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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

ERIC STEWARD, by his next friend)
and mother, Lillian Minor, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
RICK PERRY, Governor, *et al.*)
)
 Defendants.)

)

CIV. NO. 5:10-CV-1025-OLG

PARTIAL CONSENT MOTION BY THE UNITED STATES OF AMERICA TO INTERVENE AND MEMORANDUM IN SUPPORT THEREOF

The United States of America respectfully requests that this Court grant its intervention as of right as a plaintiff in this action, pursuant to Federal Rule of Civil Procedure 24(a)(2) or, alternatively, permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). As grounds in support thereof, the United States states as follows:

1. The United States' Motion to Intervene is timely because the litigation is in its early stages. The Defendants' Partial Motion to Dismiss and the Plaintiffs' Motion for Class Certification are pending, and the United States' intervention will not create any delay. Thus, intervention by the United States at this juncture will not prejudice the existing parties.
2. The United States has a substantial legal interest in the subject matter of the action because it involves claims asserted under Title II of the Americans with Disabilities Act

of 1990 and Section 504 of the Rehabilitation Act of 1973. The United States Department of Justice is the agency with primary regulatory and enforcement responsibilities under Title II of the ADA and, as such, plays a unique role in enforcing and interpreting the statute and its implementing regulations on behalf of the broad public interest. It also has a significant interest in enforcing the Supreme Court case, *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that unnecessary institutionalization of individuals with disabilities violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

3. Disposition of the action without the United States' participation may impede its enforcement and regulatory interests. Because there are not many cases interpreting *Olmstead*, the outcome of this case implicates *stare decisis* concerns that warrant the United States' intervention.

4. The United States' interests are not adequately protected by the existing parties to the litigation. Because the United States represents the public interest on a national scale, its interests differ from those represented by private Plaintiffs.

5. The United States also satisfies the requirements for permissive intervention because the action involves the interpretation of statutes that the Attorney General is entrusted by Congress to administer. *See* Fed. R. Civ. P. 24(b)(2).

6. Pursuant to Local Rule CV7(h), counsel for the United States conferred with counsel for the parties concerning the United States' Motion to Intervene. Counsel for Defendants indicated that the Defendants do not consent to the United States' request for

intervention. Counsel for Plaintiffs indicated that the Plaintiffs consent to the United States' Motion to Intervene.

7. As further support for this Motion, the United States respectfully directs the Court to the following Memorandum of Law, which is attached hereto and incorporated herein by reference.

**MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES' MOTION TO INTERVENE**

INTRODUCTION

The United States files this Memorandum in Support of its Motion to Intervene to remedy violations of the State of Texas' obligations under Title II of the Americans with Disabilities Act ("Title II" and "ADA"), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*¹ The proposed Complaint in Intervention alleges that the State of Texas unnecessarily segregates individuals with developmental disabilities in nursing facilities and places them at risk of placement therein. (*See* United States' Complaint in Intervention, attached as Exhibit 1.)

Congress enacted the ADA in 1990 "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." 42

¹ Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in federally-conducted programs and in all of the operations of public entities that receive federal financial assistance. The ADA and Section 504 of the Rehabilitation Act are generally construed to impose the same requirements. *See Kemp v. Holder*, 610 F.3d 231, 234-35 (5th Cir. 2010). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent [] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-9 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)) (alteration in original). *See also Yeskey v. Com. of Penn. Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997) ("[A]ll the leading cases take up the statutes together, as we will."), *aff'd*, 524 U.S. 206 (1998).

U.S.C. § 12101(b)(1). As Congress stated in the Findings and Purposes of the ADA, “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C.

§ 12101(a)(2). For these reasons, Congress prohibited discrimination against individuals with disabilities by public entities, including discrimination in the form of segregation.

Olmstead v. L.C., 527 U.S. 581, 588 (1999).

Congress sought “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” 42 U.S.C. § 12101(b)(2), and explicitly stated that one of the purposes of the ADA was “to ensure that the Federal Government plays a central role in enforcing the standards established [in the Act] on behalf of individuals with disabilities” 42 U.S.C. § 12101(b)(3). The United States’ prominent enforcement role is reflected in the statutory authorization given the Attorney General to commence a legal action when discrimination prohibited by the ADA takes place. 42 U.S.C. § 12133.

The Department of Justice (“Department”) thus has a unique role in enforcing and interpreting Title II and its implementing regulations on behalf of the broad public interest. This case directly implicates the United States’ interest in enforcing Title II of the ADA and the Department’s goal of ensuring that the integration mandate of *Olmstead* is met. The United States also has a substantial interest in ensuring that recipients of federal financial assistance, such as the State of Texas, do not violate Section 504 of the Rehabilitation Act’s similar prohibition of disability discrimination.

The private lawsuit was filed on December 20, 2010. The individually named plaintiffs seek to represent a statewide class of approximately 4,500 Medicaid-eligible individuals over twenty-one years of age with developmental disabilities who currently or will in the future reside in nursing facilities or who are being, will be, or should be screened for admission to nursing facilities under 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.* (collectively, "Plaintiffs"). The State's failure to provide services in the most integrated setting appropriate to the individuals' needs leaves Plaintiffs with no choice but to remain unnecessarily in nursing facilities or at risk of such segregation in order to receive necessary services, in violation of the ADA and Section 504 of the Rehabilitation Act. *See Olmstead*, 527 U.S. at 607. The State, despite having an array of community-based services for individuals with developmental disabilities, has not given nursing facility residents with developmental disabilities a reasonable opportunity to have their needs met for residential and habilitation services in the community rather than in a nursing facility. The United States has a significant interest in this matter and therefore respectfully requests intervention as a plaintiff.

On January 6, 2010, Plaintiffs filed a Motion for Class Certification. On February 23, 2011, the parties filed a Joint Motion for Protective Order and on March 8, 2011, Defendants moved for partial dismissal of Plaintiffs' Complaint. These motions remain pending. The Court has not entered a scheduling order and accordingly, discovery has not commenced and the proceedings are at an early stage.

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure provides for two means by which an applicant may intervene in an action: intervention of right, governed by subsection (a), and permissive intervention, governed by subsection (b). As discussed below, the United States satisfies both standards.

A. Intervention of Right

Fed. R. Civ. P. 24(a)(2) provides that upon timely application, anyone shall be permitted to intervene in an action:

When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As construed by the Fifth Circuit, an applicant for intervention of right is entitled to intervention of right when:

(1) the motion to intervene is timely; (2) the potential intervener asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of the case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest.

Doe v. Glickman, 256 F.3d 371, 375 (5th Cir. 2001); *Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977).

The courts apply this standard flexibly, "focus[ing] on the particular facts and circumstances surrounding each application." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996). The United States' intervention request satisfies the requirements of Rule 24(a)(2).

1. The United States' Motion for Intervention is Timely

The Fifth Circuit Court of Appeals has identified several factors relevant to determining whether a request for intervention is timely:

(1) How long the potential intervener knew or reasonably should have known of her stake in the case into which she seeks to intervene; (2) the prejudice, if any, the existing parties may suffer because the potential intervener failed to intervene when she knew or reasonably should have known of her stake in the case; (3) the prejudice, if any, the potential intervener may suffer if the court does not let her intervene; and (4) any unusual circumstances that weigh in favor of or against a finding of timeliness.

Glickman, 256 F.3d at 376; *Sierra Club*, 18 F.3d at 1205; *Stallworth*, 558 F.2d at 264-66.

The Supreme Court has emphasized that “[t]imeliness is to be determined from all the circumstances.” *NAACP v. New York*, 413 U.S. 345, 366 (1973); *see also Edwards*, 78 F.3d at 1000; *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125-26 (5th Cir. 1970) (motion to intervene more than a year after the action was commenced was timely when there had been no legally significant proceedings other than the completion of discovery and intervention would not cause any delay in the process of the overall litigation).

Timeliness is not based on an absolute measure, nor is it a tool to punish the tardy would-be intervenor. *Sierra Club*, 18 F.3d at 1205. Where the original parties will not be prejudiced and “greater justice could be attained,” federal courts should allow intervention. *Id.*

Applying these factors to the instant case, the United States' application for intervention is timely. The United States' intervention will not cause any prejudice through delay of the proceedings. Since the filing of the initial complaint in December 2010, the Court has not entered a scheduling order, discovery has not begun and

Plaintiffs' Motion for Class Certification, Defendants' Partial Motion to Dismiss and the parties' Joint Motion for a Protective Order are currently pending. The United States already filed a Statement of Interest with regard to the Defendants' Partial Motion to Dismiss and does not seek to participate in the briefing of any other currently pending motion. In addition, the United States' proposed Complaint in Intervention does not expand the claims already pending in this litigation.² The parties cannot be prejudiced as a result of the United States' intervention.

While the existing parties to the litigation will not be prejudiced by the United States' intervention, the United States will be prejudiced if its request for intervention is denied. Its interests in enforcing Title II of the ADA and the integration mandate will undoubtedly be impaired if it is not permitted to intervene in this action. Moreover, the Department's extensive experience with the statutes at issue will benefit the existing parties in presenting facts and arguments that will help frame the issues. By avoiding multiple lawsuits and coordinating discovery, intervention will lend efficiency to the proceedings.

2. The United States has a Substantial Legal Interest in this Litigation

A party seeking intervention of right must also show a "direct, substantial, legally protectable interest in the proceedings." *Edwards*, 78 F.3d at 1004 (quoting *New Orleans Pub. Serv. Inc., v. United Gas Pipe Line Co.*, 732 F. 2d 452, 463 (5th Cir. 1984) (*en banc*)). The Fifth Circuit Court of Appeals has recognized the interest of public entities

² The United States' Complaint in Intervention names the State of Texas as a Defendant in this case. While not currently a Defendant, there is no question that the State of Texas may be joined as a Defendant by the United States because the right to relief asserted against the State and the existing Defendants (state officials sued in their official capacities) is joint and several and contains common questions of law and fact in compliance with Fed. R. Civ. P. 20(a)(2).

and government agencies in enforcement of their respective statutes when granting intervention as of right. *See, e.g., Heaton v. Monogram Credit Card Bank*, 297 F.3d 416, 424 (5th Cir. 2002) (allowing intervention as of right to the Federal Deposit Insurance Corporation because it has a broader interest in protecting the proper and consistent application of the Federal Deposit Insurance Act); *Sierra Club v. City of San Antonio*, 115 F.3d 311, 314 (5th Cir. 1997) (intervention as of right granted to State of Texas to protect State's interests in environmental lawsuit in part because the Attorney General has an exclusive right to represent state agencies and the State has an important interest in enforcing the Edwards Aquifer Act); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202-04 (5th Cir. 1992) (allowing intervention as of right to the director of Office of Workers' Compensation Programs because the director has jurisdiction over claims under the Longshore and Harbor Workers' Compensation Act).

The United States has a direct, substantial and legally protectable interest in this litigation. As the federal agency with primary regulatory and enforcement responsibilities under Title II of the ADA, the Department has significant interests in enforcing and interpreting Title II and ensuring that the integration mandate of *Olmstead* is met. *Olmstead*, 527 U.S. at 607. Accordingly, the Department has recently brought, intervened in, or participated as an amicus or an interested party in *Olmstead* litigation in sixteen different states.

Congress sought "clear, strong, consistent and enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), and explicitly stated that one of the purposes of the ADA was "to ensure that the Federal

Government plays a central role in enforcing the standards established [in the Act] on behalf of individuals with disabilities” 42 U.S.C. § 12101(b)(3). Similarly, the Department has the authority to coordinate the implementation and enforcement of Section 504 of the Rehabilitation Act. Exec. Order No. 12,250, *Leadership and Coordination of Nondiscrimination Laws*, 3 C.F.R. 298 (1980), *reprinted in* 42 U.S.C. § 2000d-1, note. The central issues of this case are critical to the Department’s efforts to advance national goals of community integration and enforce the civil rights of persons with disabilities. Thus, the United States’ interest in the pending litigation merits intervention as of right.

3. *Intervention is Necessary to Protect the United States’ Interest*

The United States’ ability to protect its substantial legal interest would be impaired absent intervention. Because the ADA is a relatively young statute, federal decisions interpreting and applying the provisions of the Act are an important enforcement tool. Further, because there has not been significant case law under the Supreme Court’s decision in *Olmstead*, an unfavorable disposition of this case may, as a practical matter, impair the United States’ ability to enforce the ADA’s integration mandate. The outcome of this case, including the potential for appeals by existing parties, implicates *stare decisis* concerns that warrant the United States’ intervention. *See Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. Fla. 1967) (recognizing that potential for a negative *stare decisis* effect may “supply that practical disadvantage which warrants intervention of right”); *Sierra Club*, 18 F.3d at 1207 (quoting *Ceres Gulf*, 957 F.2d at 1204) (impairment of an intervener’s interest includes “the *stare decisis*

effect of the district court's judgment"); *see also United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that *amicus curiae* status may be insufficient to protect the rights of an applicant for intervention "because such status does not allow [the applicant] to raise issues or arguments formally and gives it no right of appeal"). As such, intervention is necessary to protect the United States' substantial interest in this litigation.

4. *The United States' Interest is Inadequately Represented by Existing Parties*

The final requirement for intervention as a matter of right is that the interest is inadequately represented by the existing parties to the litigation. The applicant for intervention bears the burden of demonstrating inadequate representation. *See Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994). This burden is "minimal," however, and is satisfied if the applicant shows that representation of his interest "may be" inadequate. *Sierra Club*, 18 F.3d at 1207 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972)).

The existing parties to this litigation cannot adequately represent the United States' interests. Only the Attorney General can attend to the interests of the United States. 28 U.S.C. § 517 ("[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.")

In this case, the United States' interest is in enforcing the ADA and Section 504 of the Rehabilitation Act to advance the public interest in eliminating discrimination in

the form of unjustified institutionalization. The private Plaintiffs cannot and do not represent the United States' views on the proper interpretation and application of Title II and Section 504 of the Rehabilitation Act. As the Ninth Circuit recognized in a case allowing private parties to intervene alongside government agency defendants, "[t]he interest of government and the private sector may diverge." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001); see also *San Juan County v. U.S.*, 503 F.3d 1163, 1228 (10th Cir. 2007); *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926-27 (9th Cir. 1990) (recognizing that city government's interest could not be adequately represented by another entity).

B. Permissive Intervention

Rule 24(b) of the Federal Rules of Civil Procedure provides an alternative basis for the United States' intervention in this action. Fed. R. Civ. P. 24(b)(1)(B) states, in relevant part:

On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.

Additionally, the Rule provides that a federal officer or agency may be permitted to intervene, upon timely motion, in an action if an existing party's claim or defense is based upon "a statute or executive order administered by the officer or agency; or . . . any regulation, order, requirement or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). For all requests for permissive intervention, the "court must consider whether the intervention will

unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The United States should be granted permissive intervention pursuant to Rule 24(b)(1) and (2).

As discussed above in conjunction with the Rule 24(a) analysis, the United States' application for intervention in this litigation is timely and the United States' participation would neither unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties. Additionally, the United States' claims against the State of Texas—namely, that the State unnecessarily segregates individuals with developmental disabilities in nursing facilities and places them at risk of placement therein—share common questions of law and fact with the private Plaintiffs' claims.

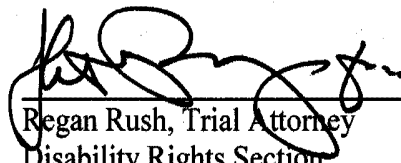
Additionally, Federal Rule of Civil Procedure 24(b)(2) permits intervention by a government agency if a party's claim is based on a statute administered by the agency. *See* Fed. R. Civ. P. 24 Advisory Committee Notes on the 1946 Amendments (explaining that subsection (b) was amended in 1946 to include explicit reference to governmental agencies and officers in order to avoid exclusionary construction of the rule, and citing, with approval, cases in which governmental entities were permitted to intervene). As the agency tasked with enforcing Title II of the ADA, the Department's intervention falls squarely within the language of Rule 24(b)(2). *See, e.g., Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2009 WL 4506301, at *2 (E.D.N.Y. Nov. 23, 2009) (permitting intervention by the United States under Fed. R. Civ. P. 24(b)(2) in an action based on Title II's integration mandate). Accordingly, the United States meets the requirements for permissive intervention.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion to Intervene and order its intervention in this action (i) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (ii) permissively pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. A proposed order and Complaint in Intervention accompany this memorandum.

Local Rule CV-7(h) Certification

Pursuant to Local Rule CV-7(h), counsel for the United States conferred with counsel for both parties, who indicated that the Defendants oppose the relief requested in this motion and the Plaintiffs consent to the relief requested in this Motion.



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Dated: June 22, 2011

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CERTIFICATE OF SERVICE

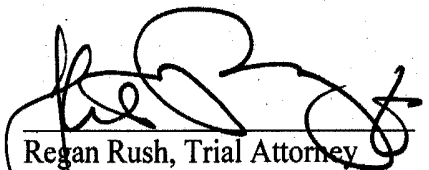
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