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ARTICLE

"Forwards, Not Backwards": How the U.S. Supreme Court May Save the Plight of Individuals with Mental Disabilities

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Introduction

When federal district court Judge Carlton Reeves penned his opinion in *U.S. v. Mississippi*,[1] the case that seemed poised to overhaul Mississippi's suffering mental health system, he began with the story of Ms. Melanie Worsham, a mental health patient, also a certified peer support specialist. Ms. Worsham works to help those like herself who suffer with lifelong serious mental illness (SMI) to "overcome the obstacles that might be getting in their way of living the life they want to live." She also assists those with SMI by aiding in "navigating the system, to find resources, and then just being moral support."[2]

Explicitly, Judge Reeves' Order portrayed Mississippi's mental health system as one that looks good "[o]n paper," but in reality "is hospital-centered and has major gaps in its community care."[3] Unavailability of community resources for reintegration risks higher rates of re-institutionalization.[4] In his ruling, Judge Reeves found that Mississippi's repeated practice of not integrating adults with SMI fully into the community violates the Americans with Disabilities Act (ADA).[5]

Reeves' ruling aligned with the spirit of *Olmstead v. L.C. ex rel. Zimring*,[6] the landmark case that classifies segregation of people with disabilities as discrimination.[7] Underlying this line of thinking is the proposition that with "reasonable accommodations," people with disabilities can experience and enjoy normal community life.[8] Subsequently, Mississippi appealed to the Fifth Circuit Court of Appeals.[9] The Fifth Circuit heard oral arguments on the matter on October 5, 2022. Observers indicate the very conservative Fifth Circuit seems prepared to end federal judicial oversight of Mississippi's mental health system.[10]

Originally, the matter stemmed from a report issued by the United States Department of Justice (DOJ) in 2011[11] finding that Mississippi institutionalizes persons with mental disabilities unnecessarily,

[1]United States v. Mississippi, 400 F. Supp. 3d 546 (S.D. Miss. 2019).
[2]*Id.* at 548.
[3]*Id.* at 549.
[4]*Id.* at 555-64.
[5]*Id.* at 575-76, 578-79.
[6]Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999).
[7]*Id.* at 582, 600.
[8]*See Mississippi*, 400 F. Supp. at 550 n.3 (referencing Ariana Cernius, *Enforcing the Americans with Disabilities Act for the "Invisibly Disabled": Not a Handout, Just a Hand*, 25 Geo. J. Poverty L. & Pol'y 35, 50 (2017) (citations omitted).

Not only are persons with disabilities 'entitled to reasonable accommodations to a public entity's services, programs, and activities, … it is discriminatory when an entity fails to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.'

Id. (quotation marks and citations omitted).

[9]*See* Brief of Defendant-Appellant, U.S. v. Mississippi, No. 3:16-CV-622-CWR-FKB (5th Cir. Jan. 10, 2022).
[10]*See* Isabelle Taft, *Federal Judges Appear Ready to End Court Oversight of Mississippi Mental Health Services*, Miss. Today (Oct. 5, 2022), [perma.cc/FVX3-S3E7].
[11]*See Mississippi*, 400 F. Supp. 3d at 551-52 (referencing Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Just. to Governor Haley R. Barbour, State of Miss. (Dec. 22, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/miss_findletter_12-22-11.pdf [perma.cc/ZY79-3SCQ].

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in violation of the ADA's mandate for community integration.[12] The 2011 report resulted from years of investigation.[13] Following several years of failed negotiations, the DOJ filed suit against Mississippi in 2016. At the time Judge Reeves issued the ruling in 2019, the Fifth Circuit had not visited the issue. so he relied on authority from other jurisdictions. Ultimately, Judge Reeves approved a remedial order aimed at expanding access to community-based services and appointed a special monitor for oversight compliance.[14]

Solicitor General for Mississippi, Mr. Scott Stewart, argued the DOJ overreached its authority.[15] He contended ADA suits could be brought only on behalf of *individuals* alleging discrimination based on mental disability, *not* by the Attorney General.[16] Title II of the ADA does not state expressly that the Attorney General can bring suits against local governments.[17] Yet, the DOJ has done so since effectuation of the ADA in 1992.[18] While the DOJ argued that Congress intended that the Attorney General be able to do so, neither party raised the argument in their initial briefs.[19] The Fifth Circuit made a special request that both sides respond to the question.[20]

If the Fifth Circuit sides with Mississippi, it would create a circuit split, because the Eleventh Circuit Court of Appeals rejected that very same argument when brought by the State of Florida.[21] When Florida appealed the matter to the U.S. Supreme Court, it denied certiorari.[22] If confronted with a circuit split, the Court might be more inclined to address the issue.[23]

Ironically, years ago, the *Olmstead* attorneys recognized the high Court's propensity to resolve circuit splits but wanted to avoid that path, if possible. They believed having to argue against law established in a different circuit would complicate their chances of victory. *Olmstead* Attorney Teresa Wynn Roseborough said, "One of the things the Supreme Court likes to do is to have questions, particularly statutory questions, percolate in the courts of appeals so that, when it is deciding an issue, it can resolve a conflict, or at least have the benefit of many decisions and many points of view on similar questions to look at in making sure that it gets the law right."[24]

Here again, disability rights advocates find themselves again likely on the side of desiring avoidance of a circuit split. If the Supreme Court were to find that the Justice Department could not sue under Title II for a class of individuals with disabilities, it would be destructive for disability rights to include people with mental disabilities.[25] A clinical review of 154 Mississippians found that they could have avoided institutionalization or minimized their stay had they had "reasonable community-based resources."[26]

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[12] *See id.* at 551 n.4 ("Olmstead is noteworthy for its broad recognition of the rights of people institutionalized in congregate facilities to live and receive needed services and supports in the community. Critically, *Olmstead* endorsed the congressional finding in the ADA that institutionalization constituted discrimination." (quoting Robert D. Dinerstein & Shira Wakschlag, *Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration*, 96 Denv. L. Rev. 917, 926 (2019)); *see also* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Just. to Governor Haley R. Barbour, State of Miss. (Dec. 22, 2011).

[13] Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Just. to Governor Haley R. Barbour, State of Miss. (Dec. 22, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/miss_findletter_12-22-11.pdf [perma.cc/ZY79-3SCQ].

[14] *See* Taft, *supra* note 10.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Letter from the U.S. Ct. of Appeals, Fifth Cir., to the U.S. Dep't of Just., C.R. Div., Appellate Section, and the Miss. Att'y Gen.'s Off., USA v. Mississippi, No. 21-60772, USDC No. 3:16-cv-622 (Sept. 23, 2022) (referencing United States v. Florida, 938 F. 3d 1221 (11th Cir. 2019); United States v. Sec'y Fla. Agency for Healthcare Admin., 21 F. 4th 750 (11th Cir. 2011) (en banc)); *see also* Alexander v. Sandoval, 532 U.S. 276, 286 (2011).

[21] *See* Taft, *supra* note 10.

[22] *Id.*

[23] *Id.*

[24] Paul Lombardo et al., *Reflecting on Olmstead: Representing Lois Curtis and Elaine Wilson*, 40 J. Legal Med. 27, 35 (2020).

[25] *See* Taft, *supra* note 10.

[26] *Id.*

The DOJ's enforcement mechanisms aim to ensure that they, as well as others with those needs, get those resources.[27]

In examining this issue, this Article highlights the failure in Mississippi's mental health system and how the use of the courts can be instrumental in expanding community-based access to services. Part I provides background on the *Olmstead* case and links it to the pending Mississippi litigation that aims to transform mental health services for Mississippians. Part II traces the statutory construction of the DOJ's enforcement mechanism for Title II of the ADA. Part III tackles federalism concerns raised as an obstacle in accomplishing the DOJ's objectives. Finally, Part IV speaks to how DOJ litigation aids in accomplishing the objectives of *Olmstead*'s vision. In other words, this piece will provide a roadmap of how the U.S. Supreme Court can possibly resolve a budding circuit split in a lawful manner that champions people with mental disabilities.

I. The Road from *Olmstead* to Mississippi: Legal Efforts to Revitalize Mississippi's Crumbling Mental Health System

"If you can't fly then run, if you can't run then walk, if you can't walk then crawl, but whatever you do you have to keep moving *forward*." -Dr. Martin Luther King, Jr.[28]

A. Civil Rights Victory of Monumental Proportion: A Review of the Landmark Olmstead *Decision*

So many advancements in the mental health movement seem to have evolved by way of a crawl, including the litigation that would broaden the path to community integration. The Atlanta Legal Aid Society brought the *Olmstead* case in 1995 on behalf of Ms. Elaine Wilson and Ms. Lois Curtis. Hospital staff said the status of both women warranted transfer to supportive community programs, but the women remained institutionalized for an extended period.[29] Both women's histories revealed a pattern of multiple readmissions,[30] an indicator of weak community support services.

As the case remained in litigation, both Ms. Wilson and Ms. Clark secured community housing and began to thrive.[31] Still, the case continued as the larger issue remained viable.[32] After the court held the Georgia Department of Human Resources (DHR) violated the ADA's integration mandate by segregating the women from the community long after professionals recommended release for community care, the DHR appealed to the nation's highest court. [33] Upon examination,

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[27] *Id.*

[28] Martin Luther King, Jr., *Quotable Quotes*, Goodreads (last accessed Dec. 13, 2022), https://www.goodreads.com/author/quotes/23924.Martin_Luther_King_Jr_[perma.cc/ZGP2-GTJJ] (emphasis added).

[29] *See Olmstead*, 527 U.S. at 581.

[30] *Id.* at 593. The Court recognized that Wilson and Curtis experienced cyclical reinstitutionalization and that institutionalized treatment might be needed from time to time. The Court said: "Some individuals, like L.C. and E.W. in prior years, may need institutional care from time to time to stabilize acute psychiatric symptoms." *Id.* at 584.

[31] See *Still Waiting…The Unfulfilled Promise of Olmsted: A Call to Action by the Bazelon Center for Mental Health Law on the 10th Anniversary of the Supreme Court's Decision*, Bazelon Ctr. for Mental Health L. (June 24, 2009), https://d252ac.a2cdn1.secureserver.net/wp-content/uploads/2017/01/Still-Waiting…The-Unfulfilled-Promise-of-Olmstead.pdf [perma.cc/69VB-J9FL].

[32] According to Attorney Charlie Bliss, Georgia kept the issue "live-looking" so as to avoid mootness. Lombardo et al., *supra* note 24, at 43. Georgia opposed the litigants at every step. *Id.* Also, the women were "susceptible" to reinstitutionalization, keeping the issue relevant. *Id.*; *see Olmstead*, 527 U.S. at 593-94.

[33] *See generally* Bazelon Ctr. for Mental Health L., *supra* note 31. Both women made the trip to Washington, D.C. to hear oral arguments. Ms. Wilson lived supervised in an apartment until her passing at age 53 in 2004. *See id.* For many years, Ms. Curtis lived at home, with supervision, in Metro Atlanta. She worked as a thriving artist and served as a disability rights advocate until her passing in November of 2022. *See id.*; Sam Roberts, *Lois Curtis, Whose Lawsuit Secured Disability Rights, Dies at 55*, N.Y. Times (Nov. 10, 2022), https://www.nytimes.com/2022/11/10/us/lois-curtis-dead.html#:~:text=Curtis%20died%20on%20Nov.,her%20aunt%20Shirley%20Traylor%20said. [perma.cc/LC2G-5YV8].

the Supreme Court found long-term continued confinement of the women to be discriminatory. Extended confinement perpetuated "unwarranted assumptions" about the inability of people with mental illness to participate fully in community life.[34] Writing for the majority, Justice Ruth Bader Ginsburg said, "[u]njustified isolation" equates with "discrimination based on disability."[35]

In making its decision, the Court considered the diminished quality of life longtime institutionalization perpetuates: truncating social life, inhibiting continued nurturing of familial bonds, stifling educational and professional growth, prohibiting economic advancement, and suffocating cultural enrichment[36]. Experts labeled *Olmstead* the *Brown v. Board of Education* for people with disabilities.[37] Indeed, many mental health advocates modeled the movement for mental health disability rights on the civil rights movement[38] for racial equality.[39]

B. A Closer Look at the Case at Issue: U.S. v. Mississippi

Given the impact that *Brown* aimed to have on states like Mississippi,[40] it seems appropriate that Mississippi would be a breeding ground for the push towards true community integration. In *U.S.*

[34]*Olmstead*, 527 U.S. at 583, 600.

[35]*Id.* at 597.

[36]*Id.* at 600-01.

[37]Bazelon Ctr. for Mental Health L., *supra* note 31; Stacie Kershner & Susan Walker Goico, *Olmstead at Twenty: The Past and Future of Community Integration: A Letter from the Guest Editors*, 40 J. Legal Med. 1, 1 (2020); Samuel R. Bagenstos, *Taking Choice Seriously in Olmstead Jurisprudence*, 40 J. Legal Med. 5, 5-6 (2020).

[38]*See* Laura L. Rovner, *Disability, Equality, and Identity*, 55 Ala. L. Rev. 1043, 1054-58 (2004) (discussing both similarities and dissimilarities between the disability rights movement and the Civil Rights Movement).

[39]*See* Bazelon Ctr. for Mental Health L., *supra* note 31. Not unlike the Civil Rights Movement which delivered *Brown*, the disability rights movement for mental health has been a rocky road, both pre- and post-*Olmstead.* Coinciding with the height of the Civil Rights Movement, President John F. Kennedy urged a new approach nationally for mental health in 1963, signing the Community Mental Health Centers Act three weeks before his assassination. This Act "envisioned a nationwide network of innovative community programs to supplant the custodial isolation of state hospitals." *See id.* at 4. While inpatient hospitalization fell from its height of 550,000 in 1955, overinvestment in late-stage crisis intervention in lieu of evidence-based approaches contributed to poor outcomes. Instead of continuing the path of innovation, a repeated cycle of "institutionalized segregation, recurrent hospitalizations, arrests, court involvement and homelessness[]—became routine for people with serious mental illnesses." *Id.* Likewise, people living with mental illness may be transported to "unprepared families" or "transinstitutionalized" to other group settings such as nursing homes or homeless shelters—places where they may be subject to abuse. *Id.* Bright spots did emerge during the Carter Administration with President Carter's commitment to advancing the cause of mental health, an issue championed by his wife, Rosalyn. President Carter created the 1978 President's Commission on Mental Health. The Commission resulted in the codification of The Mental Health Systems Act of 1980. The law created a comprehensive relationship between the federal and state governments as it relates to approaching mental health services. Regressing, in 1981, Congress repealed the Act under the Reagan Administration. At that time the federal government placed mental health services under a block grant. A bright spot emerged again when President George H.W. Bush signed the ADA in 1990. Title II of the ADA prohibits discrimination on the basis of disability by public service programs. *Olmstead* was brought under Title II of the ADA. Initially, 26 states signed briefs arguing against federal court intervention in states' operation of their mental health systems. By the end of the litigation, 19 states had withdrawn their signatures. The ruling in *Olmstead* represented a huge victory for the disability rights movement. Yet, implementation of *Olmstead* has been challenging. The same pattern of progressing forward, and seeming to move backwards, has persisted since the Court's landmark ruling. *See id.* at 5-6.

[40]On May 17, 1954, the decision in *Brown* overruled, effectively, the "separate but equal," doctrine formalized in *Plessy v. Ferguson*. The *Brown* decision found racial segregation in schools to be unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The ruling impacted twenty-one states with racially segregated schools directly, including a then very racially segregated Mississippi. *See* Jean Van Delinder, *Brown v. Board of Education of Topeka: A Landmark Case Unresolved Fifty Years Later,* Nat'l Archives: Prologue (Spring 2004), https://www.archives.gov/publications/prologue/2004/spring/brown-v-board-1.html#:~:text=On%20May%2017%2C%201954%2C%20the,schools%20in%20twenty%2Done%20states [perma.cc/EK8P-W3G2]; Charles C. Bolton, *Mississippi's School Equalization Program, 1945-1954: "A Last Gasp to Try to Maintain a Segregated Educational System,"* 66 J.S. Hist. 781, 793 (2000).

v. Mississippi, after an extended process, presiding Judge Reeves appointed a special master, Dr. Michael Hogan,[41] to assist the district court and the parties in reaching a satisfactory remedy.[42]

After the parties failed to reach an agreement, the district court issued a remedial order in September of 2021 and appointed a monitor.[43] Likewise, it issued a partial stay pending appeal without objection from the DOJ.[44] Ultimately, the court aimed to facilitate a process that would make the state ADA compliant, which means it would make those offerings it had "on paper" a reality for those individuals needing the services.[45] The DMH offers community-based mental health services primarily through fourteen regional health centers the court found to be largely unavailable.[46] In addition to Programs of Assertive Community Training (PACT), some of the services the court emphasized included mobile crisis teams,[47] community support services,[48] peer support services,[49] supported employment,[50] and permanent supported housing.[51]

Pursuant to DOJ-promulgated regulations, the state would be requiredo make reasonable accommodations unless doing so would "fundamentally alter" the state's mental health system.[52] Congress directed the U.S. Attorney General to draft said regulations when it enacted the ADA.[53] The regulations require that public entities "'make reasonable modifications' to avoid 'discrimination on the basis of disability.'"[54] Albeit, said alterations do *not* have to be made if they would "fundamentally alter" the

[41]Dr. Michael Hogan served as special master. Dr. Hogan had more than forty years of experience in mental health having led statewide mental health systems in New York, Connecticut, and Ohio. In 2002, President George W. Bush appointed Dr. Hogan chairperson of his Presidential Commission on Mental Health. In the instant matter, largely, Dr. Hogan adopted the state's proposed framework for mental health services. Both Mississippi and the United States submitted their own proposed plans to Dr. Hogan. Dr. Hogan reconciled the two and submitted a remedial plan. Basically, Dr. Hogan accepted the state's proposal as it related to services for delivery and adopted the United States' proposal as to how to monitor those services. From there, the district court adopted Dr. Hogan's proposed recommendations in full. Brief for the United States as Plaintiff-Appellee at 22-23, United States v. Mississippi, No. 21-60772 (5th Cir. Apr. 6, 2022).

[42]*Mississippi*, No. 3:16-CV-622-CWR-FKB, at 60.

[43]Brief for the Plaintiff-Appellee at 7, 22-23 United States v. Mississippi, No. 21-60772 (5th Cir. Apr. 6, 2022). In April of 2021, Mississippi submitted its report and claimed the case warranted no additional relief. Mississippi said it substantially complied with Title II having addressed the alleged violations or having committed to addressing any remaining violations. Its new DMH Executive Director, Ms. Wendy Bailey, submitted a three-and-a-half page declaration from the Department detailing improvements made since the initial opinion. The DOJ submitted its proposed remedial plan at or about the same time. *See id.* at 22-23.

[44]*Id.* at 7.

[45]*Mississippi*, No. 3:16-CV-622-CWR-FKB, at 2-3, 59-60.

[46]*Id.* at 2, 16, 19-28, 51. Services offered by the DMH "on paper" include Programs of Assertive Community Training (PACT), which consists of teams comprised of either a community or peer support specialist, nurses, specialists on housing and employment, program coordinators, and therapists. *Id.* at 2, 17. According to the district court, the state did not make PACT widely available. PACT services were offered by eight teams that covered only fourteen of eighty-two counties. *Id.* 17-23.

[47]The court said access to mobile crisis teams was quite "illusory" in many parts of the state, which lacked true access in part because of geographical distance. *Id.* at 23-24.

[48]Community support services, or mobile support services, that include medication management and in-home supports were not provided sufficiently. *Id.* at 18, 25.

[49]Peer support services, which were provided by certified specialists who had lived experience with mental illness, were "shockingly" low. *Id.* at 18, 25.

[50]Supported employment, which helps with wage earning and integration maintenance, was "quite low" with approximately 257 individuals having received supported employment in 2018. *Id.* At 18, 25.

[51]Permanent supportive housing to include locating affordable housing and providing negotiations with landlords was found to be "grossly underutilized" with only 400 individuals having benefited from the CHOICE housing program, with 2500 units needed. *Id.* at 26-27.

[52]*Id.* at 5. Pursuant to 28 C.F.R. § 35.130(b)(7), public entities must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* The Attorney General drafted the regulations for the ADA. *Id.* Congress possessed the constitutional authority to grant the Attorney General to "promulgate the regulations under the ADA, and the Attorney General's regulations [are] themselves within the strictures that Congress had laid down in passing the ADA[.]" Lombardo et al., *supra* note 24, at 35.

[53]*Olmstead*, 527 U.S. at 581 (citing 42 U.S.C. § 12134(a)).

[54]*Id.* at 581.

nature of the entity's programs.[55] The *Olmstead* Court provided some guidance as to what is meant by having a fundamental alteration that might constitute a defense to a discrimination claim: "In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."[56]

Courts look at not only the cost of providing community-based care, in light of the resources available to a state, but also the spectrum of services provided to other individuals in the state with mental disabilities. A requested modification that impedes the objectives of a state's programs fundamentally alters that program.[57] In the face of a fundamental alteration, a state would *no*t have to make the modification requested.

According to the district court, the DOJ's experts proved that Mississippi could reasonably accommodate community-based mental health services within the state's existing mental health system.[58] The state needed only to address the identified deficiencies.[59] Therefore, the district court rejected Mississippi's defense that making the changes would fundamentally alter the state's mental health system.[60]

C. On Defense: Arguments of the State of Mississippi

On appeal, Mississippi made three arguments. First, Mississippi contended the district court extended the protections of *Olmstead* erroneously, arguing *Olmstead* contemplated *individual* claims, not systemic claims. Mississippi's argument did not account for the many individualized interviews conducted by clinical review experts that supported the aggregate data. Clinical experts gathered firsthand accounts of the experiences of individual mental health patients to include their number of hospitalizations and any experiences with community-based services.[61] Only then did they combine cumulative data.

Unfortunately, the data revealed stunning deficiencies. For example, discharge procedures on the whole proved to be woefully inadequate.[62] Hospitals consistently released patients without follow-up to connect them to local community services. Hospitals used failed discharge plans repeatedly.[63] In other words, they released the patient with a discharge plan that failed; then, they readmitted the patient and released them again with the very same discharge plan that failed them in the first place.

Second, Mississippi argued *Olmstead* claims must involve findings by the state's *own* treatment professionals.[64] In *Olmstead*, it just so happened that the State of Georgia's facilities held the two patients

[55] *Id.*

[56] *Id.* at 597.

[57] *See id.* at 605 ("To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow.").

[58] *See* Brief for the United States as Plaintiff-Appellee at 46, United States v. Mississippi, No. 21-60772 (5th Cir. Apr. 6, 2022). The district court analyzed three modifications and determined they did not constitute fundamental alteration. The United States requested the following modifications: a statewide expansion of existing community mental health services, a system connecting individuals with SMI with those community-based services, and appropriate discharge planning to reduce readmissions. *Id.* Based on the testimony of a senior DMH official, the district court found the DMH had no *Olmstead* plan in place. *Id.* at 47. Ultimately, the court determined making the modifications would not be too costly. *Id.* at 47-49. On appeal, Mississippi dropped the cost-inequity argument. *Id.* at 49.

[59] The United States argued that since the district court accepted Mississippi's own plan, Mississippi should not be able to succeed on a "fundamentally alters" defense. *Id.* Additionally, Mississippi included PACT and crisis stabilization services in its Medicaid plan statewide, which the DOJ said should prevent Mississippi from availing on a "fundamentally alters" defense. *Id.*

[60] Among other things, Mississippi argued financial costs would be too high, but its own witnesses disputed this contention. *Id.* at 52-53.

[61] *Mississippi*, 400 F. Supp. 3d at 568-72.

[62] For example, providers failed to give patients their medications when discharged leading to reinstitutionalization. *Id.* at 566.

[63] *Id.* at 566.

[64] Brief for United States as Plaintiff-Appellee at 35, *Mississippi*, No. 21-60772.

long after their own experts recommended them for community care.[65] That fact speaks to the particular circumstances of *Olmstead* but does not limit *Olmstead*'s broader holding, which denounces unjustified segregation of individuals with disabilities and provides a cause of action for such segregation.[66]

Notwithstanding the state's position, the text of Title II does not support its contention.[67] *Olmstead* did not say a state's own mental health professionals could be the *only* ones to assess readiness for community care. Further, this argument may not be the strongest inasmuch as it would give the state the power to review its own decisions. The United States argued Mississippi wanted, inappropriately, "to make its own employees the sole, and unreviewable, judges of the State's compliance with Title II's integration mandate."[68] Doing so may make a Title II challenge extremely difficult to bring as internal reviews might be biased.

Third, Mississippi argued Title II protects only individuals institutionalized *currently*.[69] However, this argument is not consistent with the DOJ's guidelines[70] or findings of other appeals courts.[71] *Olmstead* required that the state provide community-based care for individuals with disabilities if: (1) the placement is appropriate; (2) the "affected" person does not oppose the treatment; and (3) "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others" who have similar disabilities.[72]

Determining that the United States satisfied each of these elements, the district court found that Mississippi violated Title II.[73] In 2011, the DOJ issued regulations making it clear that "[i]ndividuals need not wait until the harm of institutionalization or segregation occurs or is imminent to bring Title II claims."[74] Case law supports these contentions as well.[75] The district court resolved these three issues in favor of the plaintiffs, but the court of appeals opened an entirely new door.

Without prompting, in a letter to both counsels dated September 23, 2022,[76] the Fifth Circuit requested that counsel address at oral argument whether Title II of the ADA allows the United Sates to sue a state directly.[77] As best as can tell, it is an issue raised only once before: in a Title II ADA case in Florida.

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[65] *Id.*

[66] *See Olmstead*, 527 U.S. at 597.

[67] *See* Title II, 42 U.S.C. § 12132.

[68] Brief for United States as Plaintiff-Appellee at 37, *Mississippi*, No. 21-60772.

[69] *Id.* at 31.

[70] *See* Sahar Takshi, *Home Sweet Home: The Problem with Cost-Neutrality for Older Americans Seeking Home- and Community-Based Services*, 5 Admin. L. Rev. Accord 25, 35-36 (2019) (stating claimants do not have to be institutionalized currently to bring a Title II claim).

[71] The United States pointed to several cases indicating the contrary. *See* Brief for United States as Plaintiff-Appellee at 37-38, *Mississippi*, No. 21-60772 (citing Davis v. Shah, 821 F.3d 231, 263 (2d Cir. 2016); Pashby v. Delia, 709 F.3d 307, 321-22 (4th Cir. 2013); Waskul v. Washtenaw City Cnty. Mental Health, 979 F. 3d 426, 460-61 (6th Cir. 2020); M.R. v. Dreyfus, 663 F.3d 1100, 1116-17 (9th Cir. 2011), amended by 697 F.3d 706 (9th Cir 2012); Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003)).

[72] *Olmstead*, 527 U.S. at 607.

[73] *Mississippi*, 400 F. Supp. 3d at 575-76.

[74] Brief for United States as Plaintiff-Appellee at 41-42, *Mississippi*, No. 21-60772 (quoting U.S. Dep't of Just., Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead, L.C.* (2011), https://archive.ada.gov/olmstead/q&a_olmstead.htm [perma.cc/K8YC-JCVK] (last updated Feb. 25, 2020).

[75] The 10th Circuit said that "protections of the integration mandate 'would be meaningless if plaintiffs were required to segregate themselves by entering an [individual] institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.'" Brief for United States as Plaintiff-Appellee at 41, *Mississippi*, No. 21-60772 (quoting *Fisher*, 335 F.3d at 1181). "Nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA integration requirements." *Id.*

[76] *See* Letter from the U.S. Ct. of Appeals, Fifth Cir., *supra* note 20.

[77] *See id.*

II. A Giant Step Forward: Following the Statutory Construction of Title II

"If we fail to adapt, we fail to move *forward*." John Wooden[78]

A. Charting New Territory: U.S. v. Florida *Raises a New Question*

Since the inception of the ADA, the United States has brought suit under Title II.[79] It seems that states would have adapted by now, but Florida, like Mississippi, exemplifies the fact that some states have not. In *U.S. v. Florida*, the State of Florida administered services for children dealing "with complex medical needs."[80] Complainants alleged disability discrimination contending Florida institutionalized children unnecessarily.[81] The DOJ investigated and found that Florida violated Title II.[82] At first, the DOJ solicited Florida's voluntary compliance.[83] Failing in those efforts, the DOJ filed suit.[84]

When Florida moved for judgment on the pleadings, the court denied the motion.[85] After a couple of years, and following case reassignment to a new judge, the court recalibrated and dismissed the United States from the case.[86] In effect, the court found that the Attorney General did not meet the classification of a "person" entitled to bring suit for remedies under the statutory scheme.[87] On review, the appeals court reversed. It held that not being classified as a "person" under the statute did not render the Attorney General incapable of suing. The appeals court relied on the cross-references among relevant statutes to demonstrate that the text, context, and history of the enforcement mechanisms provided by Title VI of the Civil Rights Act and the Rehabilitation Act, allowed for the filing of administrative complaints that could lead to enforcement suits by the Attorney General.[88]

To be clear, Title II regulations provide that an individual who alleges discrimination "may file a complaint with … the appropriate agency."[89] At that point, the agency investigates and seeks to get

[78]John Wooden, AZQuotes, https://www.azquotes.com/quote/578071 [perma.cc/3ZJQ-8G2S] (last visited Dec. 13, 2022) (emphasis added).

[79]*See generally* Kristi Bleyer, *The Americans with Disabilities Act: Enforcement Mechanisms*, 16 Mental & Physical Disability L. Rep. 347, 348 (1992) (describing the enforcement mechanisms available to the Department of Justice under Title II, shortly after the passage of the ADA and the corresponding rules in the CFR).

[80]*See* United States v. Florida, 938 F.3d 1221, 1225 (11th Cir. 2019).

[81]*See id.* at 1224.

[82]*See id.* Title II provides that: "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Americans with Disabilities Act, 42 U.S.C. § 12132. The term "public entity" encapsulates "any State or local government," to include "department[s], agenc[ies], or other instrumentalit[ies] of government." Americans with Disabilities Act, 42 U.S.C. § 1213(1)(A)- (B).

[83]*See Florida*, 938 F.3d at 1225.

[84]*See id.* In 2013, the Department of Justice's suit was consolidated with a class action complaint by a group of children who had similar claims. *Id.*

[85]*See id.*

[86]*See id.*

[87]C.V. v. Dudek, 209 F.Supp.3d. 1279, 1284 (S.D. Fla. 2016), *overruled by* United States v. Florida, 938 F.3d 1221 (11th Cir. 2019). In dismissing the Department of Justice as a party to the case, the court reasoned that the Attorney General lacked standing to sue an entity under Title II. *See* C.V. v. Dudek, 209 F.Supp.3d at 1282. Eventually, the district court dismissed the children's case as well. *See Florida*, 938 F.3d at 1225. The appeal to the Eleventh Circuit followed. *Id.*

[88]*See Florida*, 938 F.3d at 1250. The Eleventh Circuit concluded that both the legislative history as well as the statute itself supported the position that the Attorney General could bring suit under Title II. The court said: "At the time Congress enacted the ADA, there had been a number of decisions from the Supreme Court and the circuits regarding the availability of an implied private right of action under Title VI and the Rehabilitation Act. If Congress only intended to create a private right of action under Title II, then its decision to cross-reference to § 505 of the Rehabilitation Act, which expressly incorporates Title VI, including its administrative enforcement scheme in § 602, would be mystifying, especially because it had directed the Attorney General to develop regulations that were to be consistent with Rehabilitation Act enforcement procedures that included Title VI enforcement. *See* 42 U.S.C. § 12134." *Id.* at 1242.

[89]*See* 28 C.F.R. § 35.170 (2021).

"voluntary compliance."[90] If efforts fail, "the agency shall refer the matter to the Attorney General with a recommendation for appropriate action."[91] Said action may include a lawsuit.[92]

Apparently, Florida interpreted the Court of Appeals to indicate that the Attorney General met the classification of a "person" under the statutory scheme. If so, Florida misinterpreted the appeals court's decision. Consistent with the holding of the Eleventh Circuit, the Attorney General is *not* a person under 42 U.S.C. Section 12133.[93] However, the Attorney General may bring suit on behalf of persons having experienced Title II-qualifying discrimination.[94]

Indeed, the decision of the Florida district court stood alone in its determination. No other court had ever rendered a decision indicating that the Attorney General could not bring suit on behalf of a Title II claimant.[95] If a state or local government believes the Attorney General lacks the legal grounds to sue under Title II, that entity could move to dismiss a filed complaint or seek interlocutory review, as appropriate. The fact that no other appeals court decision on this issue exists indicates that either public entities do not question the Attorney General's right to bring suit under Title II or that courts have determined that there is no substantial ground for a dispute on this particular issue.[96]

B. Historical Context: Unquestioned DOJ Standing

Since the 1990 passage of the ADA, the Attorney General has brought "dozens" of Title II lawsuits "against public entities" and has settled many more without alert or interference.[97] The DOJ's "Guidelines for Enforcement of Title VI" provides that a "possibility of court enforcement should not be rejected without consulting the [DOJ]" first.[98] Consistently, the DOJ has used litigation to enforce Title VI.[99] The

[90] *See* 28 C.F.R. §§ 35.172 - 35.173 (2021).

[91] *See* 28 C.F.R. § 35.174 (2021).

[92] *See* Americans with Disabilities: Practice & Compliance Manual § 2:181 (last updated Feb. 2023), which reads in relevant part: The "Attorney General [has] standing to sue state[s] for violations of Title II []; Congress designated 'remedies, procedures, and rights' in [the] Rehabilitation Act, which in turn adopted Title VI of [the] Civil Rights Act, as enforcement provision for Title II, Title II used [the] remedial structure based on investigation of complaints, compliance reviews, negotiation to achieve voluntary compliance, and ultimately enforcement through 'any other means authorized by law' in event of noncompliance, and Congress was aware when it enacted [the] ADA that [the] Department of Justice had filed suit in federal court to enforce Title VI and Rehabilitation Act." (referencing United States v. Florida, 938 F.3d 1221 (11th Cir. 2019).

[93] *See* 42 U.S.C. §12133; *Florida*, 938 F.3d at 1227, 1248.

[94] *See id.* at 1239. When cross-referencing the applicable statutes, the Attorney General may bring a lawsuit under Title II for a qualifying complainant. Title VI of the Civil Rights Act, 42 U.S.C. Section 12133, provides any person alleging discrimination with "the remedies, procedures, and rights" set out in the Rehabilitation Act and Title VI and includes the ability to file an administrative complaint that may result, when unresolved, in a suit brought by the Attorney General. *See id.*

[95] Florida did not allege that the appeals court's decision conflicted with any decision of another appeals court. In fact, the DOJ argued that no Court of Appeals had ever addressed the issue. Other than the district court below, which the Court of Appeals reversed, no other district court had made such a ruling. District courts that considered the question found that the Attorney General is authorized to bring suit to enforce Title II. *See, e.g.*, United States v. Mississippi, No. 16-CV-622, 2019 WL 2092569, at *2-3 (S.D. Miss. May 13, 2019), appeal on other grounds pending, No. 21-60772 (5th Cir. filed Oct. 6, 2021); United States v. Harris County, No. 16-CV-2331, 2017 WL 7692396, at *1 (S.D. Tex. Apr. 26, 2017); United States v. Virginia, No. 12-CV-59, 2012 WL 13034148, at *3 (E.D. Va. June 5, 2012); Smith v. City of Philadelphia, 345 F. Supp. 2d 482, 489-90 (E.D. Pa. 2004); United States v. City & Cnty. of Denver, 927 F. Supp. 1396, 1399-400 (D. Colo. 1996); *see also* Pet. App. 52a-55a (citing cases); *see also* On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Brief for United States in Opposition at 20, Florida v. United States, 143 S. Ct. 89 (2022) (No. 21-1384), 2022 WL 3587764.

[96] *See* Brief for United States in Opposition, *supra* note 95, at 23.

[97] See *id.* at 9. The DOJ noted as well that even if Florida's contentions were true, this case would not be an appropriate vehicle under which to bring suit as the complainant received Medicaid funds. Because the Medicaid program uses federal funds, the complainant would be able to bring suit under "materially identical substantive provisions of the Rehabilitation Act." Even Florida conceded the latter point. *Id.*

[98] *Id.* at 4-5 (citing Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 31 Fed. Reg. 5277, 5292 (Apr. 2, 1966) (28 C.F.R. § 50.3(c)(I)(B)(1)) (emphasis omitted).

[99] *See* Letter Responding to Questions at Oral Argument Pursuant to Federal Rule of Appellate Procedure 28(j) at 1-2, U.S v. Mississippi, No. 21-60772 (5th Cir. Oct. 17, 2022).

Rehabilitation Act relies on the same enforcement procedures.[100] Thus, the DOJ uses Title VI to bring enforcement suits under the Rehabilitation Act.[101] Just as Title VI and the Rehabilitation Act use identical remedial measures, those same "remedies, procedures, and rights" remain available to individuals who allege discrimination under Title II.[102]

Typically, courts hold that when Congress incorporates sections of a preexisting law into a new law it can be presumed that the legislative body has knowledge of the preestablished interpretation of the incorporated law.[103] Therefore, it can be assumed that the incorporated provisions from the preexisting law will be effectuated in much the same manner as it relates to its incorporation into the new law. The Title VI administrative enforcement scheme existed and was well established at the time of the enactment of Title II of the ADA.[104] Commonly, courts acknowledged that the DOJ could pursue enforcement actions under both Title VI and the Rehabilitation Act.[105] It makes sense that courts would think the same of Title II as the same remedial provisions were incorporated into Title II by reference.

Not only Section 12133 of the ADA but also Section 12134 supports a reading that Title II incorporates Title VI's administrative complaint process, which culminates in a potential enforcement suit being filed by the Attorney General.[106] According to Section 12134, the Attorney General must "promulgate regulations" under Title II "consistent with" "coordination regulations"[107] of the Rehabilitation Act. Under the Rehabilitation Act, an agency may use any option afforded to it by law to bring about sufficient resolution of a matter to include use of the federal courts.[108] Allowing the Attorney General to bring an action in a court of law is a logical extension of the statutory text. The express statutory text of Title II directs the Attorney General to establish an administrative enforcement scheme "consistent" with that of Title VI.[109]

C. Avoiding Narrowing the Path: Multiple Methods for a Cause of Action

If Title II did not allow suits by the Attorney General, individuals with disabilities would have only one plausible right—that is, the right to bring a private cause of action before the court themselves.[110] This approach could be severely limiting as some individuals may not have the means and resources to maintain litigation. This statement may be particularly true of those individuals with disabilities who have a fixed or relatively low income. The other option under Title VI, as well as under the Rehabilitation

[100] *See Florida*, 938 F.3d at 1221, 1228.

[101] *Id.* at 1244.

[102] *Id.* at 1244-45; *see also* 42 U.S.C. § 12133.

[103] Brief for United States in Opposition, *supra* note 95, at 12 (first citing Lorillard v. Pans, 494 U.S. 575, 581 (1978); then citing Bragdon v. Abbott, 524 U.S. 624, 644-45 (1993)).

[104] *Id.* at 11-12.

[105] *Id.* at 12.

[106] *Id.* at 12-13.

[107] *Id.* The coordination regulations can be found in "Part 41 of Title 28, Code of Federal Regulations." *Id.*; 42 U.S.C. § 12134 (a)-(b).

[108] Brief for United States in Opposition, *supra* note 95, at 12, n.3 (first citing United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039, 1050 (5th Cir. 1984) (holding that with Rehabilitation Act, agency may use any legally authorized option, including use of federal courts), cert. denied, 469 U.S. 1189 (1985), then citing National Black Police Ass'n v. Velde, 712 F.2d 569, 575 (D.C. Cir. 1983) (holding that it is authorized by law for the Attorney General to bring an action against a recipient when a case is referred to the Attorney General under Title VI, 42 U.S.C. 2000d-1), cert denied, 466 U.S. 963 (1984)).

[109] *See* Alison Tanchyk, *An Eleventh Amendment Victory: The Eleventh Amendment vs. Title II of the ADA*, 75 Temp. L. Rev. 675, 680 (2002). At least some critics and supporters alike seem to recognize the basic scheme of Title II. That is, "Title II incorporates the remedial scheme of the Rehabilitation Act, which in turn incorporates the remedial scheme of Title VI of the Civil Rights Act of 1964." *Id.* at 680.

[110] *See* John J. Coleman, III & Marcel L. Debruge, *A Practitioner's Introduction to ADA Title II*, 45 Ala. L. Rev. 55 (1993). Coleman and Debruge contend that an aggrieved party can file a lawsuit under Title II and a prevailing party, *other than the United States*, can receive attorney's fees. *Id.* at 93-94. The fact that Coleman and Debruge acknowledge that the United States can be a party under Title II supports the DOJ's contention of common acceptance of U.S. standing under Title II. *Id.*

Act, involves filing administrative complaints with the appropriate agency.[111] These administrative complaints may lead to two outcomes.

First, an administrative complaint that leads to a finding of noncompliance might result in withdrawal of funding from an agency.[112] Second, an administrative complaint not resolved to the complainant's satisfaction may be referred to the DOJ and be followed by suit brought by the Attorney General.[113] However, option one, which results in a withdrawal of federal funding, is not an option for public entities that do not receive federal funds.[114] In other words, if the entity does not receive federal funding to begin with, no federal funds can be taken away. As such, if the Attorney General cannot bring suit against those entities that do not receive federal funds, there would be no enforcement mechanism against those particular entities.[115] Having such a gap in its enforcement mechanism would defeat a significant purpose of Title II, which is to address noncompliance by these very entities. The committee reports from both the U.S. House of Representatives and the U.S. Senate suggest that Congress desires that the major enforcement mechanism for the federal government be a referral to the DOJ for the very purpose of the Attorney General being able to bring suit in federal district court.[116]

Interestingly, Florida recognized that the Attorney General could bring suit under both Title VI and under the Rehabilitation Act but put forth arguments that the same could not be said of Title II. Florida turned its argument (that the United States is not a person) on the fact that the United States conceded to being the "only plaintiff" in the lawsuit.[117] The United States did not litigate the case on behalf of any individual plaintiff.[118] In response, the DOJ argued that, "[T]he fact that the persons whose administrative complaints instigated the process that culminated in this litigation are not plaintiffs does not mean that the suit will not 'provide[]' a 'remed[y]' for them."[119] The DOJ's complaint asked the court to require that the State of Florida cease discriminating against the victims.[120]

If the DOJ obtains the desired result, the individuals who alleged discrimination would receive a remedy for the harm leveled against them. Further, they would do so without incurring the costs of litigation. In fact, the congressional record reflects the intent that the federal government should play a central role in enforcing the ADA on behalf of individuals with disabilities.[121] The DOJ analogized the situation to that of a Title VII complaint.[122] The enforcement scheme of Title VII allows individuals to file complaints of discrimination with the Equal Employment Opportunity Commission (EEOC).[123] Those complaints may result in lawsuits by the EEOC or the DOJ.[124] The EEOC, just as the Attorney General in this instance, can bring the suit in its own name.[125] It does not have to bring the suit in a representative capacity.[126] Still, the suits by the EEOC obtain appropriate relief for those individuals harmed by the discrimination.[127]

If a person is denied the ability to have the Attorney General bring suit on his or her behalf, then that person loses access to the remedy guaranteed him or her by the text of the relevant statutes. Yet, Florida

[111] *Florida*, 938 F.3d at 1221, 1230.
[112] Brief for United States in Opposition, *supra* note 95, at 13.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 14 (citing H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 98 (1990) and S. Rep. No. 116, 101st Cong., 1st Sess. 57-58 (1989)).
[117] Petition for Writ of Certiorari at 17-18, Florida v. United States, 143 S. Ct. 89 (2022) (No. 21-1384).
[118] Brief for U.S. in Opposition, *supra* note 95, at 15.
[119] *Id.* (citing 42 U.S.C. § 12133).
[120] *Id.*
[121] 42 U.S.C. § 12101(b)(3).
[122] Brief for U.S. in Opposition, *supra* note 95, at 16.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*

tried to make a series of arguments to suggest that no such authority exists under Title II.[128] The Eleventh Circuit rejected those arguments,[129] and later, the Supreme Court (properly) denied Florida's petition for certiorari, declining to hear them further.[130] If the issue does ever arrive in front of the Supreme Court, it should reject these arguments as the Eleventh Circuit did.

III. Removing a Roadblock: Why Federalism is Not a Concern

"If you're not moving *forward*, you're falling back." Sam Waterson[131]

A. The Right to Sue: Why the Federal Government Can Sue a State

One interpretation of conservatism is being slower to change. Sometimes conservatism can be beneficial; at other times it can inhibit progress. Perhaps because the Eleventh Circuit is among the more conservative circuits,[132] just as the Fifth Circuit, it may not be surprising that Florida questioned how allowing the Attorney General to bring suit against a state impacts the constitutional balance between the national and state governments. These federalism concerns seem unmerited. Nonetheless, Florida argued that Congress needed to have made "a clear statement in Title II that it intended to 'empower the federal executive to sue the States[]' [and that such a presumption should not be made] without a clear statement because federal enforcement actions impose 'considerable federalism costs,' and such litigation is coercive.'"[133]

Notwithstanding this argument, the DOJ asserted correctly that allowing the nation's government to sue a state does no such altering.[134] Previously, the Supreme Court acknowledged that, "[I]n ratifying the Constitution the States consented to suits brought by…the Federal Government."[135] No constitutional provision prevents the United States from suing an individual state.[136] "Statutes authorizing the United States to bring such suits are commonplace."[137] In fact, several of the antidiscrimination statutes take this very approach.[138] Yet, Florida wanted the Supreme Court to review the issue in the absence of a circuit

[128]For example, Florida argued that both Title I and Title III of the ADA mentioned the Attorney General specifically, but Title II did not. To counter, the DOJ contended that mentioning the Attorney General in Title II would have been redundant. By cross-referencing Title VI and the Rehabilitation Act, both of which authorize suits by the Attorney General, Title II makes its enforcement mechanism clear. Just as Florida conceded, section 505 of the Rehabilitation Act makes no mention of the Attorney General, but the Attorney General has the authority to bring suit under that statute, nonetheless. The same holds true for Title II. *See id.* at 17-18.

[129]*See id.; Florida*, 938 F.3d at 1221.

[130]*See* Taft, *supra* note 10.

[131]Sam Waterson, QuoteFancy, https://quotefancy.com/quote/1683231/Sam-Waterston-If-you-re-not-moving-forward-you-re-falling-back [perma.cc/5RZC-68MN] (last visited Dec. 13, 2022) (emphasis added).

[132]Matthew Weber et al., *Courting Change*, Reuters (Jan. 14, 2021), https://fingfx.thomsonreuters.com/gfx/rngs/TRUMP-EFFECT-COURTS/010080E30TG/index.html [perma.cc/QFT5-TQRP].

[133]*See Florida*, 938 F.3d at 1249.

[134]*Id.* at 1249-50.

[135]*Id.* at 1250 (citing Alden v. Maine, 527 U.S. 706, 755 (1999)); *see, e.g.*, United States v. Mississippi, 380 U.S. 128, 140 (1995) (stating no "provision of the Constitution prevents or has ever been seriously supposed to prevent" a State from being sued "by the United states") *See* Brief for U.S. in Opposition, *supra* note 95, at 18-19 (stating that a "suit by the United States against a State 'does no violence to the inherent nature of sovereignty'") (quoting United States v. Texas, 143 U.S. 621, 645-46 (1892)).

[136]The Eleventh Circuit made its position clear when it examined the issue. It said that Congress made express inclusion of "any State or local government," or "any department, agency, special purpose district, or other instrumentality of a State or States or local government …" in its definition of "public entities" under Title II. See 42 U.S.C. § 12131(1)(A)–(B). It noted that Florida has been a state since 1845 which means it fits the statutory characterization directly. The court said, "Florida may have valid complaints about this lawsuit, but whether it is amenable to suit by the United States is not one of them." *See Florida*, 938 F.3d at 1250]

[137]Brief for U.S. in Opposition, *supra* note 95, at 19.

[138]These statutes include, but may not necessarily be limited to, Title VI and the Rehabilitation Act as well as Title VII, *see* 42 U.S.C. § 2000e-5(f)(1); also, it includes Title I of the ADA, 42 U.S.C. § 12112(a), 42 U.S.C. § 12117(a); *see* 42 U.S.C. § 12111

split.[139] Even though the Court has reviewed some issues addressing the division of power between states and the federal government, many of those cases involved the constitutionality of a federal statute.[140] Florida could *not* argue legitimately that the federal government could not sue a state.[141] It could put forth only an argument that the Attorney General cannot sue a state under Title II *if* it contends, as it did, that Title II must mention the Attorney General bringing suit expressly.[142] The DOJ called this question a "routine" one of "statutory interpretation."[143] "[D]ecades long consensus in the lower courts" answered this question already.[144] Now, a potentially budding circuit split aims to erase this history.[145]

B. Standing on Judicial Principles: Proper Adherence to the Law

Perhaps most particularly today's Supreme Court is viewed as being "deeply skeptical of federal authority and willing to overturn long-standing precedents like *Roe v. Wade*."[146] The Fifth Circuit, known also as "the most conservative appeals court in the country,"[147] is the path by which the *Dobbs v. Jackson Women's Health Center*[148] case traveled to the U.S. Supreme Court. *Dobbs* is the case that overturned approximately fifty years of precedent by overruling *Roe*, the landmark case that used the right to privacy to grant women the right to elect an abortion up until the point of viability of the fetus.[149] Judge Reeves, the same judge who wrote the lower court's decision in *U.S. v. Mississippi*,[150] wrote the lower court's opinion in the *Dobbs* case, permanently enjoining the Mississippi law.[151] In that case, the Fifth Circuit did affirm the lower court unanimously.[152] The three-judge panel consisted of two Republican[153] appointees and one Democratic[154] appointee.[155] Reportedly, the *Dobbs* attorneys sought initially to argue the case on the issue of viability but reverted subsequently to arguing that *Roe* should be overruled. "While the Court originally asked to hear *Jackson Women's Health* arguments on a viability question, Mississippi changed course and argued … that *Roe* should be completely overturned, a change Justice Sotomayor lambasted during arguments."[156] The change may have been in part as a result of the highest

(2), (5); and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-2(f). The Supreme Court has at no time indicated any of these statues are subject to a "clear-statement" rule. *See* Brief For U.S. in Opposition, *supra* note 95, at 19.

[139] Brief for U.S. in Opposition, *supra* note 95, at 21.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Florida argued that Title II suits brought by the Attorney General intrude on states' sovereignty. To the contrary, as the case law permits, private individuals may bring suit either on their own or via class action lawsuits under Title II. *Id.* (referencing Olmstead v. L. C., 527 U. S. 587, 607; *see also* Fed. R. Civ. P. 23. *See id.*

[146] *See* Taft, *supra* note 10. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

[147] Taft, *supra* note 10.

[148] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[149] *Roe*, 410 U.S. at 153, 164-65.

[150] *See generally* U.S. v. Mississippi, 400 F. Supp. 3d 546 (S.D. Miss. 2019).

[151] Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 553 (S.D. Miss. 2019).

[152] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 266 (5th Cir. 2019).

[153] *See Higginbotham, Patrick Errol*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/higginbotham-patrick-errol [perma.cc/Z85J-KG3L] (last visited Feb. 28, 2023). President Ford nominated Judge Patrick E. Higginbotham to the federal District Court for the Northern District of Texas in 1975 and President Reagan nominated him to the Fifth Circuit Court of Appeals in 1982. *Id. See Ho, James C.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/ho-james-c [perma.cc/3485-RE9M] (last visited Feb. 28, 2023). President Trump nominated Judge James C. Ho to the Fifth Circuit in 2017 and he was commissioned in 2018. *Id.*

[154] *See Dennis, James L.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/dennis-james-l [perma.cc/Z9LP-RQWJ] (last visited Feb. 28, 2023). President Clinton nominated Judge James L. Dennis to the Fifth Circuit in 1995. *Id.*

[155] Nora Howe, *Five Takeaways from Dobbs v. Jackson Oral Arguments*, All. for Just. (Dec. 6, 2021), https://www.afj.org/article/five-takeaways-from-the-dobbs-v-jackson-oral-arguments/ [perma.cc/J94W-J7SF].

[156] *Id.*

court's then relatively new status with a 6-3 supermajority.[157] It is not necessarily uncommon for either conservatives or liberals to attempt to shape the law when they believe the composition of the court to be in their favor. It remains incumbent on the justices to ensure that they rule judiciously and in accordance with the principles of *stare decisis* and overrule in only those rare instances that warrant it. To be fair, the *Dobbs* Court contends that it acted in precisely such a manner and the courts cannot be subject to public whim.[158] However, in each and every case, the court must be sure to stand on solid footing in its legal analysis and reasoning. Otherwise, the public may lose confidence in its neutrality and it becomes another political wing of government.

From 2009 to 2016 alone, the DOJ brought forth at least 50 Title II cases, including the Mississippi suit.[159] The one appellate court that has examined the issue, the Eleventh Circuit Court of Appeals, ruled in the DOJ's favor with seemingly concrete legal analysis.[160] If the Supreme Court were to decide differently, it would need to be sure that its reasoning is sound.

IV. Realizing the Vision: How Department of Justice Disability Litigation Advances Us Forward

"Set your goal and keep moving f*orward*." Georges St-Pierre[161]

In its essence, the community integration mandate is forward-looking, not backwards. *Olmstead*'s very clear goals envisioned a world of supports where people with disabilities live "full and meaningful lives in the community."[162] Advocates believe "*Olmstead*'s promise is far from fully realized and requires robust enforcement efforts in order to achieve full implementation."[163] Facilities may release patients but fail still to provide them with what they need to survive and thrive in the community. What method has been most successful in effectuating change? Litigation, specifically DOJ action under Title II.

Even in Georgia, the state of *Olmstead*'s origin, ADA violations required DOJ enforcement for compliance. Surprisingly, the state of *Olmstead*'s birth ranks fiftieth in access to care according to Mental Health America.[164] In early 2009, the Bush Administration DOJ and the State of Georgia entered into a settlement agreement designed to improve the state's mental health system.[165] Then early in the Obama Administration, the DOJ committed to making *Olmstead* enforcement a "new priority."[166] Shortly before the DOJ's October 2010 settlement with Georgia, 14-year-old Sarah Crider, an institutionalized seventh grader, passed away from a detectible intestinal blockage.[167] The *Atlanta*

[157]Howe, *supra* note 155; Nina Totenberg, *Supreme Court's New Supermajority: What It Means For Roe v. Wade*, NPR (Dec. 31, 2020, 10:42 AM), https://www.npr.org/2020/12/31/951620847/supreme-courts-new-supermajority-what-it-means-for-roe-v-wade [perma.cc/XB4A-TLA6].

[158]*See* Lou Kettering, *US Chief Justice Roberts Defends Supreme Court's Legitimacy in First Post-Dobbs Public Appearance*, JURIST (Sept. 11, 2022, 1:52 PM), https://www.jurist.org/news/2022/09/us-chief-justice-roberts-defends-supreme-courts-legitimacy-in-first-post-dobbs-public-appearance/ [perma.cc/QU65-C4J3].

[159]*See* Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 389 (2018); *see also* Taft, *supra* note 10.

[160]*See generally* U.S. v. Florida, 938 F.3d 1221 (11th Cir. 2019).

[161]Georges St. Pierre, QUOTEFANCY, https://quotefancy.com/quote/1653104/Georges-St-Pierre-Set-your-goal-and-keep-moving-forward [perma.cc/CJ6V-SGTJ] (last visited Dec. 13, 2022) (emphasis added).

[162]Stacie Kershner & Susan Walker Goico, Olmstead *at Twenty: The Past and Future of Community Integration: A Letter from the Guest Editors*, 40 J. LEGAL MED. 1, 1 (2020).

[163]*Id.* at 2.

[164]*See* Talley Wells, *Lessons Learned from Georgia's 2010* Olmstead *Settlement: The Good, the Bad, and the Limitations of a Justice Department* Olmstead *Settlement*, 40 J. LEGAL MED. 45, 48 (2020); MADDY REINERT ET AL., THE STATE OF MENTAL HEALTH IN AMERICA 19 (Mental Health Am. ed., 2020)) (referencing that among 50 states and the District of Columbia, Georgia ranked 50 out of 51 in 2020).

[165]Wells, *supra* note 164, at 45.

[166]*See* Joseph Shapiro, *Justice Increases Efforts to Enforce Olmstead Ruling*, NPR (Dec. 3, 2010, 3:39 PM), https://www.npr.org/2010/12/03/131789387/justice-increases-efforts-to-enforce-olmstead-ruling [perma.cc/G99B-Z9C2].

[167]*Id.* The $77 million settlement would transfer thousands to community settings. *Id.*

Journal-Constitution featured Crider as one of 115 institutionalized mental health patients who passed under "questionable circumstances," motivating DOJ involvement in Georgia as well as in six other states.[168]

As advocates pushed, the DOJ joined them in asking the pertinent question: Who remained in institutions that could "thrive in a community-based setting?"[169] Then the DOJ filed briefs or joined lawsuits in approximately twenty states, but before settlement, litigation seemed inevitable.[170] "The hope was that litigation would transform Georgia's nineteenth-century mental health system of confinement and segregation into a twenty-first-century community-based system of independence and opportunity for people with significant mental health disabilities."[171] Critics said Georgia's agreement to expend millions in psychiatric facilities propelled institutionalization and diverted funds from community mental health services.[172]

Unexpectedly, Ms. Cynthia Wainscott, a mental health advocate, wrote a letter to a federal judge questioning the settlement.[173] The judge ordered briefing, withheld judicial approval of the settlement, and required that the parties meet with mental health advocates, and the litigation continued.[174] Extensive negotiations resulted in a second settlement consistent with *Olmstead* in which Georgia made an investment of more than $256 million for the expansion of crisis center.[175] The parties extended the agreement on May 18, 2016,[176] but failed compliance standards in 2018,[177] and in 2019.[178] Nevertheless, the settlement has been transformative despite its shortcomings. The improvements ushered by disability advocates demonstrated that *Olmstead* is most definitely more than litigation. Still, "[l]itigation has to be a key tool for carrying [the integration mandate] out. Without litigation, Georgia would not have invested hundreds of millions of new dollars in its mental health system, particularly during the recession."[179] While litigation has limitations, "*Olmstead* litigation is essential to ensuring Americans with institution[al] … needs receive supports in the community."[180] More specifically, the DOJ's ability to bring suit under Title II is vital to fulfilling *Olmstead*'s vision. Clarence Sundram, a legal expert regarding community services and mental disabilities, said, "these lawsuits are time-consuming and expensive, and the Justice Department has the staff, expertise and resources to see them through."[181] He said, "Many times private individuals will complain to the DOJ to invoke its assistance in these kinds of cases for precisely these reasons[.] So to rule that DOJ doesn't have the authority could remove one very significant avenue of enforcing these laws."[182]

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Wells, *supra* note 164, at 45.
[172] *Id.* at 46.
[173] *Id.* at 47.
[174] *Id.*
[175] *See* Lombardo et al., *supra* note 24, at 43 n.29.
[176] Judy Fitzgerald, Ga. Dep't Behav. Health & Dev. Disabilities, Extension Agreement Overview (2016), https://dbhdd.georgia.gov/organization/be-informed/reports-performance/ada-settlement-agreement. [perma.cc/J6AD-N374].
[177] *See* Lombardo et al., *supra* note 24, at 43 n.29; *see also* Ga Advisory Comm. to U.S. Comm'n on Civ. Rts, Disability Rights and Civil Rights in Georgia 9 (2019), https://www.usccr.gov/pubs/2019/09-09-GA-Disability-Rights.pdf [perma.cc/ZG7Z-TF8A].
[178] Lombardo et al., *supra* note 24, at 43 n.29; *see also* Interim Report of the Independent Reviewer at 3, United States v. State of Georgia, No. 1:10-cv-249-CAP (N.D. Ga. Aug. 19, 2019), https://www.justice.gov/crt/case-document/file/1210601/download [perma.cc/3XJK-CG3M].
[179] Wells, *supra* note 164, at 52.
[180] *Id.*
[181] Isabelle Taft, *'A Screeching Halt': Judges' Question in Mental Health Lawsuit has Implications Beyond Mississippi*, Miss. Today (Oct. 4, 2022), https://mississippitoday.org/2022/10/04/judges-question-in-mental-health-lawsuit-implications/ [perma.cc/3VVL-2WB6].
[182] *Id.*

VI. Conclusion

When Judge Reeves wrote the opinion in *U.S. v. Mississippi*, he entitled its closing section "Moving Forward."[183] He expressed a belief that the DMH had made good faith efforts that were, in some ways, "fruitless."[184] He said, "Community-based services have only advanced alongside the United States' integration and enforcement litigation."[185] Because the statutory construction supports that the DOJ can file a Title II lawsuit, and no legitimate federalism issues arise, the DOJ should be able to continue to file suits legally under Title II. Doing so helps to advance the realization of *Olmstead*'s vision.

When Mississippi appealed the lower court's ruling to the Fifth Circuit, peer support specialist Ms. Worsham wrote a letter to the Attorney General asking who exactly their attorneys represented.[186] "If our [R]epublic is predicated upon the notion that the government represents the People, it makes no sense to me that these attorneys are not representing the People whose lives are most impacted by the case."[187] Worsham said that in some ways the state operated still as if it were in the days of the asylums.[188] Stated another way, it operates as if it is moving backwards. She suggested it would be more productive to act consistent with the DOJ's enforcement efforts which would make positive changes while saving taxpayer dollars.[189] If so, it would be moving forward. Given the road map outlined in this discussion, what should the Supreme Court do if presented with the question of the Attorney General's standing to file suit under Title II? Move *forward*.

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[183] *Mississippi*, 400 F. Sup. 3d 546, 578.
[184] *Id.* at 578-79.
[185] *Id.* at 579.
[186] Melody Worsham, *Melody Worsham: Open Letter to Mississippi Attorney General Lynn Finch Regarding U.S. v. Mississippi*, Families as Allies (Oct. 22, 2021), https://www.faams.org/melody-worsham-open-letter-to-mississippi-attorney-general-lynn-fitch-regarding-u-s-v-mississippi/ [perma.cc/25TY-N94F].
[187] *Id.*
[188] *Id.*
[189] *Id.*

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