UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

- -

MICHIGAN PARALYZED VETERANS
OF AMERICA,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN,

Defendant.

No. 07-11702
Honorable Sean F. Cox
Magistrate Judge Pepe

- -

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

THE UNIVERSITY OF MICHIGAN AND
THE REGENTS OF THE UNIVERSITY
OF MICHIGAN

Defendants.

- -

UNITED STATES' MOTION TO INTERVENE

PLEASE TAKE NOTICE that the United States hereby moves this Court for leave to intervene in this action as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2) or, alternatively, in permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). As explained in the Memorandum of Points and Authorities, filed herewith, the United States has substantial enforcement responsibilities under Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973, which statutes form the basis of the federal claims in this case. The United States has significant protectable interests that may be impaired by the outcome of this case and the United States' claims have questions of fact and law in common with the plaintiff's claims. Accordingly, the United States respectfully urges the Court to grant this motion for leave to intervene in this case.

The plaintiff concurs as to the United States' intervention in this action. With regard to the defendant, the United States explained the nature of this motion and its legal basis but did not obtain the defendant's concurrence.

Respectfully submitted,

MICHAEL B. MUKASEY
Attorney General of the United States

RENA J. COMISAC
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
RENEE M. WOHLENHAUS, Deputy Chief
Disability Rights Section
Civil Rights Division

/s/Kathleen Devine
KATHLEEN S. DEVINE
DAVID BOOTH
Trial Attorneys
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW - NYA
Washington, D.C. 20530
Telephone: (202) 307-0480
Facsimile: (202) 307-9775
E-mail: kathleen.s.devine@usdoj.gov

For purposes of service only:
STEPHEN J. MURPHY
United States Attorney

/s/Susan K. DeClercq
SUSAN K. DeCLERCQ
Assistant United States Attorney
211 W. Fort Street, Ste. 2001
Detroit, MI 48226
(313) 226-9149
E-mail: susan.declercq@usdoj.gov
(P60545)

Dated November 20, 2007

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

- -

MICHIGAN PARALYZED VETERANS
OF AMERICA,

Plaintiff,

v.

THE UNIVERSITY OF MICHIGAN,

Defendant.

No. 07-11702
Honorable Sean F. Cox
Magistrate Judge Pepe

- -

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

THE UNIVERSITY OF MICHIGAN AND
THE REGENTS OF THE UNIVERSITY
OF MICHIGAN

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
<u>OF THE UNITED STATES' MOTION TO INTERVENE</u>

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Other Authorities

STATEMENT OF THE ISSUES

The United States of America (the "United States") files this Memorandum of Points and Authorities in Support of its Motion to Intervene in this action for injunctive and declaratory relief to remedy alleged violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The action stems from the alleged failure of the defendants, the University of Michigan and the Regents of the University of Michigan (collectively "the University") to provide qualified individuals with disabilities with equal access to the programs, services, and activities at the University's football stadium (the "Stadium"). The United States requests leave to intervene of right, or, alternatively, to intervene by permission, pursuant to Rule 24 of the Federal Rules of Civil Procedure.

ISSUES AND AUTHORITY

1. Intervention of right is warranted in this case because the United States has significant protectable interests in the enforcement of Title II and Section 504 which are not adequately represented by the existing parties and which may as a practical matter be impaired if intervention is denied.

   Fed. R. Civ. P. 24(a)(2);
   Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)
   Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999)
   Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990)

2. Alternatively, permissive intervention is warranted because the United States' claims against the University of Michigan and its Board of Regents have questions of law and fact in common with the main action, and the main action involves the interpretation of statutes that the Attorney General is entrusted by Congress to administer.

   Fed. R. Civ. P. 24(b)(2);
   Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)
   Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991)

INTRODUCTION

The United States files this Memorandum of Points and Authorities in Support of its Motion to Intervene in this action for injunctive and declaratory relief to remedy alleged violations of Title II of the Americans with Disabilities Act ("Title II" and "ADA"), 42 U.S.C. §§ 12131 et seq., and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794. The defendants, the University of Michigan and the Regents of the University of Michigan (collectively "the University"), fail to provide qualified individuals with disabilities with equal access to the services, programs, and activities at the University's football stadium (the "Stadium"). The United States requests leave to intervene of right, or, alternatively, to intervene by permission, pursuant to Rule 24 of the Federal Rules of Civil Procedure. As discussed more fully below, the United States meets the standards both for intervention of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure and for permissive intervention pursuant to Rule 24(b)(2).[1] Accordingly, the United States' motion to intervene should be granted.

A. STATUTORY AND REGULATORY BACKGROUND

The proposed Complaint in Intervention, attached as Exhibit 1, generally alleges that the defendants have discriminated and continue to discriminate, against individuals with disabilities, including individuals who use wheelchairs, by excluding them from participation in and denying them the benefits of the services, programs, and activities at the Stadium in violation of Title II of

[1]In the event defendants were to challenge the constitutionality of Title II, as suggested by p. 18 of the Answer filed on May 21, 2007, (Document 7, Answer) the United States has a right to intervene authorized by statute. 28 U.S.C. § 2403(a).

the ADA and Section 504. The Complaint in Intervention further alleges that this discrimination is evidenced by the defendants' failure to provide program accessibility at the Stadium and their failure to make alterations and additions to the Stadium so that the altered and added portions are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Title II of the ADA prohibits discrimination against individuals with disabilities by public entities, the definition of which includes an instrumentality of a State, such as a public university like the University of Michigan. *See* 42 U.S.C. § 12131(1)(A) and (B) (defining "public entity" under the ADA). Title II contains provisions that apply to all public entities, and states that "no 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; 28 CFR 35.130(a).

Section 504 also prohibits discrimination against individuals with disabilities by recipients of federal financial assistance, such as public universities. *See* 29 U.S.C. § 794(a) and (b). Section 504 states that no "qualified individual with a disability" shall "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) and (b); 34 C.F.R. 104.4(a).

Prohibited discrimination includes, in pertinent part, denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; affording 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; providing a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; or providing different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others. 28 C.F.R. 35.130(b)(1)(i-iv); *see* 34 C.F.R. 104.4(b)(1)(i-iv). Also, the public entity must administer its services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. 35.130(d); 34 C.F.R. 104.4(b)(2).

In addition to these general prohibitions against discrimination, both regulations contain specific requirements for program accessibility. The ADA regulations mandate that "except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity. 28 C.F.R. 35.149. *See* 34 C.F.R.104.21.[2] The Title II and Section 504 regulations contain an overarching standard for

---

[2]The regulations implementing Section 504 require that no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which Section 504 applies. 34 C.F.R. 104.21.

achieving program access for existing facilities; additional requirements are imposed if the facility is altered or if new construction occurs. *See* 28 C.F.R. 35.150 - 35.151; 34 C.F.R. 104.22 -104.23. With regard to existing facilities, program access requires that a public entity operate each service, program, or activity, so that when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. 28 C.F.R. 35.150; *see also* 34 C.F.R. 104.22. One method for achieving program access in existing facilities is to undertake alterations to make the facility accessible, and such alterations must meet the accessibility requirements of 28 C.F.R. 35.151. 28 C.F.R. 35.150(b); *see also* 34 C.F.R. 104.22(b). Also, in choosing among available methods for satisfying program access for existing facilities, the public entity is required to give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. 28 C.F.R. 35.150(b)(1); 34 C.F.R. 104.22(b).

Additional requirements for program access are imposed if a facility or part of a facility is altered in a manner that affects or could affect the usability of the facility or part of the facility, 28 C.F.R. 35.151(b); 34 C.F.R. 104.23(b), or if new construction is begun, 28 C.F.R. 35.151(a); 34 C.F.R. 104.23(a).

The United States' proposed Complaint in Intervention alleges discrimination by the University in failing to provide program accessibility at the Stadium in violation of Title II and Section 504, and their implementing regulations. Through intervention, the United States seeks to ensure that the programs and activities offered at the Stadium are accessible not just to the private plaintiff but to all other disabled individuals with mobility impairments who seek to attend stadium events.

B. FACTUAL BACKGROUND

On April 17, 2007, Michigan Paralyzed Veterans of America, a chapter of the Paralyzed Veterans of America, instituted this suit against the University of Michigan alleging violations of Title II of the ADA and Section 504 through discrimination in the provision of services, programs and activities at the Stadium. The private plaintiff alleges, in pertinent part, that the Stadium has an insufficient number of wheelchair seats, those wheelchair seats are limited to the end zone areas, and have obstructed views; the Stadium has inaccessible routes, inaccessible toilets, inaccessible concession stands, inaccessible souvenir stands, and inaccessible parking; and that the University of Michigan also has undertaken significant alterations of its Stadium without complying with the relevant accessibility standard. (Document 1, ¶¶ 7, 10, 37 - 41, 44 - 46.)

The U.S. Department of Education ("ED") has been investigating similar allegations regarding the inaccessibility of the Stadium. It began one investigation in February 1999 based upon a complaint it received.[3] As part of that investigation, the University provided to ED a simple, incomplete list of projects at the Stadium up to 1999 ("1999 List of Lists"), but did not provide any details about any of those projects. Exhibit 2, LOF, p.4. Because ED's complaint investigation manual at that time provided for voluntary resolution, without completion of an

[3] *See* U.S. Department of Education's formal Letter of Findings, dated October 26, 2007, to the University notifying it that it has violated Section 504, Title II of the ADA, and their implementing regulations, ("LOF"), p. 2, attached as Exhibit 2.

investigation or findings of noncompliance, and in consideration of the University's seeming agreement, in pertinent part, to improve accessibility at the Stadium in all future renovations or alterations, ED stopped its investigation and instead entered into a Commitment to Resolve,[4] thereby closing its investigation without issuing any findings of violations. *See* Exhibit 2, LOF, pp. 2-3.

The University submitted several summary monitoring reports pursuant to this Commitment, briefly stating that it had no plans to renovate or alter the Stadium. Exhibit 2, LOF, p. 3. However, in 2003, ED discovered that the University had, in fact, completed several million dollar construction projects at the Stadium and then observed, during a 2004 on-site visit to the Stadium, a massive alteration of the Stadium in progress. Exhibit 2, LOF, p. 3. Determining that the University had breached the Commitment, ED reopened its investigation in July 2004. *See* Exhibit 2, LOF, p. 3.

When ED reopened its investigation in 2004, it requested detailed plans and drawings of the various projects on the 1999 List of Lists, including specific information regarding the concrete "repair" projects in the 1990s, the construction to the souvenir stands, and the 1991-1992 field lowering project which added thousands of accessible seats, but the University refused to provide any of this information, thereby impeding ED's investigation. Exhibit 2, LOF, p.4.[5] It

---

[4]This Commitment included a provision that the "University would agree that future discussions regarding any renovations except projects currently pending approval will specifically include consideration of adding accessible sideline seating." Exhibit 2, LOF, p. 3.

[5]Nor could ED compel the University to provide this information absent pursuing an enforcement action or proceeding. *See* 34 C.F.R. 100.6, 100.8(a), 34 C.F.R. Part 101, 34 C.F.R.

was not until three years later, after the U.S. Department of Justice (the "Department") indicated an interest in the private litigation and requested permission to participate in the facilitation, that the University began to provide to ED, in July and September 2007, some of these long-requested plans and drawings regarding work performed on the Stadium in the 1990s. Exhibit 2, LOF, pp. 4, 10, 18, 19; Letter from Gloria Hage, Interim Vice President and General Counsel, University of Michigan, to Harry Orris at ED, dated November 5, 2007 ("November 5, 2007 Hage letter"), p. 16, attached as Exhibit 3. Furthermore, it was not until August 2007 that the University submitted some plans, albeit incomplete, to ED for the 2004, 2005, 2006, and 2007 concrete "repair" projects and updated its 1999 List of Lists revealing many more projects than it had previously disclosed to ED. Exhibit 2, LOF, p.4; Exhibit 3, November 5, 2007 Hage letter, p. 16. ED determined, however, that these plans and drawings "did not cover all relevant projects and did not include most of the information about the projects that [ED] had requested, such as specific details or descriptions of the work that was actually done." Exhibit 2, LOF, p. 4.

After efforts to resolve this matter administratively through informal negotiations failed, ED issued its LOF on October 26, 2007. Exhibit 2, LOF, p. 36. Attempts to negotiate continued but were unsuccessful.[6] As a result, on November 9, 2007, ED issued its formal ten day letter,

---

104.61.

[6]While issuance of the LOF did not preclude further settlement discussions, the University was required to submit an acceptable remedial plan or show that it has complied with Section 504 and Title II of the ADA within ten calendar days of issuance of the LOF or ED would be obligated to initiate enforcement action. Exhibit 2, LOF, pp. 36-37. On the tenth day, the University responded, but did not provide any remedial plan. Exhibit 3, November 5, 2007 Hage letter. On November 7, 2007, ED contacted the University in an attempt to restart

attached as Exhibit 6, notifying the University that it would refer this matter to the Department for appropriate judicial relief pursuant to 42 U.S.C. § 2000(d)(1); 34 C.F.R. 100.8(a). On November 20, 2007, 2007, ED formally referred this matter to the Department for enforcement, attached as Exhibit 7.

The United States has authority to take appropriate steps to enforce the statutes and regulations at issue, *see* 29 U.S.C. § 794a, 42 U.S.C. § 2000d *et seq.*, 42 U.S.C. § 12133, 34 C.F.R. 100.8(a), 34 C.F.R. 104.61, 28 C.F.R. 35.171(a)(3). In the interests of judicial economy, to avoid duplication, and because the private suit involves many of the same facts and issues, the United States is instead moving to intervene in the private litigation presently before this Court. However, because of the inability of the government previously to compel certain discovery from the defendants, *see* discussion *supra*, and the fact that the present discovery schedule concludes in March 2007, the United States may subsequently move to extend the discovery schedule to permit additional discovery from the University, with the full panoply of discovery tools as a party to the litigation.[7] In addition, of immediate concern is that the United States have the opportunity to conduct a week-long survey of the Stadium by its architect before the University begins demolishing any of the structure of the Stadium as part of its upcoming $226 million

---

negotiations where they had left off at the time the LOF was issued, but the University refused. Letter from Harry Orris to Gloria Hage, attached as Exhibit 4 ; letter of Gloria Hage to Thomas Hibino, dated November 8, 2007, attached as Exhibit 5 .

[7]Given the University's extreme reluctance and, at times, outright refusal to provide salient and highly relevant information to the government, *see* discussion *supra*, the United States anticipates future discovery battles with the University, eating up precious discovery time.

dollar renovation, potentially spoiling evidence. The University has stated that such work will begin this month. Exhibit 3, November 5 2007 Hage letter, p.1. To that end, the United States is simultaneously filing an emergency motion for Entry Upon Land for Inspection pursuant to Rule 34 of the Federal Rules of Civil Procedure.

C. ARGUMENT

1. The United States Is Entitled to Intervention of Right

Federal Rule of Civil Procedure 24(a) 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.

Fed. R. Civ. P. 24(a)(2). An applicant for intervention of right must prove four elements:

> (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997). "Rule 24 should be 'broadly construed in favor of potential intervenors.'" *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991). The United States meets the prerequisites for intervention of right.

(a) The United States' Application for Intervention is Timely

The motion for intervention cannot be considered untimely given that the intervention followed in less than twenty-four hours after the deadline for the University's last opportunity to settle the case with ED, and well before any depositions or other discovery deadlines have expired. The Sixth Circuit has identified several factors relevant to determining whether a request for intervention is timely:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs v. Norris, 870 F.2d 343, 345 (6^{th} Cir. 1989). "The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *Jansen v. City of Cincinatti*, 904 F.2d 336, 340 (6^{th} Cir. 1990). As the Sixth Circuit found in a case where it permitted intervention after the expiration of the discovery period and settlement negotiations had produced a conditional settlement agreement, "[T]he time between the filing of the complaint and the motion to intervene, in itself, is among the least important circumstances. What is more critical is the progress made in discovery and motion practice during the course of the litigation." *Midwest Realty Management Co. v. City of Beaverwood*, 93 Fed. Appx. 782, 786 (6^{th} Cir. 2004), (internal citations omitted), attached as Exhibit 8.[8]

Applying these factors in the instant case, the United States' application for intervention is timely. Plaintiff filed suit on April 17, 2007, and the Department learned of the litigation shortly thereafter. The litigation is still at an early stage - at present, little discovery has been

---

[8]In *Jansen*, the Court permitted intervention several months into the discovery period and after briefing on a motion for summary judgement. *Jansen v. City of Cincinnati*, 904 F.2d at 339-341.

produced by the defendant, no formal architectural survey of the Stadium has been conducted, no depositions have been taken, and experts have not been named.

Second, the Department's decision to seek intervention reflects the results of its review of the factual information it was able to collect, its determination that the University does not provide program accessibility at the Stadium, and the importance of ensuring that the United States' statutes and regulations are properly interpreted and applied in this case, thereby ensuring that all individuals have equal access to the program, services, activities, and opportunities afforded by the University at the Stadium.

Third, while the United States became aware of the private litigation last spring, it reasonably anticipated that this case would settle, either through court-ordered facilitation or administratively with ED. Approximately one month after the Complaint was filed, the litigation was referred to facilitation. (Document 9, Order Scheduling Facilitation and Status Conference.) When this Court moved the case out of facilitation and entered a Scheduling Order, establishing dates for discovery (Document 11, Scheduling Order), ED and the University were involved in "intense settlement discussions" with the University that continued "right up until the time that [ED] released its LOF" late last month. *See* Exhibit 3, November 5, 2007 Hage letter, p.2. Because of the University's seeming interest in resolving this matter administratively and its participation in these heightened settlement discussions with ED during the summer and fall of 2007, *see id.*, the Department determined not to intervene at that time, instead letting that process with ED continue in hope that the investigation would be resolved administratively, obviating the need for intervention and thus conserving judicial resources.

Fourth, defendant would not be unduly prejudiced by the United States' intervention at this time nor by any subsequent motion to extend the discovery schedule. *U. S. v. Marsten Apts, Inc.*, 175 F.R.D. 265, 267-268 (E.D. Mich. 1997) (Court found that even though some discovery had been taken, the case was not significantly close to trial and the need for additional discovery would not unduly prejudice the party opposing intervention). Indeed, the University contributed to any delay in the United States' efforts to intervene by its repeated refusals to provide highly relevant information, *see* discussion *supra,* its piecemeal partial production of salient information throughout July, August, and September, 2007, *see* Exhibit 3, November 5, 2007 Hage letter, p. 16, and its efforts to extend negotiations with ED throughout the summer and fall of 2007, *see id.*, p. 2.

Finally, this case involves an important and complex issue, the accessibility of the University's renowned football stadium amid allegations that the University denies access to the Stadium to this country's paralyzed veterans and other disabled individuals. This case will be watched closely by other public colleges and universities for guidance regarding what is required to achieve compliance in other arenas. The Department's extensive experience with the statutes at issue, the important issues raised regarding compliance for this stadium and other public arenas, all militate in favor of intervention. The United States's expertise would likely increase efficiency throughout the litigation by avoiding duplicative discovery and by utilizing expertise and resources of the Department of Justice, the agency ultimately responsible for ADA compliance at the Stadium. In light of these facts, the United States' application for intervention of right is timely.

(b) <u>The United States Has a Substantial Legal Interest in the Action</u>

With regard to the second Rule 24(a)(2) factor, the Sixth Circuit takes a broad view of the requisite "substantial legal interest" for intervention:

> [I]n this circuit we subscribe to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). For example, an intervenor need not have the same standing necessary to initiate a lawsuit. *See id.*; *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). We have also "cited with approval decisions of other courts 'rejecting the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245 (quoting *Purnell*, 925 F.2d at 948). "The inquiry into the substantiality of the claimed interest is necessarily fact specific." *Id.*

Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999). "[C]lose cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller*, 103 F.3d at 1247.

The United States' interest in the pending litigation merits intervention of right. As the federal agency charged with enforcing the ADA [and Section 504], the Department has a substantial interest in the subject matter of the pending litigation. Underlying enactment of the ADA was Congress' intent to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ." 42 U.S.C. § 12101(b)(1). 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.

This case directly implicates the United States' interest in enforcing Title II of the ADA to ensure the "clear, strong, consistent, enforceable standards" envisioned by Congress. 42 U.S.C. § 12101(b)(2). The United States also has a substantial interest in ensuring that recipients of federal financial assistance, such as the defendants, do not violate Section 504's similar prohibition of disability discrimination. Accordingly, the United States' significantly protectable interests in ensuring that this case results in clear, consistent, enforceable standards, both substantive and remedial, supports intervention of right. *See, e.g., Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992) (finding that the interest of the federal director of the Office of Workers' Compensation Programs in "consistent application of . . . a statutory scheme he is charged with administering" was sufficient to support intervention as of right); *Nuesse v. Camp*, 385 F.2d 694, 700-01 (D.C. Cir. 1967) (discussing liberalization of Rule 24(a) under 1966 amendment, and finding that state government official charged with administering a banking law had interest in advocating particular construction of the law that was sufficient to support intervention as of right).

The Department wrote the Title II regulations at issue in this case, *see* 42 U.S.C. § 12134, 28 C.F.R. Part 35; plays a central role in enforcing these regulations, *see* 42 U.S.C. § 12133, 28 C.F.R. 35.171, 28 C.F.R. 174, 28 C.F.R. 190; and plays the primary role in coordinating the implementation and enforcement of Section 504 among federal agencies, *see* Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980), *reprinted in* 42 U.S.C. § 2000d-1 (Historical and Statutory Notes). Through this regulatory and enforcement work, the Department has accumulated significant experience in guiding public entities in amending policies, practices, and procedures to conform to the mandates of Title II and Section 504. Moreover, because the alternative to the United States' intervention in the plaintiff's lawsuit is a separate action including the United States' Title II and Section 504 claims, the efficiency goals implicit in Rule 24(a) are furthered if intervention is permitted here.

(c) <u>Intervention is Necessary to Protect the United States' Interest</u>

Under the third intervention factor, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247 (citing *Purnell*, 925 F.2d at 948). "This burden is minimal." *Id.* This factor may be satisfied if a determination of the action in the applicant's absence will have a significant *stare decisis* effect to the detriment of the applicant. *Id.*

Because the ADA is a relatively young statute, federal decisions interpreting and applying the provisions of the Act are an important enforcement tool. An unfavorable disposition of this case may, as a practical matter, impair the United States' interest in eliminating disability discrimination in other public entities' programs, particularly with regard to other assembly areas at public colleges and universities as well as other major assembly areas. Thus, the outcome of this case, including the potential for appeals by existing parties, implicates *stare decisis* concerns which support intervention of right. *See Miller*, 103 F.3d at 1247. *See also United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that amicus 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");

Ceres Gulf v. Cooper, 957 F.2d 1199, 1204 ("denying intervention impairs, if not prevents, [the Director of Worker's Compensation's] ability to provide his interpretation of the law he is charged with administering . . .").

(d) <u>The United States' Interest is Inadequately Represented by Existing Parties</u>

The fourth and final element to justify intervention of right is inadequate representation of the United States' interest by existing parties to the litigation. The burden to show inadequate representation is "minimal" because the movant need not prove that the representation will in fact be inadequate, but only that it "may be" inadequate. *Miller*, 103 F.3d at 1247. Instead, "proposed intervenors need only show that there is a *potential* for inadequate representation.'" *Grutter*, 188 F.3d, 394, 400 (6th Cir. 1999). "[I]nterests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990). "[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Miller*, 103 F.3d at 1247.

In this case, the United States' interest in enforcing the ADA and Section 504 to advance the public interest in ending illegal disability discrimination at an assembly area at a large public university is inadequately represented by the existing parties. The private plaintiff cannot and does not represent the Department's views on the proper interpretation and application of Title II and Section 504, and will not be able to make all the arguments that the United States will make if allowed to intervene. *See, e.g. Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926-927 (9th Cir. 1990) (city government's interest could not be adequately represented by another entity): *Cabot LNG Corp. v. P.R. Elec. Power Auth.*, 162 F.R.D. 427, 431 (D.P.R. 1995) (allowing intervenion because a private party's interest is different to that of a government agency) (citing *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381 (10th Cir. 1977)). 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). The same reasoning applies when, as here, the United States seeks intervention into a lawsuit between private parties involving federal civil rights claims.

The Department brings to this action the Civil Rights Division's unique familiarity with the statutes, regulations, and accessibility standards at issue, and extensive experience in investigating and litigating disability discrimination complaints, including complaints relating to accessibility requirements for existing facilities, including alterations or additions to those facilities. Given the complexity of the statutory and regulatory scheme governing accessibility at large public facilities and assembly areas, the United States' participation is necessary to effectively litigate this case, to ensure that the defendants meet their obligations to provide equal access to the program offered at the Stadium for persons with disabilities, and to advance the United States' interests on behalf of the public.

Because the United States can prove each of the requisite elements for Rule 24(a)(2) intervention, we respectfully request that this Court grant our application for intervention of right.

2. **<u>The United States Application for Permissive Intervention Should Be Granted</u>**

Rule 24(b) states, in part:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). As discussed above in conjunction with the Rule 24(a) analysis, herein incorporated, so long as intervention is timely and there is at least one common question of law or fact, and intervention would not result in undue delay of excessive prejudice to the original parties, permissive intervention should be granted. *See Miller*, 103 F.3d at 1248; *Purnell*, 925 F.2d at 950-951. The United States' claims against the defendants share both common questions of law and common questions of fact with those in the pending litigation. For example, the plaintiff and the United States would assert as a common question of law whether the defendants' conduct and compliance at the Stadium violates Title II and Section 504, and the relevant implementing regulations. The factual basis in the United States' proposed Complaint is, in many respects, essentially the same basis for the plaintiff's' allegations of discrimination.

Furthermore, the Department's intervention in this case would fall squarely within the language of Rule 24(b). *See* Fed. R. Civ. P. 24 advisory committee's note (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). The Department's extensive enforcement and coordination authority increases the United States' vital interest in enforcing the statutes and regulations at issue on behalf of the public interest in ending illegal disability discrimination. *See, e.g.*, *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 92 (3d Cir. 1979) (en banc) (permitting United States to intervene based on its enforcement of federal statute and regulations protecting individuals with disabilities, and noting, "Large amounts of federal funds flow to Pennsylvania from the federal government, and the United States is vitally interested in the enforcement of the conditions on which those grants are made."). That interest is magnified where, as here, the public programs are as popular and unique as football games at the University.

For these reasons, and those addressed in our discussion of intervention of right, we respectfully request that this Court grant our motion to intervene by permission.

CONCLUSION

For the reasons set forth above, this Court should grant the United States' motion to intervene.

Respectfully submitted, this 20th day of November, 2007

MICHAEL B. MUKASEY
Attorney General of the United States

RENA J. COMISAC
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
PHILIP L. BREEN, Special Legal Counsel
RENEE M. WOHLENHAUS, Deputy Chief
Disability Rights Section
Civil Rights Division

/s/Kathleen Devine
KATHLEEN S. DEVINE
DAVID BOOTH
Trial Attorneys
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW - NYA
Washington, D.C. 20530
Telephone: (202) 307-0480
Facsimile: (202) 307-9775
E-mail: kathleen.s.devine@usdoj.gov

For purposes of service only:
STEPHEN J. MURPHY
United States Attorney

/s/Susan K. DeClercq
SUSAN K. DeCLERCQ
Assistant United States Attorney
211 W. Fort Street, Ste. 2001
Detroit, MI 48226
(313) 226-9149
E-mail: susan.declercq@usdoj.gov
(P60545)

CERTIFICATION OF SERVICE

I hereby certify that on November 20, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

DAVID M. COHEN
dcohen@sambernstein.com

KEEFE A. BROOKS
brooks@butzel.com

KATAHERINE D. GOUDIE
goudie@butzel.com

I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants:

s/SUSAN K. DeCLERCQ
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, Michigan 48226
Phone: (313) 226-9149
E-mail: susan.declercq@usdoj.gov
(P60545)