IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE GEORGIA ADVOCACY OFFICE, et al.,	)	
Plaintiffs,	)	CIVIL ACTION FILE
v.	)	NO. 1:17-CV-3999-MJB
STATE OF GEORGIA, et al.,	)	
Defendants.	)	

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants Governor Brian Kemp in his official capacity as Governor of the State of Georgia; Georgia Board of Education; Georgia Department of Education ("DOE"); Richard Woods, in his official capacity as State School Superintendent of Georgia; Georgia Department of Behavioral Health and Developmental Disabilities ("DBHDD"); Kevin Tanner, in his official capacity as Commissioner of DBHDD; Department of Community Health ("DCH"); and Russel Carlson, in his official capacity as Commissioner of DCH (collectively "Defendants" or the "State") submit this Notice of Supplemental Authority.

Last month, the United States Supreme Court issued a decision in *Loper Bright Enterprises v. Raimondo*, 22-1219, 2024 WL 3208360 (U.S. June 28, 2024)

("*Loper Bright*"). *Loper Bright* provides new and binding precedent relevant to arguments raised in the State's pending motion for summary judgment against Plaintiffs' claims arising under the Americans with Disabilities Act (the "ADA") and Section 504 of the Rehabilitation Act of 1975.[1]

In *Loper Bright*, the Court addressed whether a regulation promulgated by the National Marine Fisheries Service exceeded the agency's statutory authority. 2024 WL 3208360 at *6-8. Both the D.C. Circuit and the First Circuit said "no," and they upheld the regulation after affording the regulation deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *Id.* at *22. A 6-3 majority of the Supreme Court reversed, overruled *Chevron*, and held that courts must exercise "independent judgment when deciding whether an agency has acted within its statutory authority [and] may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.*

Loper Bright is relevant to this case based on Plaintiffs' framing of their

[1] Count I seeks liability under Title II of the ADA, and Count II alleges violations of 29 U.S.C. § 794(a), known as Section 504 of the Rehabilitation Act of 1973. (Dkt. 1 ¶¶ 154-60 (Count I), 161-165 (Count II).) As this Court has recognized, Section 504 and the ADA are subject to the same legal analysis. (Dkt. 77 at 7 (citing *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000)). Consequently, any argument set forth in this Notice of Supplemental Authority applies equally to Counts I and II.

ADA claims, and in the light of at least three arguments the State raised at summary judgment. For the Plaintiffs, their ADA claims rely heavily on a regulation promulgated by the United States Department of Justice at 28 C.F.R. § 35.130 (the "DOJ Rule"), and court decisions from outside of the Eleventh Circuit that almost universally deferred to it. (*See*, *e.g.*, Dkt. 1 ¶¶ 65-72; 188-1 at 28, 242 at 13, 20-21 (citing the DOJ Rule); 242 at 5-6, 22-23 (citing court opinions)).[2] For the State, *Loper Bright* speaks to its argument that the DOJ Rule exceeds the Justice Department's authority to implement the ADA to the extent that it establishes liability for "administering" services instead of "providing" them. (Dkt. 214-1 at 33-35.) The Court's recent decision also highlights the need to focus on the ADA's statutory text to evaluate (and dismiss) Plaintiffs' generalized

[2] Cases cited by the Plaintiffs that expressly deferred to the DOJ Rule include: *Waskul v. Washtenaw County Comm. Mental Health*, 979 F.3d 426, 461 (6th Cir. 2020) (applying *Auer* deference); *Steimel v. Wernet*, 823 F.3d 902, 911 (7th Cir. 2016) (same); *Davis v. Shah*, 821 F.3d 231, 263 (2nd Cir. 2016) (same); *M.R. v. Dreyfus*, 697 F.3d 706, 720 (9th Cir. 2012) (same); *Day v. District of Columbia*, 894 F. Supp.2d 1 (D.D.C. 2012) (citing *State of Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 277 (D. Conn. 2010) (citing *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 313 (E.D.N.Y. 2009)) (deferring to regulatory language in the absence of statutory text)); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp.2d 184, 1925 (E.D.N.Y. 2009) (applying deference), *vacated on other grounds sub nom. Disability Advocates., Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 162 (2d Cir. 2012); *Joseph S. v. Hogan*, 561 F. Supp.2d 280, 289 n.7 (E.D.N.Y. 2008) (affording "substantial deference" to DOJ Rule).

theory of liability. (*Id.* at 16-19.) *See also United States v. Mississippi*, 82 F.4th 387 (5th Cir. 2023). Finally, *Loper Bright* is relevant to the State's analysis of the Supreme Court's narrow construction of same statutory text in *Olmstead v. L.C.*, 527 U.S. 581 (1999). (Dkt. 214-1 at 6-19).

Put simply, *Loper Bright* now provides the controlling analysis when answering "the question that matters: Does the [ADA] statute support the challenged agency action?" 2024 WL 3208360 at *19. The answer is "no," and *Loper Bright* confirms why.

First, *Loper Bright* explains that judicial deference to the DOJ Rule would be particularly inappropriate because—unlike in other statutes—when enacting the ADA, Congress did not expressly delegate to the Justice Department any authority to "give meaning to a particular term." 2024 WL 3208360 at *13 n.5 (citing 29 U.S.C. § 213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves *(as such terms are defined and delimited by regulations of the Secretary)*" (emphasis in original); 42 U.S.C. § 5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect

which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis in original)). *See also* 42 U.S.C. § 12134(a);[3] *Mississippi*, 82 F.4th at 396-97. In the context of the ADA, Congress defined a plaintiff under the ADA as one who is in "receipt of services … *provided* by a public entity." 42 U.S.C. § 12131(2) (emphasis added). And, Congress did not authorize the Justice Department to define the word "provided" or any other part of Title II. Consequently, the DOJ Rule exceeds the Justice Department's authority when it expands liability to include claims about how a "public entity … *administer*[s] services." 28 U.S.C. § 35.130(d) (emphasis added). *See also* (Dkt. 214-1 at 33-35.)

Second, the *Loper Bright* Court identified a negative byproduct of applying *Chevron* deference as risking "judicial judgment [that] would not be independent at all" and, therefore, inconsistent with courts' constitutional "duty … to say what the law is." 2024 WL 3208360 at *9 (citing *Marbury v. Madison*, 1 Cranch 1137 (1803)). In other words, how *courts* read the law matters more than how an agency does. Applied here, *Loper Bright* highlights the importance of Justice Kennedy's

[3] Title II delegates to the Attorney General the limited authority to "promulgate regulations in an accessible format that implement" Title II of the ADA; nothing suggests the Plaintiff is entitled to define terms or establish bases of liability. 42 U.S.C. § 12134(a).

concurrence in *Olmstead*, as it represents binding authority applying the *text* of the ADA. *See United States v. Mississippi*, 82 F.4th 387, 394 n.11 (5th Cir. 2023) (describing Justice Kennedy's concurrence as controlling) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). For example, Justice Kennedy wrote that courts "must be cautious when [they] seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute." *Olmstead*, 527 U.S. at 615. In other words, Congress's choice of language reflects limited forms of liability against states. This is made clear earlier in Justice Kennedy's concurrence, when he identified "[g]rave constitutional concerns … when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to *read the ADA* to permit court intervention in these decisions." *Id.* at 613-14 (emphasis added). In other words, *Olmstead* represents a case that interpreted the ADA's text, whereas Plaintiffs' theory requires focusing on the DOJ Rule instead. *Loper Bright* rejects this approach. 2024 WL 3208360 at *15.

Third, *Loper Bright* also made clear that *Chevron* deference was never appropriate to resolve questions "of deep 'economic and political significance'" like education policy.[4] *Id.* at *18 (citing *King v. Burwell*, 576 U.S. 473, 486

[4] The Court has also recognized that local education policy is certainly one of

(2015)).

In sum, *Loper Bright* is supplemental and dispositive authority applicable to the issues currently before this Court.[5] Where Plaintiffs rely on the DOJ Rule and court opinions that deferred to it, *Loper Bright* mandates that these questions must be answered by "determin[ing] the best reading of the *statute*." 2024 WL 3208360 at *16 (emphasis added). Plaintiffs never have, and at least after *Loper Bright*, this omission is dispositive.

Respectfully submitted this 12th day of July, 2024.

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material significance and, consequently, it has "traditionally deferred to state legislatures." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

[5] There should be no debate that *Loper Bright* applies to the questions now before this Court. No precedent precludes this Court from considering whether the DOJ Rule is valid. *Olmstead* did not consider the question. 527 U.S. at 592 (plurality opinion). The Eleventh Circuit addressed the issue in dicta only when it "defer[red] to" the DOJ Rule without analysis and before *Loper Bright*. *See United States v. Florida*, 932 F.3d 1221, 1224 (11th Cir. 2019). Further, that *Loper Bright* did not "call into question prior cases that relied on the *Chevron* framework" does not matter on a prospective basis. 2024 WL 3208360 at *21.

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L.R. 7.1(D) CERTIFICATION

I certify that this Notice has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Notice has been prepared using 14-pt Times New Roman Font.

/s/ Josh Belinfante
Josh Belinfante

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing **DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY** with the Clerk of Court using the CM/ECF system, which will automatically send counsel of record e-mail notification of such filing.

This 12th day of July, 2024.

/s/ Josh Belinfante
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