

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civ. Action No. 4:16-cv-02331
)	
HARRIS COUNTY,)	ORAL ARGUMENT REQUESTED
)	
Defendant.)	
)	
)	
)	

**UNITED STATES’ OPPOSITION TO HARRIS COUNTY’S MOTION TO DISMISS
AND, ALTERNATIVELY, MOTION FOR MORE DEFINITE STATEMENT**

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I. Introduction

Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 (“Title II” or “ADA”), requires public entities like Harris County to ensure that their programs, services, and activities do not discriminate against individuals with disabilities. Title II’s mandate includes ensuring that the core governmental function of voting is accessible to those with disabilities. The United States’ Complaint, which must be taken as true for purposes of this motion to dismiss, alleges that Harris County has failed to comply with this mandate.

Harris County has moved to dismiss (ECF 11, “MTD”), arguing principally that the United States has no authority to file suit to enforce the guarantees of Title II. That is wrong: Title II incorporates well-known enforcement remedies from other civil rights statutes that have long been interpreted to provide the Attorney General with a right of action. (*See* Section III, *infra*.) Harris County’s other arguments for dismissal are equally unavailing. Contrary to Harris County’s contention, the United States fulfilled all necessary prerequisites to filing suit (Section IV), and the Complaint properly provides Harris County fair notice of the claim and the ground on which it rests (Section V). And because Harris County has both the right and the authority to ensure the accessibility of polling places, neither facility owners nor election judges are necessary parties (Section VI). Finally, Harris County’s motion for a more definite statement should be denied because the United States has already provided Harris County with the information it seeks (Section VII).

II. Factual Background

The United States’ Complaint (ECF 1) alleges that Harris County is responsible for the administration of elections in Harris County, including selecting more than 700 facilities that are used as polling places and ensuring the physical accessibility of each facility. Compl. ¶¶ 1, 6, 7.

In January 2013, the United States surveyed 86 polling places in Harris County to determine whether they were accessible to individuals with mobility disabilities and to assess whether Harris County's voting program was in compliance with Title II. *Id.* ¶ 9. The United States found that most of the polling places were not accessible, but nearly all could be made accessible with temporary modifications, such as portable ramps or alternative routes. *Id.* ¶ 10. In September 2014, the United States sent Harris County a Letter of Findings detailing the survey results and the temporary modifications that would be necessary to make each polling place accessible.

The Letter explained that Harris County had violated Title II of the ADA by failing to select polling places that were accessible (or would be made accessible through temporary measures). The Letter further explained that coming into compliance with Title II would require Harris County to (1) remedy identified problems through temporary measures, if possible, and (2) assess the remainder of its polling places and ensure that they were accessible or would be made accessible through temporary measures. *See* https://www.ada.gov/harris_county_lof.htm.

In May 2016, in order to verify Harris County's written representation that system-wide corrective actions were being taken, the United States conducted a followup survey. *See id.* ¶ 11. In this followup survey, the United States surveyed 32 new polling places and found that most were inaccessible because they had, "for example, steep curb ramps, gaps in sidewalks and walkways, and locked gates along the [accessible] route barring pedestrian access." *Id.* ¶ 11. Additionally, after reviewing information provided by Harris County, the United States concluded that Harris County was continuing to use some of the inaccessible polling places identified during the 2013 survey without making the necessary modifications to ensure accessibility. *See id.* ¶ 12.

Accordingly, the United States concluded that Harris County was violating the ADA by

denying voters with disabilities the same opportunity that voters without disabilities have to vote in person, and brought this lawsuit. *See id.* ¶ 13.

III. The Attorney General Has A Right Of Action To Enforce Title II

A. Overview

Congress enacted the ADA to provide a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits public entities, such as Harris County, from discriminating on the basis of disability. *Id.* § 12132. Congress adopted Title II’s enforcement scheme from a longstanding, well-understood civil rights framework. Specifically, Title II incorporates the enforcement framework of the Rehabilitation Act of 1973 (“Rehabilitation Act”), which prohibits discrimination on the basis of disability by federally funded entities. 29 U.S.C. §§ 794, 794a. The Rehabilitation Act, in turn, incorporates the enforcement framework of Title VI of the Civil Rights Act of 1964 (“Title VI”), which prohibits discrimination on the bases of race, color, or national origin by federally funded entities. 42 U.S.C. §§ 2000d, 2000d-1.

Congress understood when it enacted Title II in 1990 that these statutes gave the Attorney General a right of action to file enforcement suits in federal court. Title VI provides that compliance can be achieved either by administrative termination of federal funding or by “*any other means authorized by law.*” 42 U.S.C. § 2000d-1. For more than 50 years, the regulations implementing Title VI have interpreted the phrase “by any other means authorized by law” to mean enforcement suits by the Attorney General. *See infra* at 7-8. Courts universally accepted this interpretation in cases filed under Title VI and statutes modeled on it. *Id.* at 6-7. When Congress amended the Rehabilitation Act to include an enforcement provision, it specifically intended to codify Rehabilitation Act regulations that incorporated Title VI regulations giving

the Attorney General a right of action. *Id.* at 10-11.

Congress clearly understood this history, and intended to give the Attorney General the same right of action, when it passed the ADA and incorporated the enforcement mechanisms of Title VI and the Rehabilitation Act. The House and Senate reports accompanying Title II both stated that the “the major enforcement sanction” for a Title II violation would be that the “Department of Justice [could] file suits in Federal district court.” H.R. Rep. No. 101-485(II), at 98 (1990); *see also* S. Rep. No. 101-116, at 57-58 (1989) (same). Accordingly, for more than 25 years, the Attorney General has enforced Title II through litigation and court-enforceable settlement agreements. *See infra* at 19-20. Apart from the lone district court case on which Harris County relies, every court to address the issue has agreed that the Attorney General has authority to bring cases under Title II. *Id.*

Notwithstanding all this, Harris County now argues that the Attorney General does not have the authority to enforce Title II (or, absent some independent source of a right of action, Title VI and the Rehabilitation Act). *See* MTD at 3-8. Harris County’s brief is based entirely on the single case to reach this conclusion, *C.V. v. Dudek*, No. 12-60460, 2016 WL 5220059 (S.D. Fla. Sept. 20, 2016). Harris County’s argument hinges on Congress’s failure to explicitly name the Attorney General in Title II. But there was no need for Congress to do so, because Title II incorporated statutory enforcement provisions that had long been understood to give the Attorney General a right of action. To justify its novel reading of Title II, Harris County theorizes that Congress likely did not mean to allow enforcement by the Attorney General because “Title II reaches into many areas traditionally regulated” by states, and “thereby imposes significant federalism costs,” which would be compounded by federal enforcement. MTD at 7. But Harris County cannot cite a single sentence from the ADA’s legislative history suggesting

that Congress in fact had any such concern. Moreover, Harris County’s argument renders superfluous portions of the statutory text; ignores the plain statements in the ADA’s legislative history that Congress intended the Attorney General to enforce Title II; refuses to give deference to the implementing regulations; and rejects the reasoning of numerous courts that have addressed the issue in the context of Title VI, the Rehabilitation Act, or the ADA.

Understanding Title II’s enforcement provision requires understanding the enforcement provisions that it incorporated. Thus, the following sections will discuss Title VI, then the Rehabilitation Act, and then Title II. Based on the history of these statutes, the plain language of the ADA, its legislative history, and the implementing regulations, the United States has the authority to bring this lawsuit to vindicate the rights of voters with disabilities in Harris County. To the extent the Court deems the ADA ambiguous, it should defer to the United States’ longstanding interpretation that Title II confers such authority.

B. Statutory Text

As noted, Title II of the ADA was modeled on the Rehabilitation Act of 1973, which in turn was modeled on Title VI of the Civil Rights Act of 1964. All three statutes’ non-discrimination provisions and enforcement provisions are set forth below.

	Non-Discrimination Mandate	Enforcement Provision
ADA Title II (1990)	[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.	The remedies, procedures, and rights set forth in section 794a of title 29 [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II]. 42 U.S.C. § 12133.
Rehabilitation Act (1973, 1978)	No otherwise qualified individual with a disability in the United States, shall, solely by reason of her or his	The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

	disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.] 29 U.S.C. § 794(a) (“Section 504”).	. . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title. 29 U.S.C. § 794a(a)(2) (“Section 505”).
Title VI (1964)	No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d.	Compliance . . . may be effected (1) by the termination of or refusal to grant or to continue [federal] assistance . . . , or (2) by any other means authorized by law[.] 42 U.S.C. § 2000d-1.

C. The Attorney General Can Enforce Title VI Through Litigation

The enforcement framework that Congress selected for Title II begins with Title VI of the Civil Rights Act of 1964. Title VI’s enforcement provision, 42 U.S.C. § 2000d-1, provides that compliance can be effected by (1) administrative termination of federal funds to any federally funded entity that is discriminating on the basis of race, color, or national origin, *or* (2) “by any other means authorized by law.”

Courts have consistently interpreted the phrase “by any other means authorized by law” in Title VI as providing enforcement authority to the Attorney General to file an action in federal court. *See, e.g., Nat’l Black Police Ass’n, Inc. v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) (“Title VI clearly tolerates other enforcement schemes [besides termination of federal funding]” including “referral of cases to the Attorney General, who may bring an action”); *United States v. County of Maricopa*, 151 F. Supp. 3d 998, 118-119 (D. Ariz. 2015) (Title VI’s “any other means authorized by law” provision empowers the United States to bring suit); *United States v. Tatum Indep. Sch. Dist.*, 306 F. Supp. 285, 288 (E.D. Tex. 1969) (“[t]he United States is authorized to bring this action under Title VI of the Civil Rights Act of 1964, and its implementing

regulations, 45 C.F.R. 80.8(a)"). Courts have also interpreted statutes with enforcement provisions modeled on Title VI in the same way. *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984) ("We do not mean to imply that a federal agency seeking to enforce antidiscrimination provisions of [the Rehabilitation Act] must resort to administrative remedies. The statute expressly states otherwise: an agency may resort to 'any other means authorized by law'—including the federal courts."); *United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002) (the statutory language "take any other action authorized by law . . . expressly permits the Secretary to bring suit to enforce the [Family Educational Rights and Privacy Act] conditions in lieu of its administrative remedies.").

Indeed, the reason there are not more cases addressing the Attorney General's right to sue is that the point has been so well-established as to be beyond controversy. For decades, courts have found that the federal government has authority to litigate to enforce Title VI's prohibition on discrimination in programs receiving federal funding. *See Brown v. Califano*, 627 F.2d 1221, 1232 (D.C. Cir. 1980) (noting, in a Title VI case, the importance of the Attorney General's "authority . . . to initiate enforcement actions . . . [and] the Department [of Justice's] historic role in civil rights enforcement."). The question that preoccupied courts was whether private parties, *in addition to the United States*, had a cause of action. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (emphasizing that Title VI's enforcement provision focuses on enforcement by federal agencies, not private parties); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 722 & n.9 (1979) (White, J., dissenting) (disagreeing with the Court regarding whether civil rights law modeled on Title VI allowed *private* lawsuits, but noting that federal agencies could of course bring actions to enforce Title VI).

The regulations implementing Title VI likewise have specified since their inception that

the Attorney General has a right of action to sue to enforce Title VI. Numerous agencies provide federal funding, and thus numerous agencies enforce Title VI and have issued implementing regulations. The same year Title VI was passed, six federal agencies promulgated regulations (all still in force today) providing that the enforcement mechanisms for Title VI “include, but are not limited to . . . 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 (including other titles of the Act), or any assurance or other contractual undertaking.” *See, e.g.,* 29 Fed. Reg. 16,298, 16,301 (Dec. 4, 1964) (now codified at 45 C.F.R. § 80.8); *see also* 29 Fed. Reg. 16,274-16,309 (Dec. 4, 1964). In addition, pursuant to an Executive Order, the Department of Justice in 1965 was assigned the task of “coordinating” the implementation and enforcement of Title VI across the federal government. *See* Exec. Order No. 11,247, 30 Fed. Reg. 12,327 (Sept. 28, 1965). Exercising that authority, the Department of Justice that year issued now-codified Guidelines for Enforcement of Title VI (“Title VI Guidelines”), which provide that Title VI can be enforced in court through contract suits, suits to enforce compliance with other nondiscrimination laws or regulations, or “*initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.*” 31 Fed. Reg. 5292 (Apr. 2, 1966) (emphasis added) (codified at 28 C.F.R. § 50.3). *See also* 41 Fed. Reg. 52,699, 52,672 (Dec. 1, 1976) (codified at 28 C.F.R. § 42.411) (similar Department of Justice Title VI coordination regulation).

Thus, from the time it was passed, courts and federal agencies have consistently construed Title VI as establishing an enforcement regime in which the Attorney General can bring “a suit for other relief designed to secure compliance.” 28 C.F.R. § 50.3. Both the implementing and coordination regulations merit deference, *Chevron USA, Inc. v. Nat. Res. Def.*

Council, Inc., 467 U.S. 837, 842 (1984), and regulations issued by the coordinating agency are “of particular significance.” *Bragdon v. Abbott*, 524 U.S. 624, 632 (1988).

In the face of this evidence that the Attorney General has the authority to enforce Title VI in court, Harris County argues that the United States’ rights are limited to actions authorized by extrinsic sources of law—for instance, contract actions. MTD at 6. This is wrong for numerous reasons. First, if Harris County were correct, there would be no need for Title VI’s “any other means authorized by law” provision at all; it would not grant the Attorney General any authority she did not already have from other laws. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“a statute ought . . . to be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”) (citation omitted). In effect, Harris County is reading the phrase “other means authorized by law” to mean “other means *already* authorized by *some other* law,” but there is no basis for the addition of the italicized words to the statute. Second, Harris County’s reading is inconsistent with the Title VI Guidelines and the agencies’ implementing regulations, which specify that the Attorney General may bring both contract actions *and* general enforcement actions. *See* 45 C.F.R. § 80.8(a); 28 C.F.R. § 50.3; *supra* at 7-8. Third, every court other than the *C.V. v. Dudek* court to consider Harris County’s argument has rejected it. *See supra* 6-7; *infra* 19-20.

Moreover, Harris County’s reading would mean that private parties, who have an implied right of action to enforce Title VI regardless of whether a contractual assurance exists, could sue when the Attorney General cannot. Consistent with the longstanding understanding that Title VI is primarily focused on federal enforcement, the Supreme Court in *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 467 n.5 (1999), specifically rejected the argument that a private right of action in laws modeled on Title VI is “potentially broader than the Government’s

enforcement authority.” It would, the Court explained, “be anomalous to assume that Congress intended the implied private right of action to proscribe conduct that Government enforcement may not check.” *Id.*

D. The Attorney General Can Enforce the Rehabilitation Act Through Litigation

The enforcement framework of Title VI is incorporated into the Rehabilitation Act, which forbids disability-based discrimination by federally funded entities. 29 U.S.C. § 794. The Rehabilitation Act contained no enforcement provision when it was originally passed in 1973. Instead, in 1977, the Department of Health, Education and Welfare (“HEW”) issued regulations that incorporated its Title VI regulations, which stated that enforcement mechanisms “include, but are not limited to . . . 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 (including other titles of the Act), or any assurance or other contractual undertaking.” 42 Fed. Reg. 22,676, 22,685, 22,694-22,695 (May 4, 1977) (45 C.F.R. § 84.61, incorporating HEW’s Title VI regulations at 45 C.F.R. §§ 80.6-80.10).

In 1978, Congress amended the Rehabilitation Act to add Section 505, which states that the “remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act” in violation of the Rehabilitation Act. Pub. L. No. 95-602, § 120(a), 92 Stat. 2955 (1978) (codified at 29 U.S.C. § 794a). As the Supreme Court recognized, Section 505 “was intended to codify the regulations of the Department of Health, Education and Welfare governing enforcement of” the Rehabilitation Act. *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 635 & n.16 (1984) (citing S. Rep. No. 95-890 (1978), at 19); *accord Alexander v. Choate*, 469 U.S. 287, 304 n.24, 306 n.27 (1985). Thus, Section 505 codifies “as a specific statutory requirement” HEW’s regulations,

which called for Department of Justice enforcement authority through litigation. *See* S. Rep. No. 95-890 (1978), at 19; *see also* 45 C.F.R. § 84.61, incorporating 45 C.F.R. § 80.8.

As Congress contemplated, the Attorney General brought suits to enforce the Rehabilitation Act. *See, e.g., United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1049 (5th Cir. 1984); *United States v. Univ. Hosp. of State Univ. of N.Y. at Stony Brook*, 575 F. Supp. 607, 616 (E.D.N.Y. 1983); *United States v. Bd. of Trustees for Univ. of Alabama*, 908 F.2d 740 (11th Cir. 1990). These courts, like the courts that had considered cases under Title VI, agreed that the Attorney General had a right of action to enforce the Act. *See Baylor Univ.*, 736 F.2d at 1049 (stating that the university’s receipt of Medicare and Medicaid payments “subjects it to appropriate federal action under the Rehabilitation Act”); *Univ. Hosp. of State Univ. of N.Y. at Stony Brook*, 575 F. Supp. at 616 (the Rehabilitation Act authorizes suit by the federal government to remedy discrimination by federal fund recipients).

E. The Attorney General Can Enforce Title II of the ADA Through Litigation

1. As Congress Understood, Title II of the ADA Incorporated Title VI’s and the Rehabilitation Act’s Right of Action for the Attorney General

Thus, by the time Congress enacted Title II, it had been understood for decades that Title VI and the Rehabilitation Act gave the Attorney General a right of action to sue to ensure compliance with those statutes’ non-discrimination mandates. Congress’s awareness of that legal background is important. As the Supreme Court explained, even under a “strict approach” to statutory construction, “our evaluation of congressional action . . . must take into account its contemporary legal context,” and it is “always appropriate to assume that our elected representatives, like other citizens, know the law.” *Cannon*, 441 U.S. at 696-97; *accord Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the

interpretation given to the incorporated law, at least insofar as it affects the new statute.”).¹

Title II was enacted to extend the Rehabilitation Act’s reach, because the Rehabilitation Act prohibited discrimination only by federally funded entities and therefore provided no means to address discrimination by many other public entities. *See* 42 U.S.C. § 12101(a)(3) (finding that disability-based discrimination “persists” in “access to public services”). Thus, “Congress’ intent was that Title II extend the protections of the Rehabilitation Act to cover all programs of state or local governments, regardless of the receipt of federal financial assistance[,] and that it work in the same manner as [the Rehabilitation Act].” *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (internal quotation marks and citation omitted).

Accordingly, Congress incorporated the enforcement provision of the Rehabilitation Act (and therefore of Title VI) into Title II. Title II’s enforcement provision, 42 U.S.C. § 12133, states that “[t]he remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act] shall be *the remedies, procedures, and rights this subchapter provides to any person* alleging discrimination on the basis of disability in violation of” Title II. *Id.* (emphasis added).

The main import of this section is not merely that a “person alleging discrimination” may bring a

¹ Much like this case, *Cannon* involved a challenge to a long-established view of who could enforce a civil rights law. There, the Supreme Court held that Title IX of the Education Amendments of 1972, which was modeled on Title VI, must be construed to incorporate a private right of action. 441 U.S. at 694-95, 717. The Court’s holding was based on the fact that Title VI had long been assumed to incorporate a private right of action, and “we are . . . justified in presuming both that [Congress was] aware of the prior interpretation of Title VI” when it adopted Title IX, and thus “that that interpretation reflects their intent with respect to Title IX.” *Id.* at 697-98. The Court noted that “the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.” *Id.* at 711 (internal quotation marks and citation omitted). The Court concluded, in reasoning that applies equally in this case: “[T]he very persistence—before 1972 and since, among judges and executive officials, as well as among litigants and their counsel, and even implicit in decisions of this Court—of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption.” *Id.* at 702-03.

lawsuit, but rather that the “remedies, procedures, and rights” of Section 505 are “*provide[d] to*” such persons. As Congress knew, the “remedies, procedures and rights” of Section 505 (and Title VI) center on enforcement *by the federal government*, including litigation by the Attorney General. *See, e.g.*, 28 C.F.R. § 50.3; 28 C.F.R. § 41.5. Thus, the Attorney General has a right of action under this section—not because the Attorney General is a “person,” *see* MTD at 7, but because the Attorney General had a cause of action under the “remedies, procedures and rights” of Section 505 that were incorporated into Title II.

The legislative history makes clear exactly what Congress intended to accomplish by incorporating these “remedies, procedures and rights.” The House and Senate committee reports say: “Because the fund termination procedures of section 505 of the Rehabilitation Act . . . are inapplicable to State and local government entities that do not receive Federal funds, the major enforcement sanction for the Federal government will be referral of cases by . . . Federal agencies² to the Department of Justice. . . . The Department of Justice may then proceed to file suits in Federal district court.” H.R. Rep. No. 101-485(II), at 98 (1990); *see also* S. Rep. No. 101-116, at 57 (1989) (same).³ In other words, by incorporating the remedies, procedures and

² In this case, the Department of Justice is the designated agency with initial responsibility over voting related matters. 28 C.F.R. § 35.190(b)(6).

³ These reports accompanied an earlier draft of Title II with slightly different language. However, the change is irrelevant. The earlier draft stated that the remedies, procedures and rights of Section 505 “shall be available with respect to” any person alleging discrimination; the later draft stated that these remedies would be “provide[d] to” such persons. This change was made because the House Judiciary Committee was concerned that in Title I, concerning employment, the “shall be available” language suggested “that a plaintiff could bypass the administrative remedies of title VII and go directly to court.” H.R. Rep. No. 101-485(III), at 48-49 (1990); *id.* at 49 n.48 (“The concern[] expressed was that the term ‘shall be available’ could be read to mean that the powers, remedies and procedures were merely available to a plaintiff, and that a plaintiff could choose not to avail him or her self of such powers, remedies and procedures.”). The Committee then made identical changes to Titles II and III for the same reason. *Id.* at 23, 52 (“As in title I, the Committee . . . delete[d] the term ‘shall be available’ in

rights of Section 505, Congress intended to provide the Attorney General with a right of action.

Harris County's argument that § 12133 does nothing more than create a private right of action is thus directly contradicted by the legislative history. Indeed, Harris County's reading would render meaningless Title II's reference to "the remedies, procedures and rights set forth in" Section 505, an unacceptable result because "statutes must be read in harmony with one another so as to give meaning to each provision." *United States v. Caldera-Herrera*, 930 F.2d 409, 411 (5th Cir. 1991). If Congress had intended to create only a private right of action, Congress presumably would simply have stated that individuals could sue to enforce Title II's provisions, or at a minimum cited to a statutory provision setting forth a private right of action. For instance, in Title II of the Civil Rights Act of 1964, which prohibited certain forms of discrimination in public accommodations, Congress enacted an enforcement provision stating that "[w]henver any person has engaged . . . in any act or practice prohibited by . . . this title, a civil action for preventive relief . . . may be instituted by the person aggrieved." 42 U.S.C. § 2000a-3. But instead of enacting a similar provision in Title II of the ADA, Congress chose to incorporate Section 505, which was widely understood to give the Attorney General a right of action in federal court.

Applying Harris County's textual interpretation of § 12133 to the Rehabilitation Act's enforcement provision – from which § 12133 was copied nearly word for word – demonstrates the untenable consequences of Harris County's interpretation. If Harris County were correct that naming "persons" and not the Attorney General eliminated the Attorney General's enforcement authority, then Section 505 of the Rehabilitation Act must likewise deny the Attorney General

order to clarify that Rehabilitation Act remedies are the only remedies which title II provides for violations of title II." The change thus had nothing to do with removing the Attorney General's enforcement authority. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

any statutory enforcement authority. But that conclusion makes no sense. The Rehabilitation Act applies only to federally funded entities; it contemplates the revocation of federal funding when that funding is used to perpetuate discrimination; and there is no reason Congress would have wanted only private parties to enforce it. On the contrary, as recognized by the Supreme Court, Section 505 was enacted with the purpose of codifying HEW's enforcement procedures, which called for Attorney General enforcement in court. *Darrone*, 465 U.S. at 635 & n.16 (1984). And the idea that the drafters of Section 505 would have referred to Title VI solely to create a private right of action is illogical: the Supreme Court did not confirm until *after* Section 505 was passed that Title VI indeed contained a judicially-implied private right of action, *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95, 717 (1979).

In short, the drafters of § 12133 knew that Section 505 gave the Attorney General a right of action to sue to enforce the statute,⁴ and there is no reason to believe that they copied Section 505's well-understood "remedies, procedures, and rights" language over to § 12133 only to create a private right of action. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (citation and internal quotation marks omitted). Indeed, Congress specifically provided in 42 U.S.C. § 12201 that the ADA must *not* be construed to provide any lesser protection than the Rehabilitation Act, a prohibition that Harris County's construction of Title II violates.

⁴ For the reasons explained above, both Title VI's enforcement provision and Section 505 give the Attorney General a right of action. But even assuming *arguendo* that Title VI did not provide such a right of action, that ultimately would not change the interpretation of Title II of the ADA. Title II incorporates Section 505, and, as discussed *supra* at 10-11, Congress specifically intended that Section 505 codify regulations providing that the Attorney General could enforce the law through litigation.

2. Title II Properly Incorporates the Attorney General's Right of Action by Reference Instead of Naming Her Specifically

In support of its argument, Harris County cites *Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995), for the proposition that “when an agency in its governmental capacity is meant to have standing, Congress says so” by explicitly naming the agency in the enforcement statute. MTD at 4. The Court in *Newport News* was interpreting a statute providing that “[a]ny person adversely affected or aggrieved by a final order . . . may obtain a review of that order.” 514 U.S. at 125-126 (citing 33 U.S.C. § 921(c)). The case does not stand for the general proposition that Congress must identify the Attorney General by name in any enforcement provision. Instead, the Court held that the statute did not provide appellate authority for the agency director in light of the text and statutory scheme as a whole. *Id.* at 126-136. Unlike Title II, the statute at issue in *Newport News* used a term of art in identifying who could “obtain a review” and, unlike Title II, it did not incorporate any other statutory enforcement scheme, much less a well-established enforcement structure that for fifty years has relied on federal government enforcement action. Nothing in *Newport News* bars Congress from incorporating the Attorney General’s enforcement authority by reference rather than by explicitly naming the Attorney General. That is what Congress did here.

Harris County also relies on *Newport News* and canons of statutory construction to argue that the Court should place dispositive weight on the fact that Titles I and III of the ADA name the Attorney General, while Title II does not. MTD at 4-5. Canons of construction are, of course, “not mandatory rules,” but “guides . . . designed to help judges determine the Legislature’s intent as embodied in particular statutory language.” *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Thus, “circumstances evidencing congressional intent can overcome their force.” *Id.* Here, the statute’s structure makes clear that the difference between the Titles of the ADA was

not intended to limit federal enforcement authority under Title II. Instead, that difference reflects the fact that in Titles I and III, the Attorney General's authority was either different than that of private litigants, or different than the authority provided to her in the statutes incorporated by reference. Thus, it was necessary to name the Attorney General in Titles I and III so that her duties could be specified, but it was not necessary in Title II.

In particular, Title III of the ADA incorporates the enforcement provision of Title II of the Civil Rights Act, but then gives the Attorney General broader powers than those provided in Title II of the Civil Rights Act. For instance, Title III of the ADA allows the Attorney General to seek damages, 42 U.S.C. § 12188(b)(2), whereas Title II of the Civil Rights Act does not, 42 U.S.C. § 2000a-5. The Attorney General also has rights in Title III that private parties do not, such as her ability to seek damages and civil penalties, 42 U.S.C. §§ 12188(b)(2). Thus, the Attorney General had to be named so that these differences could be specified.

Likewise, Title I of the ADA, regarding disability discrimination in employment, incorporates a series of enforcement powers, remedies, and procedures from several sections of Title VII of the Civil Rights Act of 1964, which sets up a complex administrative regime in which different actions may be taken by complainants, the Equal Employment Opportunity Commission ("EEOC"), and the Attorney General. Each of the provisions of Title VII of the Civil Rights Act cross-referenced in Title I of the ADA name different actors that can exercise particular enforcement powers, remedies, and procedures. For example, 42 U.S.C. § 2000e-5 describes the role of the EEOC, while § 2000e-6 describes the role of the Attorney General. "The Commission" and "the Attorney General" are, therefore, identified by necessity in Title I's enforcement provision to clarify that the additional rights and responsibilities they held with respect to the Civil Rights Act, which are not shared with the general public, carry over to Title I

of the ADA.⁵

Title II, by contrast, has no administrative process like that in Title I, and the Attorney General's rights, remedies, and responsibilities are the same as those of private litigants. Thus, unlike in Titles I and III, it was unnecessary to specifically name the Attorney General. Nor did Title II differentiate the Attorney General's enforcement authority from that provided under the Rehabilitation Act, which authorized litigation, so there was no reason to mention her.⁶

⁵ A review of the drafts of Title I confirms that explicitly naming the Attorney General was intended to clarify the roles of each actor, not to grant litigation authority that would not otherwise have existed. Some early versions of the bill that became Title I named the Attorney General and the EEOC, but others did not. *Compare, e.g.*, S. 933, 101st Cong., 1st Sess. 15 (1989) (as introduced) (§ 205: “The remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964 . . . shall be available, with respect to *any individual . . .*”) (emphasis added); H.R. Rep. No. 101-485(II), at 82 (§ 107: “The remedies and procedures set forth in sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 . . . shall be available, with respect to *the Commission, the Attorney General, or any individual . . .*”) (emphasis added); S. Rep. No. 101-116 at 43 (“Section 106 of the legislation [as amended by the committee] specifies that the remedies and procedures set forth in sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be available with respect to *the Commission or any individual . . .*”) (emphasis added). None of the committee reports suggests that the addition of the reference to the Attorney General effected any substantive change. Not only was there no discussion about whether to name the Attorney General in Title I, but the Senate committee report stated—even though the Senate draft did *not* name the Attorney General—that the Attorney General would have “pattern or practice authority” to enforce the provision. S. Rep. No. 101-116, at 43. Eventually, the competing bills were reconciled with the unadorned statement that “The House amendment adds a reference to ‘the Attorney General.’ The Senate recedes.” H.R. Rep. 101-558 at 62. Nothing suggests that that naming the Attorney General was intended to grant her enforcement authority that previous drafts had lacked.

⁶ Harris County's similar attempt to distinguish Title VI of the Civil Rights Act from other titles of that Act (which explicitly name the Attorney General) also fails to account for that Act's structure. *See* MTD at 6. Unlike the other titles of the Civil Rights Act, Title VI bans discrimination in a wide range of contexts and is enforced by a variety of federal agencies. It would have been unnecessary and confusing for Congress to identify the head of only one of the many agencies responsible for enforcing these statutes; rather, broader language was appropriate. As another district court recently held, after examining the legislative history, Congress adopted the “any other means authorized by law” language in Title VI rather than a narrow provision stating that the Attorney General could bring suit specifically in order to ensure that enforcement procedures were as broad and flexible as possible for this complex title. *Maricopa*, 151 F. Supp. 3d at 1018.

3. Courts Have Consistently Concluded That the Attorney General Can Enforce Title II Through Litigation

As Congress intended, the Department of Justice has actively enforced Title II through litigation and court-enforceable settlement agreements since it was enacted. Every court to address the question except *C.V. v. Dudek* has recognized the Department's authority under Title II to bring suit. *See United States v. Virginia*, No. 12-cv-59, ECF 90 (E.D. Va. June 5, 2012) (rejecting argument that United States must rely on other statutory authority to bring enforcement action under ADA and stating that "the United States has the authority to initiate legal action to enforce Title II of the ADA"); *Disability Advocates, Inc. v. Paterson*, No. 03-cv-3209, 2009 WL 4506301, at *2 (E.D.N.Y. Nov. 23, 2009) (granting permissive intervention to Department of Justice, which is required "to promulgate regulations to implement and enforce Title II"); *United States v. City & Cnty. of Denver*, 927 F. Supp. 1396, 1399-1400 (D. Colo. 1996) (finding that the Department of Justice had met the requirements necessary to bring a Title II claim); *Smith v. City of Philadelphia*, 345 F. Supp. 2d 482, 489-90 (E.D. Pa. 2004) (dismissing private individual's Title II claim but retaining jurisdiction over United States' Title II claim because United States has "separate and independent basis for jurisdiction under Title II of the ADA and Section 504 of the Rehabilitation Act"); *see also, e.g., United States v. N. Ill. Special Recreation Ass'n*, No. 12-cv-7613, 2013 WL 1499034, at *5 (N.D. Ill. Apr. 11, 2013) (denying motion to dismiss United States' Title II complaint alleging that public athletic association discriminates against individuals with epilepsy); *United States v. City of Baltimore*, 845 F. Supp. 2d 640 (D. Md. 2012) (granting Department of Justice's motion for summary judgment in Title II claim).

In addition, the Department has entered into numerous court-enforceable consent decrees. The district courts that have approved these decrees, of necessity, have determined that the

United States had a right of action to initiate these complaints under Title II of the ADA. *See, e.g.,* U.S. Dep't of Justice, *ADA Enforcement*, https://www.ada.gov/enforce_current.htm#TitleII (detailing consent agreements); U.S. Dep't of Justice, *Housing Case Summary Page*, <https://www.justice.gov/crt/housing-cases-summary-page> (Beaumont, Ft. Worth).

4. There Is No Indication That Congress Was Motivated by Federalism Concerns

Harris County's final argument is that Congress precluded the Attorney General from enforcing Title II to avoid federal intrusion on the states. MTD at 7. But Harris County does not cite a single sentence from either the ADA's text or its legislative history suggesting that Congress had such a concern. To the contrary, the legislative history reveals Congress' overwhelming concern with expanding the reach of the Rehabilitation Act to all programs, activities, or services provided by state and local governments. *See, e.g.,* H.R. Rep. No. 101-485(II), at 84 (1990).

Thus, Harris County's argument would mean that although Congress' chief goal was to eliminate disability-based discrimination in public services, and Congress incorporated two well-known federal enforcement schemes to achieve that end, Congress nonetheless silently withdrew the Attorney General's enforcement power with respect to Title II. This is not credible; Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also Shotz v. City of Plantation*, 344 F.3d 1161, 1175-77 (11th Cir. 2003) (concluding that Congress' chief goal in Title II was to expand the reach of the Rehabilitation Act and refusing to accept an "overly literal" reading that would frustrate that goal). This reading is particularly implausible given that Congress stated within the statute that its key goal was "to ensure that the Federal Government plays a central role in enforcing" the prohibition against disability-based discrimination "on behalf of individuals with disabilities," 42 U.S.C.

§ 12101(b)(3), and that the ADA could not be construed to provide any “lesser standard” of protection than that provided by the Rehabilitation Act and its regulations, *id.* § 12201.

F. To the Extent That Title II Is Ambiguous, This Court Must Defer to the Department of Justice’s Regulations

Even assuming *arguendo* Title II were ambiguous, this Court must defer to the Title II regulations promulgated by the Department of Justice that allow for court enforcement by the Attorney General. Congress directed the Attorney General to promulgate regulations implementing Title II that are “consistent with” the Rehabilitation Act coordination regulations. 42 U.S.C. § 12134 (citing 28 C.F.R. pt. 41). The Attorney General did so, providing in 28 C.F.R. § 35.174 that if voluntary compliance cannot be achieved, the agency “shall refer the matter to the Attorney General with a recommendation for appropriate action.”

If the Court finds Title II to be ambiguous, the Court must accept the Attorney General’s reasonable construction of its authority under the statute. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-69 (2013) (applying *Chevron* deference to agency interpretation of statutory ambiguity that concerns the scope of agency’s statutory authority). The district court in *C.V. v. Dudek*, 2016 WL 5220059, at *9, was mistaken in holding that *Chevron* deference was inapplicable. The *Dudek* court reasoned that courts must defer “to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority,” but not to “the agency’s understanding of the court’s jurisdiction.” *Id.* But the issue of the Attorney General’s authority to sue does not implicate this court’s own jurisdiction: the absence of a valid “cause of action under the statute,” or “statutory standing,” does “not implicate subject-matter jurisdiction.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n.4 (2014). Moreover, the Court in *Arlington* specifically rejected any attempt at such artificial line-drawing, calling the distinction between “jurisdictional” and “nonjurisdictional”

interpretations “a mirage.” 133 S. Ct. at 1868. As the Court explained, “we have consistently held that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers. . . . no exception exists to the normal deferential standard of review for jurisdictional or legal questions concerning the coverage of an Act.” *Id.* at 1871 (internal quotation marks, citation, and alteration omitted). In response to the claim that this would give rise to a “fox-in-the-henhouse syndrome,” where agencies determined the scope of their own authority, the Court explained that this was to be avoided by ensuring that regulations were in fact a reasonable construction of the statute. *Id.* at 1874.

The Supreme Court nowhere suggested that *Chevron* deference did not apply to an agency interpretation of an ambiguous statutory provision regarding whether, or under what circumstances, the agency had a right of action in court. To the contrary, the Court cited prior cases in which it had deferred to precisely such determinations. For instance, in *Reiter v. Cooper*, 507 U.S. 258 (1993), the Court deferred to “the Interstate Commerce Commission’s view that courts, not the Commission, possessed initial jurisdiction with respect to the award of reparations for unreasonable shipping charges.” *Arlington*, 133 S. Ct. at 1871 (citing *Reiter*, 507 U.S. at 269) (internal quotation marks omitted). And in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court deferred to an agency interpretation that allowed the agency to consider both federal-law and state-law counterclaims in an administrative process, even though doing so removed those claims from Article III courts. *Id.* at 851. Nonetheless, the Court credited the agency’s interpretive view that Congress had in fact intended to authorize litigation in the administrative court instead of Article III courts. *Id.* at 844-847; *see also City of Arlington*, 133 S. Ct. at 1871 (discussing *Schor*). Neither the *Reiter* nor the *Schor* decision would make sense if it were true that courts owe no deference to an agency’s statutory interpretation that involves

whether (and where) a right of action exists.

The *C.V. v. Dudek* court cited no authority for the proposition that it did not owe *Chevron* deference to the Department of Justice’s interpretation of the meaning of the relevant enforcement provisions. Moreover, the court’s decision was diametrically opposed to a prior decision in the same case, in which the previous judge upheld the Attorney General’s authority to enforce Title II primarily on the ground that “DOJ’s interpretation of Title II [is] a reasonable construction of the statute.”⁷ *A.R. ex rel. Root v. Dudek*, 31 F. Supp. 3d 1363, 1367 (S.D. Fla. 2014) (citing *City of Arlington*, 133 S.Ct. at 1868; *Chevron*, 467 U.S. at 842).

Congress instructed the Attorney General to promulgate regulations for Title II that were “consistent with” the regulations implementing the Rehabilitation Act. 42 U.S.C. § 12134. The Attorney General did so, including promulgating a regulation allowing enforcement by the Attorney General through litigation. *See* 28 C.F.R. § 35.174. The Department of Justice’s Title II regulations are thus “within the bounds of its statutory authority” and are certainly “a permissible construction of the statute.” *City of Arlington*, 133 S. Ct. at 1868, 1874-75 (emphasis omitted). Thus, “that is the end of the matter.” *Id.* at 1874-75 (citing *Chevron*, 467 U.S. at 842); *see also* *A.R. ex rel. Root v. Dudek*, 31 F. Supp. 3d at 1367-68.

IV. The United States Has Complied With All Of The Administrative Prerequisites For Filing A Suit

Harris County next claims that the United States has not complied with the regulatory procedures for bringing a lawsuit because it has not alleged that the investigation was prompted by a complaint from an individual with a disability, and because it did not issue a separate Letter of Findings after the Department’s survey during the 2016 election. MTD at 8-10. Neither claim is meritorious.

⁷ The case was reassigned after the initial judge was elevated to the Eleventh Circuit.

First, the investigation was properly begun as a compliance review. Although some Title II investigations are initiated after complaints are filed, *see* 28 C.F.R. § 35.172(a), the regulation also states that “[t]he designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.” 28 C.F.R. § 35.172(b). The term “compliance review” is widely understood to mean an investigation that need not be prompted by an individual complaint. *See, e.g.*, 28 C.F.R. § 42.107 (Title VI regulations, providing that the Department of Justice will conduct “[p]eriodic compliance reviews” and will conduct investigations whenever “a compliance review, report, complaint, *or* any other information indicates a possible failure to comply”).

With respect to Harris County’s second argument, the County does not dispute that the United States sent a detailed Letter of Findings (“LOF”) in 2014 after it surveyed polling places during the January 2013 election. Harris County claims, however, that the United States was required to issue a separate LOF after the May 2016 election. Harris County misunderstands both the 2014 LOF and the purpose of the United States’ review of polling places in 2016. The 2014 LOF both (1) detailed the United States’ finding that two-thirds of the surveyed polling places were inaccessible and (2) set forth the United States’ conclusion that Harris County’s voting program violated the ADA on a system-wide basis. After the United States issued that LOF, Harris County claimed in a response letter that it was taking corrective actions with respect to its voting program as a whole. The 2016 survey was only intended to verify whether system-wide issues had been fixed. The United States orally explained some of the issues uncovered in the 2016 survey to Harris County officials, but it was the large-scale 2013 survey results—as detailed exhaustively in the 2014 LOF—that demonstrated that Harris County’s voting program

was inaccessible on a system-wide basis. The United States could have brought suit based on the 2013 survey and 2014 LOF alone; it cannot be that an additional survey, intended only to verify Harris County's representations about its program, undermined the United States' ability to bring suit.

V. The United States Has Properly Alleged That Harris County Violated Title II

Harris County argues that the "Complaint fails to plead enough facts to state a claim for relief that is plausible on its face against Harris County." MTD at 10. But the Complaint need only provide Harris County with "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). Here, the allegations in the Complaint clearly give Harris County fair notice of the claim (that Harris County has violated Title II of the ADA) and the grounds upon which it rests (that two-thirds of the polling places surveyed were inaccessible to people with disabilities, for the reasons set forth in the Letter of Findings).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief". Although "[s]pecific facts are not necessary," *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) a complaint must contain enough material to show the "plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). In short, an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim.

Here, the United States' complaint alleges the following:

- (1) Harris County is a public entity within the meaning of Title II, ¶ 5;
- (2) Harris County is responsible for the administration of federal, state, and local elections, including selecting the facilities to be used as polling places and ensuring those facilities' physical accessibility, ¶ 6;
- (3) The United States conducted architectural surveys of 86 polling places during the January 2013 special election, and two-thirds were inaccessible to voters with disabilities under

- the ADA, as detailed in the 2014 LOF, ¶¶ 9, 10;
- (4) Harris County continues to use some of those polling places without providing temporary or permanent measures to correct their inaccessibility, ¶ 12.

Harris County inexplicably labels these allegations “conclusory,” MTD at 10, but they are quite specific, and they contain all the material Harris County needs to understand and defend against the United States’ claim. *See Twombly*, 550 U.S. at 555.

Harris County also complains that the Complaint does not identify individual voters who were affected. But it need not do so. As another court found in a similar case, where the large majority of polling sites contain accessibility barriers, and where many county residents have mobility disabilities, “it is not too remote an extrapolation to determine that a sizeable portion of [the] County’s voting program would be presented with unnecessary difficulties if the polling places they seek to use are truly inaccessible. More simply put, these figures are too large to ignore, especially in light of the fact that the prospective harm is great.” *People of New York ex rel. Spitzer v. Cty. of Delaware*, 82 F. Supp. 2d 12, 13 (N.D.N.Y. 2000).

The same is true here. In the United States’ survey, two-thirds of polling places were inaccessible; according to census data, Harris County has 204,430 residents with an ambulatory disability. Title II of the ADA protects a voter’s ability to vote in their local polling place with their neighbors. *See Kerrigan v. Phila. Bd. of Election*, No. 07-cv-687, 2008 WL 3562521, at *17 (E.D. Pa. Aug. 14, 2008) (“the program of voting includes the opportunity to vote in one’s local, assigned, polling place, where the voter can take advantage of the opportunities to meet election judges, see their neighbors, and obtain information from candidates’ representatives”). Moreover, being deterred from attempting to vote (for instance, because the voter knows that the large majority of Houston’s polling places are inaccessible) is itself an injury under the ADA. *Disabled in Action v. Bd. of Elections in N.Y.*, 752 F.3d 189, 200 (2d Cir. 2014); *see also*

Westchester Disabled On the Move, Inc. v. Cty. of Westchester, 346 F. Supp. 2d 473, 477

(S.D.N.Y. 2004) (“Disabled voters may not know before leaving home to vote which alternative locations would actually be accessible to voters with their specific disabilities and, faced with the prospect of finding themselves at an inaccessible voting booth, may be dissuaded from attempting to vote at all.”).

Given the number of inaccessible polling places in Harris County and the number of voters with mobility disabilities, it is highly plausible that some voters with disabilities have been unable to vote at their local polling places or have been deterred from attempting to do so.⁸ This violates the ADA. *See, e.g.*, 28 C.F.R. § 35.130(b)(1)(ii) (under Title II, a public entity must not “[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others”), *id.* § 35.130(b)(4) (under Title II, “[a] public entity may not, in determining the site or location of a facility, make selections [t]hat have the effect of excluding individuals with disabilities from [its services], denying them the benefits of [its services], or otherwise subjecting them to discrimination”).

VI. Facility Owners And Election Judges Are Not Necessary Parties

Harris County claims that relief cannot be accorded without joining more than 700 facility owners and election judges, because it says those individuals may need to consent to or implement temporary measures necessary to make sites accessible. But neither facility owners nor election judges are “public entities,” and neither is subject to suit under Title II for operating a voting program that discriminates against individuals with disabilities. More importantly, it is Harris County alone that has both the responsibility and the authority to select accessible sites,

⁸ The United States is currently reviewing and working to verify the information in individual complaints that it has received. Frequently, verifying that information requires visiting a voter’s polling site on election day. Summaries of the complaints the United States receives are being provided to Harris County.

including sites that it can make accessible through temporary modifications. If a facility owner refuses to allow temporary modifications (which is unlikely, as most are minor), the proper course is for Harris County to select an alternative site. Election judges are appointed by the County and are responsible for preventing “violations of this [Texas election] code” on the day of the election itself. Tex. Elec. Code § 32.075. But the election judge does not have the responsibility to, for instance, obtain ramps or design temporary alterations that make polling places accessible; rather, that is the County’s duty.

“[Section] 43.034 of the Texas Election Code places responsibility for accessibility of polling places to the . . . physically handicapped on the commissioners courts and the governing body of each political subdivision that holds elections.” *Lightbourn v. Cty. of El Paso*, 118 F.3d 421, 431 (5th Cir. 1997) (internal quotation marks and alteration omitted). Here, that is Harris County. Thus, the commissioners court, which is the main governing body of Harris County, “shall provide a polling place that complies with” accessibility requirements, Texas Elec. Code § 43.034(b), and “[t]he governing body of each political subdivision that holds elections shall cooperate with the commissioners court in its respective county in implementing” the accessibility requirements, *id.* at § 43.034(c).

Harris County argues that it cannot fulfill these requirements because there are an insufficient number of county-owned buildings that are accessible. But as the Second Circuit explained, in rejecting a similar argument:

Even assuming . . . that there is no existing facility that is accessible, available, and meets the requirements to serve as a poll site, DOJ’s regulations make clear that the inaccessibility of existing facilities is not an excuse, but rather, a circumstance that requires a public entity to take reasonable active steps to ensure compliance with its obligations under . . . Title II. Indeed, to find that BOE’s responsibilities end where the very discriminatory effects of architectural and other barriers to access begin would not only frustrate the “clear and comprehensive national mandate for the elimination of discrimination against

individuals with disabilities,” *Henrietta D.*, 331 F.3d at 272 . . . but directly contradict the purpose of the [ADA and Rehabilitation Act]. . . .

While we agree that BOE is not expected to “create poll sites out of whole cloth,” . . . [t]he steps required by the Acts include the very accommodations that plaintiffs propose [such as] providing accessibility equipment and ramps.

Disabled in Action, 752 F.3d at 200-01 (internal quotation marks omitted). Similarly here, it is Harris County’s responsibility to select sites—county owned or otherwise—that are accessible at the outset, or to select sites that can be made accessible with temporary modifications that the County provides. *Id.*; Texas Elec. Code §43.034(b). Harris County has not alleged that there are an insufficient number of buildings within Harris County that are or can be made accessible.

Harris County relies on *Westchester Disabled on the Move, Inc., v. County of Westchester*, 346 F. Supp. 2d 473, 480 (S.D.N.Y. 2004) (citing *People of New York ex rel. Spitzer v. County of Delaware*, 82 F. Supp. 2d 12, 15 (N.D.N.Y. 2000)), where the court held that the municipalities that owned or controlled various polling places were necessary parties. MTD at 12. But the municipalities in *Westchester*, unlike the facility owners or election judges here, had significant responsibilities to select poll sites and manage the election. *Id.* at 476-80. And in contrast to what Harris County requests here, the *Westchester* court did *not* require that the owners of any private facilities used as polling places be joined as parties. *Id.*

Moreover, *Spitzer*—the only case *Westchester* cited in support of its holding—actually held that owners of facilities were *not* necessary parties. As the *Spitzer* court explained, it was the County’s responsibility under the state’s election law to select suitable (i.e., accessible) polling sites. “That they did not do so . . . is not plaintiffs’ fault. Defendants are admonished to use their abilities to insure compliance with this Order.” 82 F. Supp. 2d at 18. The *Spitzer* court noted that it had the authority to reconsider its order if an individual unreasonably refused to comply with the County’s instructions. *Id.* at 19.

Similarly here, should some election judge unreasonably refuse to comply with, for instance, Harris County's direction that a door be propped open or a van accessible space be marked out on the day of the election, the Court can attend to the issue at the appropriate time. But common sense suggests that the overwhelming majority of election judges will comply with whatever direction Harris County gives. Harris County should not be able to delay this litigation by seeking the joinder of hundreds of individuals.

VII. Harris County's Motion For A More Definite Statement Should be Denied

Lastly, Harris County requests the Court to order the United States to provide a more definite statement under Fed. R. Civ. P. 12(e) regarding the polling places surveyed in the May 2016 election. As explained above, the United States conducted the 2016 election merely to verify whether Harris County had made system-wide improvements. The accessibility problems at these sites thus did not form the basis of the Letter of Findings determining that the County was not complying with the ADA. Nonetheless, as a courtesy, and so that any issues at these sites may be corrected, the United States provided Harris County with a list of non-compliant elements at polling places surveyed during the May 2016 election by letter dated October 24, 2016.

CONCLUSION

For the foregoing reasons, the Court should deny Harris County's motion to dismiss. The United States respectfully requests oral argument on the motion.

Respectfully submitted,

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Dated: October 31, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel via the District's ECF system on October 31, 2016.

/s/ Elisabeth Oppenheimer
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