States having the ability to bring an action directly under Title II.

II. Title VI of the Civil Rights Act and Section 505 of the Rehabilitation Act Do Not Authorize Federal Enforcement Actions.

Because Title II's enforcement provision provides rights, remedies, and procedures only to a "person alleging discrimination," and the United States is not a "person," it does not matter—and this Court should not address—whether (1) Title VI of the CRA *or* (2) Section 505 of the Rehabilitation Act authorizes federal enforcement actions.

Nevertheless, the United States is wrong on both issues. As with ADA Title II, neither the text of CRA Title VI nor Section 505 of the Rehabilitation Act provides the Attorney General with a cause of action. That is not to say that the Attorney General cannot bring suit *under other provisions of law* to enforce the substantive requirements of Title VI and the Rehabilitation Act. But those causes of action are not provided by either Title VI or Section 505, and thus are not incorporated into ADA Title II.

A. The Text of Civil Rights Act Title VI Does Not Authorize the United States to Bring Suit.

Congress knows how to authorize enforcement actions by the Attorney General. This is particularly true in the context of the Civil Rights Act, where Titles II, III, IV, and VII each contain unique enforcement provisions with a common thread: each explicitly authorizes the "Attorney General" to bring a civil action in federal court. Title II, which combats discrimination in public accommodations, contains a detailed enforcement provision entitled "Civil actions by the Attorney General" that authorizes "the Attorney General" to "bring a civil action" in "the appropriate

district court of the United States." 42 U.S.C. § 2000a-5. Likewise, Title III promotes desegregation of public facilities, contains a provision entitled "Civil Actions by the Attorney General," and states that "the Attorney General is authorized to institute for or in the name of the United States a civil action." *Id.* § 2000b. Title IV secures desegregation in public education, and provides that "the Attorney General is authorized" to file "a civil action in any appropriate district court of the United States." *Id.* § 2000c-6. Title VII, which prohibits discrimination in employment, contains similar, unmistakable grants of authority to "the Attorney General" to sue if necessary for enforcement purposes. *Id.* §§ 2000e-5(f), 2000e-6.

Title VI, however, lacks these distinctive features. It does not even mention the Attorney General, much less his purported right to sue in federal court to prohibit race discrimination in programs or activities that receive federal financial assistance. Title VI instead empowers the departments and agencies to effect compliance only:

> (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . , or
>
> (2) by any other means authorized by law . . . .

Id. § 2000d-1.

Reading this statutory language to authorize suit by the United States requires ignoring other titles of the Civil Rights Act where Congress spoke explicitly as to the

Attorney General's enforcement role. That would flout the general interpretive principle requiring holistic statutory construction. *See Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.*, 797 F.3d 1248, 1275 (11th Cir. 2015) ("statutory construction is a holistic endeavor," where "individual provisions are often clarified by the remainder of the statutory scheme.") (internal quotation marks omitted); Scalia & Garner, *Reading Law* at 167 ("Context is the primary determinant of meaning," and "[t]he entirety of the document . . . provides the context for each of its parts."). And it would contravene the more specific principle that where Congress has consistently made express its delegation of a particular power, its silence [elsewhere] is strong evidence that it did not intend to grant the power." *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 676 (5th Cir. 1978) (holding that Congress did not authorize suits by the Secretary of Labor to enforce Section 8(a) of OHSA, where OSHA contained several other provisions that expressly authorized enforcement actions); *see also Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (courts will not imply grants of authority from Congress's failure to deny explicitly that authority).

That the Attorney General may enforce Title VI by "any other means authorized by law" does not open the door for the Attorney General to exercise means *not* authorized by law. *Cf.* Bazelon Br. at 9. The ordinary meaning of "any other means authorized by law" is any means legally authorized by some *other* law. The phrase does not, by itself, authorize any specific course of action or means of enforcement. It does not purport to create an independent cause of action—particularly since Congress does not authorize enforcement actions in less than explicit terms, *see Dir.,*

Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 129-30 (1995), and especially not in Spending Clause legislation such as Title VI, where any condition on the grant of federal funds must be unambiguous, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15-17 (1981). The phrase "any other means authorized by law" no more authorizes the United States to sue than it authorizes the United States to issue cease-and-desist orders or to seize bank accounts to recover federal funds. It either authorizes all means the mind can conceive (the Bazelon Amici's position), or it refers only to enforcement mechanisms that find expression in existing law outside of Title VI. The latter is the only plausible interpretation.

Thus, the plain meaning of the phrase "any other means authorized by law" requires some independent, authorized means of enforcement available under the circumstances—that is, the enforcement measure must be based on powers conferred on the agency by some other law than Title VI. For example, the federal government may obtain from those receiving federal funds a "contractual assurance[] of compliance" with Title VI, and then bring suit for breach of contract if Title VI is violated. *See, e.g.*, *United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607 (5th Cir. 1980). Also, where applicable, the United States may bring suit under Title IV. *See* Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 Harv. C.R.-C.L. L. Rev. 1, 9 n.24 (1983) (listing Title IV actions as one of the main "two legal authorizations" for enforcing Title VI). And these enforcement actions are in addition to the United States' explicit right to terminate funds.

Neither the Attorney General nor other amici, however, can identify any law—or case—authorizing the United States to bring an action directly under Title VI.

B. The Rehabilitation Act Does Not Authorize the United States to Bring Suit.

This Court need not consider the Rehabilitation Act if it concludes that Title VI of the CRA does not authorize the United States to sue, because the United States and other amici claim only that the Rehabilitation Act (and therefore Title II of the ADA) incorporates those powers and remedies set forth in Title VI of the CRA. Indeed, it would be impossible for the United States to argue that the Rehabilitation Act somehow independently creates a right of action for the Attorney General, as it references only "any person aggrieved"—a phrase that the Supreme Court has unanimously held means only private parties, not the government in its official capacity. *See Newport News*, 514 U.S. at 126-30; *see also id.* at 139-40 (Ginsberg, J., concurring).

The fact that the Rehabilitation Act neither creates a right of action for the Attorney General nor incorporates that non-existent right from Title VI is plainly demonstrated by the United States' and other amici's inability to cite a single case permitting such an action. In addition, nothing in the Rehabilitation Act regulations contemplates a statutory enforcement action brought by the Attorney General. *See* 28 C.F.R. Part 41. To the contrary, regulations and directives affirmatively demonstrate that no such enforcement action is possible. Federal agencies are directed to require recipients of federal funds to "sign assurances of compliance with [Rehabilitation Act] section 504." 28 C.F.R. § 41.5(a)(2). This collection of assurances

would be largely unnecessary if the Attorney General had authority to pursue a suit directly under the Act. Instead, contractual assurances are necessary because "they provide a basis for the Federal government to sue to enforce compliance" with the Act. U.S. Dep't of Justice, Title VI Legal Manual 72-73 (Jan. 11, 2001), http://www.justice.gov/crt/about/cor/coord/vimanual.pdf (discussing both CRA Title VI and the Rehabilitation Act).

Conclusion

The Court should affirm the district court's judgment dismissing the United States' claims under Title II of the ADA.

Date: January 23, 2018

Respectfully submitted.

Christopher M. Carr
Attorney General of Georgia

Curtis T. Hill, Jr.
Attorney General of Indiana

Derek Schmidt
Attorney General of Kansas

Jeff Landry
Attorney General of Louisiana

Mike Hunter
Attorney General of Oklahoma

Marty J. Jackley
Attorney General of South Dakota

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

/s/ *Scott A. Keller*
Scott A. Keller
Solicitor General

J. Campbell Barker
Deputy Solicitor General

Andrew B. Davis
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Certificate of Service

I hereby certify that on January 23, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Scott A. Keller
Scott A. Keller

Certificate of Compliance

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it is prepared in a proportionally spaced typeface in Microsoft Word using 14-point Equity typeface, and with the type-volume limitation because it contains fewer than 6,500 words.

/s/ Scott A. Keller
Scott A. Keller