No. 17-13595-BB

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 *AMICI CURIAE* THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL FEDERATION OF THE BLIND, THE NATIONAL DISABILITY RIGHTS NETWORK, THE AUTISTIC SELF ADVOCACY NETWORK, THE ARC OF THE UNITED STATES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., AND THE NATIONAL ALLIANCE ON MENTAL ILLNESS IN SUPPORT OF PLAINTIFF-APPELLANT THE UNITED STATES AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for *Amici Curiae* the National Federation of the Blind, the National Disability Rights Network, the Autistic Self Advocacy Network, The Arc of the United States, and the Disability Rights Defense and Education Fund, Inc. hereby certify that the following persons and parties may have an interest in the outcome of this case:

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Amici are national disability rights organizations that have a strong interest in the Attorney General's authority to bring enforcement actions under Title II of the Americans with Disabilities Act due to the benefits such enforcement confers on the persons with disabilities whom *Amici* represent.

Bazelon Center for Mental Health Law

Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including community living, employment, education, health care, housing, voting, parental rights, and other areas. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the Americans with Disabilities Act.

National Federation of the Blind

The National Federation of the Blind ("NFB") is the largest and most influential membership organization of blind people in the United States. With

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[1] No counsel for any party authored any part of this brief. No party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person (other than *Amici Curiae*, their members, and their counsel) contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this Brief for *Amici Curiae*.

more than 50,000 members, affiliates in all fifty states, the District of Columbia, and Puerto Rico, and over 700 local chapters in most major cities, the NFB is recognized by the public, Congress, governmental agencies, and the courts as a collective and representative voice of blind Americans and their families. The ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. The NFB serves its members through advocacy, education, research, technology, and programs encouraging independence and self-confidence. The NFB promotes the general welfare of the blind by (1) assisting them to integrate into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs held by both sighted and blind individuals concerning blindness that result in the denial of opportunity to blind persons in virtually every sphere of life. The NFB actively engages in litigation on behalf of blind children throughout the country to address systemic barriers.

National Disability Rights Network

The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through

legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Autistic Self Advocacy Network

The Autistic Self Advocacy Network ("ASAN") is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities.

The Arc of the United States

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("I/DD"). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals with I/DD receive the appropriate protections and supports to which they are entitled by law and can live, work, and learn in the community free from discrimination.

Disability Rights Education and Defense Fund, Inc.

Disability Rights Education and Defense Fund, Inc., (DREDF), based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy, and law reform efforts. In its efforts to promote to full integration of citizens with disabilities into the American mainstream, DREDF has represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

DREDF is nationally recognized for its expertise in the interpretation of disability civil rights laws.

National Alliance on Mental Illness

The National Alliance on Mental Illness ("NAMI") is the nation's largest grassroots mental health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI advocates for access to services, treatment, support and research and is steadfast in its commitment to raising awareness and building a community of hope for individuals living with mental illnesses across the lifespan. NAMI has a strong interest in ensuring that people with disabilities, including people with mental illnesses, have full access to services and supports in the community, in accordance with their individual needs and preferences.

STATEMENT OF THE ISSUE

Whether the Attorney General has the authority to enforce Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*.

SUMMARY OF ARGUMENT

The United States filed this action to challenge the State of Florida's practice of unnecessarily segregating children with disabilities in nursing facilities, in violation of Title II of the Americans with Disabilities Act ("ADA"). This unnecessary institutionalization of children with disabilities denies them the full

opportunity to develop and maintain bonds within their communities, restricts their ability to interact with peers without disabilities, and prevents them from experiencing many of the social and recreational activities that contribute to child development. Further, many Florida children with significant medical needs who reside in the community have been harmed by the State's policies and practices that limit community-based services. Thus, children in Florida with significant medical needs and disabilities receive services and supports in isolation from their peers instead of in the "most integrated setting appropriate" to their needs as required by Title II.

For decades, courts have recognized the Attorney General's authority to enforce Title II of the ADA. Yet the District Court below *sua sponte* dismissed the United States' suit, holding that "[c]onsistent with the plain language" of the ADA, the Department of Justice ("DOJ") does not have standing to sue under Title II. Order, Doc. 543. In light of the text and purpose of the ADA, the longstanding DOJ regulations establishing the enforcement procedures for Title II, and the unanimity of all other cases decided to the contrary, the District Court's decision was clearly erroneous. If permitted to stand, this decision will undermine the significant role the Attorney General has traditionally played in the enforcement of the ADA. The enforcement authority of the Attorney General significantly benefits individuals with disabilities, both because of the broad standing the

Attorney General has to pursue systemic relief and because of the financial barriers to private litigation. The District Court's decision would impede the progress the country has made toward the goal of "assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities, 42 U.S.C. § 12101(a)(7), and should thus be reversed.

ARGUMENT

I. Congress Expressly Granted the Attorney General Enforcement Authority for Title II.

Since the passage of the ADA in 1990, the three branches of the federal government have maintained a rare consensus that Title II provides the Attorney General with the authority to bring an enforcement action. The decision of the District Court lacks a persuasive reason to depart from the long-standing precedent that acknowledges the Attorney General's critical role in enforcing Title II.

Congress intended the federal government to play a primary role in implementing the ADA, stating among the purposes of the Act the provision of "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "ensur[ing] that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities." 42 U.S.C. §§ 12101(b)(1), (3). Congress also provided that the Attorney General in particular would play a key role in the enforcement of the ADA, including Title II's prohibition of discrimination on the

basis of disability by a public entity, by expressly instructing the Attorney General to promulgate regulations to implement the requirements of Title II. 42 U.S.C. § 12134(a). Those regulations provide that an individual may file a Title II complaint with the appropriate agency, 28 C.F.R. § 35.170(a), (c); that if the designated agency issues a noncompliance Letter of Findings, the agency shall "notify the Assistant Attorney General," 28 C.F.R. § 35.173(a)(1); that if the state or local government agrees to enter a voluntary compliance agreement, the agreement shall "provide for enforcement by the Attorney General," 28 C.F.R. § 35.173(b)(5); and that if the designated agency is unable to secure a voluntary compliance agreement with the state or local government, "the designated agency shall refer the matter to the Attorney General for appropriate action." 28 C.F.R. § 35.174.

These regulations have been in place, without Congressional modification, since 1991. In addition, as Congress expressly delegated rulemaking authority for Title II to the Attorney General, and the DOJ's issuance of the rules was procedurally and substantively sound, courts have deferred to the regulations under *Chevron* as "providing controlling weight." *Shotz v. City of Plantation*, Fla., 344 F.3d 1161, 1179 (11th Cir. 2003) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)); *see also*, *e.g.*, *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096 (9th Cir. 2013); *Nat'l Fed'n of the*

Blind v. Lamone, 813 F.3d 494, 506 (4th Cir. 2016); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998).

Congress further delegated federal enforcement authority for Title II to the Attorney General by providing that the "remedies, procedures, and rights" of the Rehabilitation Act of 1973 would govern the enforcement of Title II. 42 U.S.C. § 12133. The Rehabilitation Act, in turn, incorporated the "remedies, procedures, and rights" set forth in Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a; *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 (1999) (tracing remedies available under ADA to Title VI); *Shotz*, 344 F.3d at 1169 (same). Title VI directs federal agencies to pursue compliance by either terminating the federal funding of any program in violation of the Act or "by any other means authorized by law." 42 U.S.C. § 2000d-1. The Title VI regulations promulgated by the DOJ include among these "other means" "appropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States." 28 C.F.R. § 42.108(a)(1).

As the Supreme Court has held, it is immaterial that an agency regulation concerns the breadth of the agency's regulatory authority; as long as the agency's interpretation is a permissible construction of the statute, a regulation governing the scope of the agency's enforcement power should be given *Chevron* deference.

City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 306-07 (2013).[2] Accordingly, courts have consistently recognized that, among the "other means authorized by law" to enforce Title VI, the Rehabilitation Act, and Title II of the ADA is an enforcement action by the Attorney General. *See*, *e.g.*, *Shotz*, 344 F.3d at 1175 ("[T]he major enforcement sanction for the Federal government [for ADA violations] will be referral of cases by these Federal agencies to the Department of Justice." (quoting S.Rep. No. 101–116, at 57 (1989)); *Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) ("Prominent among these other means of enforcement [of Title VI] is referral of cases to the Attorney General, who may bring an action against the recipient."); *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607, 612 (5th Cir. 1980) ("'any other means authorized by law' language in Title VI…include[s] government suits"); *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984) ("any other means authorized by law" in the Rehabilitation Act includes "the federal courts"); *Smith v. City of*

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[2] The regulations of other agencies that share the responsibility for enforcing Title VI also interpret "other means" to include DOJ enforcement, as does the executive order delegating and coordinating the enforcement of antidiscrimination statutes among the federal agencies. *See*, *e.g.*, regulations of the Departments of Health and Human Services (45 C.F.R. § 80.8(a)), Education (34 C.F.R. § 100.8(a)), and Labor (29 C.F.R. § 31.8(a)) (stating that "[s]uch other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States"); *see also* Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980) ("The Attorney General shall coordinate the implementation and enforcement by Executive agencies of … Title VI of the Civil Rights Act of 1964" including "referral to the Department of Justice for enforcement where there is noncompliance.").

Philadelphia, 345 F. Supp. 2d 482, 490 (E.D. Pa. 2004) ("Section 602 of Title VI, 42 U.S.C. § 2000d–1, authorizes the Attorney General to enforce compliance with Title VI by filing an action in federal court. By extension, the Attorney General may also bring suit to enforce other statutes which adhere to the enforcement scheme set forth in Title VI." (citations omitted)); *United States v. City & Cty. of Denver*, 927 F. Supp. 1396, 1400 (D. Colo. 1996) ("Courts have interpreted the words 'by any other means authorized by law' to mean that a funding agency … could refer a matter to the Department of Justice to enforce the statute's nondiscrimination requirements in court.").[3]

The District Court opinion promotes a reading of Title II that also ignores the history and context of the ADA. As the above discussion demonstrates, Title II cannot be read without reference to and incorporation of provisions of the Rehabilitation Act and Title VI. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."); *Shotz*, 344 F.3d at 1168 ("[T]he meaning of one statute may be affected by

[3] Like the courts, the executive branch has always understood that the Attorney General has the authority to bring enforcement actions under Title II. In 2001, President George W. Bush recognized this role in his Executive Order describing the federal government's plan for implementing the holding of *Olmstead v. L.C.*, 527 U.S. 581 (1999), which established that individuals with disabilities must have the opportunity to live in community-based settings whenever appropriate under Title II. The President directed the Attorney General and other executive agencies to achieve "swift implementation" of the *Olmstead* decision and to "fully enforce Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization." Community-Based Alternatives for Individuals with Disabilities, Exec. Order No. 13217, 66 Fed. Reg. 33,155 (June 18, 2001).

other Acts…" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The "remedies, procedures, and rights" of Title VI have always been interpreted to include enforcement by the Attorney General. Congress was aware of this interpretation when it incorporated those same "remedies, procedures, and rights" into Title II, and would not have disclaimed the longstanding understanding of the DOJ's enforcement authority without an explicit statement to that effect. *See King*, 135 S. Ct. at 2495 ("We have held that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

Moreover, as noted earlier, the stated purpose of Title II of the ADA is to provide for "the elimination of discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter *on behalf of individuals with disabilities*." 42 U.S.C. § 12101(b) (emphasis added). If the Attorney General were not authorized to bring suit to enforce individual rights, it would violate not only the plain meaning of the statutory language, but also the intended means for implementation of the entire statutory scheme. Courts "cannot interpret federal statutes to negate their own stated purposes." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973). A reading of Title II that includes DOJ enforcement authority

is consistent with the statutory language and Congress's plan, and is thus the reading the Court should adopt.[4] *See King*, 135 S. Ct. at 2496 ("Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.").

II. The Department of Justice Must Continue to Play Its Distinctive and Significant Role in the Enforcement of the ADA.

Since its creation in 1957, the Civil Rights Division of the DOJ has led the enforcement of the nation's civil rights statutes, enabling countless Americans to more fully enjoy their voting, housing, employment, and educational rights.[5] Courts have noted that the delegation of authority to the DOJ to enforce a civil rights statute is "especially meaningful, given the Department's historic role in civil rights enforcement, its experience in helping to develop desegregation plans, and its authority to intervene in private suits as well as initiate enforcement actions." *Brown v. Califano*, 627 F.2d 1221, 1231 (D.C. Cir. 1980). Compared to private litigators, the DOJ is able to bring greater resources, stronger credibility,

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[4] The District Court also failed to persuasively explain why the Attorney General would have the authority to enforce Titles I and III of the ADA, but not Title II. While the language of Title II may be less explicit regarding this authority than the other Titles are, the entire statute must be read together, in a manner that comports with common sense and the statutory purpose. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *King*, 135 S. Ct. at 2492 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)).

[5] *See* U.S. Dep't of Justice, The Civil Rights Division (2010), https://www.justice.gov/sites/default/ files/ crt/ legacy/ 2010/12/14/division_booklet.pdf.

and the voice of the United States to its enforcement actions.[6] The District Court's diminishment of the DOJ's role in the enforcement of a civil rights statute should be rejected.

A. The Civil Rights Division of the DOJ Has Enforced Title II of the ADA Since Its Passage.

Since the passage of the ADA in 1990, the Civil Rights Division has enforced the statute, including Title II. Congress has implicitly authorized the Civil Rights Division's activities, including its ADA enforcement work, by funding the Division every year since its founding. The American public, and especially people with disabilities, has relied on DOJ enforcement for the past 25 years – enforcement that has led to improved lives for tens of thousands of people. It would be remarkable to suddenly eliminate this enforcement mechanism based the District Court's decision.

While this case may give the impression otherwise, the vast majority of the DOJ's ADA activities do not take the form of highly contested court battles. Rather, the Civil Rights Division uses a variety of methods to enforce Title II, including technical assistance, mediation, investigations, and compliance reviews.[7]

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[6] *See* Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 754 (1974).

[7] Indeed, this case is the result of a six-month investigation conducted by the DOJ in 2012 that resulted in a finding that Florida unjustifiably segregating children with disabilities, in violation of Title II of the ADA. *See* Complaint ¶ 5, Doc. 1. While the DOJ negotiated with the State for months in an effort to resolve the violations identified in its investigation, the Department

Most of the Section's investigations and compliance reviews end in settlement agreements with the covered entities. If the DOJ's enforcement authority for Title II were taken away, the only way the Department could act on any deficiencies identified in such investigations and reviews would be by withholding federal funds, if the public entity investigated received such funding. Yet "[t]he ADA makes *any* public entity liable for prohibited acts of discrimination, regardless of funding source." *Shotz* , 344 F.3d at 1174. Accordingly, if the Court countenances the District Court's decision, the DOJ's ability to enforce Title II would be circumscribed in a manner antithetical to the express purpose of the ADA.

B. The DOJ Is Able to Achieve Systemic Relief that Private Litigants Do Not Often Have Standing to Pursue.

To invoke federal jurisdiction, a litigant must establish the three elements of standing: (1) injury in fact; (2) causation; and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013). Generally, then, an individual with a disability can bring suit only to address a specific violation of Title II that has caused her injury, but will be unable to secure prospective relief unless she can show that it is reasonably likely that she will suffer the same discrimination in the future. The Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is

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ultimately determined that compliance could not be achieved through voluntary means and instituted this suit. *Id.*

instructive on this point. Adolph Lyons filed a complaint for damages, an injunction, and declaratory relief after he alleged that Los Angeles police put him in a chokehold during a routine traffic stop, though he offered no resistance and posed no threat. *See id*. at 97. Lyons sought injunctive relief against the use of chokeholds except in situations where the police were threatened by the use of deadly force, and a declaration "that use of the chokeholds absent the threat of immediate use of deadly force is a *per se* violation of various constitutional rights." *Id*. at 98.

The Supreme Court held that Lyons did not have standing to see an injunction because there was not a case or controversy between the parties, i.e., Lyons could not "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id*. at 105. Because it was "no more than conjecture" that Lyons would again be stopped by the police and subjected to a chokehold, he "ha[d] made no showing that he [was] realistically threatened by a repetition of his experience of October, 1976," and consequently, "he ha[d] not met the requirements for seeking an injunction in a federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice." *Id*. at 109.

The Court's holding in *Lyons* demonstrates that it is extremely difficult for an individual plaintiff with a disability to achieve prospective, systemic relief through a single lawsuit under Title II. For instance, a deaf individual on a business trip or vacation who was unable to communicate via 911 during an emergency could sue the municipality under Title II due to the inaccessibility of emergency services. However, based on *Lyons*, she would likely have standing to seek only retrospective relief in the form of damages. It would be quite challenging to establish that it is "more than speculation" that she would need to use 911 in that location again, such that she could seek an injunction requiring that the local emergency services comply with Title II. *Id*. at 108.

Because 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. Taking the example used above, while a single deaf plaintiff may not be able to show that she would need to use 911 again, the DOJ can establish the likelihood that deaf individuals generally will need to use 911 and that its inaccessibility violates Title II. Thus, the DOJ has standing to seek the sort of injunctive relief, often unavailable to private litigants, that brings substantive, structural change that benefits entire classes of persons with disabilities. Not only does this kind of litigation better fulfill the purpose of the ADA, it also brings greater efficiency to

the judicial process by solving in one suit a problem that affects many people, and could therefore generate multiple individual lawsuits.

In recent years, among other significant achievements, the DOJ has used its Title II standing to make classroom technologies accessible to university students with vision, hearing, and learning disabilities;[8] make polling places accessible to individuals with mobility and vision disabilities;[9] transform Rhode Island's day services system for individuals with intellectual and developmental disabilities from one based on segregated sheltered workshops and day programs to one that provides integrated supported employment opportunities;[10] and provide thousands of residents of segregated, institutional adult homes in New York the opportunity to live in the community.[11] Eliminating the ability of the Attorney General to file suit under Title II would make it harder for individuals with disabilities to realize and benefit from these kinds of victories in the future.

In addition, through its Project Civic Access, the DOJ is able to achieve comprehensive Title II compliance in a way that a private litigant never could. Built on a settlement between the Civil Rights Division and the City of Toledo,

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[8] Consent Decree, *Dudley v. Miami University*, No. 14-038 (S.D. Ohio Dec. 14, 2016).

[9] Consent Decree, *United States v. Augusta County, Virginia*, No. 15-00077 (W.D. Va. Jan. 20, 2016).

[10] Consent Decree, *United States v. Rhode Island*, No. 14-175 (D. R.I. Apr. 9, 2014).

[11] Amended Stipulation and Order of Settlement, *United States v. New York*, No. 13-4165 (E.D.N.Y. Jan. 30, 2014).

Ohio reached in 1999, Project Civic Access seeks to help state and local governments come into full compliance with Title II of the ADA. The DOJ generally undertakes compliance reviews on its own initiative under the authority of Title II, though it sometimes does so in response to complaints filed by private citizens. Most compliance reviews occur in small cities or towns and result in settlement agreements between the Civil Rights Division and the localities. The project now includes 219 settlement agreements with 204 localities in all 50 states, Puerto Rico, and Washington, D.C. These settlements cover the full range of Title II accessibility issues, such as: physical modifications of government facilities, physical modifications of polling places, establishment and delivery of auxiliary aids, installation of assistive listening systems in assembly areas, accessibility of 911 emergency services, and better telephone communication between the government and citizens with hearing or speech impairments.[12]

At least ten Project Civic Access settlements have been reached in Florida. Most recently, in 2013, the City of Jacksonville entered into a settlement with the Civil Rights Division covering, among other things, establishing a grievance procedure for resolving complaints regarding Title II violations, ensuring effective communication, access to emergency services, physical changes to emergency

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[12] *See generally* Project Civic Access Fact Sheet, *available at* https://www.ada.gov/civicfac.htm (last visited October 18, 2017).

shelters, and remediation of inaccessible sidewalks.[13] In 2005, an agreement between the Civil Rights Division and the City of Miami covered many of the same issues.[14] A series of settlements in 2004 contain similar provisions.[15] Each of these settlement agreements also recognizes the DOJ's Title II enforcement authority by authorizing the Department to institute a civil action in federal district court to enforce the terms of the agreement should the locality fail to comply.

As these settlement agreements demonstrate, the DOJ's Title II authority allows it to improve the overall accessibility of communities in one fell swoop, thereby achieving systemic change that will benefit all individuals with disabilities within the community. By contrast, private litigants would have to address the same issues one-by-one through separate lawsuits. Not only would such a procedure bog down the courts, it would likely leave many ADA violations unaddressed because of the effort and expense inherent in litigation. Even for

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[13] *See* Settlement Agreement between the United States of America and City of Jacksonville, Florida under the Americans with Disabilities Act, DJ 204-17M-398, *available at* https://www.ada.gov/jacksonville_pca/jacksonville_pca_sa.htm (last visited October 18, 2017).

[14] *See* Settlement Agreement between the United States of America and Miami, Florida under the Americans with Disabilities Act, DJ 204-18-184, *available at* https://www.ada.gov/miamiflsa.htm (last visited October 18, 2016).

[15] *See* Settlement Agreement between the United States of America and Lafayette County, Florida under the Americans with Disabilities Act, DJ 204-17-170, *available at* https://www.ada.gov/lafayettefl.htm (last visited October 18, 2017); Settlement Agreement between the United States of America and Citrus County, Florida under the Americans with Disabilities Act, DJ 204-17M-342, *available at* https://www.ada.gov/CitrusSA.htm (last visited October 18, 2017); Settlement Agreement between the United States of America and City of Coral Gables, Florida under the Americans with Disabilities Act, DJ 204-18-182, *available at* https://www.ada.gov/CoralGablesSA.htm (last visited October 18, 2017).

organizations such as *Amici* here that have standing to enforce the ADA, the costs of impact litigation prevent them from instituting more than one or two such suits at a time.

But the localities benefit as well. Without such comprehensive agreements as those achieved by Project Civic Access, public entities would be subject to a multiplicity of individual lawsuits, the response to which would be hodge-podge, unsystematic, and more expensive in terms of fees (to the plaintiffs as well as the public entities). A Project Civic Access settlement allows for a financially feasible, transparent, systematic plan to address discrimination that also protects the public entity from further suits. In short, the DOJ's Title II enforcement authority achieves great equality for persons with disabilities in a more efficient, less costly manner than private party litigation ever could.

C. Due to the Correlation Between Disability and Poverty, Many Violations of Title II Will Remain Unaddressed if the DOJ Does Not Have Enforcement Authority.

In the United States, a person with a disability is twice as likely to be poor as someone without a disability.[16] The numbers are stark: in 2015, 20.5% of the disabled population over 16 years of age lived below the poverty line, while only 11.8% of the non-disabled population did. Similarly, 13.1% of the disabled

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[16] Pam Fessler, *Why Disability And Poverty Still Go Hand In Hand 25 Years After Landmark Law*, *available at* http://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law (last visited October 18, 2017).

population over 16 lived between 100 and 149% of the poverty level, but only 7.7% of the non-disabled population did.[17] Not only does poverty negatively impact the basics of survival for persons with disabilities – including access to safe housing, reliable transportation, and adequate healthcare – but it also makes it even more difficult for persons with disabilities to enforce their rights under the ADA. Litigation is expensive, time-consuming, and emotionally draining. Further, when many aspects of daily life are already difficult and stressful because of disability and poverty, the added weight of a lawsuit is simply more than the most stalwart individual would wish to take on. Yet if the DOJ did not have Title II enforcement authority, the full burden of achieving ADA compliance would fall on the very people the statute was intended to protect, who are often the least positioned in American society to carry it. This cannot be the result Congress intended when it created "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

[17] *See* Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status, 2015 American Community Survey 1-Year Estimates, *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited October 18, 2017).

CONCLUSION

Title II of the ADA and valid DOJ regulations expressly provide the Attorney General with the authority to bring an enforcement action, as Congress has countenanced and federal courts have recognized since the ADA's enactment. The Attorney General has used this authority to achieve important victories for the rights of individuals with disabilities and seeks to do so again in this case by compelling Florida to administer its programs for children in the most integrated setting appropriate. *Amici* urge the Court to follow the long-standing, nearly universal precedent supporting this authority and reverse the District Court's dismissal of the DOJ's suit.

Respectfully submitted,

/s/ Ira A. Burnim

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**Pro Hac Vice* Application Pending

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Eleventh Circuit Rule 29(a)(5) because it contains no more than 6,500 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional typeface with Times New Roman 14-point font, in text and footnotes, using Microsoft Word 2010.

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Date: October 25, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, I electronically filed the foregoing BRIEF FOR *AMICI CURIAE* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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