Circulating Opinion

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UNITED STATES of America, *Plaintiff-Appellants*

v.

State of FLORIDA, *Defendant-Appellees*.

No. 17-13595, Decided September 17, 2019

U.S. Court of Appeals for the Eleventh Circuit

Introduction:

In *United States v. Florida*, 2019 WL 4439465 (3d Cir. Sept. 17, 2019), the Eleventh Circuit concluded, per Sixth Circuit Judge Boggs sitting by designation, that the Attorney General of the United States may enforce Title II of the Americans with Disabilities Act (ADA) against public entities through a civil action. The majority opinion reasons that Congress indicated its clear intent to grant the Attorney General litigating authority under Title II by (1) cross-referencing other federal civil rights laws that granted the Attorney General litigation authority and (2) ordering the Attorney General to promulgate implementing regulations. In her succinct dissent, Judge Branch reads the statute as written, criticizing the majority for circumventing the presumption that the federal sovereign is not a "person," and thus concluding that the Attorney General cannot be "a person alleging discrimination." The language of Title II does not mention the Attorney General, she notes, while Titles I and III of the ADA explicitly name the Attorney General as an entity with enforcement authority.

Opinion Digest:

BRANCH, Circuit Judge, dissenting:

Because the United States is not a "person alleging discrimination" under Title II of the Americans with Disabilities Act ("ADA"), Title II does not provide the Attorney General of the United States with a cause of action to enforce its priorities against the State of Florida. Accordingly, I respectfully dissent.

The relevant text of Title II states:

> The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to **any person alleging discrimination** on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12133 (emphasis added). The language of this provision is unambiguous. Title II provides enforcement rights "to any person alleging discrimination." Thus, the question is whether the Attorney General is a "person alleging discrimination" under Title II.

The Honorable Elizabeth L. Branch was nominated to the Eleventh Circuit by President Donald J. Trump and confirmed on February 27, 2018. *Judge Branch had no role in WLF's selecting or editing this opinion for our* CIRCULATING OPINION *feature.*

To answer that question, we apply "a 'longstanding interpretive presumption that 'person' does not include the sovereign,' and thus excludes a federal agency." *Return Mail, Inc. v. USPS*, 587 U.S. ——, 139 S.Ct. 1853, 1861–62, 204 L.Ed.2d 179 (2019) (quoting *Vermont Agency of Natural Resources v. US ex rel. Stevens*, 529 U. S. 765, 780–781, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)). In *Return Mail*, the Supreme Court considered whether the United States Postal Service ("USPS"), a federal agency, was a "person" eligible to seek patent review under the America Invents Act ("AIA"). USPS had petitioned for review of Return Mail's patent under two sections of the AIA that allow for post-issuance patent review. *Id.* at 1861–62. However, the language of the AIA limited post-issuance review proceedings to "a person who is not the owner of a patent," *id.* (citing 35 U.S.C. §§ 311(a), 321(a)), or when "the person or the person's real party in interest or privy has been sued for infringement." *Id.* (citing AIA § 18(a)(1)(B), 125 Stat. 330). Thus, the direct question presented to the Supreme Court in *Return Mail* was: "whether a federal agency is a 'person' capable of petitioning for post-issuance review under the AIA." *Id.* In concluding that the Government presumptively is *not* a "person" for purposes of federal statutes, the Supreme Court explained:

> This presumption reflects "common usage." *United States v. Mine Workers*, 330 U.S. 258, 275 [67 S.Ct. 677, 91 L.Ed. 884] (1947). It is also an express directive from Congress: The Dictionary Act has since 1947 provided the definition of "person" that courts use "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1; *see Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199–200 [113 S.Ct. 716, 121 L.Ed.2d 656] (1993). The Act provides that the word "person ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." § 1. Notably absent from the list of "person[s]" is the Federal Government. *See Mine Workers*, 330 U.S. at 275 [67 S.Ct. 677] (reasoning that Congress' express inclusion of partnerships and corporations in § 1 implies that Congress did not intend to include the Government). Thus, although the presumption is not a "hard and fast rule of exclusion," *United States v. Cooper Corp*., 312 U.S. 600, 604–605 [61 S.Ct. 742, 85 L.Ed. 1071] (1941), "it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Stevens*, 529 U.S. at 781 [120 S.Ct. 1858].

Id. at 1862.

Given *Return Mail*'s clear explanation of the presumption in favor of excluding the Federal Government from the definition of "person," I approach the analysis of Title II the same way. As such, I begin with the presumption that "person alleging discrimination," 42 U.S.C. § 12133, does not include the United States. *See Return Mail*, 139 S.Ct. at 1861–62. In order to overcome "the presumption that a statutory reference to a 'person' does not include the Government," there must be "some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government" in its definition of "person." *Id.* Nothing in the text of Title II overcomes this presumption. But *Return Mail* states that context matters, too. And so I next examine the enforcement language contained in the other Titles of the ADA.*

* The ADA contains three primary subchapters, each referred to as a separate "Title." Each Title "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." *Tennessee v. Lane*, 541 U.S. 509, 516–17, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004).

In Title I of the ADA, the enforcement language provides as follows:

> The powers, remedies, and procedures set forth in ... this title shall be the powers, remedies, and procedures this subchapter provides **to the Commission, to the Attorney General, or to any person alleging discrimination** on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12117(a) (emphasis added). The text of Title I thus explicitly conveys the "powers, remedies, and procedures ... to the Attorney General." *Id.* Title II echoes the "any person alleging discrimination" language contained in Title I, but the reference to "the Attorney General" is conspicuously missing from Title II. *Compare* 42 U.S.C. § 12133, *with* 42 U.S.C. § 12117(a).

Title III of the ADA also contains language bestowing enforcement authority on the Attorney General:

> If the Attorney General has reasonable cause to believe that—(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or (ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance, **the Attorney General may commence a civil action in any appropriate United States district court**.

42 U.S.C. § 12188(b)(B) (emphasis added). The text of Title III of the ADA is even more explicit than the text of Title I and clearly provides the Attorney General with the authority to bring a civil suit in federal court. Title II, by contrast, is entirely devoid of any reference to "the Attorney General" or the power to "commence a civil action." *Compare* 42 U.S.C. § 12133 *with* 42 U.S.C. § 12188(b)(B).

The difference in language across the ADA's three titles is noteworthy. It is well settled that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). If Congress had intended to grant a civil cause of action to the Attorney General in Title II, "it presumably would have done so expressly as it did in" Titles I and III. *See Russello*, 464 U.S. at 23, 104 S.Ct. 296.

Yet the majority essentially reads Title III's language (that "the Attorney General may commence a civil action in any appropriate United States district court") into Title II. Although the majority readily admits that, "at first glance, Title II's enforcement provision is not as specific as those in Titles I and III," it finds these differences inconsequential. The majority reasons that the differences between Title II and the other subchapters of the ADA "should not dictate a conclusion that, absent greater specificity, we should simply assume that a single word in § 12133 ends all inquiry." As discussed above, the inquiry does, in fact, turn on a single word. Accordingly, it is clear that the Attorney General is not a "person alleging discrimination" under Title II.

Notably, however, the United States does not argue that the Attorney General is a "person alleging discrimination." The United States instead argues that "Title II provides to 'persons' alleging discrimination the 'remedies, procedures, and rights'—including the prospect of Attorney General enforcement—that are provided to persons under the Rehabilitation Act and Title VI." The majority agrees with the United

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States: "Focusing solely on the word 'person' and the difference in the language of enforcement provisions within the ADA ignores" the presumption that "Congress legislated in light of existing remedial structures." But "[f]ocusing solely on the word 'person' " is precisely where this case should begin and end. Because the Attorney General of the United States—on behalf of the United States itself and *not* on behalf of any individuals served by the State of Florida—filed suit in this case, it is the United States that must have a cause of action to enforce Title II. And that determination necessarily depends on whether the Attorney General is a "person alleging discrimination" under the text of Title II. Because he is not such a person, the Attorney General has none of the "rights, procedures, and remedies" available under the Rehabilitation Act and Title VI. Accordingly, in this case, it is legally irrelevant what those "rights, procedures, and remedies" are because he simply does not possess those rights with respect to Title II. I do not agree that the multitude of cross-references to other federal regulatory schemes somehow provides a cause of action that does not otherwise exist in the text of Title II.

The Attorney General also insists that "a holding that the Attorney General cannot continue to bring lawsuits to enforce Title II would seriously undermine federal enforcement of the ADA against public entities." But we cannot expand the definition of "person" just because such an interpretation would "further the purpose of the" statute. *Return Mail*, 139 S.Ct. at 1867 n.11. "Statutes rarely embrace every possible measure that would further their general aims, and, absent other contextual indicators of Congress' intent to include the Government in a statutory provision referring to a 'person,' the mere furtherance of the statute's broad purpose does not overcome the presumption in this case." *Id. See Cooper*, 312 U.S. at 605, 61 S.Ct. 742 ("[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made"). And Title II remains enforceable—even if the Attorney General does not have enforcement authority—because, as the Attorney General acknowledges, a "person alleging discrimination" may still enforce Title II through a private right of action.

Both the United States and the majority make much of the fact that "one of the purposes of the ADA was to ensure that the Federal Government 'play[ed] a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities.' " But, even if we find—as I do—that Title II does not allow the Attorney General to bring suit, the federal government will continue to "play a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3). Title I and Title III of the ADA clearly and explicitly confer enforcement authority on the Attorney General. *See* 42 U.S.C. §§ 12117(a), 12188(b)(B). Accordingly, a holding that the Attorney General cannot sue the States to enforce Title II does not affect, in any way, the Attorney General's ability to enforce the other Titles of the ADA. Thus, the ADA's broad statutory purpose rationally coexists with the holding that the Attorney General cannot file federal lawsuits to enforce Title II.

Because the text of Title II is determinative, and because that text does not provide the Attorney General with a cause of action to enforce Title II against the State of Florida, I would affirm the order of the district court. I respectfully dissent.

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