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October 27, 2022

VIA ECF

Lyle W. Cayce
Clerk of Court
United States Court of Appeals
for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *United States v. Mississippi*, No. 21-60772 (5th Cir.), argued October 5, 2022—Response to the United States' October 17, 2022 Letter Under Fed. R. App. P. 28(j)

Dear Mr. Cayce:

The United States' letter draws out several important points.

First, the United States admits that almost all of its Title II lawsuits against States end in consent decrees or settlements. Letter 1-2. That is no surprise. The pressure to settle such cases is enormous and most States will not risk the fight. As a result, the important legal issues in these cases rarely reach an appellate court and the United States is almost never called to account for its overreaching misuse of Title II. That misuse is on full display in this case. This Court should hold the United States to account and require it to follow the law.

Second, the United States claims that in other cases it has used "statistical sampling similar to the Clinical Review in this case." Letter 2. The United States does not claim that it has ever done what it did here: use a small sample of persons—about 80% of whom were not

institutionalized when they were interviewed, ROA.3933-3934—to condemn an entire state mental-health system for over-institutionalizing. ROA.4958-4960 (MacKenzie testimony). (And that cascade of errors puts aside, for the moment, other reversible legal errors plaguing the judgment below. MS Br. 18-48; MS Reply Br. 3-24.) If anything, the United States' announced willingness to use sampling in this way confirms the importance of definitively rejecting the United States' approach in this case.

Third, the United States says that this "is the only ADA Title II case litigated by the United States in which the defendant opposed monitoring as a component of a remedy." Letter 2. That is again not surprising, given the United States' habit of bullying States into consent decrees and settlements rather than litigating through trial to a remedial phase—when a State would have occasion to oppose monitoring. *See* Letter 1-2. As the State has explained, the monitoring here exacerbates the many problems with the district court's injunctive takeover of Mississippi's mental-health system. MS Br. 47-48; MS Reply Br. 24. That is especially clear given that, six years into this case, no one among the district court, the United States, and the monitor can articulate objective criteria for ending the district court's takeover. *See*, *e.g.*, Mississippi's Objections to Second Report of the Court Monitor, D. Ct. Dkt. 346 at 1-3 (detailing, just last month, the monitor's continued inability to apply or adopt objective criteria in assessing the State's compliance with the injunction). Unless this Court intervenes, the end is nowhere in sight.

Fourth, the United States says that when the district court issued its remedial order it "had made no finding that Mississippi had achieved compliance with Title II during the period since the court issued its 2019 liability determination." Letter 2; *see also* Letter 2-3. But there is no dispute that the State has adopted all Core Services that, according to the United States' evidence at trial, the State needed to adopt to comply with Title II. MS Br. 37-41; MS Reply Br. 20-22; ROA.4100, ROA.4102-4111, ROA.4116-4131 (State's remedial submission). The United States still does not dispute that. *Cf.* ROA.37 (noting the United States' withdrawal of its challenge, ROA.4132-4134, to the State's remedial showing). The United States may quibble with instances of on-the-ground execution of mental-health services. But such instances cannot support the systemwide prospective injunctive relief the district court imposed. The State has satisfied the only objective criteria that the

United States put forth as needed for compliance with Title II—the baseline of Core Services to which U.S. expert Melodie Peet testified. MS Br. 37-41; ROA.4102-4111, ROA.4116-4131 (State's remedial submission). And the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999), refused to hold "that the ADA imposes on the States a 'standard of care' for whatever medical services they render, or that the ADA requires States to 'provide a certain level of benefits to individuals with disabilities.'" *Id.* at 603 n.14. Lapses or errors in on-the-ground treatment go to standard-of-care and level-of-benefits issues. Those issues will be part of *any* system of size—particularly a system that extends statewide. Such workaday issues cannot support systemwide injunctive relief. And the United States' protests on this score again drive home that it has no objective way to identify when the injunction will end. By the United States' lights, conceivable faults in execution will forever justify systemwide injunctive relief, so the district court will oversee the State's system forever—unless this Court intervenes.

Last, the United States contends that because it "may sue to address violations" of section 504 of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964, it "likewise may sue to enforce Title II of the ADA." Letter 3. That does not follow and it is wrong for reasons given by two Eleventh Circuit judges. Title II provides "remedies, procedures, and rights" only to "any person alleging discrimination" (42 U.S.C. § 12133) and the United States is not a "person" under the statute. *See United States v. Florida*, 938 F.3d 1221, 1250-54 (11th Cir. 2019) (Branch, J., dissenting); *United States v. Secretary Florida Agency for Health Care Administration*, 21 F.4th 730, 748-51 (11th Cir. 2021) (Newsom, J., dissenting from the denial of rehearing en banc). And if the argument for why the United States may sue to enforce Title II were as simple and overdetermined as the United States suggests, two other judges would not have needed over 40 pages in the Federal Reporter to muscle their way to that conclusion. *See Florida*, 938 F.3d at 1224-50 (panel majority); *Secretary Florida Agency*, 21 F.4th at 731-47 (J. Pryor, J., respecting the denial of rehearing en banc). The United States lacks a cause of action, which is one of many reasons why this suit never should have been brought—and certainly never should have generated years of costly litigation and the extraordinary judgment below.

Respectfully submitted,

/s/ Scott G. Stewart

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cc: All counsel of record via ECF